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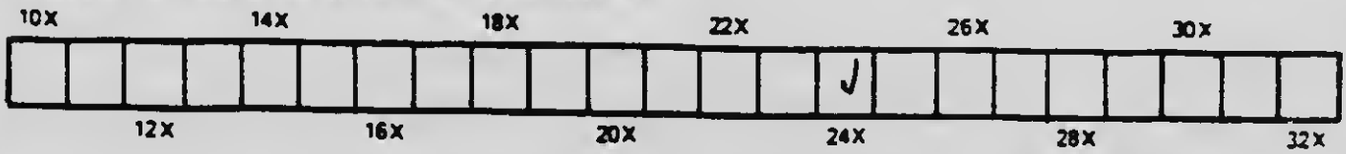

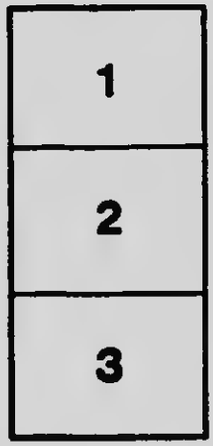

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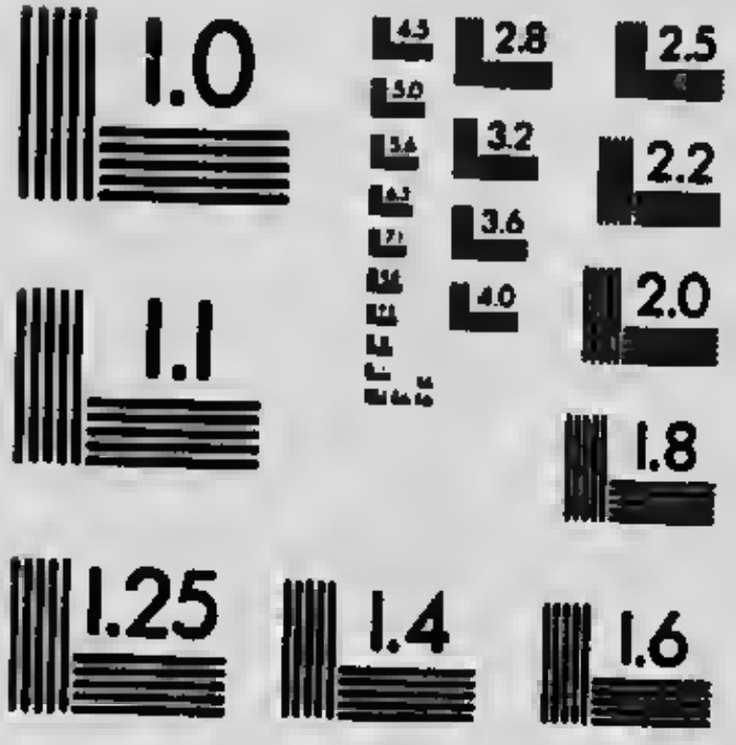

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THE

IE JUDICATURE ACT

OF ONTARIO

(Being R. S. O., 1914, Chapter 56)

AND

THE CONSOLIDATED RULES OF PRACTICE AND PROCEDURE

OF THE

upreme Court of Ontario

OF 1913

WITH PRACTICAL NOTES

(Founded on Holmested and Langton's former editions of the Judicature Acts and Rules)

BY

GEORGE SMITH HOLMESTED

One of His Majesty's Counsel for Ontario, and Senior Registrar of the High Court Division of the Supreme Court of Ontario

---

Perfection of Practice, like completeness of Opinion, is always approaching, never arrived."—THOMAS CARLYLE.

FOURTH EDITION

TORONTO:
THE CARSWELL COMPANY, LIMITED
1915

LONDON:
SWEET & MAXWELL, LIMITED
1915

PREFACE

t is greatly to be regretted that, owing to illness, Mr. omas Langton, K.C., has been prevented from taking part in the preparation of this edition; because the ent re-framing of *The Judicature Act* and *Rules* has essitated the re-casting, re-arranging, and in many tances re-writing, of many of the notes included in the t edition, in which his assistance would have been st valuable.

t may perhaps be excused if the genesis of this edition here traced.

When the first Ontario Judicature Act was passed in l, in addition to the Rules which were included in the hedule to that Act, many of the former Common Law les, and Chancery Orders, were left in force, but it was officially stated which of them; and it had to be de- mined judicially as the question arose whether or not particular Rule or Order was still operative. In der to assist the profession in determining which of former Rules and Orders remained in force, the sent editor published in 1884 an annotated edition of b of them as be considered to be in force, a labour m which be derived little personal benefit, but which rertheless belped in tbe nltimate consolidation of the les in 1888, and to some extent laid the foundation the present work. In 1884, Mr. Langton also pnb- ed tbe second edition of Mr. Maclennan's book on Judicature Act and Rules of 1881. In 1888 the Rules re consolidated, and the first edition of Holmested & ngton's edition of the Act and Rules was published 1890, in which the prior labonrs of Messrs. Holmested

and Langton on the Act and Rules were combined. A second edition was published in 1898, and a third in 1905.

The present work is the lineal successor of the various publications above mentioned, extending over thirty years, dealing with successive Ontario Judicature Acts and Rules, and has the advantage of being in effect coeval with the new procedure inaugurated in 1881, and the changes which have since, from time to time, been made therein.

The Forms in the Appendix to the Rules have been printed because in some cases they differ from those to be found in Holmested & Langton's Forms, which were published prior to the Rules now in force; and also because some annotations on these Forms appeared to be necessary.

The edition of Holmested & Langton's Forms referred to in this work is the second, which was published in 1911.

P.S.—Since the above was written Mr. Langton, K.C., has died. By all who had the honour and pleasure of his friendship he will be remembered as a true gentleman in every relation of life, and his learning and literary ability can by none be more warmly appreciated than by the editor of this work, with whom he laboured so many years in perfect amity.

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39	
40	3
41	3
42	3
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44	
45	45 (2)
46	45 (2)

TABLE I

Showing where the sections of *The Judicature Act* (R.S.O. 1897) c. 51 ich have been continued, are now to be found in *The Judicature Act* S.O. 1914), s. 56, or in other Statutes, or in Rules.

.S.O. 897 . 51 Sec.	R.S.O. 1914 c. 56 Sec.	Remarks	R.S.O. 1897 c. 51 Sec.	R.S.O. 1914 c. 56 Sec.	Remarks
1	1		47		Sup.
2	2		48		Sup.
3	3, 4, 6, 8		49	12	
4	4		50	12	
5	10		51	12	
6	5		52	12	
7		Sup.	53	12	
8	7	Sup.	54	12, 31	Amd.
9	7		55	13	
10	14		56	12, 13	
11		Sup.	57 (1)	16 (*a*)	
12		Sup.	(2)	20	
13		Sup.	(3)	19	
14		Sup.	(4)		Rep. 1 Geo. 5, c. 17, s. 33 (4) & see R.S.O. c. 109, s. 27.
15		Sup.			
16		Sup.			
17		Sup.			
18	10 (4)		57 (5)	16 (*b*)	
19	10		(6)	16 (*c*)	
20	42 (3)		(7)	16 (*d*)	
21	15		(7a)	71	
22	9		(8)	16 (*e*)	
23	9 (2)		(9)	16 (*f*)	
24	11, 85 (2)		(10)	21	
25	3		(11)	16 (*g*)	
26	3		(12)	16 (*h*)	
27		See s. 22	58 (1)		Repealed and see R.S.O. c. 75, ss. 46–8
28	3				
29	3				
30	19		(2)		R.S.O. c. 109, s. 30
31		Sup.			
32	19	Sup.	(3)		R.S.O. c. 109, s. 36
33	3				
34	3		(4)		R.S.O. c. 112, s. 5
35	73		(5)		R.S.O. c. 109, s. 49 (1)
36	72				
37	5		(6)		R.S.O. c. 109, s. 49 (2)
38	3				
39		R.S.O. c. 121, s. 40	(7)		Rep. and see R.S.O. c. 133, s. 15
40	3				
41	3				
42	3		(8)		Rep. and see R.S.O. c. 133, s. 16
43	13 (2)				
44		See R. 205			
45	45 (2)		(9)	17	
46	45 (2)		(10)	18	

R.S.O. 1897 c. 51 Sec.	R.S.O. 1914 c. 56 Sec.	Remarks
(11)		R.S.O. c. 109, s. 56
(12)	22	R.S.O. c. 153, s. 4
(13)	22	
59	23	
60	33	
61		Sup.
62	15	
63		Rule 177
64	49	
65	43	
66		Sup.
67		Sup.
68		Sup.
69		Sup.
70		Sup.
71	43 (3)	
72	24	Amd.
73	25	
74	26	
75	26	
76		Sup.
76 (a)		Sup.
76 (b)		Sup.
76 (c)		Sup.
77		Sup.
78		Sup.
79		Sup.
80		Sup.
81	32	
82	44	
83	44	
84	44	
85	44	
86	44	
87	45	
88	46	
89	47	
90	48	
91		Rule 244
92		Sup.
93		Sup.
94		Sup.
95		Sup.
96		Sup.
97	36	
98	37 (4)	
99	37 (5)	
100	37 (6)	
101		Sup.
102	53	Amd.
103		See ss. 55, 56
104	54	Amd.
105	55	
106	56	
107	56	
108	58	
109	59	
110	56 (3)	
111	61	
112	61	
113	34	
114	35 (1, 2)	
115	35 (3)	
116	35 (4)	
117	50	
118	51	
118a	52	
119	74	
120	118	
121		Sup.
122	109	Amd.
123		Sup.
124		Sup.
125	110	Amd.
126	70	
127	111	Amd.
128		Sup.
129		Sup.
130	76	(Part)
131	76	
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133	76	
134	76	
135	77	
136	84 (1)	
137	84 (2)	
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143	76, 81, 88, 90, 91, 93	
144	78, 99	
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146	83	See Rule 177
147	78	
148	87 (1-2)	Amd.
149	87 (3)	Amd.
150	94	
151	79	
152	85	
153	76 (1)	
154	95	Amd.
155	Sup.	
156	82	
157	76 (1)	
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158	104 (15)	
159	76 (1) (g)	
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161	106 (2)	Amd.
162	105 (4)	
163	105 (4)	
164	108	
165	102	

R.S.O. 1897 c. 51 Sec.	R.S.O. 1914 c. 56 Sec.
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167	103 (2
168	103 (3
169	76 (1)
170	96
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172	76 (1)
	78, 98
173	98 (6)
174	98 (7)
175	
176	98 (8)
177	117
178	115

S.O. 897 51 Sec.	R.S.O. 1914 c. 56 Sec.	Remarks.	R.S.O. 1897 c. 51 Sec.	R.S.O. 1914 c. 56 Sec.	Remarks.
166	103	Amd.	179	116	
167	103 (2)		180		Sup.
168	103 (3)		181	78	
169	76 (1) *n*		182		
170	96		183		See R.S.O. c. 25, s. 4.
171		Sup.	184		
172	76 (1) *p*	Amd.	185	114	
	78, 98		186		R.S.O. c. 59, s. 22 (2)
173	98 (6)				
174	98 (7)		187	100	Amd.
175		See Tariff B.	188	120	
176	98 (8)		189	121	
177	117		190	121 (3)	
178	115		191	151	

TABLE II

Showing where the Consolidated Rules 1897 and subsequent Rules passed prior to the Consolidated Rules 1913 are now to be found,—so far as the same have been continued in force.

The letter "R" in the table indicates that the Rules against which it is set have been repealed without any equivalent being provided.

The x indicates that the Rule against which it is set varies in some matter of substance from the former Con. Rule.

Con. Rules 1897	Rev. Rules, or Statutes	Con. Rules 1897	Rev. Rules, or Statutes	Con. Rules 1897	Rev. Rules, or Statutes
1	1	87–8	763	145	15
2–3	2	89	R	146	16
4–6	R	90	195	147	24
7	4	91	196	148–9	R
8–10	R	92	197	150	17
11	758	93	R	151	R
12	759	94	268	152	18
13	760	95–98	R	153	19
14	761	99	234 (1)	154	20
15	762x	100–1	R	155	92
16–23	R	102	234 (2)	156	93
24	754	103	R	157	21
25–31	R	104	239	158	22
32–34	751	105–6	R	159	23
35	752	107	240	160	23 (3)
36	753	108	R	161	R
37–41	R	109	241	162	25
42	208	110	242	163	26
43–4	R	111–2	243	164	27
45	209	113	R	165	29
46	211x	114	180	166	28
47	210	115	181	167	16
48	506	116–119	R	168	45
49–55	R	120	5 (1)	169	46
56	722	121–2	R	170	47
57	722	123	6	171–2	R
58	723	124	5 (1)	173	48
59–65	R	125	6	174	15
66	720	126	25	175	49
67	717	127–8	7	176	50
68	718	129–31	8	177-8	51
69	716	132	9	179	52
70	R	133	R	180	53
71	724	134	11 (2)	181–2	R
72	725	135	12	183	54
73–78	R	136	R	184	55
79	719	137	33	185	66
80	721x	138	33 (g)	186	67x
81	R	139	659	187	68
82	726	140	R	188–9	R
83	R	141	460	190	490
84	755	142	34	191–2	R
85	756	143	13	193	74 (1)
86	757	144	14	194–6	R

on. Rules 1897	Rev. Rules, or Statutes	Con. Rules 1897	Rev. Rules, or Statutes	Con. Rules 1897	Rev. Rules, or Statutes
197	91	263	121x	330	200
198	99	264	R	331	201
199	R	265	139	332	202
200	75	266–7	140	333	203
201	76, 77	268	141	334	R
202	R	269	142x	335	389
203	79–87	270	R	336	390
204	88	271	143	337	396 (1)
205	89	272	144	338	396 (2)
206	134	273	145	339–42	R
207	R	274	R	343	172
208	135	275	147	344	173
209	165	276	148	345	174
210	166	277	149	346	378
211	167	278	150	347	175
212	168	279	151	348	215x
213	169	280	152	349	204
214	R	281	153	350	225
115	170	282	154	351	178
216	171	283–4	R	352	179
217	94, 97	285	155	353	176
218	95	286–7	156x	354	177
219	96	288	157	355–6	213
220	R	299	159	357	216
221	93	290	160	358	217x
222	100	291	161	359	224
223–4	101	292	162	360	214
225	102	293	163	361	R
226	103	294	R	362	219
227	104	295	164	363	218
228	105–6	296	136	364	238 (6)
229	590 (3)	297	R	365	R
230	107	298	137	366	207x
231	108x	299	138	367	223
232	69	300	127	368	R
233	R	301	R	369	238 (5)
234	70	302	128	370	386
235	71	303	129	371	387
236	72	304	130	372	126
237	73	305	131	373	122
238	5 (2)	306	132	374–6	R
239	5 (2)	307	133	377	125
240	5 (2)	308	R	378	460
241	5 (2)	309	183	379	465
242	109	310	184	380	R
243	110	311	185	381	461
244	109	312	183	382	462
245	111x	313	134	383–4	464 (1)
46–7	112	314	186	385	486
48–9	113	315	187	386	483
250	114	316	189	387	484
251	115	317–18	R	388	485 (1)
252	116	319	188x	389–390	485 (2)
53–4	R	320	190	391	487
255	117 (1)	321	R	392	488
256	118	322	191	393	489
257	119	323	192	394	304
258	R	324–5	193	395	300
259	122	326	194x	396	301
260	123	327	R	397	302
261	124	328	198	398	303
262	120	329	199	399–402	R

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403	305
404	306
405	727
406–08	728
409	729
410	730
411	513
412	751
413	182
414	752
415	R
416	731
417	733
418	R
419	507
420	308
421	310
422	311
423	312, 319
424	515
425	314x
426	R
427	517
428	309
429	R
430	321
431	322
432	523
435	325 (1)
434	524
433	520
436	395
437	394
438	595
439	178, 527
440	334x
441	533
442	336x
443	345
444	347
445	R
446	346
447	357
448	341x
449–450	553
431	339
452	342
453	343x
454	551
453	345x
456	R
437–8	540 (1, 2)
459	540 (3)
460	R
461	350
462	J.A. s. 70
463	349
464	348
465–8	R
469–70	331
471	R
472	352
473–4	353
475–6	R
477	528
478	278x
479	274
480	R
481	275x
482	276
483	269
484	270
485–6	271
487	272
488	158
489	226
490	227
491	228
492	338
493	229
494	R
495	230
496	R
497	231
498	232
499	277x
500	278
501	279
502	280
503	281
504	280
505	282
506	280
587	283
388	284
509–10	285
511	286
512	287
513	288
514	290
515	289
316	291
517	292
518	293
519	294
320	295
321	296
522	297
523	R
524	298
525	234 (2)
526	299
527–8	R
529	245
530	246
531	73
532–6	R
337	247
558	248x
539	249
540	R
541	R
542	250
545	251
544	252
545	R
546	253
547	254
548	256
549	257
550	258
851	259
552–4	R
555–6	263 (1)
557	263 (2)
558	264
559–69	R
570	265x
571	266
572	267
573	35
574	36
575	37
576	R
577	38
578–9	39
580	R
581	40
582	41 (1)
583	42
584	41 (2)
585	43
586	354
587	355
588	355
589	355
590	355
591	355
592	R
593	121x
594	358
595	466x
596	467x
397–602	R
603	57x
604	58
605	59
606	60
607	61
608	62
609	356
610	261
611	262
612	357
613–14	R
615	J.A. s. 27 (2)
616	222
617	220
618	R
619	519
620	510
621	R
622	511
623	512
624	526
623	527

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626	
627	
628	
629	
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632–3	
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635	515
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643–4	
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653–6	
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659–60	
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675–6	
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627	R
628	531
629	512
630	R
631	529
632–3	R
634	531
635	515, 518
	525x
636	516
637	517
638	530
639	520
640	521
641	522
642	523
43–4	532
645	63
646	65
647	R
648	399x
649	R
650	400
651	R
652	401
55–6	R
657	402
658	403
59–60	404
661	405
662	406
663	407
664	408
665	409
666	R
667	410
668	R
669	411
670	412
671	413x
672	416
673	417
674	418
5–6	R
677	421
678	419
679	R
680	420
681	421x
682	R
683	422
684	423
5–6	R
687	424x
8–9	R
690	425
691	427
692	R
693	428
694	429
695	430
696	431
697	432
698	433
699	434
700	428
701–2	R
703	438
704–6	R
707	414
708	415x
709–13	R
714	436
715	437
716	438
717–19	R
720	439
721	439
722	440
723	441
724	R
725	442
726	R
727	443
728	444
729	445
730	446
731	R
752	447
733	448x
734	R
735	449
736	450
757	451
738	R
739	452
740	455
741	454
742	453
743	456
744	468
745	469
746	470
747	471
748	472
749	475
750	474
751	475
752	476
755	477
754	478
755	479
756	480
757	481
758	482
759–61	R
762–5	458
764–5	R
766	459
767	503
768	505
768a	504
769	502
770	503
771–2	R
773	508
774–5–6	509x
777	507
778	499
779	R
780	J.A. s. 30x
781	501
782–4	R
785	J.A. s. 28
786	J.A. s. 29
787	491
788	492
789	495
790	660x
791–2	494
793–816	R
817	J.A. s. 27
818	524x
819–26	R
827	496
828	497x
829	498
830–4	R
835	3 (g)
836	3 (k)
837	533
838–9	534
840	535, 536
841	557
842	R
843	538x
844	Form 111
845	539
846	540
847	541
848	R
849	542
850	543
851	P.
852	544
853	545
854	R
855	546
856	R
857	547
858	548
859	549
860	550
861	551
862	552
863	565
864	566
865	555x
866–7	R
868	567
869	568
870	569
871	570
872	571
873	R

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876	558
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878	560
879	561
880	562
881	563
882	564
883	572
884	539
885	574
886	579
887	R
888	573x
889	R
890	576
891	575
892	3 (h)
893	577x
894	578x
895-9	R
900	580
901	R
902	581
903	582
904	583
905	585
906	586
907	587
908	588
909	589
910	584
911	590x
912	591
913	592
914	594 (1)
915	594 (2)
916	595x
917	597x
918	598x
919	R
920	596x
921	599x
922	738
923	739
924	740
925	741
926	742
927	R
928	743
929	744
930	745
931	746
932	747
933	R
934	748
935	749
936	750
937	R
938	600
939-40	601
941	606 (1)
942	606 (2)
943	607
944	608
945-7	R.
948	609
949	614
950	610
951-2	R.
953	611
954	612
955	613
956	212, 615x
957-8	R
959	617
960	618
961-3	R
964	619
965-7	620
968	621
969	R
970	457
971	690
972	691, 733
973-90	R
991	692
992	693
993	694
994	695
995	696
996	697
997	698
998	699
999	700
1000	701
1001	702
1002	703
1003	704
1004	705
1005	706
1006	707
1007	708
1008	709
1009	710
1010	711
1011	712
1012	713
1013	714x
1014-21	R
1022	R.S.O. c. 83 s. 6
1023	1b. s. 4
1024	1b. s. 7
1025	1b. s. 9
1026	1b. s. 8
1027	1b. s. 10
1028	1b. s. 11
1029	1b. s. 33
1030	1b. s. 35
1031	1b. s. 43
1032	1b. s. 43
1033	R.S.O. c. 83 s. 44
1034	1b. s. 45
1035	1b. s. 46
1036	1b. s. 15
1037 (1)	1b. s. 16
1038	1b. s. 17
1039	1b. s. 18
1040	1b. s. 19
1041	1b. s. 20
1042	1b. s. 21
1043	1b. s. 21
1044	1b. s. 22
1045	1b. s. 25
1046	1b. s. 24
1047	1b. s. 25
1048	1b. s. 26
1049	1b. s. 27
1050	1b. s. 27 (3)
1051	1b. s. 28 (1)
1052	1b. s. 29
1053	1b. s. 30
1054	1b. s. 31
1055	1b. s. 32
1056	1b. s. 59
1057-1067	R
1068	359
1069	360
1070	361
1071	R
1072	362
1073	R
1074	363
1075	364
1076	365
1077	366
1078	367
1079	368
1080	622x
1081-5	R
1086	624x
1087-94	R
1095	369
1096	370
1097	371
1098	R
1099	372
1100	623
1101	623
1102	5 (h) (k)
1103	625
1104	626
1105	627
1106	628
1107	629
1108	630
1109	631
1110	632
1111	633
1112	634x
1113	635
1114	636

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1115	
1116	
1117	
1118	
1119	
1120	
1121	
1122	
1123	
1124	
1125	
1126	
1127	
1128	
1129	
1130	J.
1131	
1132	
1135	65
1134	
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1136	
1187	
1138	
1139-42	
1143	
1144	
1145	
1146	
1147	
1148	
1149	
1150-3	
1154	
1155	
1156	
1157	
1157 (a)	
1158	
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1161	
1162	
1163	
1164	
1165	
1166	
1167-9	

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1113	637
1116	638x
1117	R
1118	639x
1119	640x
1120	641x
1121	642x
1122	643x
1123	644x
1124	643
1125	646
1126	647
1127	648x
1128	R
1129	689
1130	J.A. s. 74
1131	R
1132	649
1133	650, 651
1134	667x
1135	656
1136	654
1137	652 (1)
1138	655
39–42	R
143	673
144	387
145	388
146	653
147	R
148	657
149	671
50–3	R
154	670
155	R
156	675
157	661x
37 (a)	676 (3)
158	652 (2)
159	662
160	R
161	663
162	669
163	664
164	665x
165	666
166	R
7–9	678x
1170	679
1171	680 (1)
1172	R
1173	672 (2)
1174	672 (3)
1175–6	667–8
1177	R
1178	676 (1)
1179	676 (2)
1180–1	R
1182	681
1183	682
1184	R.S.O. c. 139 s. 33
1185	Ib. s. 36 (1)
1186	Ib. s. 36 (2)
1187	Ib. s. 38 (3)
1188	Ib. s. 40 (3)
1189	676 (4)
1190	686
1191	687
1192	688
1193	683 (1)
1194	684x
1193	683 (2)
1196	684x
1197	R
1198	373x
1199	374x, 375
1200	373 (e)
1201–2	R
1203	376
1204	377
1203	379
1206	380x
1207	381
1208	382
1209	383
1210	384
1211	385x
1212	764
1213	R
1214	765
1215	766
1216	768
1217–18	R
1219	767
1220	R
1221	769
1222	770
1223	771
1224	772
1225–34	R
1233	190
1236–1245	R
1247	127
1248–c	R
125(	327
1251–.	R
1253	524x
1256	R
1257	182
1238	677
1259–1261	R
1262	325x
1263	R
1264	504
1265	R
1266	674
1267	654
1268	R
1269	600
1270	673
1271–5	R
1276	700
1277–1301	R
1302	731
1303	R
1304	146
1305	R
1306	472
1307–8	R
1309	618
1310–12	R
1313	314
1314	734
1315	735
1316	736
1317–9	R
1320	31
1231	329
1322	398
1323	R
1324	737
1325	733
1326	R

TABLE III

A COMPARATIVE TABLE SHEWING THE ENGLISH RULES OF 1883, AND THE CORRESPONDING RULES IN FORCE IN BRITISH COLUMBIA, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA, SASKATCHEWAN, AND ONTARIO.

Eng. 1883	B.C. 1912	Man. 1913	N.B. 1909	N.S. 1900	Sask. 1911	Ont. 1913
1	....	....	....	1	....	5 (1)
2	....	....	....	2	....	....
....	....	2	....	....	....	3 (d)
3	3	....	3	3	3	5
4	4	....	....	4	4	670
....	....	4	....	....	....	12
....	....	....	4	....	....	27
5	....	....	5	5	....	7
6	6	....	6	6	3	25
....	....	6	....	....	....	4
7	....	....	7	7	....	7
....	....	....	8	....	....	5
....	....	....	9	....	....	32
10	10	....	....	8	7	5
....	....	10	....	....	....	758
....	....	....	10	....	....	22
11	11	....	....	9	....	5 (1)
....	....	11	....	....	....	759
....	....	....	11	....	....	32
....	....	....	12	....	....	32
12	....	....	13	10	....	33
13	....	....	....	11	....	....
14	....	....	....	12	....	3 (1)
....	....	....	14	....	....	32
....	....	15–16	....	....	....	752
....	....	....	15	....	....	32
....	....	....	16	....	....	32
16	16	....	....	13	....	33
....	....	....	17	....	....	11
....	17	....	....	....	....	33
17	....	....	....	14	....	659
....	18	....	....	....	....	33
18	....	....	18	15	....	12
19	19	....	....	16	12	11
20	20	....	....	17	....	12
....	....	....	20	....	....	5
22	....	....	....	18	13 (2)	....
....	....	....	21	....	....	6
....	22	....	22	....	....	3j, 8
....	....	....	23	....	....	8
23	....	....	....	19	....	13
24	....	....	....	20	....	....
....	....	....	24	....	....	5 (1)
25	....	....	25	....	....	389

Eng. 1883	B.C. 1912	Man. 1913	N.B. 1909	N.S. 1900	Sask. 1911	Ont. 1913
26	....	....	....	....	....	5 (1)
....	....	....	26	....	....	9
....	....	....	27	....	....	9
27a	....	....	29	....	214	15
....	27	....	....	....	....	208
....	30	....	....	....	....	208
....	....	....	30	....	....	16, 24
32	....	....	32	21	....	5
....	32	....	....	....	....	18
33	....	....	33	22	5	21
....	33	....	....	....	....	6
34	34	....	....	23	....	6
....	....	34	....	....	....	209
....	....	....	34	....	....	23
35	....	....	....	24	6	25
....	....	35	....	....	....	6
....	....	....	35	....	....	223 (2)
....	....	36	....	....	....	572
....	....	39	....	....	....	209
....	....	....	39	....	....	402
40	40	....	....	25	8	25
....	....	40, 41	....	....	....	8
41	41	....	....	26	8 (2)	404
42	42	....	....	28	13	8
....	....	42	....	....	....	13
....	....	....	42	....	....	405
....	....	43	....	....	....	26
....	....	....	43	....	....	406
44	44	....	....	....	14	27
....	44	....	....	....	....	359
....	....	44	....	....	....	390, 2
....	....	....	44	....	....	407
45	45	....	....	29	9	29
46	....	....	....	....	....	9
....	....	46	....	30	10	9
....	....	....	46	....	....	....
....	....	....	....	....	....	408
....	....	....	47	31	11	28
48	....	....	....	32	....	8
....	48, 49	....	....	....	16	46
49	....	....	....	33	19	15
....	....	....	50	34	18 (5)	409
....	....	....	....	....	....	16
51	....	....	....	34	18 (6)	49
....	51	....	....	....	....	{18, 20, 92, 93, 580}
....	....	....	51	....	....	410
....	....	....	....	35	18 (7)	53
....	52, 53	....	53	....	....	21
....	54	....	....	....	....	411
....	....	....	54	....	....	54
55	....	....	....	39	....	412
....	....	....	....	40	18 (1)	55
....	56	....	....	....	....	23
....	....	....	56	....	....	416
....	....	....	57	....	....	95
....	58	....	....	....	....	36
....	....	....	58	....	....	418
						37

Eng. 1883	B.C. 1912	Man. 1913	N.B. 1909	N.S. 1900	Sask. 1911	Ont. 1913
....	....	....	59	....	....	37
....	....	....	60	....	....	39
....	....	61	....	....	....	421
....	....	....	61	....	....	38
62	62	....	....	41	....	17
....	....	62	....	....	....	419
....	....	....	62	....	....	37
63	....	....	....	42	20	....
....	63	....	....	....	....	16
....	....	....	63	....	....	41
64	64	....	....	43	23 (7)	25
....	....	64	....	....	....	420
....	....	....	64	....	....	42
....	....	65	....	....	....	421
....	....	....	65	....	....	520
67	67	....	....	44	24	26
....	....	67	....	....	....	422
68	68	....	....	45	25	27
....	....	68	....	....	....	423
69	69	....	....	46	....	29
....	....	69	....	....	....	421
....	....	....	69	....	....	56
70	70	....	....	47	....	29
....	....	....	70	....	....	56
....	71	....	....	....	....	424
....	....	....	71	....	....	56
....	71a	....	....	....	....	762
....	....	....	72, 76	....	....	56
....	....	73	....	....	....	425
....	....	74	....	....	....	426
....	....	75	....	....	....	427
....	....	77	....	....	....	428, 429
78	78	....	....	49	103	46
....	....	78	....	....	....	428
79	....	....	....	50	104	49
....	....	79	....	....	....	502
....	....	....	79	....	....	65
80	80	....	....	51	105	46
....	....	80	....	....	....	430 (1)
81	81	....	....	51	106	46
....	...	81	....	....	....	430 (2)
....	....	....	81	....	....	66
82	82	....	....	52	107	47
....	....	82	....	....	....	432
....	....	....	82	....	....	134
83	....	....	....	53	108	....
....	....	83	....	....	....	433
84	....	....	....	54	109	....
....	....	84	....	....	....	438
....	....	....	84	....	....	67
....	....	....	85	....	....	68
....	....	....	86	....	....	67
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....	....	325	....	....	....	141
....	....	....	....	....	266	348
....	....	328	....	....	....	109, 145
....	....	330	....	....	....	147
....	....	....	330	....	....	126
....	....	331	....	....	....	148
....	....	332	....	....	....	149
....	....	333	....	....	....	150
....	....	334	....	....	....	151
....	....	335	....	....	....	152
....	....	336	....	....	....	146
....	....	337	....	....	....	153
....	....	338	....	....	....	154
340	....	....	....	280	....	....
....	....	340	....	....	....	157
343	....	....	....	283	....	....
....	....	343	....	....	....	156
344	....	....	....	284	....	....
345	....	....	....	285	....	....
346	....	....	....	286	....	....
347	....	....	....	287	....	....
....	....	....	347	....	....	268
348	....	....	....	288	....	....
....	....	348	....	....	....	127
....	....	349	....	....	....	128
....	....	....	349	....	....	403
350	....	....	....	290	....	....
....	....	....	350	....	....	407
351	....	....	....	291	....	....
352	....	....	....	292	....	....
353	....	....	....	293	....	348
....	....	353	....	....	....	131
....	....	....	353	....	....	424
354	354	....	....	294	....	348
....	....	354	....	....	....	132
355	355	....	....	295	267	348
....	....	355	....	....	....	133
356	356	....	....	296	....	349
357	357	....	....	297	269	351
....	....	357	....	....	....	159
358	....	....	....	298	270	351
....	....	358	....	....	....	160, 162
359	....	....	....	299	271	351
....	....	359	....	....	....	161
....	360	....	....	....	....	349
360	....	....	....	300	272	....
362	362	....	....	301	274	352
....	....	362	....	....	....	183
363	363	....	....	302	275	258, 353
....	....	363	....	....	....	184

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364	....	....	....	303	276	....
....	....	364	....	....	....	185
365	....	....	....	304	277	....
....	....	....	....	....	279	178, 327
....	....	....	....	....	281	335
....	....	365	....	....	....	183
366	366	....	....	305	303	330
....	....	366	....	....	....	134
367	....	....	....	306	....	....
....	....	367	....	....	....	186
368	....	....	....	307	....	....
369	....	....	....	308	....	....
....	....	....	369	....	....	246, 250
369 (a)	....	....	....	308 (a)	....	....
370	....	....	....	309	....	....
....	370 (a)	....	....	....	....	332
....	370 (b)	....	....	....	....	345
....	370 (c)	....	....	....	....	327
....	370 (d)	....	....	....	....	334, 335
....	370 (e)	....	....	....	....	336
....	370 (f)	....	....	....	....	345, 346, 347
....	370 (g)	....	....	....	....	337, 345
....	370 (h)	....	....	....	....	341
....	370 (i)	....	....	....	....	333
....	370 (j)	....	....	....	....	342
....	370 (k)	....	....	....	....	331
....	370 (l)	....	....	....	....	343
....	370 (m)	....	....	....	....	340
....	370 (n)	....	....	....	....	340
....	370 (o)	....	....	....	....	340
....	370 (p)	....	....	....	....	340
....	370 (r)	....	....	....	....	330
....	370 (s)	....	....	....	....	J.A. s. 70
....	370 (t)	....	....	....	....	347
....	....	....	370	....	....	246, 250, 325
371	371	....	....	313	306	142
372	....	....	....	314	307	....
....	....	....	372	....	....	248, 250
373	....	....	....	315	308	....
....	....	373	....	....	....	190
....	....	....	373	....	....	249
374	....	....	....	316	309	671
375	....	....	....	317	310	....
....	....	375	....	....	....	191
376	376	....	....	318	311	222
....	....	376	....	....	....	193
....	....	....	376	....	....	246
377	....	....	....	319	312	....
378	....	....	....	320	313	....
....	....	....	378	....	....	249
379	....	....	....	321	314	....
....	....	379	....	....	....	772
....	....	....	379	....	....	261
380	....	....	....	322	315	....
....	380	....	....	....	....	233
....	....	380–383	....	....	....	396
....	....	....	380	....	....	253
381	381	....	....	323	316	65
....	....	....	381	....	....	520
382	....	....	....	324	319	418
383	....	....	....	325	320	417

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383 (a)	....	....	....	325 (a)	321	....
384	....	....	....	326	322	420
....	....	384	....	....	....	256
385	....	....	....	327	323	....
....	....	385	....	....	....	172
386	....	....	....	328	324	....
....	....	386	....	....	....	173 (1)
387	....	....	....	329	325	410
....	....	387	....	....	....	173 (2)
388	....	....	....	330	326	407
....	....	388	....	....	....	174
389	389	....	....	332	342	126
....	....	389	....	....	....	377
390	....	....	....	333	343	122
....	....	390	....	....	....	175
391	....	....	....	334	344	....
....	....	391	....	....	....	215
392	....	....	....	335	345	126
....	....	392	....	....	....	204
393	....	....	....	336	346	....
....	....	393	....	....	....	225
394	....	....	....	337	347	....
395	....	....	....	338	348	126
....	....	395	....	....	....	179
....	....	396	....	....	....	176
397	....	....	....	339	....	....
....	....	397	....	....	....	177
398	....	....	....	340	....	....
....	....	398	....	....	....	327
399	....	....	....	341	....	....
....	....	399	....	....	....	334
400	....	....	....	342	....	....
....	....	400	....	....	....	345
401	....	....	....	....	....	762
....	....	401	....	....	....	346
402	....	....	....	....	....	752
....	....	402	....	....	....	329, 347
....	....	403	....	....	....	337
....	....	404	....	....	....	341
....	....	....	404	....	....	260
....	....	....	....	....	354	257
....	....	....	....	....	359	263 (1)
....	....	405	....	....	....	333
406	....	....	....	....	....	209
....	....	406	....	....	....	333
....	....	....	406	....	....	269
....	....	407	....	....	....	339
....	....	408	....	....	....	342
....	....	409	....	....	....	344
....	....	....	409	....	....	271, 277, 347
....	....	410	....	....	....	331
....	....	....	410	....	....	277
....	....	411	....	....	....	343
....	....	412	....	....	....	340
....	....	....	412	....	....	278
....	....	413–418	....	....	....	340
....	....	....	417	....	....	331
....	....	....	418	....	....	343
....	....	419	....	....	....	330
....	....	..	420	....	....	340 (3)
....	....	. .	421	....	....	343

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....	....	....	424	....	....	227, 228
425	425	....	....	343	....	245
427	....	....	....	344	....	258
428	....	....	....	345	....	....
429	....	....	....	346	....	....
430	....	....	....	347	....	....
....	....	....	430	....	....	373
431	....	431	....	348	....	351
....	....	....	431	....	....	273
432	....	....	....	349	....	73
....	....	....	432	....	....	273
433	....	....	....	350	....	....
....	....	....	433	....	....	276
434	....	....	....	351	....	....
....	....	434–436	....	....	....	352
435	435	....	....	352	....	246
436	....	....	....	353	237	....
....	436	....	....	....	....	324, 325
437	....	....	....	354	238	....
....	....	437, 438	....	....	....	353
438	438	....	....	355	240	248, 250
439	....	....	....	356	241	248
....	439	....	....	....	....	249
440	....	....	....	....	242	....
441	....	....	....	358	....	....
....	....	....	441	....	....	226
442	....	....	....	359	....	....
....	....	442	....	....	....	213
....	....	....	442	....	....	190
443	....	....	....	360	243	....
....	....	443	....	....	....	213
....	....	....	443	....	....	2.3
444	....	....	....	....	244	....
....	....	444	....	....	....	216
....	....	....	446	....	....	291
....	....	....	447	....	....	291
448	....	....	....	....	245	....
....	....	....	448	....	....	292
449	....	....	....	....	246	....
....	....	450	....	....	....	219
....	....	....	450	....	....	136
....	....	451	....	....	....	217
....	....	....	451	....	....	295
452	....	....	....	....	247	248
....	....	452	....	....	....	234 (6)
....	....	....	452	....	....	296
....	....	453	....	....	....	234 (6)
....	....	....	453	....	....	295, 296
454	454	....	....	361	248	249
....	....	454	....	....	....	234 (6)
455	....	....	....	364	349	253
....	455	....	....	....	....	261
....	....	455	....	....	....	207
....	....	....	455	....	....	297
456	456	....	....	365	350	253
....	....	....	456	....	....	297
457	....	....	....	366	351	499
....	457	....	....	....	....	520
....	457 (a)	....	....	....	....	257
458	....	....	....	367	353	....
459	....	....	....	370	....	230

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460	460	....	....	371	356	256
461	461	....	....	372	355	158
....	....	461	....	....	....	223
462	....	....	....	373	357	....
463	....	....	....	374	358	....
....	463	....	....	....	...	264
....	....	463–465	....	....	....	126
465	....	....	....	....	....	264
467	....	..	....	377	....	....
....	....	..	470	....	....	491
....	....	471	....	....	....	274
472	....	....	....	378	....	..
....	....	472	....	....	....	273
473	....	....	....	379	....	400
....	....	473	....	....	....	275
474	....	....	....	380	....	399
475	....	....	....	381	....	399
....	....	475	....	....	....	276
476	....	....	....	382	...	401
....	....	476	....	....	....	269
476a	....	....	....	....	....	399
477	....	....	....	383	....	....
....	....	477	....	....	....	270
478	....	....	....	384	....	....
479	....	....	....	385	....	....
479 (b)	....	....	....	385 (b)	....	....
479 (c)	....	....	....	385 (c)	....	....
480	....	....	....	386	....	....
481	....	....	....	....	335	....
482	482	....	....	....	336	260
483	483	....	....	....	361	269
485	....	....	....	....	362	....
486	....	....	....	....	363	....
487	....	....	....	394	366	271, 277
...	487	....	....	....	....	269
....	....	487	....	....	....	226
488	....	....	....	395	....	....
88 (A)	....	....	....	395 (A)	....	....
...	488	....	....	....	....	277
....	....	488	....	....	....	227
489	....	....	....	396	367	229
...	489	....	....	....	....	350
....	....	489	....	....	....	228
490	....	....	....	397	368	331
..	490	....	....	....	....	276
491	....	....	....	398	369	345
492	....	....	....	399	370	....
493	493	....	....	400	371	339
494	....	....	....	401	372	343
..	494	....	....	....	....	340
..	....	494	....	....	....	230
95	....	....	....	402	373	331
..	....	495	....	....	....	231
96	....	....	....	403	374	343
97	....	....	....	404	376	....
98	498	....	....	405	377	340 (3), 287
..	....	498	....	....	....	277
99	....	....	....	406	378	..
..	....	499	....	....	....	278
00	....	....	....	407	379	289
..	..	500	....	....	....	271

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501	....	....	....	408	....	271
....	....	501	....	....	....	280
502	....	....	....	409	380	....
503	....	....	....	410	381	227, 228, 238
....	....	503	....	....	....	279
504	....	....	....	411	382}	...
....	....	....	....	....	383}	....
....	504	....	....	....	....	338
505	....	....	....	412	384	....
506	....	....	....	413	385	....
....	....	506	....	....	....	280
507	....	....	....	414	386	....
....	....	507	....	....	281	....
508	....	....	....	415	388	....
....	508	....	....	....	....	273
....	....	508	....	....	....	280 (2)
509	....	....	....	416	389	....
510	....	....	....	417	390	....
....	....	510	....	....	....	284
511	....	....	....	418	391	....
....	....	511	....	....	....	282
512	....	....	....	419	392	....
....	512	....	....	....	....	273
....	....	512	....	....	....	283
513	....	....	....	420	393	....
....	....	513	....	....	....	286
514	....	....	....	421	394	....
....	....	514	....	....	....	287
515	....	....	....	422	395	....
....	....	515	....	....	....	288
516	....	....	....	423	396	....
....	....	516	....	....	....	290
517	....	....	....	424	398	....
518	....	....	....	425	....	....
519	....	....	....	426	399	....
520	....	....	....	427	400	345
521	521	....	....	429	408	226, 227
524	....	....	....	432	411	....
525	....	....	....	433	412	....
526	....	....	....	434	413	....
....	....	526	....	....	....	291
527	527	....	....	435	414	291
....	....	527	....	....	....	292
528	528	....	....	436	415	291
529	529	....	....	437	416	292
....	....	529	....	....	....	293
530	....	....	....	438	417	234 (2)
....	....	530	....	....	....	294
531	....	....	....	439	420	156
....	531	....	....	....	....	136
....	....	531	....	....	....	295
532	....	....	....	440	421	....
....	....	532	....	....	....	296
533	....	....	....	441	422	295
....	....	533	....	....	....	297
534	....	....	....	442	423	...
535	....	....	....	443	424	....
....	535	....	....	....	....	296
536	....	536	....	444	425	298
537	537	....	....	445	426	297
538	....	....	....	446	427	....

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539
539 (a)
540
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541
....
542
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543
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544
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545
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546
547
548
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549
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550
551
552
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566
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567
568
569
571
572
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574
575

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539	....	....	....	447	....	....
539 (a)	....	....	....	117 (a)	....	....
540	....	....	....	448	....	....
....	....	540	....	....	....	304
541	....	....	....	449	....	....
....	....	541	....	....	....	300
542	....	....	....	450	....	....
....	....	542	....	....	....	301
543	....	....	....	451	432	299
....	543	....	....	....	....	297
....	....	543	....	....	....	302
544	....	....	....	452	433	417
....	....	544	....	....	....	303
545	....	....	....	453	....	....
....	....	545	....	....	....	302
546	....	....	....	454	....	....
547	....	....	....	455	....	....
548	....	....	....	456	....	....
....	548	....	....	....	....	227
549	....	....	....	457	....	....
....	549	....	....	....	....	345
550	....	....	....	458	....	....
551	....	....	....	459	....	....
552	....	....	....	....	648	....
....	....	552	....	....	....	307
553	....	....	....	460	....	....
....	....	553	....	....	....	310
554	....	....	....	461	....	491
....	....	554	....	....	....	312
555	....	....	....	462	....	....
....	....	555	....	....	....	313
556	....	....	....	464	650	J. A. s. 28
....	....	556	....	....	....	314
557	....	....	....	465	651	J. A. s. 29
....	....	558	....	....	....	317
559	559	....	....	467	434	356
....	....	559	....	....	....	309
560	....	....	....	468	435	....
....	....	560	....	....	....	321
561	....	....	....	469	....	....
....	....	561	....	....	....	322
562	....	....	....	470	437	....
....	....	562	....	....	....	323
563	....	....	....	471	438	....
....	....	563	....	....	....	320
564	....	....	....	472	....	....
....	....	564	....	....	....	245
565	....	....	....	473	439	....
566	....	....	....	474	441	....
....	....	566	....	....	....	246
567	567	....	....	475	440	357
568	....	....	....	476	....	....
569	569	....	....	479	444	515, 518
571	571	....	....	480	445	512
572	....	....	....	481	446	....
....	572	....	....	....	....	517
....	....	572	....	....	....	248
573	....	....	....	483	447	....
....	....	573	....	....	....	248
574	....	....	....	484	448	529
575	....	....	....	485	449	532

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....	....	575	....	....	....	248
576	....	....	....	486	450	....
....	....	576	....	....	....	249
577	....	....	....	487	451	....
....	....	577	....	....	....	251
578	....	....	....	488	452	....
....	....	578	....	....	....	252
579	....	....	....	489	454	....
....	....	579	....	....	....	261
580	580	....	....	491	455	530
....	....	580	....	....	....	253
581	581	....	....	492	....	533
....	....	581	....	....	....	499
582	582	....	....	493	....	534
583	583	....	....	....	457	540
584	584	....	....	....	458	544
....	....	584	....	....	....	254
585	585	....	....	....	459	545
....	....	585	....	....	....	257
586	586	....	....	....	460	3 (k)
587	....	....	....	498	461	537
....	....	588	....	....	....	260
589	....	....	....	500	....	....
590	....	....	....	501	464	....
591	591	....	....	502	467	567
....	....	591–593	....	....	....	263
592	....	....	....	503	466	....
593	....	....	....	504	468	570
594	594	....	....	505	469	568
595	....	....	....	506	456	538
....	....	595	....	....	....	264
596	....	....	....	507	....	....
....	596	....	....	....	....	429
597	....	....	....	508	....	....
598	598	....	....	509	....	569, 571
599	....	....	....	510	....	....
....	599	....	....	....	....	569
600	600	....	....	511	....	565
601	601	....	....	512	471	566
602	602	....	....	513	472	3 (g)
604	604	....	....	514	473	555
605	....	....	....	519	474	523
606	....	....	....	515	475	....
607	....	....	....	516	....	....
....	....	607	....	....	....	354
608	....	....	....	517	476	552, 572
609	....	....	....	518	477	....
609 (A)	....	....	....	518 (A)	....	....
....	609	....	....	....	....	553
610	610	....	....	533	501	580, 581
....	....	610	....	....	....	356
611	....	....	....	534	502	584, 585
611 (A)	....	....	....	....	504	....
612	....	....	....	536	364	....
....	613	....	....	....	....	357
613	....	....	....	537	....	....
....	614	....	....	....	....	358
....	....	616	....	....	....	466
617	....	....	....	....	....	539
....	....	617	....	....	....	467
618	....	....	....	538	....	457, 550

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....	618	....	....	....	....	549
619	....	....	....	539	....	....
....	619	....	....	....	....	550
620	....	....	....	541	....	....
621	621	....	....	542	....	546
622	622	....	....	543	....	590
....	622 (c)	....	....	....	....	590
623	623	....	....	544	....	....
624	624	....	....	545	511	594
....	....	624	....	....	....	386
....	624 (b)	....	....	....	....	553
625	625	....	....	546	512	595
....	....	....	625	....	....	207
626	626	....	....	547	514	596
....	....	....	626	....	....	600
627	627	....	....	548	515	596
....	....	....	627	....	....	601
....	627 (b)	....	....	....	....	593
628	628	....	....	549	516	599
....	....	....	628	....	....	601
629	....	....	....	550	....	....
630	....	....	....	551	....	....
....	631	....	....	....	....	601
....	....	632	....	....	....	261
....	633	....	....	....	....	570
....	635	....	....	....	....	446
....	....	635	....	....	....	357
....	....	....	635	....	....	613
....	....	....	636	....	....	613
....	....	....	638	....	....	600
....	....	639	....	....	....	222
....	....	640	....	....	....	220
....	....	....	641	....	....	207
642	....	....	....	....	....	726
....	....	642	....	....	....	526, 527
....	....	643	....	....	....	528
....	....	....	643	....	....	412
644	644	....	....	606	493	540
645	645	....	....	607	493	541
....	....	....	645	....	....	412
646	....	....	....	608	494	542
....	....	646	....	....	....	512
647	647	....	....	610	492, 551, 553	544
....	....	....	....	....	....	....
....	....	....	647	....	....	413, 414
648	....	....	....	611	....	544
648 (a)	648 (a)	....	....	605 (a)	50	100
648 (b)	648 (b)	....	....	605 (b)	50, 51	14
648 (c)	648 (c)	....	....	605 (c)	52	101
648 (d)	648 (d)	....	....	605 (d)	53	101
648 (e)	648 (e)	....	....	605 (e)	54	102
....	....	685	....	....	....	3 (k)
648 (f)	648 (f)	....	....	605 (f)	55	103
648 (g)	648 (g)	....	....	605 (g)	56	104
648 (h)	648 (h)	....	....	605 (h)	462–3	105, 106
648 (i)	648 (i)	....	....	605 (i)	....	590
648 (k)	....	....	....	605 (k)	57 (1)	107
648 (l)	....	....	....	605 (l)	57 (2)	108
....	648 (m)	....	....	....	....	108
....	....	650, 651	....	....	....	529
....	....	....	650	....	....	415

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....	....	652	....	....	....	530
....	....	653	....	....	....	511
....	....	654	....	....	....	515
....	....	...	654	....	....	413, 436
....	....	655	....	....	....	516
656	656	....	....	....	....	320
657	657	....	....	612	....	....
657A	....	....	....	612 (a)	....	369, 370
....	657 (a)	....	....	....	....	221
....	....	657	....	....	....	517
658	658	....	....	613	523	371
....	....	658	....	....	....	519
659	659	....	....	614	524	370
....	....	659	....	....	....	510
....	....	....	659	....	....	410
660	660	....	....	615	525	265
....	....	....	660	....	....	410
661	....	....	....	616	526	266
....	661	....	....	....	....	265
....	....	661	....	....	....	512
....	....	....	661	....	....	410
662	....	....	....	617	527	....
....	....	662	....	....	....	521
663	....	....	....	618	....	....
....	....	663	....	....	....	522
664	....	....	....	619	528	372
....	....	664	....	....	....	523
665	....	....	....	620	529	....
666	....	....	....	621	530	....
....	...	....	666	....	....	618
667	....	....	....	622	530	....
668	....	....	....	623	531	....
669	....	....	....	624	....	393
....	....	669	....	....	....	532
670	....	....	....	625	....	394
671	....	....	....	626	....	395
671A	....	....	....	626 (a)	....	....
672	672	....	....	627	538	458, 459
....	....	672	....	....	....	492
673	....	....	....	628	539	....
....	673	....	....	....	....	459
....	....	673, 674	....	....	....	491
674	....	....	....	629	540	....
675	....	....	....	630	541	....
676	....	....	....	631	541	....
677	....	....	....	632	542	....
678	....	....	....	633	....	....
679, 679A	....	....	....	634	544	....
....	....	679	....	....	....	503
680–685	....	....	...	....	579–581	438, 456
680	....	....	....	640	....	482
680B	....	....	....	640 (a)	....	....
....	680	....	....	....	....	....
....	....	680	....	....	....	485
681	....	....	....	641	....	232
....	681	....	....	....	....	....
....	....	681	....	....	....	449
682	....	....	....	....	....	509
683	....	....	683	642	....	....
....	684	....	....	643	....	474
				....	....	441

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....	686	....	....	....	....	446
....	....	....	686	....	....	615
....	....	....	687	....	....	615
....	....	....	688	....	....	615
....	....	689	....	....	....	533
....	....	....	689	....	....	615
....	....	....	690	....	....	615
....	....	691	....	....	....	534
....	....	....	691	....	....	615
....	....	692	....	....	....	540
....	....	....	692	....	....	615
....	....	693	....	....	....	541
....	....	....	693	....	....	615
....	....	694	....	....	....	542
....	....	....	694	....	....	615
....	....	695	....	....	....	544
696	696	....	....	647	....	213
....	....	696	....	....	....	545
697	....	697	....	648	....	213
698	698	....	....	....	....	537
....	....	698	....	649	589	213, 216
699	699	....	....	....	....	105 (1)
....	....	699	....	650	590	218
700	700	....	....	....	....	105 (2)
....	....	700	....	651	591	215
701	....	....	700	....	....	535
702	....	....	....	652	592	600
703	....	....	....	....	593	214
....	....	703	....	654	....	....
704	....	....	....	....	....	....
....	....	704	....	655	596	546
....	....	705	....	....	....	....
706	....	....	....	....	....	545
....	706	....	....	656	597	547
707	....	706	....	....	....	....
....	....	....	....	657	....	573
708	....	707	....	....	....	548
709	....	....	....	658	598	....
....	....	708	....	....	....	549
....	....	....	....	659	599	512
....	....	709	....	....	....	550
....	....	710	....	....	....	....
711	....	....	....	660	....	565
712	....	....	....	661	....	566
713	....	....	....	662	....	....
....	....	713	....	....	....	....
....	....	714	....	....	....	567
....	....	715	....	....	....	570
....	....	716	....	....	....	568
....	718	....	....	....	....	569
....	....	718	....	....	....	515
719	....	....	....	....	....	571
720	....	....	....	663	532	....
721	....	....	....	664	....	....
....	....	721, 722	....	665	533	....
722	....	....	....	....	....	573, 574
....	....	726	....	666	534	023
....	....	....	726	....	....	573
....	....	728	....	....	....	34, 617
....	....	....	....	....	....	576

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....	....	729	....	....	....	575
....	....	730	....	....	....	3 (*h*)
....	....	731, 732	....	....	....	577
734	....	....	....	678	....	213
735	....	....	....	679	....	....
736	....	....	....	680	....	....
737B	....	....	....	680*a*	....	....
737C	....	....	....	680*b*	....	....
737D	....	....	....	681	....	....
737E	....	....	....	681	....	....
....	737	....	....	....	....	215
738	....	....	....	682	608	....
739	....	....	....	683	609	....
740	....	....	....	684	611	....
741	....	....	....	685	612	....
742	....	....	....	686	613	....
743	....	....	....	687	614	....
744	....	....	....	688	....	....
745	745	....	....	....	620	208
....	....	747	....	....	....	580
....	....	748	....	....	....	581
....	....	749	....	....	....	582
....	....	750	....	....	....	584
....	....	751	....	....	....	585
....	....	752	....	....	....	586
753	....	....	....	....	621	....
....	753	....	....	....	....	223 (2)
754	....	....	....	....	....	505
....	754	....	....	....	....	502
....	....	754	....	....	....	587
755	....	....	....	....	622	505
756	....	....	....	689	....	507
....	....	757	....	....	....	534
759	....	....	....	....	615	....
....	....	759	....	....	....	590
760	....	....	....	690	616	....
761	....	....	....	691	617	....
762	....	....	....	692	618	....
....	762	....	....	....	....	600
....	....	762	....	....	....	592
762A	....	....	....	692 (*b*)	....	....
762B	....	....	....	692 (*c*)	....	....
762C	....	....	....	692 (*d*)	....	....
762D	....	....	....	692 (*e*)	....	....
762F	....	....	....	692 (*h*)	....	....
762H	....	....	....	692 (*i*)	....	....
763	....	....	....	....	....	208, 223
....	....	763	....	....	....	594
764	764	....	....	693	....	207
765	....	....	....	694	624	600
....	....	765	....	....	....	595
766	766	....	....	695	624	608, 609
....	....	766	....	....	....	596, 672
767	767	....	....	696	....	601
767 (a)	....	....	....	....	582	....
767 (b)	....	....	....	....	625	....
768	....	....	....	697	585	601
769	....	....	....	698	586, 636	606 (1)
770	....	....	....	699	583, 586, 606, 627	606 (1)
....	....	770	....	....	....	599

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772
772 (a)
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774
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775A
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777
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778
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779
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771	....	....	....	700	588, 607, 628	606 (2)
772	....	....	....	701	629	612
772 (a)	772 (a)	....	....	701 (a)	630	613
....	....	773	....	....	....	608
....	....	....	773	....	....	625
774	....	....	....	702	624	607
....	....	774	....	....	....	215 (2), 601
775A	....	....	....	692 (g)	....	....
....	....	....	776	....	....	628
777	....	....	....	739 (a)	....	....
....	....	777	....	....	....	610
....	....	....	777	....	....	629
778	....	....	....	739 (b)	....	....
....	....	778	....	....	....	611 (2)
....	....	779	....	....	....	611 (3)
....	....	....	779	....	....	631
779	....	....	....	739 (c)	....	....
780	....	....	....	739 (d)	....	....
....	....	780	....	....	....	611
....	....	....	780	....	....	632
781	781	....	....	704	637	268
..	....	781	....	....	....	412
....	....	....	781	....	....	633
....	....	....	782	....	....	630
....	....	....	784	....	....	634
....	....	785, 786	....	....	....	415
....	....	....	786	....	....	639
787	....	....	.. .	708	....	....
789	....	....	....	709	643	92
....	789	....	....	....	....	91
....	....	789	....	....	....	436
791	....	....	....	....	609	....
....	....	792	....	....	....	436
....	....	....	792	....	....	492
....	....	793	....	....	....	437
....	....	....	793	....	....	492
794	....	....	....	710	....	402
....	....	794	....	....	....	615
795	....	....	....	711	....	....
....	795	....	....	....	....	402
....	796	....	....	....	....	416
796	....	....	....	712	....	....
....	....	796	....	....	....	618
797	....	....	....	713	....	....
....	....	797	....	....	....	618
797A	....	....	....	713 (a)	....	....
798	....	....	....	714	....	....
799	....	....	....	715	....	....
800	....	....	....	716	....	....
....	....	800, 801	....	....	....	619
802	....	....	....	717	....	....
....	....	803, 804	....	....	....	620
805	....	....	....	720	....	....
....	....	805	....	....	....	621
....	....	....	805	....	....	496, 497
806	....	....	....	721	....	....
....	806	....	....	....	....	412
807	....	....	....	722	....	....
....	....	808	....	....	....	457
809	....	....	....	724	....	....

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....	809	....	....	....	....	412
811	....	....	....	725	....	....
812	....	....	....	726	....	....
813	....	....	....	727	....	....
814	....	....	....	728	....	....
....	814	....	....	....	....	414, 415
815	....	....	....	720	....	....
816	....	....	....	721	....	....
817	....	....	....	722	....	....
....	817	....	....	....	....	413
818	....	....	....	732	....	....
....	818	....	....	....	....	413, 436
819	....	....	....	733	....	....
820	....	....	....	734	....	....
821	....	....	....	735	....	....
....	822	....	....	....	....	436
....	823	....	....	....	....	437
823	....	....	....	736	....	....
824	....	....	....	737	....	....
....	824	....	....	....	....	410
....	825	....	....	....	....	410
825	....	....	....	738	....	....
826	....	....	....	739	....	....
....	826	....	....	....	....	410
827	....	....	....	739 (e)	....	....
828	....	....	....	739 (f)	....	....
....	....	....	828	....	....	622
828A	....	....	....	739 (g)	....	....
829	....	....	....	739 (h)	....	....
830	....	....	....	739 (i)	....	....
831	....	....	....	739 (k)	....	....
832	....	....	....	739 (l)	....	....
....	832	....	....	....	....	502
833	....	....	....	739(m)	....	....
....	....	....	833	....	....	359
834	....	....	....	740	....	....
....	....	....	834	....	....	362
837	....	....	....	741	....	....
....	....	....	838	....	....	364
....	....	....	843	....	....	172
....	....	....	844	....	....	174
....	....	....	845	....	....	377
....	....	....	846	....	....	176
....	....	....	847	....	....	175
....	....	....	848	....	....	204
....	....	....	849	....	....	173
850	....	....	....	742	559	....
....	850	....	....	....	....	625
....	....	....	850	....	....	357
851	....	....	....	743	563	....
852	....	....	....	744	564	....
....	852	....	....	....	....	627
853	....	....	....	745	565	....
....	853	....	....	....	....	628
854	....	....	....	746	566	....
....	854	....	....	....	....	629
855	....	....	....	747	567	....
856	....	....	....	748	568	....
....	856	....	....	....	....	630, 631
857	....	....	....	749	569	....
....	857	....	....	....	....	632

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858
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859
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860
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861
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862
863
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864
864 (1)
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866
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869
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870
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871
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885
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911
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....	....	....	857	....	....	374
858	858	....	....	750	570	633
....	....	....	858	....	....	373 (*d*)
859	....	....	....	751	571	630
....	....	859	....	....	....	359
....	....	....	859	....	....	379
860	....	....	....	752	....	....
....	....	....	860	....	....	667, 670
861	....	....	....	753	573	630
....	....	....	861	....	....	649
862	....	....	....	754	574	636
863	....	....	....	755	....	....
....	....	863	....	....	....	362
....	....	....	863	....	....	666
864	....	....	....	756	577	....
864 (1)	....	....	....	....	....	643
....	864 (*a*)	....	....	....	....	641
....	864 (*b*)	....	....	....	....	635, 638
....	....	864	....	....	....	363
865	....	....	....	757	647	....
....	....	865	....	....	....	364
866	....	....	....	758	649	....
....	....	866	....	....	....	365
868	....	....	....	761	654	232, J.A.s. 27
869	....	....	....	762	655	J.A. s. 29
....	....	869	....	....	....	366
870	....	....	....	763	656	....
....	....	870	....	....	....	367
871	....	....	....	764	657	....
....	....	871	....	....	....	368
885	....	....	....	771	665	....
....	....	888	....	....	....	369
....	....	889	....	....	....	371
....	....	891	....	....	....	370
....	....	892	....	....	....	372
....	....	893	....	....	....	622, 623
....	....	896	....	....	....	625
....	....	897	....	....	....	626
....	....	898	....	....	....	627
899	....	....	....	799	....	....
....	....	899	....	....	....	628
900	....	....	....	800	....	....
....	....	900	....	....	....	629
901	....	....	....	801	....	....
....	....	901	....	....	....	628
....	....	902	....	....	....	631
....	....	903	....	....	....	632
....	....	904	....	....	....	633
....	....	908	....	....	....	630
909	....	....	....	809	....	....
....	....	909	....	....	....	634
910	....	....	....	802	....	....
911	....	....	....	803	....	....
....	....	911	....	....	....	636
912	....	....	....	804	....	....
913	....	....	....	805	....	....
....	....	913	....	....	....	639
....	....	914	....	....	....	640
....	....	916	....	....	....	641
917	....	....	....	806	....	....
....	....	917	....	....	....	641

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....	....	918	....	....	....	642
....	....	919	....	....	....	643
921	....	..	....	807	....	....
....	922	....	....	....	....	526
....	....	....	922	....	....	183
....	923	....	....	....	....	526
....	....	....	923	....	....	185
....	....	....	924	....	....	219
925	....	....	....	808	....	....
....	925	....	....	....	....	625
....	926	....	....	....	....	630
....	928	....	....	....	....	600
....	929	....	....	....	....	601 (1)
....	930	....	....	....	....	601 (2)
....	931	....	....	....	....	606
....	932	....	....	....	....	606 (2)
....	933	....	....	....	....	607
....	936	....	....	....	....	649
....	937	....	....	....	....	656
....	938	....	....	....	....	655
....	941	....	....	....	....	654
....	944	....	....	....	....	387
....	945	....	....	....	....	388
....	946	....	....	....	....	653
948	948	....	....	....	....	177–179
....	....	9.8	....	....	....	671
....	....	953	....	....	....	661
....	....	954	....	....	....	662
....	....	....	....	....	693	179
955	....	....	....	....	698	180
....	....	955	....	....	....	35
956	....	....	....	....	699	....
....	....	956	....	....	....	663
....	....	957	....	....	....	664
....	....	958	....	....	....	665
....	....	959	....	....	....	666
....	....	960	....	....	....	678
961	....	....	....	816	700	....
....	....	961	....	....	....	679
962	....	....	....	817	701	172
....	....	962	....	....	....	680
963	....	....	....	818	702	174
....	963	....	....	....	....	641
964	....	....	....	....	....	178
....	964 (a)	....	....	....	....	179
....	964	....	....	....	....	179
....	....	964	....	....	....	678
965	965	....	....	....	....	179
....	....	965	....	....	....	672
966	....	....	....	819	703	378
....	966	....	....	....	....	377
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998	100
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1002 (25)	100
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1002 (27)	100
1002 (28)	100
1002 (29)	100
1002 (39)	
1002 (40)	
1002 (41)	1
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1012	1
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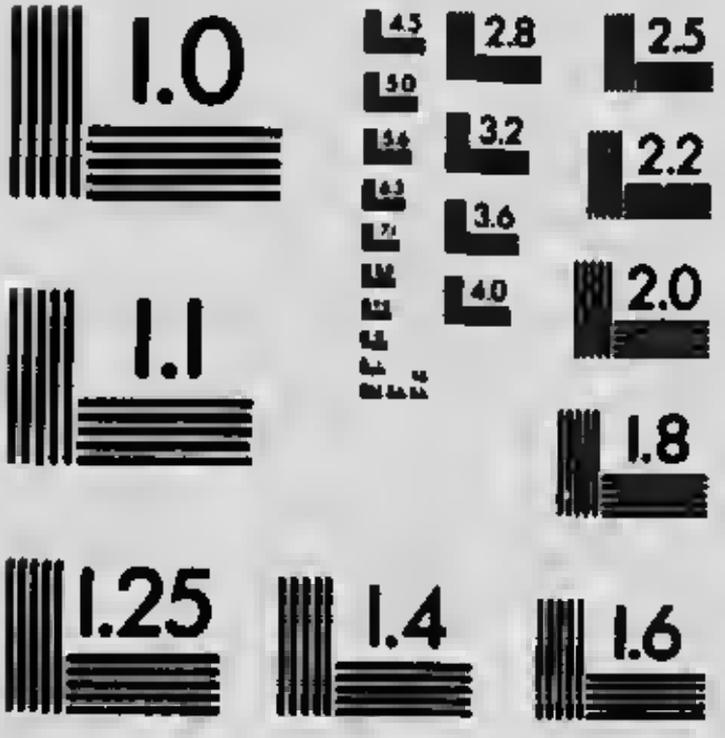

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ADDENDA ET CORRIGENDA

Page xix—Column 2, second line from bottom, for "R," read "674."

" 5—22nd line from bottom, for "to *Rule* 213, *post*," read "*infra*, p. 140."

" 107—3rd paragraph, last line but one, after "consent," add "where the damages have been assessed by a jury."

" 113—5th paragraph, 1st line, for "execution," read "executor."

" 127—9th paragraph, 1st line, for "right of claim," in two places, read "right or clnim."

" 210—1st paragraph, last line but one, for "practice," read "justice." Marginal note of next paragraph, for "Final," read "Penal."

" 253—3rd paragraph, add: "For what are to be regarded as 'issues' for the purpose of determining the incidence of coats: see *Howell* v. *Dering*, 1915, 1 K. B. 54; 111 L. T. 790."

" 291—5th paragraph, add: "A deputy C. C. Judge has the like jurisdiction: *Keyes* v. *McKeon* 23 O. L. R. 529."

" 539—2nd paragraph, add: "A question of law should not be argued *in limine* unless it will dispose of the action. It should not be so argued where the facts are in dispute: *Western S. S. Co.* v. *Amaral & Co.*, 1914, 3 K. B. 55."

" 577—*Smith* v. *Selwyn* is now reported 1914, 3 K. B. 98; 111 L. T. 95.

" 578—4th paragraph, add: "A pleading ought not to be struck out unless it is clearly irrelevant, it is not enough that after considerable argument it may possibly be found to afford no defence: *Mayor of London* v. *Horner*, 111 L. T. 512."

" 615—3rd paragraph, add "see *Page* v. *Midland*, 1914, 1 Ch. 11; 70 L. T. 14."

" 736—At foot of page add: "Certified copies of the depositions under the hand of the Judge or officer taking them are admissible in evidence: see *The Evidence Act* (R.S.O. c. 76), s. 41."

" 806—4th paragraph, 3rd line, after "8 O. L. R. 634," add "(but see now *Rule* 329)."

" 854—2nd paragraph, 4th line, for "is," read "was."

" 942—3rd paragraph, 2nd line, for "Robinson," read "Brogden."

" 962—2nd paragraph, 3rd line, for "119" read "717."

" 1144—1st paragraph, add: "but see per Meredith, C.J.O.: *Joss* v. *Fairgrieve*, 32 O. L. R., at p. 122."

" 1253—2nd paragraph, add after "450," "and p. 1244."

" 1443—4th paragraph, last line, transfer • to end of next line.

N.B.—Pages 1162-4 having been reprinted after the Table of Cases completed, some of the cases cited on those pages are now on a different page to that given in the Table.

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THE JUDICATURE ACT

REVISED STATUTES OF ONTARIO, 1914

CHAPTER 56.

n Act respecting the Supreme Court of Ontario, the administration of Justice in Ontario.

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

PRELIMINARY.

This Act may be cited as *The Judicature Act*. 3-4 V. c. 19, s. 1. Short title.

In this Act,— Interpretation.

(a) "Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by the Rules; "Action."

Interpleader matter comes within the above definition of "action" see Rule 3 (g).

tion" in England includes proceedings by originating summons: *ritt*, 30 Ch. D. 231; and, in Ontario, proceedings commenced by ing notice of motion under *Rules* 600, 610, 615, or by petition ule 692.

oceeding for a writ of *habeas corpus* is a criminal proceeding not an "action": *Rex* v. *Graves*, 21 O. L. R. 329; proceedings n the Crown side are not "actions": *Ib.*

ounty Court action, although not in England commenced by s held to be an "action": *Johnson* v. *Refuge Assurance Co.*, K. B. 259, and "Rules" was held to mean "Rules of the Court n the proceeding is initiated," consequently a Division Court ould be an "action" in Ontario.

(b) "Appellate Division" shall mean Appellate Division of the Supreme Court; "Appellate Division."

(c) "Cause" shall include an action, suit or other original proceeding between a plaintiff and a defendant; "Cause."

-1

Sec. 2.

"County." (*d*) "County" shall include district;

"County Court." (*e*) "County court" shall include district court;

"County town." (*f*) "County town" shall include district town;

"Court of Appeal." (*g*) "Court of Appeal" shall mean Court of Appeal for Ontario;

"Defendant." (*h*) "Defendant" shall include a person served with a writ of summons or process, or served with notice of or entitled to attend a proceeding;

"Defendant" does not include a third party served with notice under *Rule* 165: *Eden* v. *Weardale*, 28 Ch. D. 333, 339; but by an order made under *Rule* 168 he may be placed in the same position as a defendant: *Eden* v. *Weardale*, 35 Ch. D. 287.

"Divisional Court." (*i*) "Divisional Court" shall mean Divisional Court of the Appellate Division;

"High Court." (*j*) "High Court" shall mean High Court of Justice for Ontario;

"High Court Division." (*k*) "High Court Division" shall mean High Court Division of the Supreme Court;

"Judge." (*l*) "Judge" shall include a Chief Justice and an *ex-officio* judge;

"Judgment." (*m*) "Judgment" shall include an order;

As to the difference between a judgment and an order: see *Ex p. Chinery*, 12 Q. B. D. 342; *Re Schmitz*, *Ib.* 509; *Onslow* v. *Com. of Inland Revenue*, 25 Q. B. D. 465.

"Matter." (*n*) "Matter" shall include every proceeding in the Court not in a cause;

"Party." (*o*) "Party" shall include a person served with notice of or attending, a proceeding, although not named on the record;

"Petitioner." (*p*) "Petitioner" shall include a person making an application to the Court, either by petition, motion or summons, otherwise than as against any defendant;

"Pleading." (*q*) "Pleading" shall include a petition or summons, the statement in writing of the claim or demand of a plaintiff, of the defence of a

defendant thereto, and of the reply of the plaintiff to a counterclaim of a defendant; Sec. 2.

Summons" in the corresponding English section 100 does not a writ of summons: *Murray* v. *Stephenson*, 19 Q. B. D. 60.

the *Rules*, petitions are almost abolished, and all proceedings not ed to be commenced by writ of summons are to be commenced ginating notice: see *Rule* 10. Perhaps, by analogy, an originating may be a "pleading."

d in Ontario the "writ of summons" appears to be the only mons" to which this sub-section can apply. Quieting title pro- g: *Rule* 692, and petitions of right: *Rule* 738, are about the roceedings now required to be commenced by petition.

(r) "Plaintiff" shall include a person asking any relief otherwise than by way of counterclaim as a defendant against any other person by any form of proceeding; "Plaintiff."

s) "Proper officer" where that expression is used with respect to a duty to be discharged under this Act or the Rules and that duty has been heretofore discharged by a particular officer, shall mean that officer, and where that expression is used in respect to a new duty under this Act or the Rules shall mean the officer to whom the duty is assigned by this Act or by the Rules or if it is not assigned to any officer shall mean such officer as shall from time to time be directed to discharge the duty, if it relates to the Appellate Division by the Chief Justice of Ontario, or if it relates to the High Court Division by the President of that Division; "Proper officer."

) "Rules" shall mean Rules of Court, and shall include those made under the authority of this or any other Act, and those approved by the Lieutenant-Governor in Council on the 11th day of July, 1913; "Rules."

) "Supreme Court" shall mean Supreme Court of Ontario. 3-4 Geo. V. c. 19, s. 2 (1). "Supreme Court."

ONSTITUTION AND JUDGES OF SUPREME COURT.

he Supreme Court shall be continued as a superior f record, having civil and criminal jurisdiction, hall have all the jurisdiction, power and authority Supreme Court continued.

Sec. 3.

Jurisdiction of Supreme Court.

which on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of that Court, and such jurisdiction, power and authority shall be exercised in the name of the Supreme Court. 3-4 Geo. V. c. 19, s. 3.

The Jud. Act has not fused the former two systems of Law and Equity, but has transferred each of these two jurisdictions to one Court which administers both systems: per Chitty, J., in *Emmerson* v. *Ind.*, 34 W. R. 636; 54 L. T. 757; 33 Ch. D. 327; see 12 App. Cas. 300.

JURISDICTION OF THE SUPREME COURT OF ONTARIO.

The jurisdiction of the former Courts now vested in the Supreme Court of Ontario was entirely statutory.

The general jurisdiction of the former High Court of Justice is defined in the former Jud. Act, R. S. O. (1897), c. 51, ss. 25-34, 36-39, 41 and 42. Some of its jurisdiction under other statutes was mentioned in s. 40.

These sections have not been re-enacted in the present Act, but inasmuch as they constitute the foundation of the jurisdiction of the Supreme Court as at present constituted, it is necessary to refer to them.

The Supreme Court has now vested in it the jurisdiction formerly conferred on the High Court of Justice, and on the Court of Appeal. The High Court of Justice was formerly the Court of first instance, and the Court of Appeal an Appellate Court. Under the present constitution of the Court, the Supreme Court is both a Court of first instance and also a Court of Appeal, but these functions are exercised in two divisions, namely, the High Court Division and the Appellate Division.

JURISDICTION OF HIGH COURT OF JUSTICE UNDER THE ONT. JUD. ACT, R. S. O. (1897), c. 51.

Section 25 of that Act was as follows:

COMMON LAW JURISDICTION.

Jurisdiction of High Court.

"25. The High Court shall be a Superior Court of Record of original jurisdiction, and shall, subject as in this Act mentioned, possess all such powers and authorities, as by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty's Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions and causes as well criminal as civil, and may and shall proceed in such actions and causes by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law, and may and shall also hear and (with or without a jury, as provided by law) determine all

es of fact that may be joined in any such action or cause, and Sec. 3.
gment thereon give, and execution thereof nward in as full and
le e manner as night, at the snid date, be done in Her Majesty's
rts of Queen's Bench, Common Bench, or, in matters which regard
Queen's revenue (including the condemnation of contraband or
ggled goods), by the Court of Exchequer in England. 58 V. c. 12,
."

he civil and criminal jurisdiction nbove mentioned is now vested
e Supreme Court.

riminal Jurisdiction.—By the B. N. A. Act, s. 91, s.-s. 27, "The Criminal Juris-
inal law, except the constitution of Courts of criminal jurisdic- diction.
but including the procedure in criminal matters," is within the
sive legislative power of the Dominion Parliament; and by s.
-s. 14, "the administration of justice in the Province, including
onstitution, maintenance, nnd organization of Provincial Courts,
of civil and criminal jurisdiction, and including procedure in
matters in the Courts," is within the legislative control of the
ncial Legislatures.

ie High Court Division is now a "Superior Court of Criminnl
iction" within the meaning of the Code, and the Appellate
on is the "Court of Appeal" under the Crim. Code, s. 2 (7),
and see 3-4 Geo. V. c. 50 (D).

section 576 of the Criminal Code, every Superior Court of
al jurisdiction is empowered to make rules for the regulation
sittings of the Courts and the pleading, practice, and proce-
in the Court, including the subjects of *mondomus*, *certiorari*,
corpus, prohibition, *quo warranto*, and the stating of cases by
es nnder s. 762 of the Code. In pursuence of this power.
279-1288 of 27th March, 1908, may have been passed; see these
in note to *Rule* 213, *post*.

ceedings to collect a debt due to the Crown under an estreated Estreating
lzance of hail, taken in a criminal case, are civil and not crim- bail.
roceedings, and are regulated by R. S. O. c. 104: *Re Talbot's*
3 Ont. 65; *Rastall* v. *Attorney-General*, 18 Gr. 138.

ceedings to commit for contempt are not criminal matters
the meaning of the B. N. A. Act: *The Copeland-Chatterson Co.*
ness Systems Co., 16 O. L. R. 481; *Scott* v. *Scott* (1913), A. C.
9 L. T. 1.

itable Jurisdiction.—Section 26 (R. S. O. 1897, c. 51), which Equitable
defined the jurisdiction of the High Court, was as follows: jurisdic-
tion.

. The High Conrt shall also, subject as in this Act mentioned,
e like jurisdiction and powers as hy the laws of England were
4th day of March, 1837, possessed hy the Court of Chancery
and, in respect of the matters hereinafter enumerated, that
:

all cases of fraud and accident;

all matters relating to trusts, executors and administrntors.
ership and account, mortgages, ewards, dower, infants, idiots,
and their estates;

stay waste;

compel the specific performance of agreements;

Sec. 3.

5. To compel the discovery of concealed papers of evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same;

6. To prevent multiplicity of suits;

7. To decree the issue of Letters Patent from the Crown to rightful claimants;

8. To repeal and avoid Letters Patent issued erroneously or by mistake, or improvidently, or through fraud. 58 V. c. 12, s. 22."

Fraud.

Fraud and Accident.—*Fraud.*—The jurisdiction by this section vested in the Court, in respect of fraud, is confined to fraud arising in reference to civil rights. A distinction has been attempted to be drawn between acts which are illegal but which are not accompanied by any moral turpitude, and acts which are both illegal and are the result of moral delinquency. The former class of acts have been termed "legal fraud": see *Peek* v. *Derry*, 37 Ch. D. 541, and the latter "moral fraud," or "actual fraud," but it has been denied that any such distinction exists, and that in all cases where "fraud" is charged it must be supported by proof of moral turpitude: *Jolliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. 966; *Weir* v. *Barnett*, 3 Ex. D. 238, 243, *per* Bramwell, J.: and see *In re Watson*, 21 Q. B. D. 301; *Peek* v. *Derry*, 14 App. Cas. 337; *Glasier* v. *Rose*, 42 Ch. D. 436. The House of Lords in *Peek* v. *Derry*, 14 App. Cas. 337; 61 L. T. 265, has held that in an action of deceit the plaintiff must prove actual fraud, and such fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement made through carelessness, and with reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud; a false statement, if made in the honest belief that it is true, does not render the person making it liable to an action for deceit: *Tomkinson* v. *Bolkis & Co.*, 1891, 2 Q. B. 614; *Angus* v. *Clifford*, 1891, 2 Ch. 449; *Knox* v. *Haymon*, 67 L. T. 137; *Le Lievre* v. *Gould*, 68 L. T. 626. But misrepresentations upon an application for life insurance found to be material will make void the policy, notwithstanding that they may have been made in good faith and in conscientious belief that they were true: *Jordon* v. *Provincial Provident Institution*, 28 S. C. R. 554.

The law as laid down in *Peek* v. *Derry*, *supra*, as regards false statements made by the directors of joint stock companies in prospectuses issued by them, is very materially modified by statute: see R. S. O. c. 178, ss. 107-109, and see *Angus* v. *Clifford*, 1891, 2 Ch. 449.

Where fraud is alleged in any proceeding, the facts must be set out in the statement of claim or petition, as the case may be, which are alleged to amount to fraud; mere general allegations that fraud has been committed are insufficient: *Re Rica Gold Washing Co.*, 11 Ch. D. 36, per Jessel, M.R.

As to the effect on costs, of unsuccessfully charging fraud: see notes to s. 74, "*Discretion of Court or Judge.*"

Accident.

Accident.—By the term accident is intended not merely casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct

the party seeking relief in respect thereof: Story, s. 78. One Sec. 3.
the most common instances in which relief is sought under this Accident.
d is in the case of lost bonds, or other instruments under seal.
such a case relief is usually granted on the terms of the plaintiff
ing a bond of indemnity to the defendants: *McDonald* v. *Hime*, 15
72; but see *Macauley* v. *Boyle*, 25 C. P. 339; and where a suit
brought to recover promissory notes alleged to be lost after
urity, and the defendant allowed the bill to go *pro confesso*, indem-
was dispensed with: *Abell* v. *Morrison*, 23 Gr. 109. A will lost
destroyed may be established on parol evidence of its contents, and
of due execution: *Sugden* v. *St. Leonards*, 1 P. D. 154; *Cor-*
v. *Carroll*, 34 C. L. J. 415; *Stewart* v. *Walker*, 6 O. L. R. 495.
jurisdiction of the Court also extends to giving relief in respect
nstruments which have been destroyed: *Frontenac* v. *Breden*, 17
645.

nder this head of jurisdiction the Court may also grant relief in the
of a defective execution of a power resulting from accident or mis-
or both, and also in regard to agreements to executa powers,
h may generally be deemed a species of defective execution: see
. on Pow. 549. But this relief is only granted to persons having
moral right, and where there are no opposing equities. Thus,
relief may be granted in favour of a purchaser: *Fothergill* v.
rgill, 2 Freem. 256; under which term a mortgagee, or lessee,
cluded: *Barker* v. *Hill*, 2 Chy. R. 113; *Reid* v. *Shergold*, 10 Ves.
to a creditor: *Pottord* v. *Greenvil*, 1 Chy. Ca. 10; *Wilkes* v.
es, 9 Mod. 485; to a wife: Cowp. 267; *Clifford* v. *Burlington*, 2
379; to a legitimate child: *Garth* v. *Blanfrey*, Gilb. Eq. 8, 166;
v. *Sneed*, Amb. 64; and to a charity: *Innes* v. *Soyer*, 7 Ha. 377;
. & G. 606; *Attorney-General* v. *Sibthorp*, 2 R. & M. 107; but
favour of the donee of the power, nor a husband: *Watt* v. *Watt*,
244; nor an illegitimate child: *Tudor* v. *Anson*, 2 Ves. Sr. 582;
grandchild: *Watt* v. *Butlas*, 1 P. Wms. 60; nor of remote rela-
or volunteers: *Smith* v. *Ashton*, 1 Freem. 308.

der this head of jurisdiction, personal representatives who have
stake overpaid creditors, or legatees, beyond the amount they
stly entitled to receive, may recover the overpayment: *Edwards*
eman, 2 P. Wms. 447; *Hawkins* v. *Day*, Amb. 160; Story, s. 90.
so *Uffner* v. *Lewis*, 5 G. L. R. 684; *Re Horne*, 1905, 1 Ch. 76.

relief cannot be given from the consequences of a positive con-
thus, a lessee cannot get relief from payment of rent because
destruction of the demised premises by accident: *Pym* v. *Black-*
3 Ves. 34, 38; Story, s. 101; nor can relief be given on the
of accident to a party whose own gross negligence or fault has
the accident: *Ex p. Greenway*, 6 Ves. 812; nor can a lessee
eved from a forfeiture for breach of a covenant not to assign
let, because he has acted in forgetfulness of his covenant:
v. *Isaacs*, 1891, 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent*,
Q. B. 835; 78 L. T. 713; 80 L. T. 459.

take.—The cases in which contracts may be set aside for mis- Mistake.
e usually those in which, either there has been mutual mis-
ignorance in both parties affecting the essence of the con-
r a fact is known to one and unknown to the other, and there
fraud or surprise upon the ignorant parties: see *Beauchamp*
, L. R. 6 H. L. 223, at p. 233; but although as a rule the

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Mistake.

mistake must be mutual in order to afford a ground for equitable relief, yet even a unilateral mistake which has been induced by the opposite party may be a ground for setting aside a contract: see *Wilding* v. *Sanderson*, 1897, 2 Ch. 524.

In *Hurd* v. *MacKinnon*, 1909, 1 Ch. 476; 100 L. T. 330, an appointment made in forgetfulness of the execution of a prior appointment in favour of the same appointee was set aside. Where a beneficial owner in a contract of sale contracted that he should not be bound to get in the outstanding legal estate, and a conveyance subsequently executed for the purpose of carrying out the contract by mistake in effect rendered him liable to do so, the deed was reformed in accordance with the contract: *Fenner* v. *McNab*, 107 L. T. 124. And where a trustee by mistake makes payments to the wrong person, the *cestui que trust* rightfully entitled may recover the sums so paid from the payee; if the latter knew he was not entitled he becomes constructive trustee for the person rightfully entitled; if on the other hand he received the payments thinking he was entitled to them, the action of the *cestui que trust* against him may be barred by the Statute of Limitations, if not brought within six years from the receipt of the money: see *Re Robinson*, *McLaren* v. *Public Trustee*, 1911, 1 Ch. 502; 104 L. T. 331.

By the common law, money paid under a mistake of fact is recoverable: *Boylis* v. *Bishop of London*, 1912, 2 Ch. 318; 1913, 1 Ch. 127, but not money paid under a mistake of law: *Stanley* v. *Nuneaton*, 108 L. T. 986.

Trusts.

Trusts.—The jurisdiction in respect of trusts was formerly a part of the exclusive jurisdiction of the Court of Chancery. By the Statute of Frauds (29 Car. 2, c. 3; see now R. S. O., c. 102), s. 9, all declarations or creations of trust or confidences, of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing; and by s. 11, all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Section 10 makes two exceptions from the statute: (1) trusts arising or resulting from any conveyance of lands or tenements, by implication, or construction of law; (2) trusts transferred or extinguished by act or operation of law. Trusts of chattels real must be evidenced by writing: *Forster* v. *Hale*, 3 Ves. 695; *Riddle* v. *Emerson*, 1 Vern. 108; but not trusts of chattels personal: *McPhadden* v. *Jenkins*, 1 Ph. 153; *Benbow* v. *Townsend*, 1 My. & K. 506.

A trust of land in a foreign country may be enforced by the Supreme Court where the trustee is resident within its jurisdiction: *Smith* v. *Henderson*, 17 Gr. 6; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196; and see *Re Robertson*, *Robertson* v. *Robertson*, 22 Gr. 449. *Sed vide*, *Ross* v. *Ross*, 23 Ont. 43.

The Court has jurisdiction under *The Trustee Act* (R. S. O. c. 121), s. 4, to appoint new trustees upon a summary application: *Re Hellwell*, 21 Gr. 346; *Re Dillon*, 3 C. L. J. 126.

The Court may also on a summary application by a trustee, guardian, or personal representative, give advice or direction respecting the management or administration of the trust property, or the assets of his ward, or his testator or intestate: see *Ib.* s. 66.

The Court is authorized to allow trustees compensation for their vices: *Ib.* s. 67. Sec. 3.

Executors and Administrators.—The jurisdiction of the Court r personal representatives authorizes it to entertain actions or ceedings to compel them to account for their administration: see *les* 608 *et seq.*, to fix the compensation to be paid them for their vices: *The Trustee Act* (R. S. O. c. 101), s. 67; to control their nagement of the estate of their testator, or intestate, and if neces- y to restrain them from exercising their office, and to appoint a elver or other person to act in their stead: *Harrold* v. *Wallis*, 9 443; *Re Moore, McAlpin* v. *Moore*, 21 Ch. D. 778; *Re Murphy*, ore Boyd, C., 9th April, 1887; *Johnson* v. *McKenzie*, 20 Ont. 131; an injunction may be granted at the instance of an executor inst his co-executor to restrain him from intermeddling with the le before probate: *In re Moore, Ker* v. *Moore*, 13 P. D. 36; 58 L. 886; without appointing a receiver: *Bourn* v. *Phillips*, 1897, 1 Ch. ; 75 L. T. 629. Executors and administrators

The Court may also, on application, give a personal representative ice: see *supra*.

An executor may now be removed on the same grounds as the Court remove any other trustee: *The Trustee Act* (R. S. O. c. 121), s. Before that enactment, it was held that the High Court would remove an executor from his office while anything remained to ions by him as executor, even though the will provided for his ainance as a trustee after his duties as executor had ceased, and ad acted as trustee by investing the trust fund: *Re Bush*, 19 Ont. nd see *Eaton* v. *Daines*, 96 L. T. Jour. 413.

The statutory jurisdiction to remove an executor cannot, however, xercised summarily on motion *in invitum*; an action is necessary: Davis, 17 P. R. 187.

s to the testamentary jurisdiction of the Court: see *infra*, p. 24. q.

Co-partnership.—The Court of Chancery formerly exercised a urrent jurisdiction with the Courts of Common Law in partner- cases, but in all cases of difficulty and complexity the equity diction was resorted to. Under this head the Court has power ntertain actions for the specific performance of agreements to into partnership for a definite term: *Buxton* v. *Lister*, 3 Atk. *England* v. *Curling*, 8 Beav. 129; but not where no specified for the duration of the partnership has been named: *Hervy* v. , 9 Ves. 357. It has also power to enforce the specific per- ances of articles of partnership: *Somerville* v. *McKay*, 16 Ves. *England* v. *Curling*, 8 Beav. 129; *Miles* v. *Thomas*, 9 Sim. 606, *Marshall* v. *Watson*, 25 Beav. 501; *Haggart* v. *Allan*, 4 Gr. 36; ot where damages would be an adequate compensation: *Street* gby, 6 Ves. 815; *British Empire Shipping Co.* v. *Somes*, 3 K. & J. nor where the partnership is in contravention of any public *Collins* v. *Swindle*, 6 Gr. 282. Partnership.

has also power to decree a dissolution of partnership: *Rawlins* ckham, 1 Giff. 355; *Hue* v. *Richards*, 2 Beav. 305; *Newton* v. , 1 Gr. 596; *O'Lone* v. *O'Lone*, 2 Gr. 125; and to appoint a er of the partnership assets: *Prentiss* v. *Brennan*, 2 Gr. 274; *Ib.* . 17, note; and to decree the taking of the partnership accounts. Court has also power to entertain an action to establish a

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partnership: *Bingham* v. *Smith*, 16 Gr. 373; and to decree an account up to the time of the commencement of the action, even where a dissolution is not asked: *Loscombe* v. *Russell*, 4 Sim. 8; *Fairthorne* v. *Weston*, 3 Ha. 387; and see *Lyon* v. *Tweddell*, 44 L. T. 785; 50 L. J. Chy. 571.

Account.

Account.—Under this head of jurisdiction the Court entertains actions for an account brought by a principal against his agent: *McKenzie* v. *Johnson*, 4 Mod. 373; *Kerr* v. *Laferty*, 7 Gr. 412; *Ridley* v. *Sexton*, 18 Gr. 580; 19 Gr. 146; *Arthurton* v. *Dolley*, 3 Gr. 1; *Wright* v. *Ronkin*, 18 Gr. 625; *M'Lean* v. *Grant*, 20 Gr. 76; *Smith* v. *Henderson*, 17 Gr. 6; *Harrison* v. *Harrison*, 14 Gr. 586; *Londman* v. *Crooks*, 4 Gr. 353; but not necessarily by an agent against his principal: *Padwick* v. *Stanley*, 9 Ha. 627; *Smith* v. *Leveaux*, 2 D. J. & S. 1; and see *Ascherson* v. *Tredegar, etc., Co.*, 1909, 2 Ch. 401. An action for an account will lie where there are mutual accounts between the plaintiff and defendant, i.e., where each has received and paid on account of the other: *Phillips* v. *Phillips*, 9 Ha. 471; or by *cestui que trust* against his trustee; or by creditors, legatees, or next of kin against personal representatives; or by a client against his solicitor; or by partners against each other; or by a mortgagor against his mortgagee, or *vice versa*; or where the accounts are complicated; or where fraud is charged; or by any party having a statutory right to call another to account, e.g., by a municipal corporation against a registrar of deeds for an account of moneys received by him in excess of his salary, to which excess the corporation is entitled: *Re Ingersoll, Gray* v. *Ingersoll*, 16 Gnt. 194

See further as to proceedings in taking accounts: *Rule* 410, *et seq.*, and notes.

Mortgages.—The Court has jurisdiction to foreclose the equity of redemption in mortgaged property, real or personal, also to direct a sale of the mortgaged property and the application of the proceeds; and also to provide for redemption by the mortgagor: see *Rules* 33 (h), 460-490, and notes thereto; and generally has jurisdiction as to all matters relating to mortgages.

Awards.

Awards.—The Court has power to set aside awards: *Lawson* v. *Hutchinson*, 19 Gr. 84; *Edward* v. *Gordon*, 12 Gr. 333; *Kemp* v. *Henderson*, 10 Gr. 54; *Jekyll* v. *Wade*, 8 Gr. 353; *Hickman* v. *Lawson*, 8 Gr. 386; *Gillam* v. *Cleghorn*, 7 Gr. 83. But an award was not impeachable in Equity on the ground that it was erroneous in either law or fact, unless the error appeared on its face. The cases in which the Court of Chancery could interfere were those in which such an error so appeared; or where there had been corruption, fraud, or excess of jurisdiction; or where the arbitrators making the award admitted that they had made a mistake: *Re Grant* v. *Eastwood*, 22 Gr. 553; *Pardee* v. *Lloyd*, 26 Gr. 374; and see *Le Moy* v. *McRae*, 16 Ont. App. 348; *Re Harvey & Parkdale*, 16 Gnt. 372. The Court of Chancery could also enforce awards: *Armstrong* v. *Cayley*, 2 Chy. Ch. 128, 163; *Wilson* v. *Switzer*, 1 Chy. Ch. 44, and see *Bell* v. *Miller*, 9 Gr. 385; *Hodder* v. *Turvey*, 20 Gr. 63; where specific performance was decreed: *Darnley* v. *London, Chatham & Dover Ry. Co.*, L. R. 2 H. L. 43; *Blackett* v. *Bates*, L. R. 1 Chy. 117; *Nickels* v. *Hancock*, 7 D. M. & G. 300; *Norvall* v. *Canada Southern Ry. Co.*, 5 Gnt. App. 13.

In addition to the powers conferred by the R. S. G., 1897, c. 51, s. 26, the Court has also jurisdiction under *The Arbitration Act* (R. S.

c. 65), c. 5, to permit a revocation of a submission to arbitration; Sec. 3.
stay an action where there is an agreement to refer the matters
question to arbitration: *Ib.* s. 8; and for recent cases where the
wer has been exercised under the corresponding English Statute:
Bonsis v. *Neome*, 1910, 1 Ch. 732; *Freeman* v. *Chester*, 1911, 1
B. 783; *Pena Copper Mines* v. *Rio Tinto*, 105 L. T. 346; *Printing*
chinery Co. v. *Linotype*, 1912, 1 Ch. 566; *Doleman* v. *Ossett*, 1912,
K. B. 257; 107 L. T. 581; *Bristol* v. *Aird*, 1913, A. C. 241; 108 L. T.
4. The Court has also power to appoint umpires, or third arbitra-
rs: s. 9. Also to remit awards: s. 12. Also to remove arbitrators
umpires who misconduct themselves: s. 13, and set aside an
ard made by such an arbitrator or empire: s. 13 (2). It may also
force awards: s. 14, and may compel the attendance of witnesses
fore arbitrators: ss. 15, 28, and may provide for the taking of
dence *de bene esse* for the purpose of a reference: s. 16. And
y, where agreed by the parties, entertain an appeal from
ard; s. 17; *Re Graham*, 25 O. L. R. 5. The Court may also
arbitrator to state a case: s. 29.

A motion to set aside an award, otherwise than by way of appeal,
st be made within 8 weeks after publication of the award, or
hin such further time as the Court may allow: s. 33. In computa
of the 8 weeks, vacations are not to be counted: *Ib.*

An appeal from an award made on a submission by consent is
ject to the same *Rules* as appeals from awards made by Referees
er the order of the Court: s. 17, and see *Rules* 502-504.

Appeals from awards of compensation made under the Dominion
lway Act (R. S. C., c. 37), are regulated by s. 209 of that Act:
see *Birely* v. *Toronto, H. & B. Ry.*, 25 Ont. App. 88.

Appeals from awards of compensation under the *Ontario Railway*
(R. S. O. c. 185), are regulated by that Act: s. 90 (15).

Dower.—The jurisdiction of the Court of Chancery was formerly Dower.
orrent with that of the Courts of Law in actions to enforce
ns for dower: *Craig* v. *Templeton*, 8 Gr. 483; *Grieve* v. *Woodruff*,
t. App. 617. Damages for detention of dower cannot be recovered
re the husband does not die seised, even though a demand of
r be made: *Morgan* v. *Morgan*, 15 Gnt. 194.

he Court had jurisdiction to compel a widow to elect between the
ision made for her by her deceased husband's will and her dower,
ever it was inconsistent with the testator's intention to be
cted from his will, that she should enjoy both: *Lapp* v. *Lapp*,
r. 159; *Murphy* v. *Murphy*, 25 Gr. 81; *Ripley* v. *Ripley*, 28 Gr.
Laidlow v. *Jockes*, 25 Gr. 293; 27 Gr. 101; *Patrick* v. *Shover*, 21
123; *Armstrong* v. *Armstrong*, 21 Gr. 351; *McGregor* v. *Mc-*
or, 20 Gr. 450; *Coleman* v. *Glanville*, 18 Gr. 42; *Lee* v. *McKin-*
8 Gr. 527; *Hutchinson* v. *Sargent*, 16 Gr. 78; *McLennon* v. *Grant*,
r. 65; *Kerr* v. *Leishman*, 8 Gr. 435; *Re Quimby*, 5 Gnt. 738;
on v. *Fraser*, 18 Ont. 496; *Morriott* v. *McKay*, 22 Ont. 320; *Re*
r, 8 Ont. 372; *Rudd* v. *Horper*, 16 Ont. 422; *McMylor* v. *Lynch*,
t. 632; *Elliott* v. *Morris*, 27 Gnt. 487; *Re Geo. Shunk Est.*, 31
175; *Reynolds* v. *Palmer*, 32 Gnt. 431; and where a dowrese has
her election she may be restrained from afterwards prosecuting
tion for dower: *Westacott* v. *Cockerline*, 13 Or. 79.

e right to dower is now regulated by *The Dower Act* (R. S. O.

Sec. 3. Infants.

Infants.—The jurisdiction of the Court of Chancery over infants was partly exclusive, and partly concurrent with that of the Superior Courts of Common Law. As regards the custody of the persons of infants, it was concurrent with that of the Courts of Law; but as regards their estates, it was exclusive.

As regards the persons of infants, the Court of Chancery could make order for their custody, education, and maintenance, and appoint guardians of their persons: *Re Keith*, 7 P. R. 138; *MacNabb* v. *McInnes*, 25 Gr. 144; *Re Irwin*, 16 Gr. 461; *Murphy* v. *Lamphier*, 12 Gr 241; *Anon.*, 6 Gr. 632. The jurisdiction of both the Courts of Law and Equity is now vested in the Supreme Court. The Surrogate Courts have a concurrent jurisdiction to appoint guardians of the persons and estates of infants: see *The Infants' Act* (R. S. O. c. 153), ss. 26, 32.

Custody.

Custody of Infants.—As regards the custody of infants: see *Re Keith*, 7 P. R. 138; *Re Gillrie*, 3 Gr. 279; *Re Davis*, 3 Ch. Ch. 277; *Andrews* v. *Salt*, L. R. 8 Chy. 622; *Re Smart*, 12 P. R. 312, 435, S. C. *sub. nom. Smart* v. *Smart*, 1892, A. C. 425; 67 L. T. 510; *Re Kenna*, 29 O. L. R. 590; and see *The Infants' Act*, ss. 2-4.

The power to remove testamentary guardians is now expressly given to the Court by statute: *The Infants Act* (R. S. O. c. 153), s. 29; and see *Re X.*, 1899, 1 Ch. 526. Formerly it was not customary for the Court of Chancery to exercise jurisdiction in regard to an infant, unless the infant had some property in respect of which the jurisdiction could be invoked: *Wellesley* v. *Beaufort*, 2 Russ. 21; *Clayton* v. *Clarke*, 3 D. F. & J. 682; but the right of the Court to exercise jurisdiction is not considered to be limited to cases in which the property of the infant is involved: *Re Spence*, 2 Ph. 247; *Re Tynn*, 2 Dr. & S. 481; *Re Smart*, 12 P. R. 312, 435; see S. C. *sub. nom. Smart* v. *Smart*, 1892, A. C. 425; 67 L. T. 510; *Re McCrossan*, 1892, 2 Ch. 246. Any suit relating to the estate or person of an infant and for his benefit has now the effect of making him, whether plaintiff or defendant, a ward of Court: *Gynn* v. *Gilbard*, 1 Dr. & S. 356; *Re Berte*, 9 H. L. C. 440; *Pendleton* v. *Macrory*, 2 Dick. 736.

There is nothing contrary to public policy in a mother having no estate, transferring the custody of her infant child to a grandparent who undertakes to maintain and educate him: *Chisholm* v. *Chisholm*, 40 S. C. R. 115.

Maintenance.

Maintenance of Infants.—The Court has power to order the sale of infants' estates when necessary to provide for their maintenance or education, or when by reason of any part of the property being exposed to dilapidation or depreciation from any other cause, the infant's interest requires it: *The Infants' Act* (R. S. O. c. 153), s. 5. The Court may also make provision out of an infant's estate for his maintenance and education. *Ashbough* v. *Ashbough*, 10 Gr. 430; *The Infants' Act* (R. S. O. c. 153), ss. 2 (2), 16, 20, 21.

In England it is held that the Court has no jurisdiction to order moneys to be raised for the maintenance of an infant by a sale or mortgage of the infant's reversionary interest in realty, because such an interest cannot be delivered in execution: *Cadman* v. *Cadman*, 33 Ch. D. 397; 55 L. T. 569; *Re Badger*, 1913, 1 Ch. 385; 108 L. T. 411; but in Ontario see *The Execution Act* (R. S. O. c. 80) s. 34.

An injunction to restrain a breach by an infant of an apprentice- Sec. 3.
p deed was refused: *De Francesco* v. *Barnum*, 43 Ch. D. 165; but
contract entered into by an infant which is for his benefit is bind-
on him and may be enforced by injunction: *Bromley* v. *Smith*,
9, 2 K. B. 235; 100 L. T. 731; *Gadd* v. *Thompson*, 1911, 1 K. B. 304;
L. T. 836; *Roberts* v. *Gray*, 1913, 1 K. B. 520; 108 L. T. 232; and
ere an infant has obtained money or property in circumstances
ich amount to fraud it may be recovered from him: *Cowern* v.
ld, 1912, 2 K. B. 419; 106 L. T. 984; *Stocks* v. *Wilson*, 1913, 2 K. B.

For further jurisdiction as to infants: see *post*, p. 23, and sec. 22
notes, and *Rule* 618 and notes.

Marriage.—In the last edition of this work it was stated that the Marriage.
h Court of Justice had jurisdiction to declare a marriage null and
l, relying on the dictum of Boyd, C., in *Lawless* v. *Chamberlain*, 18
. 296. Later decisions serve to show that that dictum is erroneous,
the proper conclusion seems to be that the Supreme Court has
matrimonial jurisdiction except to grant alimony, and to adjudi-
on the validity of marriages where the question arises incid-
ally in an action. The Court has refused to annul a marriage
impotence: *T.* v. *B.*, 15 O. L. R. 224, and on the ground that the
ies were related within the prohibited degrees: *May* v. *May*, 22
. R. 559; and on the ground that one of the spouses was insane
e time of the marriage: *King* v. *Birmen*, 47 C. L. J. 232, and see
d v. *Spence*, 4 O. W. R. 998; *Malott* v. *Malott*, 4 O. W. N. 1405; 1577;
man v. *Hallman*, 5 O. W. N. 976; and see Holmested's *Matrimonial*
diction in Ontario and Quebec, pp. 3 *et seq.*

The Marriage Act (R. S. O. c. 148), s. 36, the Court is empowered
nul certain marriages—but in view of the B. N. A. Act, s. 91 (26),
alidity of this Act appears to be questionable: see Holmested's
imonial Jurisdiction in Ontario and Quebec, pp. 14 *et seq.*

Idiots and Lunatics.—The jurisdiction over idiots and lunatics is Idiots and
regulated, so far as regards obtaining declarations of lunacy, and lunatics.
ding for the sale of lunatics' estates, and for their custody and
enance, and the payment of their debts, by *The Lunacy Act*
. O. c. 68), s. 14. The Court has jurisdiction to authorize the
ittee of a lunatic to accept a devise made to him on condition:
fton, 1898, 2 Ch. 378; 78 L. T. 765.

aying Waste.—The jurisdiction of the former Court of Chancery Staying
y waste was part of the concurrent jurisdiction of the Court waste.
was exercised by means of injunction. The jurisdiction of
y originally arose in England on account of the incompetency of
ourts of Law to give adequate relief. The jurisdiction of the
of Chancery was originally confined to cases of what was by a
hat misleading use of words called "equitable waste," meaning
y acts which were deemed waste only in Courts of Equity, and
hich no action would lie at law; and to cases where no waste
en actually committed, but was threatened; but the Court is now
d to grant an injunction to restrain waste, notwithstanding that
rty in possession claims by an adverse legal title: see s. 17, *infra*.
onveyancing and Law of Property Act (R. S. O. c. 109), s. 30, in
abolishes the distinction between legal and equitable waste, by
away from a tenant for life without impeachment of waste,
al right to commit equitable waste, unless an intention to con-
t right is expressed. See, however, *In re Cartwright, Avis* v.

Sec. 3.

Newman, 41 Ch. D. 532; *Dashwood* v. *Magniac*, 1891, 3 Ch. 306; *Meux* v. *Cobley*, 1892, 2 Ch. 253.

Waste

All the niceties of ancient learning as to waste are not to be transferred without discrimination to such a country as Ontario: *Hixon* v. *Reaveley*, 9 O. L. R. 6.

A mortgagee of a term of years being in possession, may, at the suit of the mortgagor, be restrained from committing waste, even though he have obtained the consent of the reversioner: *Chisholm* v. *Sheldon*, 1 Gr. 318.

A mortgagor in possession will not be restrained from cutting timber for fuel, fencing, or repairs upon the premises, but if the security is scanty he will be restrained from cutting timber for other purposes, at the suit of the mortgagee: *Russ* v. *Mills*, 7 Gr. 145; *King* v. *Smith*, 2 Ha. 239; or at the suit of an execution creditor: *Wason* v. *Carpenter*, 13 Gr. 329.

An injunction has been granted to restrain waste pending litigation as to the ownership of the property: *Christie* v. *Long*, 3 Gr. 630; *Robins* v. *Porter*, 2 U. C. L. J. 230; and an injunction has also been granted to restrain waste in favour of an unpaid vendor against a vendee and his assignee: *Lawrence* v. *Judge*, 2 Gr. 301; *Ferrier* v. *Kerr*, 2 Gr. 668; *Mitchell* v. *McGaffey*, 6 Gr. 361; *Walsh* v. *Brown*, 4 U. C. L. J. 68; *McLean* v. *Burton*, 24 Gr. 134; *Summers* v. *Cook*, 28 Gr. 179. A tenant for life who is not entitled to hold without impeachment of waste, may be restrained from committing any waste in an action at the suit of the remainderman: *Clow* v. *Clow*, 4 Ont. 355; but see *Drake* v. *Wigle*, 22 C. P. 341; *Saunders* v. *Breakie*, 5 Ont. 603; *Munsie* v. *Lindsay*, 10 P. R. 177, and where the tennnt for life holds his estate without impeachment of waste, if he is guilty of malicious, extravagant, or capricious waste, that was formerly called "equitable waste," and may be restrained at the suit of the reversioner or remainderman: *Garth* v. *Cotton*, 1 W. & T. L. C. Eq. 806; *Vane* v. *Barnard*, 2 Vern. 738; *Rolf* v. *Somerville*, 2 Eq. Ca. Abr. 759; *Morris* v. *Morris*, 15 Sim. 505; *Micklethwait* v. *Micklethwait*, 1 De G. & J. 519; *Turner* v. *Wright*, 2 D. F. & J. 234; *Talbot* v. *Hope-Scott*, 4 K. & J. 96; and see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 30. He cannot be restrained from merely permissive waste: see *In re Cartwright, Avis* v. *Newman*, 41 Ch. D. 532.

As to permissive waste by tenants for life, or years: see 44 C. L. J. 175; 8 Columbia Law Rev. 425; 134 L. T. Jour. 354.

A tenant in tail in possession cannot be restrained from committing waste: *Turner* v. *Wright*, Joh. 752; *Saville's case*, Mos. 224, 1 W. & T. L. C. Eq. 13, except after possibility of issue extinct: *Attorney-General* v. *Marlborough*, 3 Madd. 538; *Abrahall* v. *Bubb*, 2 Sw. 172.

A purchaser who has gone into possession and has failed to meet his payments may be restrained from committing waste: *Ferrier* v. *Kerr*, 2 Gr. 668.

Where the plaintiff has slumbered on his rights: *Hughson* v. *Cook*, 20 Gr. 238; or the injury is trifling: *Bernard* v. *Gibson*, 21 Gr. 195, an injunction will be refused.

Specific performance.

Specific Performance.—The jurisdiction of the Court of Chancery to decree specific performance of contracts was discretionary, but the exercise of this discretion was regulated by certain fixed rules and principles: *Lamare* v. *Dixon*, L. R. 6 H. L. 414. This branch of the jurisdiction of the High Court is also discretionary: *In re Scott*, 1895,

603. Speaking generally, the Court of Chancery refused to decree Sec. 3.
ic performance of contracts or obligations except in those cases in
there was no adequate remedy at law for breach of the agree-
and in which the Court could superintend and enforce the execu-
of its decree: *Johnson* v. *Montreal & City of Ottawa Ry.*, 22 Gr.
neither would it enforce specific performance of mere voluntary
ments: *Re Lucan*, 45 Ch. D. 470. Agreements for the sale or
g of land will be specifically enforced *Dennison* v. *Kennedy*, 7 Gr.
Simmons v. *Campbell*, 17 Gr. 612; *Hexter* v. *Pearce*, 1900, 1 Ch. D.
an agreement for lease of an undivided moiety of mineral pro-
, even when made by parol, if there have been acts of part per-
nce; *Shennan* v. *Parsill*, 18 Gr. 8; *Butler* v. *Church*, 16 Gr. 205;
nald v. *McKinnon*, 26 Gr. 12; but poyment of the whole, or part,
purchase money is not an act of port performance sufficient to
parol evidence of a contract for the sale of lands: *Johnson* v.
anada Co., 5 Gr. 558; the acts of part performance relied on
be such as cannot be referred to any other than the alleged con-
Alderson v. *Maddison*, 5 Ex. D. 293; 7 Q. B. D. 174; 8 App.
67; *Sexton* v. *Shell*, 6 U. C. L. J. 94. Letting the purchaser
ossession is, ordinarily, a sufficient part performance: see *Crain*
ple, 22 Ont. 519; this case was reversed in appeal on another
see 20 Ont. App. 291. As to how far signing the deed, without
y by the vendor, is port performance, or evidence to sotisfy
atute of Frauds: see *Gillately* v. *White*, 18 Gr. 1; *McClung* v.
cken, 3 Ont. 596.

purchaser under a contract for sale of land in not entitled Contract for sale of land.
cree for specific performance by the vendor, unless he has been
lo the performance of the obligations devolving upon him,
ways ready to carry out the contract on his part within a rea-
time, even though the time was not of its essence; and is not
where he has declared his inability to perform his share of
tract: *Wallace* v. *Hesselin*, 29 S. C. R. 171; *Levy* v. *Stogden*,
Ch. 5; 79 L. T. 364; but though a purchaser by laches may
barred himself from the right to specific performance he may
eless he entitled to damages: *Cornwall* v. *Henson*, 1900, 2
; 82 L. T. 735; but in the case of land he is not entitled to
s for loss of his bargain, but only to the amount of the price
b. and see *Confederation Life* v. *Labatt*, 27 Ont. App. per
.A., at p. 326, whereas in the case of goods he may recover
to the amount of their value, and not merely the price
.

times where the vendor is unable to convey all that he con- Where vendor unable to give title as agreed.
to sell, he may be compelled to perform the contract so far
able, and the purchaser will be allowed an abatement in
hase money, *e.g.*, where the purchaser was entitled to a con-
free from the dower of the vendor's wife, and she refused
n the conveyance, specific performance was decreed, but with
ement: *Van Norman* v. *Beaupre*, 5 Gr. 599; *Loughead* v.
27 Gr. 387; and see *Jones* v. *Dale*, 16 Ont. 717; *Stammers* v.
pe, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358. But where
r agreed to sell partnership lands, but owing to his co-partner
to join in the sale, the vendor was only able to convey
ided interest, the Court refused to decree specific perform-
favour of the purchaser with an abatement: *Crain* v. *Rapple*,
App. 291; but where the plaintiff at the time he entered into
et for the exchange of lands had no title to the lands he

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proposed to give in exchange, but the title, as the defendant knew, was in the plaintiff's wife. It was held that the defendant could not on that ground repudiate the contract, and the plaintiff having before action tendered a conveyance from his wife, specific performance was decreed: *St. Denis* v. *Higgins*, 24 Ont. 230.

Breach of trust.

A contract for the sale of land involving a breach of trust, will not be specifically enforced: *Delves* v. *Gray*, 1902, 2 Ch. 606; 87 L. T. 425.

Exchange.

Specific performance of an agreement for the exchange of lands in the United States for lands in Ontario, was enforced at the suit of the owner of the lands in the United States: *Montgomery* v. *Ruppensburg*, 31 Ont. 433.

Covenant to build.

A covenant to build cottages of a specified character, was specifically enforced: *Molyneux* v. *Richard*, 1906, 1 Ch. 34; 93 L. T. 698.

Rights respecting chattels.

The sale and specific delivery of chattels may be enforced when damages would manifestly be an inadequate compensation. So also the specific delivery of heirlooms: *Pusey* v. *Pusey*, 1 W. & T. L. C. Eq. 961; *Somerset* v. *Cookson*, 1 W. & T. L. C. Eq. 962; of chattels of unique value: *Falcke* v. *Gray*, 4 Drew. 651; *Dowling* v. *Bettjemann*, 2 J. & H. 544; *Thorn* v. *Commissioners of Works*, 32 Beav. 490; *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562; 55 L. T. 831; may be enforced; but specific delivery of merchandise will not usually be decreed: *Buxton* v. *Lister*, 3 Atk. 384; *Fothergill* v. *Rowland*, 17 Eq. 141; but a contract relating to saw logs has been specifically enforced: *Farewell* v. *Wallbridge*, 6 Gr. 634; *Flint* v. *Corby*, 4 Gr. 45; *Stevenson* v. *Clark*, *Ib.* 541; *Fuller* v. *Richmond*, 2 Gr. 24; 4 Gr. 657.

Allotment of shares.

An agreement for the allotment of shares in a company, if any shares remain available, may be specifically enforced: *Price* v. *Denbigh Ry. Co.*, 17 W. R. 572; *Ferguson* v. *Wilson*, 2 Chy. 77; *Canada Life Assce. Co.* v. *Peel Manufact'g Co.*, 26 Gr. 477; and agreements for the sale of shares in companies: *Duncuft* v. *Albrecht*, 12 Sim. 190; *Cheale* v. *Kenward*, 3 D. & J. 27; *Turner* v. *Moy*, 32 L. T. 56; and for the transfer of shares in a company: *McGregor* v. *Curry*, 6 O. W. N., p. 202; and for the sale of patents: *Cogent* v. *Gibson*, 32 Beav. 557; or future inventions: *Printing Co.* v. *Sampson*, L. R. 19 Eq. 462;

Sale of business

for the sale of good will with business premises, and fixtures: *Smith* v. *Peters*, 20 Eq. 511; *Mossop* v. *Mason*, 18 Gr. 453; 17 Gr. 360; 16 Gr. 362; or with plant and trade secret: *Bryson* v. *Whitehead*, 1 S. & S. 74; but not of good-will only: *Baxter* v. *Connoly*, 1 J. & W. 580. A contract between several manufacturers not to sell goods manufactured by them below a stipulated price may be enforced: *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Gr. 540; as also agreements not to trade within reasonable limits: see *Holcomb* v. *Nixon*, 5 Gr. 278, 373; but conditions as to the price at which goods are to be sold by retail cannot be enforced against any sub-purchaser: *Taddy* v. *Sterious*, 1904, 1 Ch. 354; 89 L. T. 628; *McGruther* v. *Pitcher*, 1904, 2 Ch. 306.

Incomplete contract.

A contract which on its face does not appear to have been intended to be a final and concluded agreement will not be specifically enforced: *Page* v. *Norfolk*, 70 L. T. 23, 781; *Hodson* v. *Thetford*, 123 L. T. Jour. 87; *Hatzfeldt* v. *Alexander*, 105 L. T. 434.

Where the price was to be paid in the shares of a syndicate to be formed, the nature of whose objects were not defined nor ascertainable with certainty, specific performance was refused: *Douglas* v. *Baynes*, 1908, A. C. 477; 99 L. T. 569.

Contract for service

covenant by a lessor to employ a porter for the general benefit s lessees of flats, was held not to be one which the Court could fically enforce: *Ryan* v. *The Mutual Tontine Westminster Cham-Co.*, 1893, 1 Ch. 116; 67 L. T. 820.

Arbitration

pecific performance of an agreement to refer to arbitration, will e decreed, either directly or indirectly, by compelling the recal-nt party t. appoint an arbitrator: *Re Smith & Nelson*, 25 Q. B. 5; but see R. S. O. c. 65, s. 8; *Manchester Ship Canal* v. *Pear-*1900, 2 Q. B. 606; 83 L. T. 46.

Award.

to specific performance of awards, and contracts relating to erships: see *supra*, p. 9.

Separation deed.

greements for the execution of separation deeds may be enforced: n v. *Wilson*, 1 H. L. C. 538.

Negative covenant

metimes where the Court cannot decree specific performance of a ve part of a contract, if the contract includes a separate negative rt, the latter may be enforced, *e.g.*, an agreement by a singer to t a particular place cannot be enforced, nor an agreement by a to write for a particular publisher; but if the agreement also es that the singer is not to sing elsewhere without the consent plaintiff, or that the writer will not write for any other pub-during the engagement, the negative agreement may be en-: *Lumley* v. *Wagner*, 1 D. M. & G. 604; *Rolfe* v. *Rolfe*, 15 Sim. tiff v. *Cassell*, 2 Jur. N. S. 348; *Daggett* v. *Ryman*, 16 W. R. Brown v. *Harper*, 68 L. T. 488; *Star Newspaper Co.* v. *O'Con-*4 L. T. Jour. 182; but such negative covenant must be reason-*Ehrmann* v. *Bartholomew*, 1898, 1 Ch. 671; 78 L. T. 646; and there is no such negative covenant, an injunction will not be d: *Whitwood* v. *Hardman*, 1891, 2 Ch. 416; 64 L. T. 716; on v. *Cunningham*, 1894, 1 Q. B. 125.

Declaratory judgment.

, as a rule, where the subject matter of a contract is not such Court can order to be specifically performed, it cannot, by a tory judgment, indirectly grant that relief: *Chang-Yen Mao* v. g. 120 L. T. Jour. 313.

Contracts not specifically enforceable

ere the specific performance of a contract involves the working allway in all its minutiæ for all time to come, specific per-ce will not be decreed, nor will the Court attempt to enforce andamus or injunction: see *Kingston* v. *Kingston P. & C. E. Ry.*, 399; *Bickford* v. *Chatham*, 16 S. C. R. 235.

Court has refused to order specific performance of an agree-y an Electric Railway Company to run its cars on certain at certain hours, and with certain officers, as the Court could rsee the carrying out of the judgment if granted: *Kingston* v. *n P. & C. Electric Railway Co.*, 25 Ont. App. 462; see *Hamilton ilton Street Ry. Co.*, 8 O. L. R. 642; 10 O. L. R. 594.

County Court

ases where County Courts have no jurisdiction to decree equit-ief, they cannot indirectly decree specific performance by treat-agreement for a lease as an actual lease: *Foster* v. *Reeves*, Q. B. 255; 67 L. T. 537; and see *Whilden* v. *Jackson*, per J.A., 18 Ont. App. 442; but since the latter case the equit-risdiction of the County Courts has been restored by certain see *The County Courts Act* (R. S. O. c. 59), s. 22 (d), (f), (g), (i).

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Discovery.

Discovery.—This was formerly a part of the exclusive jurisdiction of the Court of Chancery, but, even before the Judicature Act, the Common Law Courts were empowered to compel discovery: see R. S. O., 1877, c. 50, ss. 156, *et seq.*; 41 Vict., c. 8, s. 9. Discovery is now an incidental part of the relief which may be obtained in every action. This may be obtained by a plaintiff against a defendant, and by a defendant against a plaintiff. The method of obtaining discovery is prescribed by *Rules* 327-337, 348-353. Actions for discovery only, in aid of a foreign action, will not be entertained: *Dreyfus* v. *Peruvian Guano Co.*, 41 Ch. D. 151.

Multiplicity of suits.

Multiplicity of Suits.—The mode by which a multiplicity of suits in reference to the same matter, was avoided in the Court of Chancery, was by requiring all persons interested in the subject matter of the litigation to be made parties either as plaintiffs or defendants in one suit; but as this general rule sometimes operated inconveniently it was in certain classes of cases provided that some only of the persons interested need be made parties, and that those who were not made parties should be sufficiently represented by those who were made parties, and should be bound by the proceedings as if they had been themselves parties: (see *Rules* 66, 75-77, 79-87, and notes), or else it was provided that the parties interested need not all be made original defendants, but might be added as defendants at a later stage of the proceedings (see *Rule* 490).

See further as to the prevention of multiplicity of suits: sec. 16 (*h*) and notes, *infra*.

Patents.

Decreeing the Issue, or Cancellation of Patents.—The jurisdiction conferred on the Court by this section to decree the issue or cancellation of patents is probably confined to patents issued by the Provincial Government. The Court of Chancery would formerly rescind a patent for land improperly granted by the Provincial Government, although the grant were voidable, or even void at law: *Martin* v. *Kennedy*, 2 Gr. 80. But it would not set aside a patent issued upon a deliberate view of all the circumstances, where there was no fraud or mistake: *Simpson* v. *Grant*, 5 Gr. 267; *Boulton* v. *Jeffrey*, 1 E. & A. 111; *Barnes* v. *Boomer*, 10 Gr. 532; *Kennedy* v. *Lawlor*, 14 Gr. 224; and see *Farmer* v. *Livingstone*, 8 S. C. R. 140; even though the patent issued contrary to a report of the Heir and Devisee Commissioners as to the party entitled: *McDiarmid* v. *McDiarmid*, 9 Gr. 144; nor if the plaintiff had an opportunity of bringing the material facts to the attention of the officers of the Crown before the patent issued, and neglected to do so: *Mahon* v. *McLeon*, 13 Gr. 361. But a patent issued in error might be rescinded; *e.g.*, where a patent issued to a third party after another party had contracted to purchase, and had gone into possession of the land: *Martyn* v. *Kennedy*, 4 Gr. 61; *Attorney-General* v. *Hill*, 8 Gr. 532; or where it issued without proper consideration by the officers of the Crown of all the facts: *Fricht* v. *Scheck*, 10 Gr. 254; or had issued to A., when an order in council had been passed for the grant of the land to B.: *Attorney-General* v. *Garbutt*, 5 Gr. 383; and see *Saugeen* v. *Church Society*, 6 Gr. 538. The Supreme Court has now the like jurisdiction: see *Farah* v. *Glen Lake Mining Co.*, 17 O. L. R. 1; *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 18 O. L. R. 275; 102 L. T. 375; *Bartlet* v. *Delaney*, 27 O. L. R. 594; 29 O. L. R. 426; *Zock* v. *Clayton*, 28 O. L. R. 447.

The Attorney-General is a proper party to such actions whenever the person to whom the patent has issued would be entitled to compensation if the patent be rescinded: *Saugeen* v. *Church Society*, *supra*; *Re* [illegible]

cy-General, 15 Gr. 467; and see *McIntyre* v. *Attorney-General*, 14 Sec. 3.
but if the case made by the plaintiff is one of fraud, and the pat-
would not be entitled to any compensation on the patent being set
then the Attorney-General is not a necessary party; *Rees* v. *At-*
General, 16 Gr. 467; and see *Cosgrove* v. *Corbett*, 14 Gr. 617; *Law-*
. Pomeroy, 9 Gr. 474; *Farah* v. *Glen Lake Mining Co.*, *supra*;
e *Attorney-General* v. *McNulty*, 8 Gr. 324; 11 Gr. 281, 581;
ooke v. *Attorney-General*, 11 Gr. 330; *Mutchmore* v. *Davis*, 14
6, whsrs the Attorney-General appears to have been a party
the patent was impeached for fraud.

Court may be unable to grant relief where third parties have
d a title under the impeached patent without notice of the
Proctor v. *Grant*, 9 Gr. 26, 224; but see *Stevens* v. *Cook*, 10

Court by virtue of its jurisdiction to decree the issue of patents,
not, however, entertain a suit for the specific performance of
r in council for the grant of land: *Simpson* v. *Grant*, 5 Gr. 267.

gh there is jurisdiction before the issue of a patent to estab-
right to the issue, the Court will not act, in the absence of
cial ground for invoking the jurisdiction: see *Bull* v. *Frank*,
0; *Brouse* v. *Cram*, 14 Gr. 677; but the Court may in a suit-
e make a declaratory judgment as to the rights of the parties
ill practically work the result of a partition if the Crown
g to act upon the judgment: *Pride* v. *Rodger*, 27 Ont. 323.

r the R. S. C. c. 69, s. 35, the Court has power to decree the can- Jurisdiction
of patents for invention issued by the Dominion Government; under R. S. C.
also entertain actions to restrain the infringement of such c. 69.
and for damages therefor: *Ib.* s. 31; *Hunter* v. *Carrick*, 28
10 Ont. App. 449; 11 S. C. R. 300; *Smith* v. *Goldie*, 7 Ont.
A prior patent to a person who is not the true inventor is
ce to an action by the true inventor under a subsequent
mith v. *Goldie*, 9 S. C. R. 46.

les of decision in the matters mentioned in sections 25 and 26 Rule of de-
., 1897, c. 51, mentioned, except where otherwise provided, are cision in
same as governed the Court of Chancery in England, in like such cases
the 4th day of March, 1837: R. S. O. (1897), c. 51, s. 27.

ver, therefore, any Provincial statute modifies what was the
le of decision of the Court of Chancery in England in like
tho 4th March, 1837, then the express provisions of the
statutes must control the decision of the Court rather than
es which goverued the Court of Chancery in England at the
e mentioned: see *Smith* v. *The Methodist Church*, 16 Ont. 199.

risdiction of the Court of Chancery in England was to some
gulated by Imperial Statutes, and by force of s. 27 these
ecame part of the law of Ontario. They were, in 1902,
d consolidated and issued as R. S. O 1897, vol. III.

Judicature Act (R. S. O. 1897, c. 51), s. 28, the jurisdiction
rt was further defined—that section was as follows:

"The High Court shall have the like jurisdiction and power Jurisdic-
urt of Chancery in England possessed on the 10th day of tion in cases
ns a Court of Equity to administer justice in all cases in where for-
e existed no adequate remedy at law. 58 V. c. 12, s. 24." merly no
adequate
remedy at
Law.

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That section conferred upon the Court all the powers of the English Court of Chancery on 10th June, 1857, whether derived from the Common Law, or statutory enactment: see *Re Hodges*, 1 Gr. at p. 289, *per Eaton*, V.C. The general words of that section, however, were controlled by other express enactments of the Provincial Legislature. See *supra*, p. 19.

Perpetuating testimony

Amongst other things the Court has jurisdiction to entertain an action for the perpetuation of testimony where the Court of Chancery could have done so: see *West* v. *Lord Sackville*, 1903, 2 Ch 378; 88 L. T. 814; but the Court will not entertain such an action where the plaintiff can, if he chooses, bring the matter in controversy to an immediate judicial investigation: *Ib.* 1903, 2 Ch. p. 388; see *post*, s. 133

Equitable Revenue Jurisdiction.—By *The Judicature Act* (R. S. O. 1897, c. 51), s. 29, the jurisdiction of the Court was further defined—that section was as follows:

Equitable jurisdiction in matters of revenue.

"**29.** The High Court shall have the like equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th day of March, 1865. 58 V. c. 12, s. 25."

This section in the Revised Statutes of 1877 (c. 40, s. 37), was taken from the 28 Vict. c. 17, s. 2, and was confined in its terms to the Court of Chancery. The Courts of Law appear also to have had jurisdiction both legal and equitable in matters of revenue: see R. S. O. 1877, c. 39, s. 4; and see Jud. Act, 1897, s. 25, *supra*. Prior to 28 Vict. c. 17, s. 2, it had been held that the Court of Chancery had no equitable jurisdiction in revenue cases: see *Norwich* v. *Attorney-General*, 2 E. & A. 541; *Miller* v. *Attorney-General*, 9 Gr. 558; and even after equitable jurisdiction in revenue cases had been conferred on the Court of Chancery, it was held that the Court had no jurisdiction to relieve against the forfeiture of a recognizance of bail in a criminal case, which had been estreated into a Court of Quarter Sessions: *Rastall* v. *Attorney-General*, 17 Gr. 1; 18 Gr. 138; but it was held that the Crown might proceed in Chancery for dues alleged to be fraudulently withheld, although there were no equitable circumstances connected with the demand: *Attorney-General* v. *Walker*, 25 Gr. 233.

Partition.—By *The Judicature Act* (R. S. O. 1897, c. 57), s. 33, the jurisdiction of the Court in suits for partition or sale was extended—that section was as follows:

Jurisdiction in partition

"**33.** In any action or proceeding in the High Court for partition or sale of the estate of joint tenants, tenants in common or co-partners, where any of the persons interested in the lands whereof partition or sale is sought are unknown to the plaintiff, or have not been heard of for three years or upwards, the Court shall have the same jurisdiction that, in proceedings under *The Partition Act*, it possesses for the purpose of binding the interests of such persons and dealing with the estate of such of them as by reason of long continued absence may reasonably be believed to be dead; and the like proceedings may be taken in such action or proceeding for the said purposes as might be taken upon a petition under the said Act; and every deed or vesting order made in any such action or proceeding shall have the same effect as a deed or vesting order made in proceedings under the said Act. 58 V. c. 12, s. 29."

Rev. Stat. c. 123.

The effect of this section was to enable the Court in an ordinary action to avail itself of the powers and authorities conferred upon it

Partition Act (R. S. O. c. 114), without resorting to the pro- Sec. 3.
laid down in that Act: see *Bennett* v. *Bennett*, 8 Gr. 446;
v. *Cassey*, 15 Gr. 399; *Munro* v. *Munro*, *Ib*. 431; and see *Rule*
d nnies.

Re Hynes, *Hodgins* v. *Andrews*, 19 P. R. 217, an order was
appointing a guardian for an absentee who had been long
d of, and directing that he be served with an office copy of the
nt for partition, and notice for the absentee.

sony.—By *The Judicature Act* (R. S. O. 1897, c. 51), s. 34,
tion to grant alimony was conferred—that section was as

. The High Court shall have jurisdiction to grant alimony to Jurisdic-
e who would be entitled to alimony by the law of England, tion in
ny wife who would be entitled by the law of England to a alimony.
and to alimony as incident thereto, or to any wife whose
lives separate from her without any sufficient cause and
rcumstances which would entitle her, by the law of England,
cree for restitution of conjugal rights, and alimony when
shall continue until further order of the Court. 58 V. c. 12,

jurisdiction conferred by this section is part of the juris-
ormerly exercised in England by the Ecclesiastical Courts, as
to proceedings for divorce or judicial separation.

e proceedings are instituted against a defendant for alimony,
about to quit Ontario with intent to defraud his creditors
, or the plaintiff in particular, he is liable to be arrested and
ail: see *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83),
hardson v. *Richardson*, 8 P. R. 274; *Needham* v. *Needham*, 29
Horn v. *Horn*, 4 U. C. L. J. 261.

efendant may be discharged from arrest if on the facts it
ear that the plaintiff cannot reasonably be expected to
the action: *Macpherson* v. *Macpherson*, 2 Ch. Ch. 222. The
arrest issued *pendente lite* remains in force after judgment,
gh the wife resides out of the jurisdiction: see *Macdonald* v.
2, 5 U. C. L. J. 66.

g the action, if the wife is in need of support, an order may
d for payment of interim alimony; as to the mode of obtain-
m alimony: see H. & L. Forms Nos. 613, 616; *Rules* 386,
otes.

dy bar in England to a suit for restitution of conjugal rights
or adultery on the part of the plaintiff; and cruelty or
herefore under this section is the only bar to an action by
alimony against a husband who declines to live with her:
Nelligan, 26 Ont. 8.

f grave misconduct short of adultery will not disentitle a
mony: *Aldrich* v. *Aldrich*, 21 Ont. 447.

eement to live apart founded on valuable consideration will
Atwood v. *Atwood*, 15 P. R. 425; but not if the agreement
terms provide for the maintenance of the wife: *Frémont*
. 26 O. L. R. 6.

nt alimony is granted where the husband has been guilty Permanent
n and cruelty: *Severn* v. *Severn*, 3 Gr. 431; see *Martin* v alimony.

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Martin, 78 L. T. 568; or desertion, where coupled with other acts of cruelty, *Ib.*; or cruelty alone: *Jackson* v. *Jackson*, 8 Gr. 499, *Browning* v. *Browning*, 1911, P. 161; 104 L. T. 750; but not as a rule where he has only been guilty of a solitary act of personal violence *Rodman* v. *Rodman*, 20 Gr. 428. So also it may be granted for desertion and adultery: *Henderson* v. *Henderson*, 19 Gr. 464; *Martin* v. *Martin*, 78 L. T. 568; and perhaps for adultery alone: *Howey* v. *Howey*, 27 Gr. 57; *Aldrich* v. *Aldrich*, 21 Ont. 447; *Koch* v. *Koch*, 1899, P. 221; 81 L. T. 61; or for wrongfully accusing the wife of adultery: see *Ferris* v. *Ferris*, 7 Ont. 496. But acts of violence provoked by the misconduct of the wife for the purpose of making evidence to found a claim for alimony, are not such acts of cruelty as will entitle the wife to judgment: *Payne* v. *Payne*, 10 O. L. R. 742, but cumulating circumstances to the husband's conduct by which mental distress is produced in the wife which are sufficient to impair and do seriously impair her health, amount to cruelty: *Lovell* v. *Lovell*, 11 O. L. R. 547; 13 O. L. R. 569.

A husband taking up his residence with relatives with whom his wife was not on good terms, and could not be reasonably expected to reside, was held to be desertion: *Goodfriend* v. *Goodfriend*, 48 C. L. J. 231.

A husband may be guilty of desertion though he and his wife have never cohabited: *De Laubanque* v. *De Loubonque*, 1898, 79 L. T. 705.

The committal of a lunatic wife to an asylum is not cruelty or desertion: *Hill* v. *Hill*, 2 O. L. R. 541; 3 O. L. R. 202.

But where the wife leaves the husband without sufficient cause *Edwards* v. *Edwards*, 20 Gr. 392; or refuses him his marital rights *Synge* v. *Synge*, 1901, P. 317, she is not entitled to alimony; and it would seem that where the husband refuses to live with her by reason of her cruelty or adultery, she is not entitled to alimony: *Nelligan* v. *Nelligan*, p. 22, *supra*. The condonation by a wife of acts of cruelty by her husband, is annulled by repetition of such acts: *Bavin* v. *Bavin*, 27 Ont. 571; *Copsey* v. *Copsey*, 1905, P. 94; 91 L. T. 363.

Where the ground is desertion, and the husband offers to receive his wife back, the Court will require to be satisfied that the offer is *bona fide*, and not merely set up to prevent the pronouncement of judgment: *Rae* v. *Rae*, 31 Ont. 321.

Persistent and malicious charges by a wife against her husband of an abominable offence against morality, is held not to be legal cruelty: *Russell* v. *Russell*, 1897, A. C. 395; 77 L. T. 249; but it was held sufficient ground for refusing a restitution of conjugal rights: *Russell* v. *Russell*, 1895, P. 315; 73 L. T. 295.

A refusal by the husband to supply his wife with suitable clothes is not of itself a ground for granting alimony: *Price* v. *Price*, 21 O. L. R. 454.

Amount allowed.

One-third of the income the property of the husband calculated at 4 per cent. is allowed as permanent alimony in England: *Shorthouse* v. *Shorthouse*, 78 L. T. 687.

A judgment for alimony may be suspended on the application of the husband on proof of the wife's subsequent adultery: *Severn* v. *Severn*, 14 Gr. 150; but a husband who has deserted his wife, is not entitled as of right to have a judgment against him for alimony

d on his afterwards offering to receive and maintain her: *v. Cronk*, 19 Gr. 283. Sec. 3.

dgment or order for alimony may be registered: see *post*, s. 73.

lement of Infants' Estates.—By *The Judicature Act* (R. S. , c. 51), s. 37, the jurisdiction to deal with the settlement of estates was conferred—that section was as follows:

. The High Court shall have the same jurisdiction as the f Chancery in England had on the eighteenth day of March, regard to enabling infants, with the approbation of the Court, e binding settlements of their real and personal estate on e; and in regard to questions submitted for the opinion of rt in the form of special cases on the part of such persons, by themselves, their committees or guardians, or otherwise, therein." 58 V. c. 12, s. 33 (1). Jurisdiction of High Court in respect to settlement of estates of infants, and special cases.

lements.—The jurisdiction of the English Court of Chan- to sanctioning marriage settlements by infants of their pro- as on the 18th March, 1865, regulated by the Imp. Stat. Vict. c. 43, now *The Infants Act* (R. S. O., c. 153), ss. 22-25. does not apply to males under twenty years nor females under 1 years: see s. 25. An application for the sanction of the a settlement does not constitute the infant a ward of Court necessitate the Court's inquiring into the propriety of the : Seton, 5th ed., 903. Settlements by infants

Act only enables the Court to remove the bar of infancy. es not enable an infant, even with the sanction of the Court, re than an adult could do: *e.g.*, where an infant was a mar- nan and made a post-nuptial settlement with the sanction Court under the above-mentioned Act, but the settlement which would not have bound her if she had been an adult; eld, notwithstanding it had received the sanction of the be invalid: *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. 13 App. Cas. 61; *Mills* v. *Fox*, 37 Ch. D. 153; *sed vide* v. *Bucklond*, 1900, 2 Ch. 534. But the Act enables an th the sanction of the Court to make a valid post-nuptial so far as an adult can make one: *Re Woll*, 50 L. T. 435.

gland applications for the sanction of the Court to a settle- n infant are required to be supported by evidence to show: nfant's age; (2) If there is any parent or guardian; (3) If t near relatives, and with whom, and under whose care is; (4) Infant's parents' rank and position; (5) Infant's d property; (6) The age, rank and position of the other Ills property, fortune and income; (8) The fitness, and act, of the trustees: Seton, 6th ed., 1062.

nuptial settlement by a married woman while an infant, r the sanction of the Court, was held valid against credi- *ingway* v. *Brailhwaite*, 61 L. T. 224; but see *Re Holland*, 4.

ment made by an infant without the sanction of the Court inding on the settlor, he not having attempted to repudiate lapse of four years after attaining his majority: *Edwards* 893, A. C. 360; 69 L. T. 153; *sed vide Re Jones, Farring- ester*, 1893, 2 Ch. 461; a settlement made by a married

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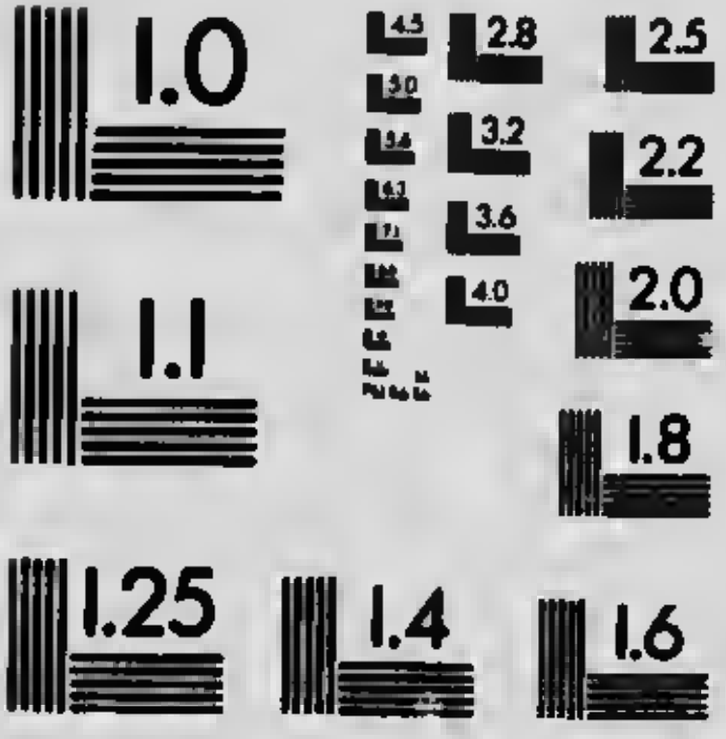

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woman while an infant may be ratified by her on coming of age, notwithstanding her coverture: *Re Hodson*, 1894, 2 Ch. 421.

Special cases.

Special Cases.—The jurisdiction of the English Court of Chancery in regard to special cases on the 18th March, 1865, was regulated by Imp. Stat. 13 & 14 Vict. c. 35. By that Act a special case may be stated without commencing an action, but that provision has not been retained in Ontario, and the only provisions of Imp. Stat. 13 & 14 Vict. c. 35, on this point, now in force in Ontario are to be found in ss. 135, 136, *post*.

After action commenced a special case may be stated under *Rule* 126, but, as no provision is made for stating a special case otherwise than in an action, the above section 3 of the Jud. Act must be taken to be modified so that the jurisdiction mentioned can now only be exercised as provided by the *Rules*.

Fictitious questions not entertained.

Fictitious questions will not be entertained, so as to give the Court jurisdiction in matters not cognizable under the Act: *Pryse* v. *Pryse*, 15 Eq. 86; and see *Key* v. *Key*, 4 D. M. & G. 73; neither will the Court entertain hypothetical questions: *Glasgow Navigation Co.* v. *Iron Ore Co.*, 1910, A. C. 293; 102 L. T. 435. All persons beneficially interested should be parties: *Entwistle* v. *Cannon*, 4 W. R. 450; and trustees must be parties to a case for construing the trust deed: *Worley* v. *Richardson*, 3 D. M. & G. 126. Where some of the parties beneficially interested are out of the jurisdiction, but others having identical interests are before the Court, the presence of the absentees may in the discretion of the Court be dispensed with: *Re Brown*, 29 Beav. 461.

The case must be framed so that the rights of the parties can be determined, or the Court will decline to answer the questions submitted: *Bulkely* v. *Hope*, 4 *N.* R. 280. The Court will not act on inferences drawn by the parties, but necessary facts should be proved by affidavit: *Domville* v. *Lamb*, 9 Ha. lv.

Amendment of case.

The case may be amended: see *Rule* 183; but where a material fact was omitted from the case, but was admitted by all parties at the hearing, prefacing the order with a recital to that effect was held to be sufficient: *Lone* v. *Debenham*, 11 Ha. 188; 17 Jur. 1005.

But an amendment after final judgment cannot be allowed: *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297; and see S. C. 23 Ont. App. 566; 78 L. T. 270.

Costs.

The costs of all proceedings under the Act are in the discretion of the Court: see *Attorney-Gen.* v. *Toronto Gen. Trusts Corporation*, 5 O. L. R. p. 608; and see Jud. Act. s. 74, *post*.

Testamentary Jurisdiction.—By *The Judicature Act* (R. S. O. 1897, c. 51), s. 38, a testamentary jurisdiction was conferred—that section was as follows:

The Court may try the validity of wills.

"**38.** The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. 58 V. c. 12, s. 34."

The Court has no original testamentary jurisdiction except that conferred by the *Surrogate Courts Act* (R. S. O., c. 62), ss. 32, 33, to

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rs commenced in the Surrogate Court and transferred to the me Court; and that conferred above to set aside wills under wer conferred by the above s. 38: see *per* Middleton, J., *Mutrie xander*, 23 O. L. R. at p. 401. it has therefore no original juris- a to establish a lost will relating merely to personalty: *Ib.* er has it any jurisdiction to revoke a grant of administration by a Surrogate Court, except by way of appeal from the Surro- Court: see *Taylor* v. *Teandle*, 27 O. L. R. 531. it has power to ide a will after probate granted in an action at the suit of a who was not a party to the probate proceedings: *Badenach* v. , 29 O. L. R. 165.

Testamentary jurisdiction

der *The Trustee Act* (R. S. O., c. 121), s. 10, the Supreme has power to remove a personal representative appointed by rogate Court, or by a testator, on any ground which the Court remove "any other trustee," and may appoint some other person s place. The Surrogate Court in certain cases has the like ; see *The Surrogate Courts Act* (R. S. O. c. 62), s. 60.

Personal representatives.

e jurisdiction of the Court, as regards wills affecting personalty, ds on this section; but as regards wills affecting realty the iction of the Supreme Court would seem to depend not only on ection, but also on the Jud. Act (R. S. O. 1897, c. 51), ss. 25 and which the jurisdiction of the former Superior Courts of Law vested in the High Court.

e Court has not jurisdiction to adjudicate on a claim to set a renunciation of probate, or allow a retraction by a plaintiff was named in a will as executor and has filed a renunciation. laintiff must go for relief to the Court in which the retractation lled: *Forwell* v. *Kennedy*, 2 O. W. N. 821.

tters' probate are, notwithstanding *The Devolution of Estates* (R. S. O. c. 119), only *prima facie* evidence as far as realty ncerned of the testamentary capacity of the testator; and in an asserting title under a will, the defendant may give evidence ag want of testamentary capacity: *Sproule* v. *Watson*, 23 Ont. 692.

Probate.

r cases in which wills have been contested on the ground of the al incapacity of the testator: see *Brown* v. *Bruce*, 19 U. C. Q. ; *Menzies* v. *White*, 9 Gr. 574; *Emes* v. *Emes*, 11 Gr. 325; *Mar- Martin*, 15 Gr. 586; *Ingoldsby* v. *Ingoldsby*, 20 Gr. 131; *Wilson lson*, 22 Gr. 39; and for cases in which wills have been sought to t aside as having been obtained by undue influence: see *Water- v. Lee*, 10 Gr. 176; *Donaldson* v. *Donaldson*, 12 Gr. 431; *Wilson lson*, 22 Gr. 39; 24 Gr. 377; *Re White, Kersten* v. *Tane*, 22 Gr. 24 Gr. 224; *Thompson* v. *Torrance*, 28 Gr. 253; 9 Ont. App. 1.

Validity of wills

ction 38 provides that the Court may pronounce wills void for and undue influence or otherwise in the same manner and to ame extent as the Court has jurisdiction to try the validity of and other instruments. The cases in which Courts of Equity ccustomed to set aside deeds and other instruments for fraud, e they are voidable and not merely void, are: Firstly, where there tual fraud in the party defendant in which the party plaintiff ot participated. Secondly, where there is a constructive fraud st public policy, and the party plaintiff has not participated in. Thirdly, where there is a fraud against public policy, and

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the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*: Story, s. 695.

The Court will not, under *The Trustee Act*, act upon a summary petition, or otherwise, than in an action, remove a trustee or executor *in invitum*: *Re Davis*, 17 P. R. 187.

By *The Judicature Act* (R. S. O. 1897 c. 51), s. 40, jurisdiction in the following matters was conferred; that section was as follows:

Jurisdiction.

"**40.** The High Court shall also have jurisdiction—

In matters testamentary. Rev. Stat. c. 62.

1. In matters testamentary as provided in sections 33 to 35 inclusive of *The Surrogate Courts Act*. (Now R. S. O. c. 62), ss. 32 and 33.)

Appeals against judgment of commissioners under Rev. Stat. c. 6.

2. On any appeal from the judgment or decision of the Commissioners under *The Act to Prevent Trespasses to Public Lands*, as provided in said Act; (But see now *The Public Lands Act* (R. S. O. c. 6), s. 17).

Lunatics and infants. Rev. Stat. cc. 68 and 153.

3. In respect of lunatics and infants and their property and estates, as provided by *The Act respecting Lunatics* and *The Act respecting Infants*. (Now respectively R. S. O. c. 68, and R. S. O. c. 153.)

Testamentary guardians. Rev. Stat. c. 158.

4. In respect of guardians and trustees, as provided by *The Act respecting Infants*. (Now R. S. O. c. 153.)

Partition. Rev. Stat. c. 114.

5. In respect of partition and sale of real estate as provided in *The Partition Act*. 58 V. c. 12, s. 35; (Now R. S. O. c. 114).

Settled estates. Rev. Stat. c. 74.

6. In respect of leases and sales of settled estates, as provided in *The Settled Estates Act*. 58 V. c. 20, s. 2 (5); (Now R. S. O. c. 74).

Matters Testamentary.—The clauses of the Surrogate Courts Act referred to, provide for the transfer of contentious matters regarding the grant of probate or administration from the Surrogate Court to the Supreme Court, (*a*) where the parties agree, or (*b*) where a Judge of the Supreme Court so orders.

The Supreme Court has no original jurisdiction to grant probate of a will, or letters or administration; and where a case is transferred to the Supreme Court from the Surrogate Court, it is usually ultimately remitted to the Surrogate Court, to issue probate or administration, as the case may require: *Thompson* v. *Torrance*, 28 Gr. 253; see Decree in that case: D. B. 37, fo. 192; H. & L. Forms, No. 937.

Infants.

Infants.—The jurisdiction by this section conferred on the High Court over infants is cumulative with that already conferred under (R. S. O. 1897, c. 51), s. 26 (2) and s. 28. As to the general jurisdiction of the Court over infants: see Story's Eq., c. 35, and *supra*, p. 23.

Trustees.

Guardians and Trustees.—The same observation applies in regard to the jurisdiction over trustees: see R. S. O. (1897), c. 51, s. 26 (2), *supra*, p. 5; and ss. 28 and 37; and see *supra*, p. 19.

Partition.

Partition.—The like observation applies in regard to the jurisdiction in Partition: see R. S. O. (1897), c. 51, s. 33, *supra*, and Story's Eq., c. 14, and see *supra*, p. 20. The jurisdiction under *The Partition Act* (R. S. O., c. 114), may be exercised in any ordinary action for partition; and it would seem that it is not essential that the procedure prescribed by that Act should be strictly pursued, in order to enable the Court to exercise any special powers conferred by that Act: see *Bennett* v. *Bennett*, 8 Gr. 446; *Cassey* v. *Cassey*, 15 Gr. 399.

ases and Sales of Settled Estates.—*The Settled Estates Act* Sec. 3.
. O. c. 74) now regulates the jurisdiction of the Court as to
d Estates.

lmiralty Jurisdiction.—It haa heen held that the Supreme Admiralty.
of Ontario has concurrent jurisdiction with the Exchequer
of Canada in respect of Admiralty cases arising on the inland
s of the Province: *Shipman* v. *Finn*, 50 C. L. J. 234. Prior to
ud. Act. 1881, many actions for ship collisiona were entertnined
Common law Courts: see *e.g. Brown* v. *Beatty*, 35 U. C. R. 328;
ince the Jud. Act, 1881: see *Collier* v. *Wright*, 19 Ont. App. 298;
C. R. 714.

neral Jurisdiction.—By *The Judicature Act* (R. S. O. (1897),
, ss. 41, 42 and 43, the following general jurisdiction was con-
—those sections were as follows:

1. The High Court shall have, generally, all the jurisdiction General jurisdiction.
, prior to the 22nd day of August, 1881, was vested in, or
le of being exercised by, the Court of Queen's Bench, Court of
ery, Court of Common Pleas, and Courts of Assize, Oyer and
ner, and Gaol Delivery (whether created by Commission or
wise) and the High Court shall be deemed to be and shall be a
uation of the said Courts respectively (subject to the provisions
s Act) under the said name of "The High Court of Justice for
lo." 58 V. c. 12, s. 36."

to criminal jurisdiction see R. S. O. (1897), c. 51, s. 25, *supra*,

2. The jurisdiction of the High Court shall include (subject to Existing jurisdiction of Judges continued.
xceptions hereinafter contained) the jurisdiction which at the
encement of this Act, was vested in or capable of being exer-
by the Judges of the said Courts respectively, sitting in Court
smbers, or elsewhere, when acting as Judges in pursuance of
tatute or law; and all powers given to any such Court, or to
uch Judges, by any statute; and also all ministerial powers,
and authorities, incident to any and every part of the juris-
n. 58 V. c. 12, s. 37."

e Eng. Jud. Act of 1837, s. 16.

der ss. 41 and 42 the High Court was held to have jurisdiction
lare patents for land void, notwithstanding that R. S. O. (1877),
s. 29, has not been kept in force: *Forah* v. *Glen Lake Mining Co.*,
L. R. 1; see also R. S. O. (1897), c. 51, s. 26 (8), *supra*, p. 6.

that was done by the Jud. Act, 1881, was to give the High Court Effect of Jud. Act, 1881.
e jurisdiction which the Court of Ch[illegible]ry or the Courts of Com-
Law had before. It conferred n[illegible] right to relief. An
to enforce a charge where the [illegible]e of the subject matter
nder £10 could not have been entertained by any of those
before the Jud. Act, and therefore cannot now be maintained:
ury v. *Meredith*, 30 Ch. D. 387; see *Gilbert* v. *Braithwait*, 3
Ch. 413; *Westbrooke* v. *Browett*, 17 Gr. 339; *Reynolds* v. *Cop-*
9 Gr. 627; *Harding* v. *Cardiff*, 29 Gr. 308; *Allen* v. *Lyon*, 5
15; *Show* v. *Freedy*, 8 C. L. J. 136. Where, however, an action
ught to recover an annuity, or other periodical payment, although
nount actually in arrear when the action is commenced be less
£10, it may nevertheless be entertained, inasmuch as such an
is brought to recover not only the arrears but also the grow-
ayments: see Story's Eq. Plg. (8th Ed.), s. 500; and where a

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substantial right is in question, the Court has jurisdiction, and will entertain the action, even though the pecuniary amount involved is trifling: see *Clarry* v. *G. T. Ry.*, 29 Ont. 18; *Clarke* v. *Creighton*, 14 P. R. 100. Where, however, an action is brought in the Supreme Court which turns out to have been within the jurisdiction of an inferior Court, the plaintiff, whether successful or unsuccessful, may have to bear the extra costs occasioned by bringing the action in the Supreme Court, unless the Court otherwise orders: see *Rule* 649.

Actions relating to land out of Ontario.

Principles on which Court Exercises its Jurisdiction. — As a general rule an English Court will not adjudicate on questions relating to the title to, or to the right of possession of, immovable property out of the jurisdiction of the Court. Exceptions to this rule depend upon the existence between the parties to the suit within the jurisdiction of some personal obligation arising out of contract, or fiduciary relation, or out of fraud or other conduct which in the view of an English Court of Equity would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property: *Deschamps* v. *Miller*, 1908, 1 Ch. 856; 98 L. T. 564.

Extra-territorial jurisdiction.

Formerly the Court of Chancery in England exercised a jurisdiction in respect of property situate beyond its jurisdiction, if the defendant were within its jurisdiction, and enforced its decree by process of contempt against the person of the defendant: see *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444. But the tendency of modern decisions regarding the jurisdiction of Courts in the Overseas Dominions of the Crown is to confine their jurisdiction to property and persons within their respective territorial jurisdictions, subject to certain exceptions where persons without the jurisdiction are necessary parties to suits properly instituted against persons within the territorial jurisdiction of the Court, and the other cases provided for by *Rule* 25: see notes to *Rule* 25.

The Supreme Court has no jurisdiction to entertain an action against a defendant resident within its territorial jurisdiction for damages for trespass to land situate out of the territorial jurisdiction of the Court: *Companhia de Mocambique* v. *The British South Africa Co.*, 1893, A. C. 602; 69 L. T. 604; *Brereton* v. *C. P. Ry.*, 29 Ont. 57. See *The Black Point Syndicate Ltd.* v. *Eastern Concession, Ltd.*, 1898, 79 L. T. 658. Nor will it entertain an action against a defendant within its jurisdiction, to set aside an alleged fraudulent conveyance of land without the jurisdiction: *Burns* v. *Davidson*, 21 Ont. 547; nor for redemption: *Henderson* v. *Bank of Hamilton*, 20 Ont. App. 646; 23 S. C. R. 716; nor for a declaration that a deed of lands out of the jurisdiction is in reality a mortgage, and for redemption: *Gunn* v. *Harper*, 2 O. L. R. 611; nor to enforce a lien on lands out of the jurisdiction by a judgment for sale, or recovery of possession: *Great North Western Ry.* v. *Charlebois*, 1899, A. C. 114; 79 L. T. 35; but see *Duder* v. *Amsterdamsch*, *infra*; nor by a mortgagee for sale: *Strange* v. *Radford*, 15 Ont. 145; nor to determine the title: *Ross* v. *Ross*, 23 Ont. 43, of lands out of the jurisdiction; nor to enforce claims arising out of a French marriage to land out of the jurisdiction: *Deschamps* v. *Miller*, 1908, 1 Ch. 856. But it would seem that an action for foreclosure of the equity of redemption in land out of the jurisdiction may be entertained: *Paget* v. *Ede*, 18 Eq. 118; and see *Re Robertson R.* v. *R.*, 22 Gr. 449; *Bryson* v. *Huntington*, 25 Gr. 265; but as to actions to foreclose the equity of redemption in personal property out of the jurisdiction: see *Hughes* v. *Oxenham*, 1913, 1 Ch. 254; 108 L. T. 316.

ecific performnnce was decreed of a contract to exchange land in nited States for land in Ontnrio, the plaintiff being the owner e land in U. S., nnd submitting to the jurisdiction of the Court tario by suing in it: *Montgomery* v. *Ruppensburg*, 31 Ont. 433; receiver was appointed of the rents and profits of land out of urisdiction on which plaintiff claimed to have an equitable e: *Duder* v. *Amsterdamsch*, 1902, 2 Ch. 132; 87 L. T. 22; but it difficult to understand how such a receivership could be en- if opposed, except by seeking the aid of the Court where the was situate. Sec. 3.

here a plaintiff is entitled to sue n defendant within Ontario to lde an agreement, the fact that there are lands included in the neat which are out of the jurisdiction will not prevent the from exercising jurisdiction: see *MacKay* v. *Colonial Invest. Co.*, 4 O. L. R. 571.

seems equally clear that the Supreme Court has no jurisdiction certain an action relating to personal property out of its terri- jurisdiction, nor any action affecting or dealing with the rights rsons in such property whether they be resident in Ontario or here: see *The Royal Bank* v. *The King*, 1913, A. C. 283, and *s* v. *Orenham*, *supra*, and *Cotton* v. *The King*, 45 S. C. R. 469; A. C. 176. Actions relating to personalty out of the jurisdiction.

e Royal Bank v. *The King*, *supra*, involved, it is true, a question the power of a Provincial Legislature to legislate regarding ty beyond its territorial jurisdiction, but as it was there held he Legislature had not that power, it seems *à fortiori*, that it not delegate to any Court the power to deal with property out jurisdiction.

e Court will not exercise jurisdiction against a defendant who foreign sovereign and refuses to submit to its jurisdiction: ll v. *Sultan of Johore*, 1894, 1 Q. B. 149; 70 L. T. 64; nor over ign ambassador: see *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. L. T. 51; nor the officials of a foreign legation: *Re Bolivia*, Ch. 139; and it would seem that the privilege cannot be : *Ib.* Foreign sovereign.

all the jurisdiction which was vested in the former High Court tice is now vested in the Supreme Court, a Judge trying a case competent to give legal or equitable relief, or both, as the case equire. Thus, where a person fraudulently personating a testa- d forged mortgages of the testator's estate, and an action was t to obtain a declaration that certain mortgages were void, have them delivered up, Kay, J., looking at this enactment at he was not administering equity merely, and should there- ve the plaintiff his legal remedy as to the deeds, and direct o be delivered up, as well as declare them void: *Cooper* v. 51 L. J., Chy. 149; see also *Manners* v. *Mew*, 29 Ch. D. 725. Legal and equitable relief may be given.

hts and Privileges of Judges.—By *The Judicature Act* (R. 1897), c. 51), s. 43, it was enacted: Rights and privileges of Judges.

3. Every Judge of the High Court shall have, use and exer- the rights, incidents and privileges of a Judge of a Court of and all other rights, incidents and privileges as fully to all and purposes as the same were, prior to the fifth day of ber, 1859, used, exercised or enjoyed by any of the Judges of Her Majesty's Superior Courts of Common Law at Westminster. 12, s. 38."

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And it is to be presumed that the Judges of the Supreme Court as Judges of the High Court Division have and may exercise the like rights, incidents and privileges: see *post*, s. 13 (2).

The Public Officers Act (R. S. O. c. 15), s. 18, empowers a Judge of the High Court Division in Chambers to appoint some other person to act for a public officer who is personally interested in some matter pending before him in his official capacity: see *Re County Court Judges' Income Assessment*, 5 O. W. N. 657.

Jurisdiction under Dom. Acts.

Dominion Jurisdiction.—The former High Court of Justice and Court of Appeal, in addition to the jurisdiction above mentioned, also exercised jurisdiction under certain Dominion Statutes the jurisdiction thereby conferred is now vested in the Supreme Court.

By 3-4 Geo. V. c. 50 (D.) it is provided:

Change of name of Ontario Court of Appeal not to affect references under existing law.

1. Where by any Act of the Parliament of Canada heretofore passed, provision is made by which any jurisdiction, power or authority is conferred upon, or provision is made for an appeal to, or the stating a case for the opinion of, or for any proceeding, matter or thing being had, taken or done by or before the Court of Appeal for Ontario, such jurisdiction, power and authority shall be deemed to be conferred upon, such appeal shall lie to, such case may be stated for the opinion of, and such proceeding, matter or thing may be had, taken or done by or before a Divisional Court of the Appellate Division of the Supreme Court of Ontario.

As to Ontario High Court.

2. Where by any Act of the Parliament of Canada heretofore passed, provision is made for stating a case for the opinion of, or for any proceeding, matter or thing being had, taken or done by or before the High Court of Justice for Ontario or a Judge thereof, such case may be stated for the opinion of, and such proceeding, matter or thing may be had, taken or done before the High Court Division of the Supreme Court of Ontario or a Judge of that Division sitting in Court or in Chambers.

This Act came into force on 1st January, 1913.

Dom. Railway Act (R. S. C. c. 27).

By the Dominion *Railway Act* (R. S. C. c. 27), s. 209, jurisdiction is given to the "Superior Court" to entertain appeals from awards for compensation under the Act. At the time the Act was passed appeals from inferior Courts were made in Ontario to the High Court of Justice; now appeals from such Courts are not to the High Court Division, but to the Appellate Division. *The Railway Act* provides that the practice in appeals under the Act are to be as nearly as may be the same as upon an appeal from the decision of an inferior Court; whether the appeal is now to the High Court Division or the Appellate Division, is not very clear. It would seem as if it is now to a single Judge of the High Court Division: see s. 209 (3). But it is possible that under s. 209 (4), under *The Arbitration Act* (R. S. O. c. 65), s. 17, an appeal would also lie to the Appellate Division.

Winding-up Act (R. S. C. c. 144).

Under *The Winding-up Act* (R. S. C. c. 144), s. 102, an appeal was given in proceedings under that Act to the Court of Appeal for Ontario, which appeal now lies to the Appellate Division.

Cr. Code (R. S. C. c. 146).

Under *The Criminal Code* (R. S. C. c. 146), jurisdiction was given the Court of Appeal to entertain appeals in criminal cases: see s. 2 (7); and ss. 1013, 1014, 1015, 1016, 1021. This jurisdiction is now transferred to the Appellate Division.

By *The Criminal Code*, jurisdiction is conferred on the High Court of Justice as a Superior Court of Criminal Jurisdiction: see Cr. Code, s. 2 (35); and the jurisdiction thereby conferred is now vested in the High Court Division.

y *The Controverted Elections Act* (R. S. C. c. 7), jurisdiction was erred on the High Court of Justice to try Dominion election tions: see s. 2 (f), and s. 5; and that jurisdiction is now vested he High Court Division. Its jurisdiction under this Act is regu- by Rules of Court passed December 14th, 1908: see *Holmested's inion Election Rules* (1909). Secs. 3-6. Dom. Con. Election Act (R. S. C. c. 7).

ppellate Jurisdiction.—For the appellate jurisdiction of the t: see *post*, ss. 24-31.

. The Supreme Court shall continue to consist of two nches or divisions, which shall be designated respec- ly "The Appellate Division of the Supreme Court of ario," and "The High Court Division of the Supreme rt of Ontario." 3-4 Geo. V. c. 19, s. 4. Supreme Court to consist of two divisions.

he Supreme Court was originally constituted in its present form Edw. VII. c. 28, which took effect on 1st January, 1913.

. The Appellate Division shall continue to consist of a ef Justice, who shall be the President of the Division shall be called the Chief Justice of Ontario, and four er judges, to be called Justices of Appeal, and of the er judges of the High Court Division who for the time g constitute or are members of a Divisional Court. Geo. V. c. 19, s. 5. Constitution of Appellate Division.

—(1) The High Court Division shall continue to con- of fourteen judges. Constitution of High Court Division.

2) The Chancellor of Ontario, the Chief Justice of the g's Bench, the Chief Justice of the Exchequer and the ef Justice of the Common Pleas shall retain their sent rank and titles, and the senior of them for the e being or the last of them who holds office as the may be shall be the President of the High Court ision. Chancellor and Chief Justices to retain rank and title. Senior to be President of High Court Division.

3) The Justices of Appeal now holding office shall in their present rank and precedence. Rank of present Justices of Appeal.

4) When a vacancy occurs in any of the offices men- ed in sub-section 2, the office which becomes vacant l be abolished. When vacancy occurs office to be abolished.

5) When all of the offices mentioned in sub-section 2 e ceased to exist, the High Court Division shall con- of a Chief Justice, who shall be the President of the sion and shall be called the Chief Justice of the High rt, and thirteen other judges. 3-4 Geo. V. c. 19, s. 6. When all the offices cease to exist High Court Division to consist of a Chief Justice and thirteen other Judges.

Secs. 7-9.

Precedence of Chief Justice of Ontario.

Precedence of Chief Justice of High Court and Justices of Appeal.

Precedence of other Judges.

7.—(1) The Chief Justice of Ontario shall have rank and precedence over all the other judges.

(2) The Chief Justice of the High Court shall have rank and precedence next after the Chief Justice of Ontario.

(3) The Justices of Appeal hereafter appointed and the other Judges shall have rank and precedence after the Chief Justice of the High Court and among themselves according to seniority of appointment.

Subject to s. 6.

(4) Sub-sections 2 and 3 shall be subject to the provisions of section 6. 3-4 Geo. V. c. 19, s. 7.

Residence of Judges.

All of the Judges of the Supreme Court of Judicature were required to reside in Toronto, or within five miles thereof, but leave may be granted from time to time by Order in Council, to reside elsewhere in the Province for any specified time: R. S. C. c. 138, s. 7.

Every Judge to be a Judge of the Supreme Court.

8. Every judge appointed to the Appellate Division or to the High Court Division shall be a Judge of the Supreme Court and shall be *ex officio* a Judge of the Division of which he is not a member, and, except where it is otherwise expressly provided, all the Judges of the Supreme Court shall have in all respects equal jurisdiction, power and authority. 3-4 Geo. V. c. 19, s. 8.

This section seems to contemplate that Judges instead of being appointed simply Judges of the Supreme Court, may be appointed to one or other of the Divisions of the Court; and that if so appointed they shall, nevertheless, be entitled to sit as Judges of both Divisions.

Oath of office.

9.—(1) Every judge hereafter appointed, before entering on the duties of his office, shall take and subscribe the following oath:—

Form.

"I do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as ; so help me God."

How oath to be administered.

(2) The oath shall be administered to a Chief Justice before the Lieutenant-Governor in Council, to a Judge of Appeal by the Chief Justice of Ontario, and to a Judge of the High Court Division by the President of that Division, unless the Lieutenant-Governor in Council in any case otherwise directs, and in that event before such officer or functionary and in such manner as the Lieutenant-Governor in Council may direct. 3-4 Geo. V. c. 19, s. 9.

Secs. 10, 11.

Giving of judgment by Judge who resigns or is appointed to another Court.

10.—(1) Where a judge resigns his office or is appointed to any other court, he may at any time within eight weeks after his resignation or appointment give judgment in any cause, action or matter previously tried or heard before him, as if he had not so resigned been appointed.

When to take part in judgment.

(2) Where he has heard a cause, action or matter ntly with other judges in a Divisional Court he may any time within the period mentioned in sub-section take part in the giving of judgment by that court as if were still a member of it.

Judgment of remaining Judges or majority.

(3) Where he does not take part in the giving of judgent or where a judge by whom a cause, action or matter s been heard in a Divisional Court is absent from illss or any other cause or dies, the remaining judges of court, or, if there is a difference of opinion, a majority them may give judgment as if the judge who has so igned or been appointed or is dead were still a member the court and taking part in the judgment, and in the e of absence as if the absent judge were present and ing part in the judgment.

Reading judgment of absent Judge.

(4) Where a judge who has heard a cause, action or tter in a Divisional Court is not present when the gment of the court is delivered, his written judgment y be read by one of the other judges and shall have same effect as if he were present. 3-4 Geo. V. c. 19, 0.

Death of Judge.

Where a Judge dies after the trial of an action, but before giving ment, there is no power to direct that the action be set down for ing before the Appellate Division on the evidence already taken, ot by consent of parties, but the case must go to trial again: ke v. *Trask*, 1 O. L. R. 207.

SEAL.

Seal.

1. There shall be a seal for the Supreme Court to be roved by the Lieutenant-Governor in Council. 3-4 . V. c. 19, s. 11.

The seal is in the custody of the Clerk of Records and Writs, by ation of the Judges of the Supreme Court of 2nd January, 1913.

Jurisdiction to be exercised by Appellate Division.

12.—(1) The Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division, and in the name of the Supreme Court.

Jurisdiction to be exercised by High Court Division.

(2) Except as provided by the next preceding subsection, all the jurisdiction vested in the Supreme Court shall be exercised by the High Court Division in the name of the Supreme Court. 3-4 Geo. V. c. 19, s. 12.

See notes to s. 3, *supra*.

Jurisdiction of Chief Justice and Justices of Appeal.

13.—(1) All jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or exercisable by the Chief Justice of Ontario or by a Justice of Appeal, shall be vested in and may be exercised by a Judge of the Appellate Division, and shall be exercised in the name of the Supreme Court.

Jurisdiction of Judges of the High Court Division.

(2) All jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or exercisable by a Judge of the High Court shall be vested in and may be exercised by a Judge of the High Court Division, and shall be exercised in the name of the Supreme Court. 3-4 Geo. V. c. 19, s. 13.

See notes to s. 3, *supra*.

Provisions for absence or vacancy in office of a Judge.

14. Upon the request of the judge or judges for or with whom he is requested to sit or act, or upon the request of the Chief Justice of Ontario or of the President of the High Court Division, any Judge of the Supreme Court or any retired judge of that Court may sit and act as a judge of either of the divisions of the Supreme Court, or perform any other official or ministerial act for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of a Divisional Court: and while so sitting and acting, any such judge or retired judge shall have all the power and authority of a Judge of the Supreme Court. 3-4 Geo. V. c. 19, s. 14.

The power to appoint Judges of the Superior Courts in each vince being vested in the Governor-General: see *B. N. A. Act*, s. 96, right of the Provincial Legislature to pass this section has been bted in so far as it purports to authorize retired Judges to act Judges of the Supreme Court: see 49 C. L. J. 313. Secs. 15, 16 (a).

As to causes of judicial disqualification: see *Boulton* v. *Church* dely, 15 Gr. 450; *Dimes* v. *Grand Junction*, 3 H. L. C. 759. "The looks with such distrust upon an interested Judge that, whatever be the amount of interest, the fact is enough to disqualify all his dicial acts": *per* Field, J., *Ex p. Dale*, 43 L. T. 542; in case of essity an interested Judge may sit for the purpose of enabling a rum of the Court to give judgment: see *Boulton* v. *Church Society*, *ra*; and see further as to disqualification of Judge by reason of or interest: *Reg.* v. *Klemp*, 10 Ont. 143; *Reg.* v. *Ell*, *Ib.* 727; *Reg.* *tevle*, 26 Ont. 540; *Allinson* v. *General Council*, 1894, 1 Q. B. 750; L. T. 471; *Reg.* v. *Huggins*, 1895, 1 Q. B. 563; *Eckersley* v. *Mersey* ks, 1894, 2 Q. B. 667; 71 L. T. 308; *Reg.* v. *Burton*, 77 L. T. 364. Disqualification of Judge.

5.—(1) Subject to the Rules, the Courts and the judges reof, or any commissioner appointed under section 49, y sit and act, at any time and at any place, for the nsaction of any part of the business of such Courts, or such judges or commissioner or for the discharge of duty which by any statute, or otherwise, is required e discharged. Sittings of Courts.

(2) Subject to sub-section 1 the Divisional Courts shall at Toronto. 3-4 Geo. V. c. 19, s. 15. Where Divisional Court Sittings to be held.

he Divisional Courts here referred to are the Divisional Courts e Appellate Division: see *ante*, s. 2 (1).

ADMINISTRATION OF JUSTICE.

3. In every civil cause or matter law and equity shall dministered according to the following rules:— Rules of law.

(*a*) Where a plaintiff claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any defendant in such cause or matter, or to any relief founded upon a legal right which before the passing of *The Ontario Judicature Act, 1881*, could only have been given by a Court of Equity, the Supreme Court and every judge shall give to such plaintiff such and the same relief as ought to have been given by the Court of Chancery in a suit Equitable relief. 44 V. c. 5.

Sec. 16 (a).

or proceeding for the same or the like purposes properly instituted before the passing of that Act;

Taken from Eng. J.A., 1873, s. 24, s.-s. 1.

This and the next section deal with the old anomaly of different Courts recognizing different rights and duties, applying different remedies to the same case, and in some cases even enforcing rules of law in conflict with one another. The removal of the conflict of law is provided for by s. 22. The rest of the matter is dealt with in the present section, the provisions of which have been summarized thus:—

Law and Equity to be administered.

The plaintiff may assert an equitable claim in the Supreme Court (s.-s. *a*); and may obtain an equitable remedy (*ibid.*); the defendant may raise any equitable answer or defence to any claim; that is to say, anything which would formerly have been good by way of answer if the suit had been brought in Chancery (s.-s. *c*), or would have afforded ground for an injunction if the action had been brought at law (s.-s. *f*); and he may assert, by way of counterclaim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross suit at Law, or in Equity (s.-s. *d*); the defendant may also obtain relief relating to, or connected with, the original subject of the action, against other persons, whether already parties or not (*ibid.*). The Court is to recognize equitable rights incidentally appearing (s.-s. *e*); no cause is to be restrained by injunction; what would have been ground for injunction is to be raised by way of defence, or upon an application to stay proceedings (s.-s. *f*). Subject to these provisions, Common Law rights and duties are to be recognized (s.-s. *g*), and the Court is to apply all appropriate remedies, and dispose of all matters in controversy (s.-s. *h*). See Wilson Jud. Act. 7th ed., p. 15.

By the operation of the Act the Supreme Court is to administer justice according to so much of the principles of Law and Equity as may be necessary to give complete and effectual relief to suitors: *Gibbs* v. *Guild*, 9 Q. B. D. 66, *per* Lord Coleridge, citing *Pugh* v. *Heath*, 7 App. Cas. 237; and where there was any conflict between the two, Equity is to prevail; therefore concealed fraud, and the absence of means of discovery, will, if pleaded, prevent the application of the Statute of Limitations, as formerly in pure Equity proceedings: *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59; *Barber* v. *Houston*, 14 L. R. Ir. 273; irrespective of the question whether such matters formerly constituted at Law a good answer to a plea of the Statute.

In *Adamson* v. *Adamson*, 7 Ont. App. 592, the opinion was expressed by Burton, J.A., that notwithstanding the Jud. Act, the owner of an equitable estate cannot proceed to recover possession of land against a trespasser in possession, but was bound to sue in the name of the person having the legal estate. This opinion did not form part of the judgment of the Court in the case, and was founded upon the view that before the *Administration of Justice Act*, 1873, ejectment would not lie in such a case, and that the latter Act only enabled the Court of Chancery to entertain suits for ejectment in the same way as the Courts of Common Law. The point, which did not there distinctly arise, as the proceedings were before the Jud. Act, has since been considered in *Heenan* v. *Heenan*, 3 C. L. T. 163; *Thorne* v.

lliams, 13 Ont. 577, and *Gordon* v. *Armstrong*, 16 P. R. 432; see *Jones* v. *McGrath*, 16 Ont. 617, where the opinion was expressed t since the Jud. Act, such an action may be maintained by the ltable owner in his own name; but the owner of the legal estate uld also be made a party to the action: *Cope* v. *Crichton*, 30 Ont. ; *Allen* v. *Woods*, 68 L. T. 143; *Saylor* v. *Cooper*, 2 Ont. 398; *rclough* v. *Marshall*, 4 Ex. D. 37; and *Goodrich* v. *Everglyn Coal* . W. N. 1889, 152; but see *Faulkner* v. *Greer*, 16 O. L. R. 123; 40 C. R. 399, where the legal owner of the timber in question in the lon was not a party, but the equitable owner was held entitled to intain an action for trespass in respect thereof. Sec. 16 (b).

in an action of ejectment by the owner of the legal title, he was, on counterclaim of the defendant setting up an equitable title, ered to convey the legal estate to the defendant: *Trinidad Asphalt* v. *Coryat*, 1896, A. C. 587.

For definitions of "plaintiff," "petitioner," "defendant," see *Jud.* , s. 2 (*h* and *r*) *supra*, pp. 2, 3.

(*b*) No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not; Declaratory judgments and orders.

This section is the same as Eng. O. 25, r. 5, and is an amended reduction of Chy. O. 538. It does not make any radical change in rules and practice of the Court: *Bunnell* v. *Gordon*, 20 Ont. 281.

Chancery Order 538 was held only to apply to cases where the ntiff was entitled to relief consequent upon the declaration be d, if he chose to claim it, but it was held not to apply to cases re the plaintiff was not entitled to claim any relief consequent n the declaration: *Rooke* v. *Lord Kingsdown*, 2 K. & J. 753; *ke* v. *Cook*, 23 Gr. 110; *Cogswell* v. *Sugden*, 24 Gr. 474; *Brookes onley*, 8 Ont. 549. Thus, a decree was pronounced declaring the construction of a will, without directing administration. In a where the plaintiff was entitled to the latter relief if he desired *Murphy* v. *Murphy*, 20 Gr. 575; and see *Canada Central Ry. Co.* *he Queen*, *Ib.* 303. This section was passed to enable the Court ronounce a declaratory decree whether consequent relief could laimed or not. But notwithstanding the power thus conferred the diction will be exercised with great caution: *Austen* v. *Collins*, . T. 903. See also *Grand Junction W. W.* v. *Hampton Urban*, *Co.*, 1898, 2 Ch. 331. Declaratory judgment may now be granted in favour of a party who would not be entitled to relief

declaratory judgment may be pronounced even though the causa ction be one at Common Law: *e.g.*, that defendant is a tres- er on land: *Harrison* v. *Rutland*, 1893, 1 Q. B. 142; 68 L. T. 35; certain land is a highway: *Toronto* v. *Lorsch*, 24 Ont. 227; rton v. *Miller*, 26 Ont. 36; *Gooderham* v. *Toronto*, 19 Ont. App. and tha rights of parties in unpatented lands: *Pride* v. *Rodger*, nt. 320; and regulations of defendants have been declared to be binding upon the plaintiff, without granting any consequential f: *London Ass'n of Shipowners* v. *London and India Docks*, 1892, . 242.

Sec. 16 (b).

Declaratory judgment refused.

The Court has no jurisdiction under this clause or otherwise to declare a marriage void *ab initio*: *A. v. B.*, 23 O. L. R. 261; nor to establish a lost will of personal estate and declare that the executor therein named is entitled to probate: *Mutrie v. Alexander*, 23 O. L. R. 396; and see *Belanger v. Belanger*, 24 O. L. R. 439, nor to declare an absentee is to be presumed to be dead for the purpose of administering his estate, as that is a matter within the jurisdiction of a Surrogate Court: *Re Coots*, 1 O. W. N. 807. See also notes to s. 38 of R. S. O. 1897, c. 51, *supra*, p. 24.

Semble, the Court has now jurisdiction under this section to make a declaration of the legitimacy of a plaintiff, and his right in remainder to a title and estates: *West v. Sackville*, 1903, 2 Ch. 378; 88 L. T. 814.

A declaration was made that a lessor was not entitled to impose a particular condition attached by him to a license to assign, and that the lessee was entitled to assign without any further consent of the lessor: *Young v. Ashley Gardens Properties, Limited*, 1903, 2 Ch. 112; 88 L. T. 541; *Evans v. Levy*, 1910, 1 Ch. 452; 102 L. T. 128; and see *Jenkins v. Price*, 1907, 2 Ch. 229; 1908, 1 Ch. 10.

A declaratory judgment was pronounced in an action against the Attorney-General as to the construction of a statute, so as to bind the Crown and its officers: *Burghes v. Attorney-General, and Dyson v. Attorney-General, infra.*

A declaration was made that a tenement was not subject to an easement of light by reason of an alteration in the dominant tenement: *Ankerson v. Connelly*, 1906, 2 Ch. 544; 95 L. T. 716.

Declaratory judgment when refused.

In *Bunnell v. Gordon*, 20 Ont. 281, the plaintiff asked for a declaration that she was entitled to an inchoate right of dower. She had joined in a mortgage with her husband to bar dower. Subsequently the husband had assigned his equity of redemption to an assignee for the benefit of creditors, and the mortgagees were proceeding for a sale. The plaintiff claimed a declaration in order to have a portion of any surplus arising on such sale set apart to answer her dower, in case it should become consummate by the death of her husband. The declaration was refused, it being held that what was asked was a declaration as to a claim which might be made by another or others under circumstances which might or might not happen: see also *Thomson v. Cushing*, 30 Ont. 123.

A declaration was refused as to the validity of a life policy during the life of the assured, even where the Society issuing the policy had refused to accept from the holder premiums upon the ground that the policy was void: *Honour v. Equitable Life, &c.*, 1900, 1 Ch. 852; also as to the invalidity of letters patent already expired, where no legal right of the plaintiff had been infringed: *N. E. Marine Engineering Co. v. Leeds Forge Co.*, 1906, 2 Ch. 498; and see *Offin v. Rochford*, 1906, 1 Ch. 342; *Dysart v. Hammerton*, 1914, 1 Ch. 927; also where a special statutory tribunal is appointed to determine the question as to which a declaration is asked: *Young Men's Christain Assoc. v. Ottawa*, 29 O. L. R. 574.

Cases in which declaration of right made.

But in some cases the Court made a decree declaring future rights. Thus the question of the right of renewal, on which a lessee's claim to compensation for land taken by a railway depended, was declared: *Bogg v. Midland Ry. Co.*, L. R. 4 Eq. 310; and, to save expense, it has construed executory marriage articles: *Byam v. Byam*, 19 Beav. 58.

A declaratory judgment is a judicial act, and will not be made ely on admissions of counsel, or by consent: *Williams* v. *Powell*, N. 1894, 141. Sec. 16 (c).

Where a right of recovery was given by statute in a Court of sum- y jurisdiction, it was held that the High Court had no power to e a declaratory judgment that the plaintiff had such right: *Bur- ough* v. *Brown*, 1897, A. C. 615.

A declaration that a debtor was the beneficial owner of a claim nst the Dominion Government, was refused, the plaintiff not being position to claim any consequential relief: *Stewart* v. *Guibord*, L. R. 262.

A declaration that a municipal corporation had no power to expro- e lands acquired by a street railway for the purposes of its ness was refused: *Toronto Ry.* v. *Toronto*, 13 O. L. R. 532.

A declaration of right in respect of a matter which the Legislature expressly assigned to the Surrogate Court Registrar was also ed: *Attorney-General* v. *Cameron*, 26 Ont. App. 103.

A declaratory decree was refused under the former practice where as sought for the purpose of protecting the plaintiff against a ngent claim by the defendant: *Jackson* v. *Turnley*, 1 Drew, 617; ee *Cogswell* v. *Sugden*, *supra*, p. 37; and also where it was sought eet future rights in events which had not happened: *Longdale* v. s, 8 D. M. & G. 391; *Dowling* v. *Dowling*, L. R. 1 Chy. 612; or ns entitled in reversion: *Garlick* v. *Lawson*, 10 Ha. App. xlv.; or n esse, *Bright* v. *Tyndall*, 4 Ch. D. 189; or to declare a purely question as against infants, even by consent: *Webb* v. *Byng*, 8 . & G. 633; *De Windt* v. *De Windt*, L. R. 1 H. L. 87; or to e a merely legal right: *Trustees of Birkenhead Docks* v. *Laird*, M. & G. 732; *Bristow* v. *Whitmore*, 4 K. & J. 743; *Metropolitan of Works* v. *Sant*, L. R. 7 Eq. 197; *Jenner* v. *Jenner*, L. R. 1 51; see also *Miller* v. *Robertson*, 35 S. C. R. 80; but see now *supra*. Other cases in which declaratory judgments have been refused.

It would seem that a case in which the Crown is interested is not ted from the application of the English Rule corresponding to rovision: *Burghes* v. *Atty.-Gen.*, 1911, 2 Ch. 139; 1912, 1 Ch. 105 L. T. 193, 758; *Dyson* v. *Atty.-Gen.*, 1911, 1 K. B. 410; 103 707; S. C., 1912, 1 Ch. 158; but see *The Interpretation Act* (R. . 1), s 29 Crown interested.

A merely declaratory judgment will not prevent the setting up of tatute of Limitations against the person in whose favour the ation is made: *Cope* v. *Cope*, 26 Ont. 441.

unty Courts.—This sub-section applies to County Courts in otherwise within the jurisdiction of a County Court: *Bradley ber*, 30 Ont. 443, 449; and see sec. 23, *post*.

(c) Where a defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any plaintiff in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff in such cause Equitable defences.

Sec. 18 (d).

or matter, the Court and every judge shall give to every equitable estate, right or ground of relief so claimed and to every ground of equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in a suit or proceeding instituted in that court for the same or the like purpose before the passing of *The Ontario Judicature Act, 1881;*

44 V. c. 5.

Taken from Eng. Jud. Act, 1873, s. 24, s.-s. 2, and to the same effect as the section previously in force.

See this section applied in *Mostyn* v. *W. Mostyn*, 1 C. P. D. 145; *Hughes* v. *Metropolitan, &c., Ib.* 120; *Eyre* v. *Hughes*, 2 Ch. D. 148; *Marshall* v. *Marshall*, 5 P. D. 19; *Emmerson* v. *Ind*, 12 App. Cas. 300; *Cooper* v. *Vesey*, 20 Ch. D. 611. See also s.-s. (*e*) *infra*.

Relief which may be granted to defendants.

(*d*) The Court and every judge shall also have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff as such defendant shall have properly claimed by his pleading, and as the Court or any judge might have granted in a suit instituted for that purpose by the same defendant against the same plaintiff; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to the Rules or to any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall henceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as

if he had been duly sued in the ordinary way by such defendant; Sec. 16 (d).

A defendant in an action of tort may now plead tender of amends: see *post*, s. 71.

See Eng. Jud. Act, 1873, s. 24 (3).

The *Rules* respecting counterclaims (*Rule* 113, *et seq.*), and third parties (*Rules* 165-171) were made in furtherance of the powers conferred by this sub-section. See notes to those *Rules*.

As to how far *Rules* have been made to regulate the exercise of the powers conferred by this section of granting relief between co-defeadants: see *Treleaven* v. *Bray*, 45 L. J. Chy. 113; and notes to *Rule* 165, *et seq.*

This section does not entitle a defendant to proceed by way of counterclaim against a co-defendant unless the plaintiff is also interested in such counterclaim; if the plaintiff is not so interested, the defendant must seek his relief against a co-defendant under the third party procedure: *Cope* v. *Crichton*, 18 P. R. 462.

In *Mudge* v. *Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369, an action propounding the will of a married woman made after she had obtained a protection order, and become possessed of separate estate, the defendant set up that the protection order had been fraudulently obtained, and claimed by way of cross relief to have it set aside. The will pronounced against, and administration granted to the defendant; and it was held to be within this section as asserting by counterclaim what might be asserted in a suit against the same plaintiff.

A defendant is not bound to make his cross claims in the same action, but may assert them by cross action. Thus where an action was brought against shippers and consignees for damages for detention at the port of lading, and for freight, and the defendants brought a cross action for a larger sum for damages for loss of cargo by the shipowners' negligence, and the writs were issued on the same day and statement of claim delivered first in the former action, a master stayed proceedings in the second action with liberty to the plaintiffs in it to file a counterclaim in the first action; but it was held on appeal that though there was jurisdiction to make such an order, it should only be exercised where the points in issue are the same, and that in the case in question the right to bring a cross action should not be interfered with: *Adamson* v. *Tuff*, 44 L. T. 420. See also the notes to s. 16 (*f*), and *Rule* 320. Defendant not bound to set up cross-claim by counterclaim.

As to the effect of the concluding words of this section: see *Fowler* v. *Knoop* in the note to *Rule* 165.

This section does not authorize a counterclaim against a plaintiff and a third party, in respect of a matter not "relating to, or connected with the original subject of the cause or matter," *e.g.*, in an action for libel, a counterclaim for an alleged libel against the defeadant committed by the plaintiff and his agent who was added as a party to the counterclaim, was struck out: *Edge* v. *Weigel*, 97 L. T. 447.

Where a defendant claimed indemnity under a covenant made with a third party as trustee, for his benefit, it was held that the

Sec. 16 (e, f). defendant was not entitled to sue on the covenant, and the claim, therefore, was dismissed: *Markham* v. *Paget*, 1908, 1 Ch. 679; 98 L. T. 605.

Courts to take notice of equitable rights and duties.

(*e*) The Court and every judge shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of *The Ontario Judicature Act, 1881*;

44 V. c. 5.

Same as Rsv. Stat. 1895, c. 51, s. 57 (8) and taken from the Eng. J. A., 1873, s. 24 (4).

In *Williams* v. *Snowden*, W. N. 1880, 124, a plaintiff in ejectment was ordered specifically to perform an agreement to lease the premises to defendant, which agreement, though not raised by defence, appeared incidentally in the cause. See *Mostyn* v. *W. Mostyn, &c.*, 1 C. P. D. 145; *Borrowes* v. *Delancy*, 24 L. R. Ir. 503, where it incidentally appeared that a party was entitled to have a deed rectified. See also *Furness* v. *Bond*, W. N. 1888, 78; *Scott* v. *Brown*, 1892, 2 Q. B. 724; *Annesley* v. *Annesley*, 31 L. R. Ir. 457; and cases in note to s.-s. (*c*), *supra*; and *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 49; see in note to *Rule* 85.

The doctrine of Equity whereby part performance furnishes a ground for enforcing a contract not enforceable at law by reason of s. 4 of the Statute of Frauds, is confined to suits as to the sale of interests in land, and has not been extended by the Jud. Act. The Jud. Act confers no new rights, but alters procedure only: *Britain* v. *Rossiter*, 11 Q. B. D. 123. See also *Gibbs* v. *Guild*, 9 Q. B. D. 67, and *The Mercantile Amendment Act* (R. S. O. c. 133), s. 16.

Under this section relief was given against a forfeiture in an action to re-enter for breach of covenant for payment of taxes which the defendant paid before statement of claim delivered: *Buckley* v. *Beigle*, 8 Ont. 85.

Notwithstanding this sub-section an equitable assignment is not equivalent to a legal assignment, and is not a breach of a covenant not to assign without leave: *Gentle* v. *Faulkner*, 1900, 2 Q. B. 267; 82 L. T. 708; and a person entitled to the benefit of a covenant made with some other person cannot sue on it, the action must be brought in the name of the covenantee: see *Markham* v. *Paget*, *supra*, p. 42.

Section 19 also now enables the Court to relieve against penalties and forfeitures.

Restraining proceedings.

(*f*) No cause or proceeding shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding

might have been obtained, prior to *The Ontario Judicature Act, 1881*, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto; but nothing in this Act shall disable the Court from directing a stay of proceedings in any cause or matter pending before it; and any person, whether a party or not (*a*) to any such cause or matter, who would have been entitled, prior to *The Ontario Judicature Act, 1881*, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, may apply to the Court by motion in a summary way, for a stay of proceedings in such cause or matter either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be deemed just;

Sec. 16 (f). 44 V. c. 5. 44 V. c. 5.

To the same effect as Rev. Stat. 1897, c. 51, s. 57 (9), and see . J. A., 1873, s. 24 (5).

The effect of this sub-section is that, in ordinary cases, whatever ld formerly have been ground for an injunction restraining an on must now be raised in the action, either by way of defence, upon an application to stay proceedings: *Garbutt* v. *Faweus*, 1 Ch. 55.

(*a*) "*Whether a party or not.*" The jurisdiction to stay proceed- Staying proceedings. on the application of a person not a party is only to be exercised re the action is an improper one, or where its prosecution might e been restrained by injunction under the former practice in ncery, and only where the applicant is one who seeks to inter-, and can properly be added as a party: *Fawkes* v. *Griffin*, 17 . 473.

An application to stay proceedings in an action must be made in action sought to be stayed, and not by commencing a new action an injunction: *Garbutt* v. *Faweus*, 1 Ch. D. 155; *Re South of ice Pottery Works Syndicate*, 37 L. T. 260; *Re People's Garden pany*, 1 Ch. D. 44; *Walker* v. *Banagher Distillery Company*, 1 Q. . 129; *Wright* v. *Redgrave*, 11 Ch. D. 24; *White* v. *Harrow*, 50 W. 66. Two decisions to the contrary: *Kingchurch* v. *People's Garden pany*, 1 C. P. D. 45, and *Needham* v. *Rivers Protection Company*, . D. 253, are overruled. See also *Searle* v. *Choat*, 25 Ch. D. 723; e v. *Capsey*, 1891, 3 Ch. 411, and the same rule applies where the eedings sought to be stayed are being taken by an officer of the rt, *e.g.*, a sheriff: *Wright* v. *Redgrave*, *supra*; or a receiver: *Searle hoate*, and *Lane* v. *Capsey*, *supra*.

Sec. 16 (f).

Thus, actions for claims provable (as to which see *Crowle* v. *Russell*, 4 C. P. D. 186), in pending administration proceedings must be restrained by motion in the actions and not in the matter in which the administration proceedings are being taken: see *Cobbold* v. *Pryke*, 4 Ex. D. 315; *Powell* v. *Jewsbury*, 9 Ch. D. 39; *Bailey* v. *Monteith*, 3 C. L. T. 599.

Proceedings under a writ of elegit, issued to enforce payment of costs of an action, were stayed where the lands taken under the writ were not lands in the hands of the defendants, chargeable with those costs: *Earl Jersey* v. *Uxbridge Rural Sanitary Authority*, 1891, 3 Ch. D. 183.

In *Besant* v. *Wood*, 12 Ch. D. 630, it was said that though a pending motion cannot be restrained, a person may, in a proper case, be restrained from instituting proceedings. See also *Cercle Restaurant Co.* v. *Lavery*, 18 Ch. D. 555; *Hart* v. *Hart*, 18 Ch. D. 670; and *Armstrong* v. *Armstrong*, 1892, P. 98, where proceedings in a foreign Court were stayed by injunction: see *post*, s. 21.

See also *Hedley* v. *Bates*, 13 Ch. D. 498; (explained *Stannard* v. *St. Giles*, 20 Ch. D. p. 196); *Re Artistic Colour Printing Co.*, 14 Ch. D. 502; *Crowle* v. *Russell*, 4 C. P. D. 186.

Enforcing agreements of compromise in the same action.

Stay to Enforce a Compromise.—Under this clause and sec. 16 (*h*) the Court has power to enforce a compromise entered into pending an action, and (where no terms of the compromise go beyond what is in controversy in the action: *Rees* v. *Carruthers*, 17 P. R. 51), to stay the action on a summary application in that action: *Eden* v. *Naish*, 7 Ch. D. 781; *Scully* v. *Lord Dundonald*, 8 Ch. D. 658; *Re Gaudet Frères Steamship, etc., Co.*, 12 Ch. D. 882; *Baker* v. *Baker*, 55 L. T. 723; *Smythe* v. *Smythe*, 18 Q. B. D. 544, followed in *Farran* v. *Hunter* (before Ferguson, J., 25th Sept., 1888). See also *Davidson* v. *Merritton*, 18 P. R. 139. The former Chy. practice required a fresh suit to be brought for specific performance of the agreement for compromise, unless it related merely to the prosecution of the suit: *Pryer* v. *Gribble*, L. R. 10 Chy. 534, or unless where the compromise was entered into before answer, and was set up by the answer and specific performance prayed by way of cross-relief: *Small* v. *Union Perm. B. S.*, 6 P. R. 206.

Where a compromise has been made by the defendants with one only of two plaintiffs, the other not concurring, an application by the defendant to stay proceedings as to the non-concurring plaintiff is wholly irregular: *Re Matthews, Oates* v. *Mooney*, 1905, 2 Ch. 460.

A separate action to enforce a compromise may still be brought: *Hart* v. *Hart*, 18 Ch. D. 670; *Knowles* v. *Roberts*, 58 L. T. 259, and may sometimes be necessary: see *Gilbert* v. *Endean*, 9 Ch. D. 259; *Re Hearn, De Bertodano* v. *Hearn*, 108 L. T. 737, but ordinarily it will be proper to apply in the action for such order as may be necessary. Where the pronouncing of some judgment is necessary to give effect to the compromise, a motion for judgment should be made to the Court; the Master in Chambers would have no jurisdiction to make an order in such a case: *Pirung* v. *Dawson*, 9 O. L. R. 248; though possibly he would have jurisdiction where the order required is merely to stay or dismiss the action: see *Ib.*

The decisions as to staying proceedings upon summary application in case of a compromise are not necessarily applicable to a compromise arrived at pending a reference, as under *Rule* 410 the Master may after the compromise proceed to report it: *Corry* v. *Lemoine*, 18 P. R. 482.

An agreement as to payments after judgment in a foreclosure action is enforced by the appointment of a new day: *McCollum* v. *Coslan*, O. L. R. 240. Sec. 16 (f).

It has been held that the compromise cannot be set aside on summary application, and that an action is necessary: *Emeris* v. *Woodard*, 43 Ch. D. 185; and see *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673; L. T. 193; 1897, 2 Ch. 584; 77 L. T. 57; *Gilbert* v. *Endean*, 9 Ch. 259; but, where necessary, an issue may be directed to determine to whether a valid agreement of compromise has been arrived at, d a stay may be directed provisionally to be continued in the event the compromise being valid: *Rees* v. *Carruthers*, 17 P. R. 51; and has also been held that the validity of a compromise agreed to by illiterate plaintiff without the knowledge or concurrence of his licitor, may be inquired into, without bringing a new action to set aside, if the compromise is pleaded in the action alleged to be compromised, and, where that is done, its validity may be tried in the tion: *Johnson* v. *G. T. Ry. Co.*, 25 Ont. 64; 21 Ont. App. 408; *ist* v. *G. T. Ry. Co.*, 22 Ont. App. 504; *Davidson* v. *Merritton*, P. R. 139. Setting aside a compromise.

Where the intended compromise fails but the plaintiff has obtained me advantage, he will be required to restore it, as a condition of ing allowed to continue the action: *Henderson* v. *Underwriting soc.*, 65 L. T. 616, 732; *Guy* v. *Walker*, 8 T. L. R. 31 .

A stay was refused where an action had been settled by the plain-'s solicitor, the settlement having been provisional and not adopted the plaintiff: *McDonald* v. *Field*, 12 P. R. 213.

Vexatious Proceedings.—Actions or proceedings which are absolely groundless are frivolous and vexatious. A stay of such proceedgs may be granted not as a substitute for an injunction, but under e inherent jurisdiction of the Court to control its procedure. Staying vexatious proceedings.

"A Court of competent jurisdiction has inherent power to prevent use of its process, by staying or dismissing, without proof, actions ich it holds to be vexatious": *Per* Lord Watson, *Hoggard* v. *Pélicier*, 92, A. C. 61.

The institution of such proceedings is an abuse of the process of e Court, and they may be stayed summarily upon motion: *Edmunds* *Attorney-General*, 26 W. R. 550; 38 L. T. 213; W. N. 1878, 64. e also *Tucker* v. *Collinson*, 34 W. R. 355; 54 L. T. 128, 263; or missed: *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210; *Ker* v. *lliams*, 79 L. T. Jour. 229; W. N. 1886, 16; *Willis* v. *Earl Beaump.* 11 P. D. 59; *Blair* v. *Cordner*, 36 W. R. 64; *Grepe* v. *Loam*, Ch. D. 168; *Lawrance* v. *Lord Norreys*, 39 Ch. D. 213; 15 App. . 210; 62 L. T. 706; *Warwick* v. *East*, W. N. 1889, 8; *Willis* v. *Earl ice*, 1893, 2 Ch. 545; 69 L. T. 358; *e.g.*, where the process of the urt is set in motion improperly, as where the cause of action arose another country the plaintiff and defendant were foreigners, and defendant being in England on a holiday was served with a writ day before his sailing for his own country: *Egbert* v. *Short*, 1907. b. 205, approved in *Re Norton's Settlement*, *Norton* v. *Norton*, 1908, h. 471; 99 L. T. 257; and where the action was brought in England en it ought to have been brought in Scotland where the cause of ion arose: *Logan* v. *Bank of Scotland*, 1906, 1 K. B. 141; 94 L. T. ; actions against a public officer for an act plainly in accordance

Sec. 16 (f). with his duty: *Castro* v. *Murray*, L. R. 10 Ex. 213; *Chatterton* v. *Secretary of State for India*, 1895, 2 Q. B. 189; 72 L. T. 858; *and see* *Dyson* v. *Attorney-General*, *supra*, p. 39, against a Judge for any act done in that capacity: *Cobbett* v. *Field*, W. N. 1877, 8; *Hind* v. *Brett*, W. N. 1883, 37; *Anderson* v. *Gorrie*, 1895, 1 Q. B. 668; *Haggard* v. *Pelicier Frères*, 1892, A. C. 61; *Lane* v. *Llewellyn*, 1906, 1 K. B. 487; an action against a member of Parliament for a mandamus to compel him to present a petition in Parliament: *Chaffers* v. *Goldsmid*, 1894, 1 Q. B. 186; where the point has already been decided against the plaintiff in another action: *Dawkins* v. *Saxe Weimar, etc.*, 1 Q. B. D. 499; *Edmunds* v. *Attorney-General*, *supra*; *Mortlock* v. *Mortlock*, 20 L. T. 773; *Horrocks* v. *Stubbs*, 74 L. T. 58; *Macdougall* v. *Knight*, 25 Q. B. D. 1; *Hall* v. *Paulet*, 66 L. T. 645; *Willis* v. *Howe*, 69 L. T. 358; *Kellaway* v. *Bury*, 66 L. T. 599; *Wallace* v. *Duff*, 94 L. T. Jour. 181; *Whitworth* v. *Darbishire*, 68 L. T. 216; *Stephenson* v. *Garnett*, 1898, 1 Q. B. 677; 78 L. T. 371; *Re Ontario Sugar Co., McKinnon's Case*, 22 O. L. R. 621; where the plaintiff has no *locus standi*: *Robson* v. *Dodds*, L. R. 8 Eq. 301; *Vale* v. *Oppert*, 5 Ch. D. 969; or it is clear that the plaintiff has no cause of action: *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162, or the case is clearly *res judicata*: *Birch* v. *Birch*, 1902, P. 130; 86 L. T. 361; *Boswell* v. *Coaks*, 86 L. T. 365 *n*; where the claim though stating a sufficient case is shown by admission of the plaintiff to be without foundation: *Jameson* v. *Laing*, 7 P. R. 404. The Court will not decide a doubtful point of law on an application to stay proceedings as frivolous: *Roberts* v. *Charing Cross & E. H. Ry.*, 87 L. T. 732; or of fact: *Goodson* v. *Grierson*, 1908, 1 K. B. 761; 98 L. T. 740 (an action to recover bets); or dismiss an action which is brought in good faith to try a question of law: *Rex* v. *Thursby*, 90 L. T. 265. Where a right to sue, however slight, appears on the face of the proceedings, and is not displaced by any admission, the plaintiff will not be prevented from having his action disposed of in the regular way: *Bloxam* v. *Metropolitan, etc.*, L. R. 3 Chy. 337; *Seaton* v. *Grant*, L. R. 2 Chy. 459; *Ross* v. *Edwards*, 14 P. R. 523; 15 P. R. 150, but he may be directed to facilitate an early disposition of the action: *Jameson* v. *Laing*, *supra*, or may be required to give security for costs as a condition of being allowed to proceed: *Smith* v. *Clarkson*, 7 O. L. R. 460; 8 O. L. R. 131.

In England a special Act empowering the Court to prevent the bringing of vexatious proceedings has been passed: see *Vexatious Actions Act*, 1896 (59 & 60 V. c. 51), and see *Ex p. Attorney-General*, 76 L. T. 351.

In *Davey* v. *Bentinck*, 67 L. T. 742, an action was dismissed as frivolous and vexatious, under the inherent jurisdiction of the Court, where the plaintiff had persistently disobeyed an order for particulars. The inference was drawn that he did not deliver them because he had none to give, the action being frivolous.

Vexatious defence. Similarly there is inherent jurisdiction to strike out a defence as frivolous, vexatious and abuse of procedure: *Reichel* v. *McGrath*, 14 App. Cas. 665.

Vexatious motions. Where a party has made numerous unsuccessful interlocutory applications, the costs of which he has not paid though so ordered, he may be restrained from making any further such application without the leave of the Court: *Kinnaird* v. *Field*, 1905, 2 Ch. 306; 93 L. T. 147.

Actions against JJ.P. In actions against Justices of the Peace, brought contrary to the provisions of *The Public Authorities Protection Act* (R. S. O. c. 89), the

roceedings may be set aside summarily: see s. 9 of that Act: *sed vide* Sec. 16 (*l*).
Webb v. *Spears*, 15 P. R. 232. The omission to give notice of action where one is requisite is no ground for summarily staying an action: *Burney* v. *Emmett*, 7 O. L. R. 604.

The power to stay proceedings as frivolous or vexatious will not ordinarily be exercised merely on the indorsement on the writ, and before statement of claim: *Ross* v. *Edwards*, 15 P. R. 150; *Fletcher* v. *Bethom*, 68 L. T. 438.

An action in which relief is claimed which had been already claimed in another action will be stayed, only in so far as it claims relief included in the former action: *Morton* v. *Quick*, 26 W. R. 441. Res judicata.

For a form of order staying proceedings where repeated frivolous applications have been made, see *Grepe* v. *Loam*, 37 Ch. D. 169; Seton, 7th ed., 344; *Kinnaird* v. *Field*, 1905, 2 Ch. 306; 93 L. T. 147.

There was no rule of practice at Common Law by which a plaintiff ordered to pay costs in the course of an action, but not paying them, was liable to have his action stayed till they were paid: *Morton* v. *Palmer*, 9 Q. B. D. 89; but the Court had power in its inherent jurisdiction to direct a stay if that appeared to be equitable. (The Master in Chambers has not this inherent power: *Rickert* v. *Britton*, 3 O. W. N. 1512). The *onus* of showing the propriety of a stay was on the party asking for it. In Equity the *onus* was on the other party, and he was required to show that a stay would be inequitable. The Common Law rule is adopted in Ontario as the most convenient: *Stewart* v. *Sullivan*, 11 P. R. 629, followed in *Wright* v. *Wright*, 12 P. R. 42. See also, in addition to the cases there cited, *Re Wickham*, *Harony* v. *Taylor*, 35 Ch. D. 272; 57 L. T. 468; and if the action is vexatious, or has been vexatiously conducted by the plaintiff, the Court by virtue of its inherent jurisdiction may stay the proceedings for non-payment of costs: *Graham* v. *Sutton*, 1897, 2 Ch. 367; 77 L. T. 35; *Rickert* v. *Britton*, 4 O. W. N. 258. Staying for non-payment of costs.

An action may be stayed till security ordered to be given for damages has been given: *Richards* v. *Howell*, W. N., 1883, 159, 168.

Another Action in Ontario Pending.—Proceedings will not be stayed pending another action where the plaintiff would not be bound by the result of the other action: *Tilbury* v. *Romney*, 19 P. R. 242; or if it will not determine the question raised in the action sought to be stayed: *Toronto* v. *Toronto Ry. Co.*, 5 O. W. R. 14. Another action pending.

Cross Actions.—One of two cross actions between the same parties, arising out of the same matter, may be stayed, and a consolidation in fact thus effected; and where such an application is made the action against the party on whom the burden of proof lies ought in general to be stayed, and the action brought by him ought to be allowed to proceed, the other party being at liberty to raise by defence, set-off or counter-claim, all questions intended to be raised by him in the action which is stayed: *Thompson* v. *Eastern Ry. Co.*, 9 Q. B. D. 160. See further the notes to section 16 (*d*), and *Rule* 320. Cross actions.

Staying Proceedings Where an Agreement to Refer to Arbitration.—Where a submission to arbitration has been made, any legal proceeding brought in respect of any matter agreed to be referred may be stayed "at any time after appearance and before delivering any pleading or taking any other step in the proceeding": R. S. O. c. Staying proceedings where an agreement to refer to arbitration.

Sec. 16 (g).

65, s. 8; *Scott* v. *Avery*, 5 H. L. C. 811; *Belfield* v. *Borne*, 69 L. T. 786; *Trainor* v. *Phoenix Fire Ass. Co.*, 65 L. T. 825; *Scott* v. *Mercantile Accident Co.*, 66 L. T. 811; and see notes to C. L. P. Act, s. 214, Maclennan's Jud. Act, 2nd ed., p. 90. An allegation of fraud by the plaintiff will not prevent the application of this rule: *Ib.* But when the plaintiff is entitled to some relief (*e.g.*, an injunction or receiver) which could not be attained by a reference to arbitration, such relief may be granted, and the action stayed, except so far as is necessary to enable the plaintiff to obtain such relief: *Pini* v. *Roncoroni*, 1892, 1 Ch. 633; *Baker* v. *Yorkshire F. & L. Ass. etc., Co.*, 1892, 1 Q. B. 144; *Lyon* v. *Johnson*, 60 L. T. 223; 40 Ch. D. 579; *Chappell* v. *North*, 1891, 2 Q. B. 252; *Turnock* v. *Sartoris*, 62 L. T. 209; *Printing Machinery Co.* v. *Linotype*, 1912, 1 Ch. 566.

An action was perpetually stayed where its subject was embraced in a reference to an official referee under *The Vendors and Purchasers Act*, R. S. O. c. 122; *City of Toronto* v. *Canadian Pacific Railway Co.*, 18 P. R. 374, 451.

Where partizans had been appointed as arbitrators a stay was refused: *Bonnin* v. *Neame*, 1910, 1 Ch. 732; and see *Freeman* v. *Chester*, 1911, 1 K. B. 783.

Under this provision the Court may stay by injunction an action commenced in a foreign Court contrary to an agreement to refer. *Peña Copper Mines* v. *Rio Tinto*, 105 L. T. 346.

Unless the action is stayed an award made without the consent of both parties *pendente lite* would be of no effect: *Doleman* v. *Ossett*, 1912, 3 K. B. 257.

Practice.

Practice.—An application to stay must be made before delivering any pleadings or taking any other step in the proceeding on the part of the defendant. The attendance on a motion made by the plaintiff for an account under Rules 63 or 64 is the taking of a step which bars the right to apply for a stay: *Ochs* v. *Ochs*, 1909, 2 Ch. 121.

The motion must in general be on notice. "In a summary way" does not mean *ex parte* except in cases of emergency: see *Hewitt* v. *Dowling*, W. N. 1875, 202, *Kevers* v. *Mitchell*, W. N. 1876, 53, and notes to sec. 17.

Semble, the Master in Chambers has no jurisdiction to stay an action on the ground that it is frivolous or vexatious: see *Knapp* v. *Carley*, 40 C. L. J. 390; 7 O. L. R. 409; *Rickert* v. *Britton*, 3 O. W. N. 1512.

A motion to stay proceedings under the jurisdiction of the Court to control its own proceedings should be made in Chambers, not in Court: *Lee* v. *Mimico Real Estate Co.*, 15 P. R. 288; and before the action is entered for trial: *Cross* v. *Howe*, 62 L. J. Chy. 342; 3 R. 218.

Giving effect to legal claims

(*g*) Subject to the foregoing provisions for giving effect to equitable rights and other matters of equity and the other express provisions of this Act, the Court and every judge shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the common

law or created by any statute, in the same manner as the same would have been recognized and given effect to prior to *The Ontario Judicature Act, 1881*, by any of the courts then existing and whose jurisdiction is now vested in the Supreme Court; Sec. 13 (h). 44 V. c. 5.

Same as Rev. Stat. 1897, c. 51, s. 57 (11); and taken from Eng. J. A. 1, s. 24 (7).

(*h*) The Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it shall deem just, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in such cause or matter so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. 3-4 Geo. V. c. 19, s. 16. Multiplicity of proceedings to be avoided. All matters in controversy to be determined in one proceeding

Taken from Rev. Stat. 1897, c. 51, s. 57 (12), and Eng. J. A., 1873, (7).

Sir W. T. Charley, M.P., in his edition of the Judicature Act, said: the closing words of this section be verified by experience, this will prove a second Magna Charta to the suitor."

Modern procedure endeavours to work out the rights and liabilities l parties, as far as possible, in the same action: *per* Boyd, C., in *way* v. *Toronto*, 20 Ont. 98; *sed vide Snider* v. *Snider*, 30 O. L. 05.

cause or matter is pending within the meaning of this section so as final judgment remains unsatisfied: *Sall* v. *Cooper*, 16 Ch. D. 43 L. T. 682; *Smith* v. *Cowell*, 6 Q. B. D. 75; *Hart* v. *Hart*, 18 Ch. 0. See also *Re Clagett, Fordham* v. *Clagett*, 20 Ch. D. 637, where s said that a "pending matter" in any Court of Justice is one in some proceeding may still be taken. A foreclosure action is end after the granting of the final order: *Wills* v. *Luff*, 38 Ch. 0. "Pending matter."

he meaning of this and the preceding sub-section is, that when- a subject of controversy arises in an action which can *conti* be determined between the parties to the action, the Court l, if possible, determine it, so as to prevent further and needless tion: *Re Tharp*, 3 P. D. 81; *McDougall* v. *Hall*, 13 Ont. 166;

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Byrne v. *Brown*, 22 Q. B. D. 666. The right of the parties is limited by the opinion of the Court as to the practical convenience of trying incongruous claims in the same action. See notes to *Rule* 122.

Notwithstanding this sub-section the Court may, nevertheless, decline to decide questions relating to contingent interests which may never come into possession: *Kevan* v. *Crawford*, 6 Ch. D. 29; or questions not raised in the pleadings: see *Gray* v. *Manitoba & N. W. Ry.*, 1897, A. C. 254.

Injunctions and receivers.

17. A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall deem just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, whether the person against whom it is sought is or is not in possession under any claim of title or otherwise, or if out of possession does or does not claim a right to do the act sought to be restrained under a colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. 3-4 Geo. V. c. 19, s. 17.

This section does not give any new right to an injunction which was not in force before the Judicature Act, 1881, nor does it extend the jurisdiction of the Court, or alter the principles on which the Court formerly gave summary relief: *Lawson* v. *Crawford*, 44 C. L. J. 40.

Where an injunction or receiver is a substantial object of the action the writ should be indorsed with a claim for that relief: *Colebourne* v. *Colebourne*, 1 Ch. D. 690, but it may be had though not so claimed *Norton* v. *Gover*, W. N., 1877, 206.

"Interlocutory order."

An "interlocutory order" means not merely an order between writ and final judgment, but an order other than final judgment whether before or after final judgment: *Smith* v. *Cowell*, 6 Q. B. D. 75; *McLean* v. *Allen*, 14 P. R. 84; *Easton* v. *Nar Valley, etc.*, 8 T. L. R. 649. See also *Salt* v. *Cooper*, 16 Ch. D. 544, and *Agnew* v. *McDowell*, 14 L. R. Ir. 44 where, after a verdict, an injunction was granted against a continuance of the trespasses complained of in the action, no injunction having been granted at the trial. See also notes to sec. 25.

An action is pending where judgment has been pronounced but has not been entered: *Spence* v. *G. T. Ry. Co.*, 17 P. R. 172.

Practice.

Motions under this section may be made in Court, except probably in the case of a mandamus, in regard to which provision is made for a summary application in Chambers: see *Re Brookfield, etc.*, 12 P. R. 485, and *Rules* 207 (11), 622, and notes.

Mandamus.—The jurisdiction as to mandamus before the Ont. Act, 1881, related to writs of two kinds: (1) the old prerogative of mandamus, and (2) a writ which was grantable under various tory provisions. Sec. 17. Mandamus

rerogative Mandamus.—The prerogative writ was one which not issue as of strict right like the writs which the subject had right to call for under the clause of Magna Charta, by which Crown is bound not to refuse or delay justice or right, but issued e discretion of the Crown, and the power to issue it was not ated to the ordinary Judges between party and party, but the etion of the Crown was exercised through that one of the Courts hich the Sovereign is supposed to be personally present: see 3 om. 110, 132; 4 Mod. 340; *Reg.* v. *Cowle*, Burr. 855; Tapping ortt 223. For this reason it is still in England only granted on cation to the K. B. D. being considered one of the flowers of the Court of Queen's Bench, now belonging to the K. B. D.: *Glossop ston Local Board*, 12 Ch. D. 115-116. The discretion which the possessed was not an arbitrary, but a judicial discretion: see v. *Wigan*, 1 App. Cns. 622; but was only exercised where there o other effectual remedy: *Rex* v. *University of Cambridge*, 1 W. 2; *Re Barlow*, 30 L. J. Q. B. 271; *Rex* v. *Halls*, 3 A. & E. 497. Prerogative mandamus.

Ontario the former Superior Courts of Law had concurrent iction in the matter; and the Supreme Court has now the same iction that any of the Courts formerly existing had: see sec. 3 Act. *Re Stratford & Huron Railway and County of Perth*, 38 Q. B. 156, *per* Moss, J.A., and *Board of Education, Napanee* v. ee, 29 Gr. 395; *Re Paris Skating Rink Co.*, 6 Ch. D. 731; *to Pub. Lib. Board* v. *Toronto*, 19 P. R. 329.

e prerogative mandamus is not interfered with by the above sub-n, or by any other enactment.

is not the appropriate remedy for the enforcement of rights g out of contract: *Re London, H. and B. Ry. and Tp. Wawanosh*, C. Q. B. 93; *Re Hamilton and N. W. Ry. and Halton*, 39 U. C. 93; *Grand Junction Ry.* v. *Peterboro'*, 8 S. C. R. 76; or other si right of the applicant against the respondent: *Reg* v. *Cam-ll*, 45 W. R. 336; *Kingston* v. *Kingston P. & C. E. Ry.*, 25 Ont. 62. If a mandamus be grantable in such a case it is the man-which may be claimed in an action under above sec. 17: see lon v. *Hamilton St. Ry.*, 8 O. L. R. 642; 10 O. L. R. 594; 39 S. 73. Contracts not enforced by mandamus.

prerogative mandamus is preserved for the extraordinary cases, without it a party would be left without effectual remedy pel the performance of some duty in which the applicant is ted, and to the performance of which he has a specific legal *Reg.* v. *Lewisham*, 1897, 1 Q. B. 498; 45 W. R. 346, but it is not d where the applicant has another appropriate remedy: see *upra*, and *Pasmore* v. *Oswaldtwistle Urban D. Co.*, 1898, A. C. where a special Act provided the remedy for non-performance duty): *Bush* v. *Beavan*, 1 H. & C. 500; *Tp. of Moulton and Haldi-*12 Ont. App. 503; *Re Massey M'g Co.*, 11 Ont. 444; 13 Ont. App. *eg.* v. *Lambourne Ry.*, 22 Q. B. D. 463; *Reg.* v. *Registrar of Stock Co.'s*, 21 Q. B. D. 131; *Re Whitaker & Mason*, 18 Ont. 63; *rter* v. *Gravenhurst*, 18 Ont. 243; *Peebles* v. *Oswaldtwistle* Q. B. 625; 76 L. T. 315; *Westacott* v. *Stewart*, 46 W. R. Remedy for extraordinary cases.

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379. A petition of right has been considered to be other appropriate remedy: *Reg.* v. *Commissioners of Inland Revenue*, 12 Q. B. D. 461.

Crown and its officers.

The prerogative mandamus cannot be granted against the Crown. *McQueen* v. *McQueen*, 16 S. C. R. 1; and see *per* Cockburn, C.J., *Queen* v. *The Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387; though it may be granted against an officer of the Crown to compel the performance by him of a public duty: *Re Massey M'g Co.*, *supra*.

Not granted where other remedy.

Formerly the existence of a remedy in Equity was not sufficient reason for refusing the writ, the Court only considered whether there was another specific remedy at law: see *Rex* v. *Stafford*, 3 T. R. 652; *Re Hamilton and N. W. Ry.* v. *Holton*, 39 U. C. Q. B. 93; and see *Re Stratford and Huron Ry. Co. and Perth*, 38 U. C. Q. B. 112, but, since the Ont. Jud. Act, the existence of any other remedy, legal or equitable, which the Court can apply will probably be sufficient reason for not interfering by way of the prerogative mandamus.

The granting of the prerogative mandamus is discretionary, and it will not be granted where the applicant is himself in fault: *Reg.* v. *Wigan*, 1 App. Cas. 622; *Reg.* v. *G. W. Ry. Co.*, 62 L. J. Q. B. 572; 69 L. T. 572.

Where a prerogative mandamus is the proper remedy it should be applied for on motion: an action for a mandamus cannot be maintained: *Smith* v. *Chorley*, 1897, 1 Q. B. 532, 678; *Kingston* v. *Kingston P. & C. Ry.*, 28 Ont. 399; 25 Ont. App. 462; but where an action was brought and a motion made in it for a mandamus the proceedings were stayed so as to turn the motion into a summary application for a prerogative mandamus: *Toronto Public Library Board* v. *Toronto*, 19 P. R. 329.

Semble the application should now be made by originating notice: see *Rules* 10, 215 (2), 20. The application may be made to a Judge in Chambers, 207 (11), but in important matters it may be well to apply in Court.

Examples.

Examples.—A mandamus will not be granted (either in an action or otherwise) to interfere with a discretion vested in, and honestly exercised by, a local public authority: *Smith* v. *Chorley*, 1897, 1 Q. B. 532, 678; but has been granted where the discretion has been exercised

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on a mistaken view of the matters to which the discretion of the local authority extends: *Reg.* v. *St. Pancras*, 24 Q. B. D. 371; *Reg.* v. *Cotham*, 1898, 1 Q. B. 802; and to a Judge of an inferior Court who refused to hear a cause because he erroneously decided that he had no jurisdiction: *Reg.* v. *Judge of Southampton, C. C.*, 65 L. T. 320; *Re McLeod* v. *Amiro*, 27 O. L. R. 232.

Where a Division Court Judge held that the evidence before him showed that the case was beyond the jurisdiction of a Division Court, and ruled that no further evidence should be given, and the plaintiffs submitted to this, and a judgment of non suit was entered, and the plaintiff moved to set it aside and for a new trial, which was refused, it was held that mandamus did not lie. The fact that the plaintiff had no right of appeal did not enlarge the remedy by mandamus: *Re Ratcliffe* v. *Crescent Mill & Lumber Co.*, 1 O. L. R. 331.

A mandamus will not be granted against a public body where, if issued, it would be unavailing, or where there is no necessity for the relief: *Re Giles* v. *Wellington*, 30 Ont. 610; nor where the performance of the duty sought to be enforced is impossible by rea-

ant of funds: *Re Bristol and Somerset Ry.*, 3 Q. B. D. 10; see *Gen.* v. *Dorking*, 20 Ch. D. 595; nor against a railway company mpel it to reinstate and keep open its line which had fallen into e in consequence of subsidence: *Reg.* v. *Great Western Ry.*, 69 L. T. 572; nor to compel a railway company to operate its railwny: *ston* v. *Kingston P. & C. E. Ry. Co.*, 28 Ont. 399; 25 Ont. App. 462. Sec. 17. Mandamus.

mandamus was granted to rehear an application for a license to iquor before justices who had improperly taken money for grant- he application: *Reg* v. *Bowman*, 1898, 1 Q. B. 663.

ormerly a writ of mandamus was issued, but now writs of man- a are abolished and the mandamus is in the form of an order h haa the same effect: see *Rule* 623.

tatutory Mandamus.—The right to claim a mandamus in an n was first given by Imp. Act, 17 & 18, c. 125, s. 69, adopted here 50 (aee R. S. O. 1877, c. 52, s. 4). Statutory mandamus.

his enactment goes further than the previous statutes, and enacts a mandamus may he grar d "by an interlocutory order of the In all cases in which it shall appear to the Court to be just or nient that such order should be made." Under the Jud. Act, sec. 17.

he object of this clause was probably two-fold: (1) to enlarge the tion of the Court in granting writs of mandamus, and (2) to e the writ to be obtained on an interlocutory application, and merely aa part of the judgment in an action.

he mandamus referred to in this section is not the old prerogamandamus, "but only a mandamus which may be granted to the performance of some act, of something to he done, which is sult of nn action where an action will lie": *per* Brett, L.J., In *p* v. *Heston, etc.*, 12 Ch. D. 122; see also *Rich* v. *Melancthon*, 26 R. 48.

mble, a mandamus grantable hy action will not be granted to e private rights arising under an agreement, where the order not be carried out without minute supervision of the operation ailway by the Court: *Kingston* v. *Kingston P. & C. E. Electric ay*, 25 Ont. App. 462, as explained in *Hamilton* v. *Hamilton St.* 0 O. L. R., at p. 603.

hough the Court or a Judge has power to grant a mandamus interlocutory application, it will not be done unless the plainearly shows that he will suffer some injury hy waiting for the of the action: *In re Paris Skating Rink Co.*, 6 Ch. D. 731; *s Alkali Co.* v. *Sheffield and Midland Railways Co.'s Committee*, T. 131.

ere is no Statute of Limitations applicable to a claim for a mus: *Ward* v. *Lowndes*, 1 E. & E. 940; 29 L. J. Q. B. 40.

ere it is sought to restrain interference with an individual's under a statute, the remedy is by injunction, and not by manda- *Holland* v. *Dickson*, 37 Ch. D. 669.

actice.—As to practice on motions for mandamus: see notes to 22. Practice.

econd application for a prerogative mandamus, after the first en dismissed, will not be entertained: *Reg.* v. *Mayor of Bodmin*,

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1892, 2 Q. B. 21; *E. v. Thompson*, 6 Q. B. 721; *Reg. v. Pickles*, 12 L. J. Q. B. 401; unless the dismissal was owing to a technical insufficiency in the affidavits: *Re Guillot & Southwick, etc.*, 26 U. C. Q. B. 246; but see *Reg. v. Bodmin, supra.*

In England it has been held that the prerogative writ must be moved for by counsel, not by an applicant in person: *Reg. v. Mayor of Liverpool*, 7 T. L. R. 592; *Ex p. Whyte*, 12 T. L. R. 458; *Ex p. Wallace*, 1902, 2 K. B. 488: and see *Rules* 2, 505 (5).

Although on an application for a prerogative mandamus proof of a previous demand and refusal to do the act required must be given, this is not essential in actions for mandamus: *Young v. Erie & Huron Ry.*, 27 Ont. 536.

Appeal.

Appeal.—Where a peremptory mandamus is granted the decision is subject to review: *Reg. v. Churchwardens of All Saints*, 1 App. Cas. 611; *Reg. v. Bangor*, 18 Q. B. D. 349, 360.

Costs.

Costs.—A successful applicant for a prerogative mandamus is not necessarily entitled to costs. These are in the discretion of the Court: *Reg. v. Harding*, 6 T. L. R. 53, 175.

Injunctions

Injunctions.—By the transfer to the Supreme Court of the former jurisdiction of the Common Law Courts (see J. A., sec. 3), it has power to grant injunctions, interlocutory or final, in any action to restrain the defendant from the repetition or continuance of any breach of contract, or wrongful act complained of in the action, or from the commission 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; such relief may be granted or refused upon such terms, as to its duration, keeping an account, or giving security or otherwise, as may seem just (see R. S. O. 1877, c. 52, s. 30). The Supreme Court has, therefore, not only the jurisdiction formerly possessed by the Court of Chancery to grant injunctions, but also that formerly conferred on the Courts of Law by the above enactment.

The difference between a mandamus and a mandatory injunction would appear to be now merely nominal, as far as their legal effect goes. A mandamus, however, may in certain circumstances be obtained without bringing an action, whereas an injunction is not granted except in an action. Formerly a mandatory injunction differed from a mandamus in form, the injunction being issued in a negative form, *i.e.*, requiring the defendant not to leave undone the thing required to be done; whereas the mandamus expresaly commanded him to do the required act; but this distinction no longer prevails—and a mandatory injunction now follows the form of a mandamus. Formerly both a mandamus and an injunction were issued in the form of writs, but now both are in the form of orders of Court: see *Rule* 623.

Scope of enactment as to injunctions

Scope of the Act.—The meaning of the words "just or convenient," and whether they have enlarged the powers of the Court, has been considerably discussed.

An injunction may be granted where "it shall appear to the Court to be just or convenient": *Thorley's Cattle Food Company v. Massam*, 6 Ch. D. 582; *Hinrichs v. Berndes*, W. N. 1878, 11; *Saxby v. Easterbrook*, 3 C. P. D. 339; *Re Cambrian Mining Co.*, 25 W. R. 881, and the words of the section rather enlarge than diminish the arm of the Court in

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ject of injunction: *per* Fry, J., in *Thomas* v. *Williams*, 43 L. T. 94; L. J. Chy. 605. But it is with regard to settled legal reasons or ciples that the Court will decide what is just or convenient: *dow* v. *Beddow*, 9 Ch. D. 89; *Shaw* v. *E. of Jersey*, 4 C. P. D. 359; to which see the case of *Neal* v. *Rogers*, 22 O. L. R. 588); *kin* v. *Balls*, 13 Ch. D. 324; *Fletcher* v. *Rogers*, 27 W. R. 97; *Aslatt orporation of Southampton*, 16 Ch. D. 143; and this section does in the least alter the principles upon which the Court should act: v. *Browrigg*, 10 Ch. D. 294; *Lawson* v. *Crawford*, 44 C. L. J. 40. does not give any new rights to parties who had previously no rights rceable at Law or in Equity; but it enables the Supreme Court, out being hampered by any old rules, to grant an injunction when- it is just or convenient so to do, for the purpose of protecting or rtiag the legal rights of the parties: *N. London Ry. Co.* v. *Great thern Ry. Co.*, 11 Q. B. D. 30; 48 L. T. 696; *Bonner* v. *G. W. Ry.*, Ch. D. 1; *Wood* v. *Lillies*, 61 L. J. Chy. 158; *Richardson* v. *Methley ol Board*, 1893, 3 Ch. 510; *Kitts* v. *Moore*, 1895, 1 Q. B. 253; *Neal* v. *ers*, *supra*. See also *Robinson* v. *Pickering*, 16 Ch. D. 660; and Brett Cas. in Modern Equity, 321; and notes, *infra*, under "Receivers."

Illustrations of the general principles on which injunctions are granted or refused.

a *Cooper* v. *Whittingham*, 15 Ch. D. 507, Jessel, M.R., said that section may be said to be a general supplement to all Acts of lament, and where a statute creates a penalty for doing an act, injunction to restrain the act may be claimed as an ancillary edy. As to this dictum, see *Hayward* v. *E. London W. W. Co.*, h. D. 146; see also *Richardson* v. *Methley*, 1893, 3 Ch. 510.

The Court will not grant an injunction at the suit of the Crown estrain acts *ultra vires* of a company; except where injury to the lic is plainly shewn: *Attorney-General* v. *Niagara, etc., Tramway* 18 Ont. App. 453 (where an injunction to restrain a tramway pany from running its cars on Sunday was refused); nor will irreparable injury be restrained if legal rights are not invaded: . *of Birmingham* v. *Allen*, 6 Ch. D. 284; *Ballard* v. *Tomlinson*, 26 D. 194.

Refused where no legal injury done.

o Court will grant an injunction where if the thing sought to be rained is allowed to go on, no legal injury is done to any one: Brett, L.J.: *N. London Ry. Co.* v. *G. N. Ry. Co.*, *supra*. Thus there o right to restrain the removal of exigible goods where there o subsisting judgment or order under which execution might be d: see *Newton* v. *Newton*, 11 P. D. 11 (see after judgment *ton* v. *Newton*, 1896, P. 36); *Carter* v. *Carter*, 1896, P. 35; *Burdett der*, 6 O. L. R. 532; 7 O. L. R. 72 (where the entry of judgment stayed); nor the alienation by defendant of lands which would be e to satisfy the judgment if the plaintiff should succeed in the n: see *Hepburn* v. *Patton*, 26 Gr. 597; *Robinson* v. *Pickering*, 50 Chy. 527; *Merchants Bank* v. *Bell*, 29 Gr. 413; *Parkes* v. *St. ge*, 10 Ont. App. 496, 542; nor the alienation of her separate pro- by a married woman pending an action against her to recover ot: *Nat. Prov. Bank* v. *Thomas*, 24 W. R. 1013. An action will lot or such purposes: *Chamberlain* v. *McDonald*, 14 Gr. 447

n *London & Blackwall Ry. Co.* v. *Cross*, 31 Ch. D. 354, it was that the enlarged powers as to injunctions given by this section not enable the Court to restrain a person from proceeding for ensation under the *Land Clauses Act*, though the claim be or vexatious, and made in the name of a third party without

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his authority. The Court acts in such a case on the ground that its process is being abused.

Refused where other sufficient remedy.

Where the legislature has pointed out a mode of procedure before a magistrate, the Court will not interfere by way of injunction or declaration of right, except, it would seem, in very special circumstances: *Grand Junction W. W. Co.* v. *Hampton Urban, etc., Council*, 1898, 2 Ch. 331.

Use of name restrained.

In *Street* v. *Union Bank of Spain and England*, 30 Ch. D. 156, an injunction restraining the use of the telegraphic name "Street London" was refused, it being held that defendants had done no injury, and that the matter was simply one of inconvenience, which the Court had no jurisdiction to restrain, though mistakes had occurred, and plaintiff's telegrams had been received and opened by defendants.

Granted to give effect to legal right.

But the Court has jurisdiction to grant an injunction to give effect to a legal right, and the only limit to such jurisdiction then is, that it shall be just or convenient to make the order: *Corporation of Cork* v. *Rooney*, 7 L. R. Ir. 191. To use the words of Jessel, M.R., in *Aslatt* v. *Corporation of Southampton*, 16 Ch. D., at p. 148: "Of course the words 'just and convenient' do not mean that the Court is to grant an injunction simply because the Court thinks it convenient, it means that the Court should grant an injunction for the protection of rights, or for the prevention of injury, according to legal principles. The moment it is found that there is a legal principle, that a man is about to suffer serious injury, and that there is no pretence for inflicting that injury upon him, the Court ought to interfere"; and see *Richardson* v. *Methley School Board*, *supra*; *Evan* v. *Smith*, 3 T. L. R. 390. But an injunction will not be granted to restrain the commission of a trivial act, although an invasion of the plaintiff's legal rights: *Llandudno* v. *Woods*, 1899, 2 Ch. 705; or to restrain a trespass where the damages were merely nominal: *Graham* v. *Northern Ry.*, 10 Gr. 259.

The granting of an injunction to restrain the doing of a particular thing is an act dependent on the discretion of the Court, and in exercising its discretion the Court will consider amongst other things whether the act complained of will produce injury to the applicant, whether the injury be atoned for by damages, and whether the damages must be sought in successive suits, or may be obtained once for all: *Doherty* v. *Allman*, 3 App. Cas. 709.

An injunction was granted to restrain a railway company from proceeding to trial in respect of land not properly included in or delineated on their plan and book of reference: *Protheroe* v. *Tottenham & Forest Gate Ry.*, 1891, 3 Ch. 278; 65 L. T. 323.

An injunction restraining a landowner from taking proceedings before Justices of the Peace on an irregular notice under a Drainage Act, was granted as shorter and cheaper than a prohibition: *Hedley* v. *Bates*, 13 Ch. D. 498; but this was because the Court was seised of the case *aliunde*. Where it is a mere case of prohibition, and the Court is not called upon to decide the question on other grounds between the same parties, there is no reason for changing the proceeding from prohibition to injunction. *Stannard* v. *Vestry of St Giles*, 20 Ch. D. 196, 197.

When granted against person not a party.

An injunction is granted against a person not a party, only when he is agent of a party, or in cases where he is doing something which

unts to contempt of the Court or its process: *Re Goy & Gay* v. *ock*, 80 L. T. Jour. 392. Sec. 17.

he performance of statutory duties imposed on a public body may nforced by injunction. Thus an injunction was granted against ilway company to compel it to observe statutory provisions cting the speed of trains, although there was no evidence of any ge by reason of their breach: *Attorney-General* v. *London & N. y.*, 1900, 1 Q. B. 78; and to restrain a road company from con- ting its road otherwise than as authorized by statute: *Attorney- ol* v. *Weston*, 4 Gr. 211; and an injunction was granted to ain a municipal corporation from carrying on a business in excess s statutory powers, and the discretion of the Attorney-General stitute such proceedings on the relation of rival traders cannot be lsed with by the Court: *Attorney-General* v. *London County cil*, 1901, 1 Ch. 781; 84 L. T. 245; but an injunction or mandamus mpel a street railway company to run its cars in accordance with greement with a city was refused: *Kingston* v. *Kingston P. & C. .*, 25 Ont. App. 462; *Hamilton* v. *Hamilton St. Ry.*, 8 O. L. R. 642; L. R. 594; 39 S. C. R. 673; and an injunction to compel a road any to keep its road in repair was also refused: *Attorney-General ston*, 4 Gr. 211. Statutory duty enforced by injunction.

was held that an action for an injunction may be commenced st a Local Board without the month's notice required by the c Health Act, in all cases where, before the Judicature Act, a would have been sustained in Chancery for an injunction; and gh damages are claimed by way of subsidiary relief: *Flower* v. *Leyton Local Board*, 5 Ch. D. 347; and when the action is *bond* rought for an injunction, damages may be awarded in lieu of junction, though no notice of action has been given: *Chapman ckland*, 23 Q. B. D. 294.

ere, if the defendant succeeded in an appeal to the House of , success would be useless unless the fund in question in the was protected in the meantime, it was held that the injunction to be continued pending the appeal: *Polini* v. *Gray*, 12 Ch. D. 438. Granted pending appeal.

injunction may be granted restraining an act, though a statute es a penalty for its commission: *Hamilton, etc., Road Co.* v. *erry*, 13 Ont. 466; and to restrain a company from acting con- to its Act of incorporation: *Devonport* v. *Plymouth*, 52 L. T. 161. Ganted though penalty imposed.

Mellor v. *Thompson*, 31 Ch. D. 55, an injunction motion was *in camerâ* on the ground that a public hearing would defeat the of the action. As to hearings *in camerâ* in general: see *Scott tt*, 1913, A. C. 413; 109 L. T. 1. Hearing in camera.

lay.—Delay is, in general, no bar to an injunction in aid of a right, unless the legal remedy is barred by the lapse of time: *ood* v. *Fullwood*, 47 L. J. Chy. 459; but where buildings (which ressed the provisions of restrictive covenants) had been allowed ain for five years without complaint, an injunction was refused: v. *Bolls*, 13 Ch. D. 324. Delay.

mages.—As to awarding damages in lieu of an injunction: see *infra*.

ndatory Injunctions.—These may be granted as formerly: *relley* v. *Pearson*, 28 W. R. 752; *Mullins* v. *Howell*, 11 Ch. D. Mandatory injunctions.

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763; *Smith* v. *Smith*, L. R. 20 Eq. 504; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Hermann Loog* v. *Bean*, 26 Ch. D. 306; but an injunction will not be granted where the proper remedy is a prerogative writ of mandamus: *Glossop* v. *Heston Loc. Board*, 12 Ch. D. 120; *Attorney-General* v. *Dorking*, 20 Ch. D. 595.

For a statement of the function of a mandatory injunction: see *Glossop* v. *Heston*, 12 Ch. D. 120.

A mandatory injunction may be granted for the removal of a building obstructing ancient lights though completed before the writ issued: *Lawrence* v. *Horton*, 38 W. R. 555; 62 L. T. 749, especially where it has been run up with extra haste to anticipate the action of the Court: *Daniel* v. *Ferguson*, 1891, 2 Ch. 27; and even though the action has not been actually begun before the building was completed, *e.g.*, where defendant evaded service in order to have the building completed before service: *Van Joel* v. *Hornsey*, 1895, 2 Ch. 774. *Kuble* v. *Poole*, 105 L. T. Jour. 474; *a fortiori*, it will be granted where a building is completed *pendente lite*: *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282; 49 L. T. 318; *Home & Colonial Stores* v. *Colls*, 1902, 1 Ch. 302; 85 L. T. 701; or after notice that it was an invasion of a public right: *Attorney-General* v. *Parish*, 1913, 1 Ch. 444.

Restrictive covenants as to building may be enforced by injunction, but where the plaintiff has himself violated, or sanctioned the violation of the building scheme, and changed the character of the neighbourhood from that contemplated by the scheme, the Court may refuse its aid: *Sobey* v. *Sainsbury*, 1913, 2 Ch. 513; 109 L. T. 393.

On an interlocutory application.

The Court may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed: *Toronto Brewing and Malting Co.* v. *Blake*, 2 Ont. 175; *Bonner* v. *G. W. R. Co.*, 24 Ch. D. 16; *Hermann Loog* v. *Bean*, 26 Ch. D. 306.

Although a mandatory injunction is not usually granted on an interlocutory application, yet it may be so granted where the defendant has done the act complained of after knowledge of the plaintiff's intention to move to restrain him from doing it: *Van Joel* v. *Hornsey*, 1895, 2 Ch. 774; 73 L. T. 372.

A mandatory injunction to pull down buildings erected before notice of any intention to restrain their erection will not be granted upon an interlocutory application: *Johnston* v. *Royal Courts of Justice*, W. N. 1883, 5; but in a clear case the Court may on such a motion order an erection to be restored: *Allport* v. *The Securities Co.*, 72 L. T. 533.

Form.

A mandatory injunction was granted in a positive and not in the usual negative form, where the defendant was an uneducated man: *Bidwell* v. *Holden*, 63 L. T. 104; and it was held that this is now the proper form of a mandatory injunction in all cases: *Jackson* v. *Normanby Brick Co.*, 1899, 1 Ch. 438 (C.A.); 80 L. T. 482; and see *Stuart* v. *Gronite Rink*, 1 Ont. 102 at p. 107; *Smith* v. *Smith*, L. R. 20 Eq. 505.

Damages in lieu of.

The Court may in a proper case award damages in lieu of granting a mandatory injunction: *Tolton* v. *C. P. Ry. Co.*, 22 Ont. 204; *Mayfair, etc.* v. *Johnston*, 1894, 1 Ch. 508.

Interlocutory injunctions.

Interlocutory Injunctions.—The office of an interlocutory injunction is usually simply to retain matters *in statu quo* till the trial: *Erie & Niagara Ry. Co.* v. *G. W. R. Co.*, 21 Gr. 171; *Preston* v. *Luck*,

D. 497; and the Court will not determine legal rights on such Sec. 17.
eriocutory application: *G. T. Ry. Co.* v. *Credit Valley R. Co.*, Interlocutory injunctions.
572. See also *Lybbe* v. *Harte*, W. N. 1883, 127; and *Atten-*
h v. *London, etc., Telephone Co.*, W. N. 1884, 2, where the Court
d to consider the questions involved till the hearing.

application for an interlocutory injunction must be made
ly. Acquiescence or delay will generally be an answer to the
before trial; but the applicant is not bound to move till the
g, and delay till then is not such acquiescence as will disentitle
en to relief: *Davies* v. *Marshall*, 4 L. T. 105; *Rich* v. *Brantford*,
83. See *Caldwell* v. *Galt*, 27 Ont. App. 162.

motion is made in Court, not in Chambers: see *Rules* 205, 207.
aster in Chambers and judicial officers having like powers have
isdiction: *Ib.*, 208. County Judges as Local Judges of the High
have a limited jurisdiction under *Rule* 210 in Supreme Court
in the County Courts they have the same jurisdiction that
e Court Judges have in the Supreme Court: *The County Courts*
. S. O. c. 59), s. 28.

plaintiff must make out on his own case a *prima facie* right
injunction, otherwise it will not be granted, however much the
of convenience may be in favour of granting it. *Société*
ne, etc. v. *Tilghman, etc.*, 25 Ch. D. 1. It will not be granted
ground that no harm will be done thereby: *Strousberg* v. *Link-*
2 Sol. Jo. 751, and see *per* Cotton, L.J., in *Preston* v *Luck*, 27
506; *Challender* v. *Royle*, 36 Ch. D. 425.

re the plaintiff is himself in fault an interlocutory injunction
not be granted: *Kirkheaton* v. *Ainlie*, 1892, 2 Q. B. 278; 67 L.

Iberate violation of a covenant may be restrained though
ury may be trifling: *Cooke* v. *Gilbert*, 92 L. T. Jour. 312, S
. 382.

Court will not by an interlocutory order interfere on behalf of Balance of convenience.
ty in a way which might injure the other in case he should
: *Hill* v. *Kirkwood*, 28 W. R. 358; 42 L. T. 105; *Evans* v. *Pules-*
N, 1880, 127.

Court on an interlocutory application for an injunction should
r the balance of convenience, and if on the one hand irrepar-
jury may be caused by withholding the injunction, while on
er hand any injury occasioned by the injunction may be suffi-
compensated by damages, the injunction should be granted:
tion of Cork v. *Rooney*, 7 L. R. Ir 191; see also *Atty.-Gen.* v.
., 20 Ch. D. 595; *Bonner* v. *G. W. Ry. Co.*, 24 Ch. D. 10; and
v. *Grand Junction Ry. Co.*, 26 C. note p. 289; *Grafton* v.
, 27 Ch. D. 43; 51 L. T. 141; *Walker* v. *Clarke*, 56 L. T. 111;
R. 245; *Hamilton, etc., Rood Co.* v. *Raspberry*, 13 Ont. 466;
v. *Pender*, 27 Ch. D. 43.

n the plaintiff's legal right is not clear and serious loss and
nconvenience may necessarily result from granting an inter-
injunction, and no irreparable loss would result from refusing
ould not be granted: *Dwyre* v. *Ottawa*, 25 Ont. App. 121.

re, in pursuance of a clause in articles of partnership, one part-
expelled a co-partner from the firm on the ground of his

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having been convicted of a crime, the Court refused an interlocutory injunction to restrain such expulsion, the fact of the conviction not being denied: *Carmichael* v. *Evans*, 1904, 1 Ch. 486; 90 L. T. 573.

The Judicial Committee of the Privy Council refused to interfere with an interlocutory injunction restraining trespass on mining lands, although the respondent did not appear: *Croudace* v. *Zobel*, 1899, A. C. 238.

An interlocutory injunction to restrain a nuisance caused by defendant teaching music in the ordinary course of his business was refused, on the ground that if granted it would break up the defendant's business, whereas damages would be a sufficient compensation to the plaintiff if found entitled to succeed at the trial: *Pope* v. *Peate*, 7 O. L. R. 207.

An interim injunction was granted restraining the repetition of a slander under a pretence of mind reading: *Quirk* v. *Dudley*, 4 O. L. R. 532.

When interlocutory motion may be made.

A plaintiff may serve notice of motion for an injunction without leave at any time after the issue of the writ: *Re Sceptre V. Co.*, 22 Sol. Jour. 230; or possibly by leave before, in cases of urgency; see *Thornloe* v. *Skoines*, L. R. 16 Eq. 126; but ordinarily an action should be pending. A case involving necessity for dispensing with the issue of the writ is not easily imaginable. It might, however, occur where immediate action is necessary after the offices of the Court are closed for the day. The mere preparation of the writ ready for issue is easily done in connection with the affidavits, which, in any case, must be prepared, and should properly speaking be entitled and sworn in a pending action: see *Charnock* v. *Hertz*, 4 T. L. R. 331; *Silber* v. *Lewin*, 33 Sol. Jour. 757; *Green* v. *Prior*, W. N. 1886, 50. The notice of motion may be served with the writ: *Capes* v. *Brewer*, 24 W. R. 40.

A defendant may move at any time after service of the writ and before judgment: *Sargent* v. *Read*, 1 Ch. D. 600; but see "*Injunction against plaintiff*," *infra*, p. 62.

In cases of urgency and necessity an application may be made before service of the writ, and *ex parte*, as for instance, where it was alleged that trustees were on the eve of bankruptcy, a receiver was appointed *Re H.'s Estate*, 1 Ch. D. 276.

Where notice has been given, an injunction should not be granted *ex parte* even where from pressure of business the motion cannot be brought on: *Graham* v. *Campbell*, 7 Ch. D. 490; where, however, there is some defect in the notice served, the Court may, when injury is likely to ensue by delay in serving a new notice, grant an injunction *ex parte*; but where the opposite party appears *gratis*, and claims to be heard in opposition to the motion, the Court cannot properly proceed *ex parte*: *McLeod* v. *Noble*, 24 Ont. App. 459.

After notice of motion for an injunction is served it is a contempt of Court to proceed with the act sought to be restrained pending the motion: *Cornell* v. *Assiginack*, 28 C. L. J. 279; and see *McGill* v. *McKittrick* (Ch. D.) (before Street, J., 6th July, 1892); and a mandatory injunction will, if necessary, be granted to restore matters to the *status quo*: *Ib.*, and see *Van Joel* v. *Hornsey*, 1895, 2 Ch. 774; 73 L. T. 372.

he plaintiff is entitled to move as soon as his legal right is ded. Notice to the defendant before coming to the Court is not ssary: *Cooper* v. *Whittingham*, 15 Ch. D. 501; *Upmann* v. *For-*, 24 Ch. D. 231; *Goodhart* v. *Hyett*, 25 Ch. D. 182; *United Tele-e* v. *London Tel. Co.*, 26 Ch. D. 766; *Nicols* v. *Pitman*, 26 Ch. 74; *Wittman* v. *Oppenheim*, 27 Ch. D. 260; and an offer to accede e plaintiff's demands will not deprive the plaintiff of his right to , or to costs, where the violation of his rights has been wilful: *essy* v. *Day*, 55 L. T. 161; not even though the defendant has innocently: *Millington* v. *Fox*, 3 My. & Cr. 338; *Yeatman* v. *Horn-r*, 107 L. T. 742; *Geary* v. *Norton*, 1 De. G. & Sm. 9; but if the tion is trifling and has been innocent and unintentional, costs be refused the plaintiff: *American Tobacco Co.* v. *Guest*, 1892, 1 30. Where, on service of the writ, defendant offered an under-g and costs, an injunction was refused: *Jenkins* v. *Hope*, 1896, 1 78; *Snaggs* v. *Seyd*, W. N. 1894, 95.

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When plaintiff may commence action.

x parte Injunctions.—An injunction should not be granted *arte* except in cases of urgency, as where immediate damage is done or apprehended: see *Capitol Manufacturing Co.* v. *Buffalo ally Co.*, 3 O. W. N. 553; *Anon. per* Hodley, J., W. N. 1876, *Welsh* v. *Milton*, 24 W. R. 679; *Tozer* v. *Walford*, W. N. 1875, *Blewitt* v. *Dowling*, *Ib.*, 202; *Hennessey* v. *Rohmann*, 36 L. T. N. N. 1877, 14, and *Taylor* v. *Eckersley*, 2 Ch. D. 302; *Re H.'s e.*, 1 Ch. D. 276; *Hyde* v. *Warden*, 1 Ex. D. 309; cases of receivers. e defendant has appeared, that fact should always be mentioned e Judge on an *ex parte* motion for an injunction: *Harrison* v. *rell*, 3 Mer. 1; and where it is not, the plaintiff may be made to n any event the costs of a motion to dissolve an injunction so ed: *The Mexican Co.* v. *Maldonado*, 88 L. T. Jour. 238; W. N. 8.

Ex parte injunctions.

e affidavits on which an *ex parte* motion is made should dis-all facts and circumstances material for the Court to know, or njunction will be dissolved on motion for that purpose, even h the party moving did not consider the omitted matter material: *ster* v. *Callaway*, 6 Gr. 577; *Ley* v. *McDonald*, 2 Gr. 398; *Hynes her*, 4 Ont. 60; see notes to *Rule* 216.

here an *ex parte* injunction is dissolved on the ground of con-ent of material facts, the party who obtained it will, in general, dered to pay the costs of the motion forthwith: *Walton* v. *Henry*, R. 390; an interim injunction obtained on the suppression of may be dissolved on the motion to continue it, though there be osa motion: *Boyce* v. *Gill*, 64 L. T. 824; and though the Court ee fit to grant another injunction in the same terms: *Ib.*

ration of Interim Injunction.—Where an interim injunction nted *ex parte*, it is usually limited to a few days only, and the obtaining it, when serving it on the party enjoined, usually at the same time a notice of motion to continue it. If the on the hearing of this motion thinks fit to continue it, it is continued "until the trial or other final disposition of the ," and in that case the injunction continues in force until ent is entered. An injunction granted until a certain day s on that day unless continued; no motion to dissolve is neces-nless it is sought to get rid of the injunction in the meantime: *ig* v. *Conmee*, 19 P. R. 45. Where the judgment at the trial cted not to be entered until a future time, an interim injunction

Duration of interim injunction.

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until the trial, etc., remains in force until that time arrives: *Carroll* v. *Provincial Gas Co.*, 18 P. R. 518, and where a party by his counsel or solicitor gives an undertaking to refrain from doing an act, and a party has refrained from applying for an injunction in consequence, the undertaking will continue in force, and be enforced by the Court in the same manner as an injunction: *Haggert* v. *Brampton*, *Ib.*, in note, p. 518; *Polini* v. *Gray*, 12 Ch. D. 438; *London & B. Ry. Co.* v. *Grand Junction C. Co.*, 1 Eng. Ry. Cas. 224; and see *Bolton* v. *London School Board*, 7 Ch. D. 766.

A plaintiff was held not entitled to have matters kept *in statu quo* by an injunction after judgment, and until the case could be heard by the Court of Appeal, where the decisions in Courts of first instance were against the plaintiff, even though, unless time was given to take the case to the Court of Appeal, he would be without substantial relief: *Wyld* v. *McMaster*, 4 Ont. 717; *sed vide*, *King* v. *Duncan*, 9 P. R. 61; *Polini* v. *Gray*, 12 Ch. D. 438.

In *Mackenzie* v. *Toronto* (7th Dec., 1904), where the plaintiff sought to restrain the defendants from cutting off the water supply to his house, Boyd, C., at the trial, being of opinion that the immediate dissolution of the interim injunction would work unnecessary hardship and inconvenience on the plaintiff, continued the injunction to the 1st March following, or any later date which might be fixed by the Court of Appeal, and subject thereto, dismissed the action.

Where an interim injunction is granted by a Local Judge under *Rule* 210, it is only to be for eight days: *Rule* 211.

Injunction against plaintiff.

Injunction against Plaintiff.—An interim injunction may in a proper case be granted against the plaintiff at the instance of a defendant: *Stewart* v. *Kingsmill*, 13 Gr. 347; *Edgecumbe* v. *Carpenter*, 1 Beav. 171; but a defendant who has not filed a counter-claim is not entitled to such an injunction unless the relief sought by injunction arises out of or is incidental to the relief sought by the plaintiff, *e.g.*, where he and the plaintiff are both claiming under the same contract: *Collison* v. *Warren*, 1901, 1 Ch. 812; 84 L. T. 482; and see 17 Times L. R. 315. If the defendant desires any other injunction before he is in a position to file a counter-claim, he must bring a cross action: *Carter* v. *Fey*, 1894, 2 Ch. 541; 70 L. T. 786; distinguishing *Sargant* v. *Read*, 1 Ch. D. 600, and *Parker* v. *Lopes*, 7 Ch. D. 358; and see *Brandon* v. *Elliott*, 14 Gr. 109.

Costs.

Costs.—As to the mode of disposing of the costs where a party obtains the relief he seeks on an interlocutory motion: see *Sonnenschein* v. *Barnard*, 57 L. T. 712.

The plaintiff may be ordered at the trial to pay the costs of an interim injunction obtained by him, where the facts proved at the trial show no anticipation of such immediate serious damage as to justify the application for an injunction: *Skiltzsky* v. *Cronston*, 22 Ont. 590; *Johnson* v. *Jenking*, 13 C. L. T. 270.

Appeal.

Appeal.—Where after the expiration by effluxion of time of an interim injunction, proceedings are taken against a party to the action to commit him for disobeying the order, an appeal by him against the interim order will lie: *McLeod* v. *Noble*, 24 Ont. App. 459.

An appeal lies from an interlocutory injunction order to the Appellate Division: see s. 26 (1) *a*, *infra*. Such an order is not within

5 *infra*: see *McLaren* v. *Caldwell*, 5 Ont. App. 363; 8 S. C. R. 435; Sec. 17.
og 6 Ves. 392.

Miscellaneous Decisions.—The following are further decisions illustrating the principles on which the Court acts in regard to injunctions. Illustrations

Any injunction which can be granted by interlocutory order, can *a fortiori* be granted at the trial: *Beddow* v. *Beddow*, 9 Ch. D. 93.

The right to an injunction to restrain trespassers formerly depended on whether the person sought to be restrained was in possession or not, and if in possession whether he was a mere trespasser or acted under colour of right: see Kerr on Injunctions, 289; *Hodges* v. *Bettle*, 33 L. J. Ch. 451; 10 Jur. N. S. 226; *Stansford* v. *Hobstone*, L. R. 9 Chy. 116. But the Canadian Legislature long since dealt with this difficulty by enacting (20 Vict. c. 56, s. 4; Con. Stat. U. C. c. 12, s. 27; R. S. O., 1877, c. 40, s. 39) that "the Court may grant an injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title." The enactment in the above section 17 is to the same effect. Restraining trespassers

By Jud. Act, W. N., 1876, c. 38, an *ex parte* application for an injunction restraining a man from trespassing with a horse and cart was refused, the Judge remarking that "injunctions are not ordinarily granted for mere trespass, unless serious injury is threatened to the property." On a fresh application being made in this case, after notice to the defendant, no order was made, on the defendant consenting that damages should be assessed up to the date of the trial: *Makin* v. *Watrow*, *Ib.*, 105. In the exercise of its discretion an injunction was refused to restrain a son from trespassing on his father's premises: *Waterhouse* v. *Waterhouse*, 94 L. T. 133; or the passing over land to reach the sea shore, doing no damage, although legally a trespass on the plaintiff's property: *Behrens* v. *Richards*, 1905, 2 Ch. 614; 93 L. T. 521; or using a highway for catching moths: *Fielden* v. *Cox*, 120 L. T. 521, and though the act complained of was a trespass, plaintiff was refused to pay costs: *Ib.*

An injunction to restrain interference with the enjoyment of an easement, which was not 20 years old, was refused, although it had been enjoyed for 19 years: *Governor of Bridewell* v. *Ward*, 68 L. T.

Nuisances may be restrained by injunction; but where the act complained of as a nuisance is done in pursuance of a legal right conferred by statute, and to carry out a lawful object, and is reasonable in its character, it is no nuisance in law, and no injunction can be granted to restrain it: *Harrison* v. *Southwark & Vauxhall Water Co.*, 1891, 2 Ch. 409; but a legal right may be exercised in an unreasonable way so as to become a nuisance: *e.g.*, the ringing of church bells at unreasonable times, and may be restrained: *Soltau* v. *De Held*, 2 Sim. N. S. 133; 21 L. J. Chy. 153; the unreasonable playing of a hand: *St. Margaret's Church* v. *Stephens*, 29 Ont. 185; or of street organs: *Lambton* v. *Mellish*, 1894, 3 Ch. 163. A public urinal is not necessarily a public nuisance: *Vernon* v. *St. James' Vestry*, 16 Ch. D. 449; 44 L. T. 229; *Graham* v. *Newcastle*, 67 L. T. 260, 790; but it may be one which will be restrained by injunction: *Sellors* v. *Matthews*, 14 Q. B. D. 928; 52 L. T. 762. A nuisance caused by the noise of washing dishes, and heat and smell from a cooking range, may be restrained: *Sanders* v. *Grosvenor Mansions*, 1900, 2 Ch. 373; 82 Nuisances.

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L. T. 758; so also noise, vibration, and smell from steam engines. *Knight* v. *Isle of Wight E. L. & P. Co.*, 90 L. T. 410; *Colwell* v. *St. Pancras*, 1904, 1 Ch. 707. Also nuisances created by carrying on a trade: *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; *Rushmer* v. *Polsue*, 1906, 1 Ch. 234; 93 L. T. 823; 1907, A. C. 121; also a nuisance of bad odours created by a tobacco factory: *Appleby* v. *Erie Tobacco Co.*, 22 O. L. R. 533; or by a fried fish shop: *Adams* v. *Ursell*, 1913, 1 Ch. 269; 108 L. T. 292; or an obstruction to a street, by causing crowds to assemble so as to obstruct the thoroughfare: *Lyons* v. *Gulliver*, 110 L. T. 284.

A mandatory injunction was granted for the removal of so much of a building as encroached beyond the building line, which had been erected after notice of the settlement of the line by the municipal authority: *Attorney-General* v. *Parish*, 1913, 2 Ch. 244.

A reversioner can only bring an action to restrain permanent injuries to the reversion; an action will not lie by a reversioner to restrain a nuisance occasioned by noise and odours coming from an adjoining property: *White* v. *London Omnibus Co.*, 136 L. T. Jour. 451.

Where after an action commenced to restrain a nuisance, the nuisance was abated by defendant, no injunction was granted, but the motion being turned into motion for judgment, the costs of the action were awarded to plaintiff: *Barber* v. *Penley*, 1893, 2 Ch. 447; 68 L. T. 662.

Where a perpetual injunction restraining a nuisance was granted at the trial, from which an appeal was brought, and, pending the appeal, the defendants at great expense removed the cause of complaint, the injunction was rescinded; though held to have been properly granted: *Attorney-General* v. *Birmingham*, 1910, 1 Ch. 48; 101 L. T. 796; 1912, A. C. 788; even where the Attorney-General sues to restrain a public nuisance he is not entitled *ex debito justitiæ* to an injunction: *Ib.*

Recount of ballots.

The Supreme Court has no jurisdiction to restrain by injunction a County Court Judge and returning officer from holding a recount of ballots cast at an election for the House of Commons. The proceedings before the County Court Judge are not cognizable by the Supreme Court, except in so far as Parliament has by legislation conferred jurisdiction: *McLeod* v. *Noble*, 24 Ont. App. 459.

The Crown or its servants discharging discretionary function.

The Court has no jurisdiction at the suit of a subject to restrain the Crown, or its officers acting as its agents or servants, or discharging discretionary functions committed to them by the Sovereign: *Atty.-Gen. for Ont.* v. *Toronto Junction R. Club*, 8 O. L. R. 440.

Foreign sovereign.

The Court has no jurisdiction to prevent a foreign sovereign from removing his property in this country, though it be an article made in infringement of a patent; and a foreign sovereign who submits to be made a defendant in an action for the purpose of empowering the Court to make an order does not thereby part with any of his rights: *Varasseur* v. *Krupp*, 9 Ch. D. 351; and see *Re Republic of Bolivia*, 1914, 1 Ch. 139; 110 L. T. 141.

Proceedings in foreign Courts.

In the absence of any sufficient equity to justify it the Court will not restrain by injunction a plaintiff from proceeding in a foreign Court: *Hunt* v. *Hunt*, 1897, 2 Q. B. 34, as reversed in appeal, 77 L. T. 421. Mere hardship or inconvenience will not be sufficient reason: *Fletcher* v. *Rodgers*, 27 W. R. 97; but where a foreigner has appeared

n English Court, the Court has a discretion to restrain him from ating the same subject matter in his own country: *Dawkins* v. *onetti*, 29 W. R. 228; see also *Re Boyse, Crofton* v. *C.*, 15 Ch. D. and notes to section 21 *infra*. Sec. 17.

n *Ex parte McPhail*, 12 Ch. D. 632, Jessel, M.R. refused leave erve a writ out of the jurisdiction, on the ground that the plain- ould have as effectual a remedy by application to the local Court.

Where the writ is to be served out of the jurisdiction, if an *ex* injunction is required, *semble* it may be included in the order ing the writ to be served out of the jurisdiction, but in Ontario an order could not be made in Chambers: see *Young* v. *Brassey*, D. 277.

roperty which is the subject of an action may be preserved under 370, by means of an injunction: *Strelley* v. *Pearson*, 43 L. T. 155. Preservation of property.

Velati & Co. v. *Braham & Co.*, 46 L. J. C. P. 415, which was an n against a jeweller for the return of goods deposited with him, efendant was ordered to deliver up the goods to an officer of the to abide the event of the action.

threatened sale of a specific chattel, which, if carried out could been compensated in damages, is not a proper case in which to an injunction restraining the sale: *Bradley* v. *Borber*, 30 Ont. 443.

London and County Banking Co. v. *Lewis*, 21 Ch. D. 490, an hile mortgagee, who had commenced an action for foreclosure, ed an injunction restraining the defendant from parting with gal estate.

Anon., W. N., 1876, 21, a defendant was restrained from parting a bill of exchange. See also *Anon.*, *Ibid.*, 37.

interim injunction was granted against a lunatic partner at it of a co-partner: *J.* v. *S.*, 1894, 3 Ch. 72; 70 L. T. 758.

injunction may be granted to restrain the interference with light ich plaintiff is entitled for the purpose of his business: *Lazarus* v. *ic Studio Co.*, 1897, 2 Ch. 214; 76 L. T. 457.

ere for the purpose of stopping a fire, the defendant's servant ertion of an alleged or assumed right set fire to heather on d premises, and the jury found that the act was reasonable but essary, an injunction was awarded against the defendant at it of his landlord: *Cope* v. *Sharpe*, 1910, 1 K. B. 168; 1911, 2 K. 104 L. T. 718; but it was held by the Court of Appeal that the ng done as a reasonable precaution at the time, the defendant stified in doing it; though subsequent events proved it to have nnecessary: S. C. 1912, 1 K. B. 496.

nactions have been granted restraining the committee of a club cting improperly in expelling a member: *Fisher* v. *Keane*, 11 353; *Labouchere* v. *Earl of Wharncliffe*, 13 Ch. D. 346; see also *ns* v. *Antrobus*, 17 Ch. D. 615; *Foster* v. *Harrison*, W. N. 1881, t see *Rowe* v. *Hewitt*, 12 O. L. R. 13. Restraining action of clubs.

injunction was granted restraining a photographer from pub- a photograph of the plaintiff, whose portrait he had taken: v. *Photographic Co.*, 40 Ch. D. 345; restraining the publica- libels: *Thorley Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; Publication of photographs.

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Libel and slander.

Thomas v. *Williams*, *Ib.*, 864; *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Hayward* v. *Hayward*, 34 Ch. D. 198; and slanderous oral statements injuriously affecting the person: *Quirk* v. *Dudley*, 4 O. L. R. 532; or property or trade: *Hermann Loog* v. *Bean*, 26 Ch. D. 306; *Mellin* v. *White*, 1894, 3 Ch. 276; subsequently reversed on the facts: 1895, A. C. 154; or tending to injure a friendly society or a joint stock company: *Hill* v. *Hart Davies*, 31 W. R. 22; 47 L. T. 82; but the Court will not restrain a trader from publishing circulars to the effect that his goods are better than those of a rival trader: *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 86; 79 L. T. 429.

Though the jurisdiction in the case of such libels is clear, even on an interlocutory application, the Court only acts in a strong case and in general not unless satisfied that the statements complained of are untrue: *Quartz Hill Gold Mining Co.* v. *Beall*, 20 Ch. D. 501; *Bonnard* v. *Perryman*, 1891, 2 Ch. 284; 65 L. T. 506; *Collard* v. *Marshall*, 1892, 1 Ch. 571; 66 L. T. 248; *Lee* v. *Gibbings*, 8 T. L. R. 773; *Liverpool* v. *Smith*, 37 Ch. D. 170; nor where defendant swears he will be able to justify, and the Court is not satisfied that he may not be able to do so: *Bonnard* v. *Perryman*, 1891, 2 Ch. 269; *Monson* v. *Tussaud's, etc.*, 1894, 1 Q. B. 671; 70 L. T. 235; nor where there is no reason to apprehend such danger or injury to the plaintiff in person or property, as to make it right to grant an interlocutory injunction: *Salomons* v. *Knight*, 1891, 2 Ch. 294.

Where an action for defamation will not lie, an injunction to restrain the alleged defamation will not be granted: *White* v. *Mellin*, 1895, A. C. 154.

Where the jury at the trial negatived the publication being a libel, an injunction to restrain its further publication was refused: *Dockrell* v. *Dougall*, 78 L. T. 840; 80 L. T. 556.

Publication of "Black list."

An interlocutory injunction was granted against a trades union, to restrain the publication *pendente lite*, of a black list of men employed by plaintiff: *Trollope* v. *London Building Trades Federation*, 72 L. T. 342.

Misappropriation of funds by public body.

An interlocutory injunction was granted to restrain a municipality from misappropriating its funds: *Jarvis* v. *Fleming*, 27 Ont. 309.

Contravention of charter.

An interlocutory injunction was granted to prevent a corporate body from acting in contravention of a prohibition contained in its special Act: *Atty.-Gen.* v. *Metropolitan Electric Supply Co.*, 1905, 1 Ch. 24; and from proceeding to elect some one to fill the place of the plaintiff as a member, who was alleged to have forfeited his seat by absence: *Richardson* v. *Methley School Board*, 1893, 3 Ch. 510.

Interference in suit by nominal party.

Also to prevent a defendant from interfering with the proceedings in another action, in which he was also defendant, but which he had agreed to allow the plaintiff to defend in his name on being indemnified; the indemnity having been given: *Montfort* v. *Marsden*, 1895, 1 Ch. 11; 71 L. T. 620.

Goodwill.

Canvassing for customers of a business the good will of which has been sold by defendant to the plaintiff, may be restrained: *Trego* v. *Hunt*, 1896, A. C. 7; 73 L. T. 514; but where the sale of the goodwill has been made by an assignee for creditors, an injunction to restrain the debtor from canvassing his former customers was refused: *Green* v. *Morris*, 1914, 1 Ch. 562. An injunction may be granted against a former partner to prevent him from using information

ired while a partner, to the prejudice of the goodwill in the ness to which his former co-partner is entitled: *Jennings* v. *Jen-s*, 77 L. T. 786. Sec. 17.

o also a servant may be restrained from utilizing copies of entries eptitiously obtained from his master's books: *Robb* v. *Green*, 1895, B. 315; 73 L. T. 15; or from disclosing a secret process used in naster's business: *Amber Size & C. C. Co.* v. *Menzel*, 1913, 2 Ch. 109 L. T. 520, or from making use of such process, or from ag use of information concerning a secret machine, obtained e in his master's service: *Caribonum Co.* v. *LeConch*, 109 L. T. 385. Servants.

nd the publication or use of documents, or copies thereof, im-erly obtained, will be restrained: *Ashburton* v. *Pope*, 1913, 2 69.

he publication of shorthand notes of private letters by the clerk took them was restrained: *Laidlaw* v. *Lear*, 30 Ont. 26. Shorthand notes.

Where an injunction was applied for to restrain a landlord from ising his legal rights of distress, until the determination of an n brought by the tenants against the landlord, to try his right e rent, the injunction was granted for a fortnight, and continued if the rent should in the meantime be paid into Court: *Shaw* v. *of Jersey*, 4 C. P. D. 120, 359; but this case is said to be no longer thority for the right to an injunction in such cases: *per* Middle-., in *Neal* v. *Rogers*, 22 O. L. R. 588, he being of the opinion that ria is the proper remedy. Landlord and tenant.

injunction will not be granted at the suit of a landlord or rever-to restrain a trespass or nuisance not of a permanent char-or not actually injuring the reversion: *Cooper* v. *Crabtree*, 47 5; 51 L. J. Chy. 189.

t an injunction may be granted at the suit of a tenant against andlord to restrain improper interference with the demised ses, *e.g.*, the fixing of an advertisement on the outside wall of the ed premises: *Goldfoot* v. *Welch*, 1914, 1 Ch. 213; 109 L. T. 820.

Blewitt v. *Dowling*, W. N., 1875, 202, an action of ejectment t a landlord, the plaintiff was restrained from issuing writs t the tenants. In *Drake's Patent Concrete* v. *Dower*, *Ib.*, 230, der was granted restraining the defendant from pulling down ly erected houses. In *Fenner* v. *Bedford*, *Ib.*, 238, an order ade on an *ex parte* application restraining the continuance of sses and destruction of property, and liberty was given to serve der on any persons found on the premises as well as the ant. In *Tozer* v. *Walford*, *Ib.* 250, a defendant who had cove-not to do any act dangerous to his co-tenants, was restrained working an engine, in consequence of the working of which the ff's insurance company had refused to continue his insurance. y he had become liable under a covenant with his superior d.

Interlocutory injunction for the purpose of enforcing an agree-o lease premises for a single day was refused: *Glasse* v. *Wool-3 L. T. Jour. 172.

ovenant by a lessor to employ a porter for the general benefit lessees of premises, let in flats, was held not to be enforceable nction: *Ryan* v. *Mutual T. W. Chambers Assn.*, 1893, 1 Ch. 116. Enforcing covenants.

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An injunction to restrain a breach by an infant of an apprenticeship deed was refused: *De Francesco* v. *Barnum*, 43 Ch. D. 165.

Restrictive covenants in a lease may be enforced by injunction: *e.g.*, covenants against carrying on an offensive trade; not only as against the lessee but also as against any occupant of the demised premises: *Mander* v. *Falcke*, 1891, 2 Ch. 554; 65 L. T. 203; or from using premises otherwise than for a private residence; *Hobson* v. *Tulloch*, 1898, 1 Ch. 424.

Restrictive covenants as to buildings, which are made for the personal benefit of the covenantee, and not as part of a general building scheme, may be enforced by injunction; but where the injury occasioned by a breach is slight, and damages would be an adequate compensation, they may be awarded in lieu of an injunction: *Snow* v. *Wilmott*, 5 O. W. R. 361.

Contracts in restraint of trade not enforced.

The enforcement by injunction of a negative stipulation in a covenant by defendant not to employ himself in any business other than the plaintiff's was refused as being unreasonable: *Ehrman* v. *Bartholomew*, 1898, 1 Ch. 671; *Estes* v. *Russ*, 1914, 1 Ch. 468; 110 L. T. 296.

Threatened contempt of Court.

The Court has jurisdiction to restrain by injunction the commission of acts which, if committed, would be a contempt of Court: *e.g.* the threatened publication of a statement of claim with comments as calculated to prevent a fair trial: *Kitcat* v. *Sharp*, 31 W. R. 227; 48 L. T. 64; *Gazette Co.* v. *Shallow*, 41 S. C. R. 339; publication of advertisements warning the public that an invention claimed by the plaintiff is an infringement of defendant's patent rights: *Barney* v. *United Telephone Co.*, 28 Ch. D. 394; and distribution of circulars containing *ex parte* statements on the merits of a case in litigation: *Coats* v. *Chadwick*, 1894, 1 Ch. 347; 70 L. T. 228.

A party to an action sending circulars to other persons in the same interest soliciting their support in the litigation is not contempt of Court: *In re New Gold Coast Co.*, 1901, 1 Ch. 860; but the distribution of fraudulent circulars containing misrepresentations to persons interested in pending litigation, with a view to inducing them to adopt a certain course, is a contempt punishable with imprisonment: *In re Septimus Parsonage & Co.*, 1901, 2 Ch. 424.

Threatened injuries.

To maintain an action *quia timet* to restrain an apprehended injury, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable: *Fletcher* v. *Bealey*, 28 Ch. D. 688; see *Attorney-General* v. *Manchester*, 1893, 2 Ch. 87 (small pox hospital being established); *Phillips* v. *Thomas*, 62 L. T. 793 (apprehended repetition of a nuisance). The Court in its discretion refused an injunction where there would be great difficulty in framing an order so as not to prejudice the trial: *Liverpool, etc., Stores Assoc'n* v. *Egerton*, 57 L. T. 770; 58 L. T. 204; 37 Ch. D. 170. See also *Hinrichs* v. *Bernders* W. N. 1878, 11.

In patent cases.

The principles on which the Court ought to act in determining whether to grant an interlocutory injunction to restrain an alleged infringement of a patent, or only to require the defendant to keep an account, were discussed in *Plimpton* v. *Spiller*, 4 Ch. D. 286.

Where a defendant before action offers to account and to destroy all articles infringing plaintiff's patent, the Court may refuse an interlocutory injunction: *Jenkins* v. *Hope*, 1896, 1 Ch. 278; 73 L. T. 705

An injunction against the infringement of a patent was refused Sec. 17.
ere, though there had been an infringement, it had been discon-
ued several years before action, and there was no intention or
babiility of a renewal of the wrongful user: *Proctor* v. *Bayley*, 38
R. 100.

An injunction will be granted to restrain the exportation of goods Trade marks.
ier a trade mark likely to deceive a foreign though not a home
rchaser: *Orr Ewing* v. *Johnston*, 13 Ch. D. 434, and also to restrain
infringement of a trade mark: *Cochrane* v. *Macnish*, 1896, A. C. 225;
where the action was brought against a retail dealer, who had not
n guilty of any intentional infringement, and who at once yielded
he plaintiff's demand, no costs were awarded against the defendant:
erican Tobacco Co. v. *Guest*, 1892, 1 Ch. 630; and the plaintiff was
l not to be entitled to an account: *Slazenger* v. *Spalding*, 1910, 1 Ch.
; 102 L. T. 390; or to an injunction: *Spalding* v. *Gammage*
L. T. 530; so also the user of a name which has come to be
wn to the trade, as indicating goods made by the plaintiff, may be
rained by injunction: *Reddaway* v. *Banham*, 1896, A. C. 199; *Powell*
Birmingham Vinegar Co., 1896, 2 Ch. 54; 1897, A. C. 710; *Pinet* v.
son Pinet, 77 L. T. 322; 1898, 1 Ch. 179; 77 L. T. 613; but see *Lever*
Sedingfield, 80 L. T. 100.

The use of a name by a company so like that of another company
o be calculated to deceive the public may be restrained: *Manchester*
very Co. v. *N. Cheshire and Manchester Brewery Co.*, 1898, 1 Ch.
1899, A. C. 83; 79 L. T. 645; *Aerators* v. *Tollit*, 1902, 2 Ch. 319; 86
. 651; *British Vacuum Cleaner* v. *New Vacuum Cleaner Co.*, 1907,
. 312; 97 L. T. 201; *Fine Cotton Spinners* v. *Harwood*, 1907, 2 Ch.
97 L. T. 45; *Electromobile Co.* v. *British Electromobile Co.*, 97 L. T.
98 L. T. 258.

The use of a trade name calculated to lead the public to believe
the defendant's business was that of the plaintiff, was restrained:
Hall v. *British & American Shoe Co.*, 1902, 2 Ch. 354; *Gramm Motor*
k Co. v. *Fisher Motor Co.*, 30 O. L. R. 1.

Wholesale manufacturers who do not sell their goods by retail have
sufficient interest to maintain an action for the alleged infringe-
of their trade mark on goods sold by retail: *Ullman* v. *Leuba*,
A. C. 443; 99 L. T. 531.

Where the defendant by mistake published an advertisement offer-
or sale certain goods made by the plaintiffs by a wrong designa-
and on his attention being drawn to the mistake he at once
ntinued the advertisement, but the plaintiffs nevertheless went
the action, it was held that they were not entitled to an injunc-
and the action was dismissed: *Spalding* v. *Gammage*, 110 L. T. 530.

he infringement of copyright may also be restrained by injunc- Copyright.
Church v. *Linton*, 25 Ont. 131; *Collis* v. *Carter*, 78 L. T. 613.

he Court will restrain an arbitrator from acting in any case in Arbitrator.
he is unfit or incompetent to act: *Malmesbury* v. *Budd*, 2 Ch.
; *Beddow* v. *Beddow*, 9 Ch. D. 89; *Burford* v. *Chambers*, 25 Ont.
Vineberg v. *Guardian, etc., Co.*, 19 Ont. App. 293; but see *Jackson*
ry Ry. Co., 1893, 1 Ch. 238; and will restrain arbitration proceed-
where the instrument containing the agreement for reference is
cned: *Kitts* v. *Moore*, 1895, 1 Q. B. 253; 71 L. T. 676.

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An injunction restraining arbitration proceedings, in *Farrar* v. *Cooper*, 44 Ch. D. 323, and proceedings outside the arbitration agreement, in *Wood* v. *Lillies*, 61 L. J. Chy. 158; 8 T. L. R. 281, was refused, where, if proceeded with, they would be futile.

Proceedings were restrained which were being taken for the fixing of a new renewal rent by a sole arbitrator appointed by the lessor, on the assumption that default had been made by the lessees in appointing an arbitrator, they having appointed one under protest contending that there was no right to arbitrate: *Farley* v. *Sanson*, 5 O. L. R. 105; 7 O. L. R. 639.

See also as to restraining arbitration proceedings: *N. London, etc.*, v. *G. N. Ry.*, 11 Q. B. D. 30; *London & Blackwall, etc.* v. *Cross*, 31 Ch. D. 354; *Ives* v. *Willans*, 1894, 1 Ch. 68; 2 Ch. 478.

Undertaking as to damages.

Undertaking as to Damages.—The usual undertaking as to damages should be inserted in all interlocutory injunction orders: *Graham* v. *Campbell*, 7 Ch. D. 491; *Corp. of Cork* v. *Rooney*, 7 L. R. Ir. 191; *Re Johnston, Ex p. Abrams*, 50 L. T. 184, even though the order is granted on notice: *Smith* v. *Day*, 21 Ch. D. 421; 48 L. T. 54; and there is no exception in this respect in favour of the Crown: *Secretary for War* v. *Chubb*, 13 L. T. 83; W. N. 1880, 128; but see *Atty.-Gen.* v. *Albany Hotel Co.*, 1896, 2 Ch. 696; 75 L. T. 140, 195, where it was not required.

The history of the undertaking is given by Jessel, M.R., in *Smith* v. *Day*, *supra*.

Where the injunction, though made *pendente lite*, is of the nature of a final order, no undertaking as to damages need be inserted: *Fenner* v. *Wilson*, 1893, 2 Ch. 656; 68 L. T. 748, where an injunction was granted restraining the publication of matter tending to prejudice the fair trial of the action.

The usual form of the undertaking is as follows: "and the plaintiff, by his counsel, undertaking to abide by any order which this Court may make, as to damages, in case the Court shall hereafter be of opinion that the defendant [or defendants, or any or either of them], shall have sustained any by reason of this order, which the plaintiff ought to pay."

Where there are several defendants, the undertaking should be so worded as to apply to all of them who are affected by the injunction: *Tucker* v. *New Brunswick, etc., Co.*, 44 Ch. D. 249; 63 L. T. 69.

Where a married woman applies, her undertaking by her counsel is sufficient: *Re Prynne*, 53 L. T. 465; *Pike* v. *Cave*, 68 L. T. 650.

Semble, that the undertaking of counsel for a corporation, as to damages, renders the corporation as responsible as in the case of an individual: *East Molesey* v. *Lambeth*, 1892, 3 Ch. 289; 67 L. T. 497; see *Manchester, etc.* v. *Parkinson*, 60 L. T. 47.

Where an interlocutory injunction is granted *ex parte* on the terms that a party shall be added as plaintiff, and his undertaking given as to damages, the amendment must be made and undertaking given at the earliest practicable moment, or the injunction will be dissolved with costs: *Spanish General Agency Corporation* v. *Spanish Corporation*, 63 L. T. 161.

The undertaking as a general rule should extend to the damages incurred by any party to the suit, who may be damaged by the injunc-

a wrongly granted, and should not be confined to the person actually joined: *Tucker* v. *New Brunswick Trading Co.*, 44 Ch. D. 249. Sec. 17.

Where the plaintiff has been required to give security for costs of action, an undertaking as to damages must be given by a responsible person within the jurisdiction, as one term of the plaintiff's obtaining an interlocutory injunction: *Delap* v. *Robinson*, 18 P. R. 231.

Undertaking Given by Defendant in Lieu of Interim Injunction.—An order having been made restraining the defendant from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the Court might make at the hearing as to pulling down or altering any buildings erected by him; the Court of Appeal, being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the defendant the undertaking in the terms of his offer, but held that, without any such undertaking, the Court would have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action, or after notice had been given to the defendant that the plaintiff objected to the building: *Smith* v. *Day*, 13 Ch. D. 651; and see *Penwood* v. *Hornsey*, 53 L. T. 126, in which a similar undertaking was given on a motion for an interim injunction, where buildings were erected by the defendant *pendente lite* of the value of between $30,000 and $40,000, and were ordered to be pulled down, although the plaintiff's damages were estimated at only $3,000. Undertaking by defendant in lieu of injunction.

Where an order is made by consent embodying an undertaking by the defendant equivalent to an interlocutory injunction as asked by the plaintiff, there is in that case no implied undertaking as to damages on the plaintiff; if such an understanding is required it must be made part of the consent: *Howard* v. *Press Printers*, 91 L. T. 718; 53 W. R. 137; *Oberrheinische Metallwerke, etc.* v. *Cocks*, 121 L. T. Jour. 137. See further as to Undertakings as to Damages, 21 C. L. J. 44.

Enforcing the Undertaking.—How far an undertaking can be enforced when the Court has erred in granting the injunction has been a subject of some difference of opinion: see *Smith* v. *Day*, 21 Ch. D. 421; *Novello* v. *James*, 5 D. M. & G. 876; 24 L. T. O. S. 165; *Smith* v. *Bloke*, 27 Ch. D. 474; 51 L. T. 274; *Montreal St. Ry. Co.* v. *Lachie*, 16 S. C. R. 622; *Hunt* v. *Hunt*, 54 L. J. Chy. 289. Enforcement of the undertaking.

The application for an inquiry as to damages should be made at the trial or when the injunction is dissolved: *Smith* v. *Day*, *supra*; *Wilson* v. *Burton*, 60 L. T. 630; W. N. 1888, 55; 58 L. J. Ch. 442; but in *Newby* v. *Harrison*, 5 L. T. 12; 3 D. F. & J. 287, an inquiry was granted after the lapse of four months, and in *Re Hailstone*, *Hopkinson* v. *Carter*, 102 L. T. 877, after two years from the hearing; but an application to enforce the undertaking after an unexplained delay of seven years was refused, though a *prima facie* case was made out: *Wilson* v. *Hall*, 23 Ch. D. 644; 49 L. T. 275.

The granting of an inquiry as to damages consequent on the granting of an injunction is discretionary, and cannot be claimed *ex debito justitiæ*. Where, therefore, no damage appeared to have been sustained apart from the detriment arising from litigation, and the Court at the trial thought the defendant's conduct had provoked the litigation, and even though the action was dismissed, the inquiry as to damages was refused: *Gault* v. *Murray*, 21 Ont. 458; see also *Cockell* v. *British Linen Co. Bank*, 1892, 3 Ch. 159; and *Montreal St.*

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Ry. Co. v. *Ritchie*, 16 S. C. R. 622; *Smith* v. *Day*, 21 Ch. D. 421; *Ex p. Hall*, 23 Ch. D 644; *Schlesinger* v. *Bedford*, W. N. 1893, 57. It was granted: *In re Pemberton* v. *Cooper*, 107 L. T. 716.

Where a receiver is appointed of property in litigation, such property is thereafter *in custodiâ legis*, and the unsuccessful party to the litigation is not liable for damages for its detention while in the hands of a receiver: *Peruvian Guano Co.* v. *Dreyfus*, 1892, A. C. 166; 66 L. T. 536.

As to the measure of damages for restraining the sale of shares: see *Mansell* v. *British Linen Bank*, 1892, 3 Ch. 159.

Notice of injunction.

Notice, and Enforcement, of Injunctions.—A notice granting an injunction may be given by telegram. A sheriff's officer who receives such a notice should inquire by telegraph to see if it be *bonâ fide*: *Ex parte Longley*, 13 Ch. D. 110, in which case it was held that a London solicitor obtaining an order restraining a sale in the country ought to telegraph to his agent at the place and ask him to give notice to the persons affected: and see *McLaren* v. *The Ishpenning*, 39 C. L. J. 290 (Ex.). See also *Re Bryant*, 4 Ch. D. 98. A defendant is bound to obey an injunction of which he is made aware before being served with it: *Stewart* v. *Richardson*, 17 Gr. 150; and a wilful breach of the injunction may be punished by committal, even though there had been ample time to serve the order, and it had not been served: *United Telephone Co.* v. *Dale*, 25 Ch. D. 778. See *The Seraglio*, 10 P. D. 120. But notice of motion to commit must be served personally: see *Nelson* v. *Worssam*, W. N. 1890, 216.

A proceeding to compel compliance with an injunction by committal or sequestration is not a criminal proceeding: *The Copeland-Chatterson Co.* v. *Business Systems*, 16 O. L. R. 481; and see *Scott* v. *Scott*, 1913, A. C. 417; 109 L. T. 1

A solicitor falsely stating that an injunction has been granted is liable to be struck off the rolls: *Kimpton* v *Eve*, 2 V. & B. 352; and see *per* Blake, C., 1 Gr. 66.

Where notice of motion for an injunction has been served, it is a contempt of Court to proceed with the act sought to be restrained pending the motion: *Cornell* v. *Assiginack*, 28 C. L. J. 279; and see *McGilt* v. *McKittrick*, Ch. D., before Street, J., 6th July, 1892, where an act of trespass by building a wall was persisted in after action brought, though no interim injunction was applied for, and defendant was ordered by the judgment to remove the wall, although it trespassed but a few inches on the plaintiff's land; and see *Greenwood* v. *Hornsey*, *supra*, p. 71.

Where an injunction was granted restraining a defendant from negotiating bills of exchange, which had been deposited by him with his solicitor, and the solicitor subsequently ordered the defendant to indorse one of them, both defendant and his solicitor were held to have committed a contempt of Court, notwithstanding that the solicitor had a right to call for the indorsement: *Doy* v. *Longhurst*, 68 L. T. 17.

Stranger concurring in breach of injunction.

A person who is neither a party, nor a servant or agent of a party, but who with full knowledge of an injunction assisted defendant in disobeying it, may be committed not for breach of the injunction but for contempt of Court: *Seaward* v. *Paterson*, 1897, 1 Ch. 545; 76

T. 215; *Crooks* v. *Crooks*, 1 Gr. 66; or may be ordered to pay costs Sec. 1 a motion to commit: *Hubbard* v. *Woodfield*, 135 L. T. J. 239.

Where an injunction is granted against a party, his servants and nts, a servant continues bound by the injunction though he subuently leaves his master's service, and may be committed for a ach of the injunction though not served with it: *Brown* v. *Sage*, Gr. 1; *Gilchrist* v. *Carden*, 26 C. P. 1. So also new trustees are nd by an injunction granted against their predecessors in the t, of which they have notice: *Avory* v. *Andrews*, 46 L. T. 279.

Where a defendant was restrained from selling goods, being a urshie imitation of the plaintiff's, it was held that a sale of such is by the defendant, acting as agent for a third party, was no ach of the injunction: *Ripley* v. *Arthur*, 86 L. T. 495, 735.

A breach of an injunction may be punished by committal for con- Committal for breach. pt, or by sequestration; but it is only where the disobedience has wilful that punishment will be awarded: see *Fairclough* v. *Manter Ship Canal*, 102 L. T. Jour. 292; *Davis* v. *Rhayader Granite rries*, 131 L. T. Jour. 79. But a breach of an injunction is none the a contempt even though not committed wilfully or contumaciously: comb v. *Trowbridge*, 1910, 2 Ch. 190; 102 L. T. 647; and a cortion enjoined cannot excuse itself on the ground that the breach committed by one of its servants; and though the Court may ead the issue of a sequestration or attachment to enable the to obey the injunction, it may, nevertheless, order the party efault to pay the costs of the opposite party as between solicitor client: *Ib.* In the case of a corporation disobeying an injunction emedy is by sequestration: *Ib.*; *Davis* v. *Rhayader Granite Quar- supra.* A breach of an injunction may also be punished by fine: *Re n & Wentworth*, 23 O. L. R. 390; *Broom* v. *Godwin*, 2 O. W. N. 321.

to the term of imprisonment of persons in contempt for breach order of the Court: see *Re Davies*, 21 Q. B. D. 236; *Rule* 551.

Where the injunction order is *ultra vires* of the Court granting it, ach of it is no contempt: *McLeod* v. *Noble*, 28 Ont. 528.

Where, however, an injunction is erroneously or improvidently ed, but only voidable, nothing should be done while it is in force ntravention of its reasonable import: *Dunn* v. *Board of Education of Toronto*, 7 O. L. R. 451.

here the Court finds a party guilty of contempt, it may order o pay the costs of a motion to commit, though the committal be d; but if no contempt has in fact been committed, there is no iction to award costs against such party, and if granted the is appealable on that ground: *Ellam* v. *Martyn*, 79 L. T. 510.

order to commit for contempt in a civil proceeding, is not "a al proceeding," and is appealable like any other order: see *The nd-Chatterson Co.* v. *Business Systems*, 16 O. L. R. 481; *Scott* v. 1913, A. C. 417; 109 L. T. 1.

actice.—A motion for an interim injunction may be made *ex* Practice. to a Judge in the Weekly Court, or under *Rule* 211, to a local Where an injunction is granted *ex parte*, it is usually for a time, and until a motion to continue it shall have been disof; and the party obtaining it must, if he desire to continue it that time, give the usual notice of motion to continue it, but

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leave to make such motion on shorter notice may be granted. Where the injunction is granted by a Local Judge, it is not to be for a longer period than eight days: see *Rule* 211. An *ex parte* injunction ought not to be granted without an undertaking on the part of the applicant to answer damages, if any, which the opposite party may sustain by its being granted: see *ante*, p. 70.

A perpetual injunction is usually only granted at the trial or other disposition of the action.

Though it is the usual and proper practice to serve the writ of summons with a notice of motion to continue an interim injunction previously obtained, yet the omission to do so was held not to be a fatal objection to granting the motion to continue: *Nipissing Coca Cola B. W. v. Wisse*, 2 O. W. N. 677.

Scope of the enactment as to receivers.

Receivers.—A receiver is a person appointed by the Court to receive property which is the subject of litigation. A receiver may be appointed *pendente lite* for the purpose of receiving the property in question, until it shall be determined whether the plaintiff or defendant is entitled to it; and such appointment may be continued or made, at the trial for the purpose of working out the rights of the parties as determined by the judgment. Or such an appointment may be made after judgment by way of equitable execution. The appointment of receivers may now be made in any case in which it appears to the Court to be just or convenient: *Jud. Act*, s. 17, *supra*.

Receivers, how appointed.

Duty of receiver.

A receiver is an indifferent person between the parties, appointed by the Court to collect and receive the rents and profits of land, or the produce of personal estate, or to take the care and custody of any other property which it does not seem proper to the Court that either of the litigants should do, either by reason of the controversy existing between them, or by reason of personal disability on the part of the party legally entitled, *e.g.*, infancy or lunacy.

Claim for, to be indorsed on writ.

Where the appointment of a receiver is a substantial part of the relief sought by a plaintiff, he should indorse a claim to that effect on his writ: *Colebourne v. Colebourne*, 1 Ch. D. 690.

Appointment operates as injunction.

The appointment of a receiver operates as an injunction, and neither of the litigants can receive the money, or property, committed to a receiver, without a contempt of Court, and it is not necessary in the order appointing a receiver to grant an injunction in terms: Kerr on Receivers, 8.

Receivers, when appointed.

Receiver, when Appointed.—The former Common Law Courts had no power to appoint receivers.

In Chancery a receiver would not be appointed at the instance of a mortgagee having the legal estate, or other person able to obtain protection at law: *Berney v. Sewell*, 1 J. & W. 647; *Buxton v. Monkhouse*, G. Coop. 41; *Kelsey v. Kelsey*, L. R. 17 Eq. 495.

It has been a moot point whether this sub-section has enlarged the power of the Court to grant a receiver. In *Anglo-Italian Bank v. Davies*, 9 Ch. D., at p. 293, Cotton, L.J., said: "Under that (the present) sub-section the Court may and does grant receivers where it never could have done so before. Thus, for instance, it has the power to grant a receiver under that section where a plaintiff has himself the power of obtaining possession at law." See also *Tyrrell v. Painton*, 1895, 1 Q. B. 202; *Tillet v. Niron*, 49 L. T. 598; 25 Ch. D. 238; *Mason*

Westoby, 32 Ch. D. 206; *The Ampthill*, 5 P. D. 224, and *Gawthorpe* v. *Gawthorpe*, W. N., 1878, 91, where Jessel, M.R., considered that there was no limit to the power of the Court to grant a receiver on motion, except that it was only to be exercised where it appeared just or convenient. But in *Habershon* v. *Gill*, W. N., 1875, 231, Quain, J., on the other hand, indicated an opinion that the words "just or convenient" were to be interpreted by the old practice. See also *Holmes* v. *Cottage*, 1893, 1 Q. B. 551, and *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801; 70 L. T. 636; where the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.JJ.), were unanimous in holding that the Eng. Act has not given the Court power to grant a receiver by way of equitable execution in any case in which the Court of Chancery was formerly not able to do so; and that there is no right to an order merely because a receiver would be a more convenient mode of obtaining satisfaction of the judgment than execution in the usual way. This decision has been followed in *O'Donnell* v. *Faulkner*, 1 O. L. R. 170; *Morgan* v. *Hart*, 1914, 2 K. B. 183. Sec. 17.

If it appears to be just or convenient, the power may now be exercised where the plaintiff seeks to recover land by a legal title. The Court has to consider, amongst other things, the probability of the plaintiff's succeeding, length of defendant's possession, and whether has any *prima facie* title, also the position of tenants, who, if the defendant is not of undoubted solvency and remains in the receipt of rents, may have to pay twice if plaintiff succeeds: *John* v. *John*, 1918, 2 Ch. 573.

Legal Title.—Formerly the Court would not, except under special circumstances, or in cases covered by R. S. O. (1877) c. 40, s. 39, appoint a receiver against a person in possession of lands claiming by a legal title; but since *The Judicature Act*, it has been held that the jurisdiction is extended, and that a receiver may be appointed even as against a person claiming a legal title, wherever the Court may think it "just or convenient": *Real and Personal Advance Co.* v. *Carey*, 27 W. R. 706; but see *North London Ry. Co.* v. *Great Northern Ry. Co.*, 11 Q. B. D. 30; 48 L. T. 695; *Phillips* v. *Jones*, 76 L. T. Jour. 373. Receiver, when appointed against holder of legal title.

Infant's Estate.—A receiver will be appointed of an infant's estate in a proper case, as where the father is of bad character or insolvent, and there is danger of loss: *Kiffin* v. *Kiffin*, cited 1 P. W. 704; *Ex parte Comfort*, 15 Ves. 499 *n.*; *Re Cormicks*, 2 Ir. Eq. 264, or there is no testamentary guardian, or one who declines to act: *Hicks* v. *Hicks*, 3 Ves. 273; *Bridges* v. *Hales*, Mos. 111; or the guardian is misconducting himself; *Beaufort* v. *Berty*, 1 P. W. 704, and see *Dillon* v. *Lord Clonmell*, 4 Bro. P. C. 306. Receiver, when appointed. Infants' estate.

Lunatic's Estate.—A receiver will be appointed over a lunatic's estate where no person will act as committee, or where the committee cannot act, or the management of the estate onerous: Kerr on Receivers, 78. Lunatics' estates.

Trust Estate.—The Court will in a proper case appoint a receiver to act in place of an executor, or trustee, but it will not do so on slight grounds. Where fraud is charged a receiver will be appointed: *Vernon* v. *Kinzie*, 2 O. S. 40, and see *Meacham* v. *Draper*, 1 Chy. 316; or in case of misconduct or improper management, or where there is danger of loss of the trust property: *Middleton* v. As against executors and trustees.

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Dodswell, 13 Ves. 266; *H.* v. *H.*, 1 Ch. D. 276; *Colebourne* v. *Colebourne*, *Ib.*, 690; or the executor or trustee is wasting the assets: *Keene* v. *Riley*, 3 Mer. 436; *Re Wells, Molony* v. *Brooke*, 45 Ch. D. 569; 63 L. T. 521; or that being a sole executor, or trustee, he is insolvent: *Harrold* v. *Wallis*, 9 Gr. 443; *Re Johnson*, L. R. 1 Chy. 325; *Gawthorpe* v. *Gawthorpe*, W. N. 1878, 91; although mere poverty is no ground for the appointment: *Anon.*, 12 Ves. 4; but if coupled with bad character it may be: *Everett* v. *Prytherch*, 12 Sim. 368; or if being a female, she has married a man in necessitous circumstances, the *cestuis que trustent* being infants: *Dillon* v. *Lord Mountmashel*, 4 Bro. P. C. 306. A receiver may also be granted before probate, or administration, to prevent waste or spoliation, and to provide for the collection of assets pending litigation as to the right to administration: *Atkinson* v. *Henshaw*, 2 V. & B. 85; *Bull* v. *Oliver*, *Ib.* 96; *Jones* v. *Godrich*, 4 Jur. 98; *Wood* v. *Hitchings*, 2 Beav. 289; 4 Jur. 858; *King* v. *King*, 6 Ves. 172; *Re Moore, Ker* v. *Moore*, 13 P. D. 36; 58 L. T. 386: but see *Knight* v. *Duplessis*, 1 Ves. S. 324; but to warrant the appointment there must in general be shown to be litigation pending, or threatened, in the Surrogate Court: *Jones* v. *Jones*, 3 Mer. 174; *Jones* v. *Frost*, 3 Mad. 1; Jac. 466; *Marr* v. *Littlewood*, 2 My. & Cr. 458; *Parkin* v. *Seddons*, L. R. 16 Eq. 36; or that there is some difficulty in obtaining administration: *Overington* v. *Ward*, 34 Beav. 175. Pending litigation respecting the grant of probate or administration, the Surrogate Court has power to grant administration *pendente lite*: R. S. O. c. 62, s. 53.

Other cases.

A trustee appointed, upon his own undertaking in a suit, to act as receiver of the trust property, is not, under ordinary circumstances, in England, entitled to a salary as receiver: *Pilkington* v. *Baker*, *British Mutual Investment Co.* v. *Pilkington*, 24 W. R. 234. But in this Province trustees are entitled to compensation as such: *The Trustee Act* (R. S. O. c. 121), s. 67.

Receiver, when granted on application of, or against mortgagee of legal estate.

Mortgaged Estate.—Formerly a receiver would not be granted at the instance of a mortgagee entitled to the legal estate: *Berney* v. *Sewell*, 1 J. & W. 648; except under special circumstances: see Kerr on Receivers, 29-30, 34; nor against a prior mortgagee in possession, at the instance of a subsequent incumbrancer, so long as anything remained due on the prior mortgage; and the Court would only act on the prior mortgagee's own admission that he had been paid off, or his refusal to accept what was due to him: *Berney* v. *Sewell*, 1 J. & W. 647; *Miles* v. *Moore*, 15 Beav. 180; but where the prior mortgagee in possession had himself acquired the equity of redemption, and it appeared that he had received rents and profits more than sufficient to pay off his mortgage, a receiver might be granted: *Steinhoff* v. *Brown*, 11 Gr. 114. And now a receiver may be appointed at the instance of a mortgagee of the legal estate, if it seems to the Court to be just or convenient so to do: *Pease* v. *Fletcher*, 1 Ch. D. 273; but see *North London Railway Co.* v. *Great Northern Railway Co.*, 48 L. T. 695; and see *In re Prytherch*, *P.* v. *Williams*, 42 Ch. D. 590. Where the mortgagor is in possession, and a receiver is appointed at the instance of the mortgagee, the usual direction for the tenants to attorn is not sufficient to compel the mortgagor to pay a rent to the receiver; but he will from the date of the demand of rent by the receiver be compelled to pay an occupation rent if he continues to retain possession: *Yorkshire Banking Co.* v. *Mallon*, 35 Ch. D. 125, 56 L. T. 399; *Re Burchnall, Walker* v. *Burchnall*, 96 L. T. Jour. 130.

in *Pease* v. *Fletcher*, 1 Ch. D. 273, where the plaintiff was mortgagee Sec. 17.
property, as to some of which his title was legal and as to some
itable, Bacon, V.C., on an interlocutory application, appointed a
elver for the whole. In *Truman* v. *Redgrave*, 18 Ch. D. 547, a
elver was granted on application of a legal mortgagee who was
vented by the mortgagor from taking possession, and also an in-
ction restraining the mortgagor from interfering with the manage-
nt of the business and possession of the premises. (See the form
order in that case).

An equitable mortgagee may, after default, have a receiver as When on application of equitable mortgagee.
inst a mortgagor in possession "without prejudice" to the rights
any prior mortgagee: *Atkins* v. *Blain*, 13 Gr. 616; Kerr on Re-
vers, 35. The Court will not try, on an interlocutory motion, the
stion whether a prior mortgagee in possession has been paid off,
en he himself distinctly swears that there is something due;
his affidavit as to the amount due is required to be specific; if
ue, or his accounts are so negligently kept that he cannot speak
itively, a receiver may be appointed: *Rowe* v. *Wood*, 2 J. & W.
; *Hiles* v. *Moore*, 15 Beav. 180; *Codrington* v. *Parker*, 16 Ves. 469.

A mortgagee cannot have a manager appointed to manage a busi-
carried on on the mortgaged property, where the business itself
not been mortgaged: *Whitley* v. *Challis*, 1892, 1 Ch. 64; 65 L.
38.

A mortgagee is not as of right entitled to a receiver in all circum- Mortgagees.
ces, at the expense of the equity of redemption: *Re Prytherch*,
herch v. *Williams*, 42 Ch. D. 590; 38 W. R. 61, where it was con-
red not just or convenient to grant a receiver to a mortgagee in
ession, who desired to give up possession.

Co-owners.—In an action for partition, where one of the co-owners Co-owners.
occupation, though not in exclusive occupation of the property, the
t has jurisdiction under section 17, *supra*, to appoint a receiver
the hearing: *Porter* v. *Lopes*, 7 Ch. D. 358.

Formerly a case of destructive waste, or gross exclusion, was neces-
to be made to warrant the appointment of a receiver in such a
Kerr on Receivers, 79; but see *Gaskin* v. *Balls*, 13 Ch. D. 313,
Thesiger, L.J., and *North London Ry. Co.* v. *Great Northern Ry.*
11 Q. B. D. 30; 48 L. T. 695, where it was held that the jurisdiction
ant injunctions has not been extended by *The Judicature Act*:
hillips v. *Jones*, 76 L. T. Jour. 373.

artnership Estate.—The Court in granting a receiver of part- Receiver, when appointed in partnership cases.
ip property, thereby takes the affairs of the partnership out of
hands of all the partners, and entrusts them to a receiver or
ger of its own appointment; and while an injunction only re-
ns one or more of the partners from doing what may be com-
ed of, the appointment of a receiver excludes all alike from taking
in the management of the concern: *Hall* v. *Hall*, 3 Mc. & G. 86.
herefore, does not follow that the Court will grant a receiver
nte lite, in every case where it would grant an injunction.

here a partnership is alleged on one side and denied on the other,
ly a receiver is not appointed until that question has been
mined: *Peacock* v. *Peacock*, 16 Ves. 49; *Chapman* v. *Beach*, 1 J.
564 *n*; *Fairbairn* v. *Pearson*, 2 Mac. & G. 144.

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Not appointed pendente lite of going concern.

Where a dissolution is neither sought nor is absolutely necessary, a receiver *pendente lite* will not in general be granted of a "going concern": *Goodman* v. *Whitcomb*, 1 J. & W. 585; *Roberts* v. *Eberhardt*, Kay. 148; *Holl* v. *Hall*, *supra*, p. 77; unless there is danger of the business being destroyed, or the assets misapplied in the meantime; or unless one partner is misconducting himself; *e.g.*, by colluding with debtors of the firm: *Estwick* v. *Conningsby*, 1 Vern. 118; or carrying on a separate trade with the partnership property: *Harding* v. *Glover*, 18 Ves. 281; or is wrongfully excluding the plaintiff from the management: *Wilson* v. *Greenwood*, 1 Sw. 481; *Goodman* v. *Whitcomb*, 1 J. & W. 592; *Rowe* v. *Wood*, 2 J. & W. 558; *Const* v. *Harris*, T. & R. 525; *Prentiss* v. *Brennon*, 1 Gr. 371; *Bilton* v. *Blakely*, 6 Gr. 575; *Steele* v. *Grossmith*, 19 Gr. 141; or where some of the partners are insolvent: *Collins* v. *Borker*, 1893, 1 Ch. 578.

Exception to rule.

Where a partner is appointed receiver and manager without salary, he is entitled to be paid out of the assets for premiums paid to a guarantee company for becoming surety for him: *Horris* v. *Sleep*, 1897, 2 Ch. 80; 76 L. T. 458.

The mere fact of a dissolution does not entitle a partner to a receiver as against his co-partners: *Pini* v. *Roncoroni*, 1892, 1 Ch. 633. The lunacy of a partner is a ground for appointing a receiver: *J.* v. *S.*, 1894, 3 Ch. 72; 7 L. T. 758. A receiver and manager of a partnership business was appointed at the instance of the trustee in bankruptcy of one of the partners, notwithstanding a provision in the articles that the share of a bankrupt partner should remain in the business as a loan to the solvent partners until the end of the term: *Collins* v. *Borker*, 1893, 1 Ch. 578; 68 L. T. 572.

In an action for the dissolution and winding up of an insolvent partnership, an order was made for the sale of the assets by a receiver before trial; the assets being of such a character that their sale at once was desirable and other special circumstances existing: *McLaren* v. *Whiting*, 16 P. R. 552.

A receiver appointed in a partnership action though entitled to indemnity for all proper expenditures out of the assets of the firm in his hands, has no claim for indemnity against the partners personally: *Boehm* v. *Goodall*, 1911, 1 Ch. 155; 103 L. T. 717; but see *Matthews* v. *Ruggles-Brise*, 1911, 1 Ch. 194; 103 L. T. 491.

Where one of the partners is appointed a receiver, he is entitled to remuneration for his services and costs incurred as receiver, notwithstanding he is found as partner indebted to the partnership: *Dovy* v. *Scarth*, 1906, 1 Ch. 55.

Property in litigation.

Property in Litigation.—The Court may now appoint a receiver where the title to the property is uncertain and disputed: *Berry* v. *Keen*, 51 L. J. Chy. 912; and the defendant is in possession: *Cook* v. *Andrews*, 1897, 1 Ch. 266; *Foxwell* v. *VonGrutten*, 1897, 1 Ch. 64; 75 L. T. 311, 368; *John* v. *John*, *supra*, p. 75; but a case must be made to justify the appointment. Such cases as *Talbot* v. *Hope Scott*, 4 K. & J. 139, and *Dunn* v. *Ferrior*, L. R. 3 Chy. 719, are not now law: *Berry* v. *Keen*, *supra*.

An interim receiver of rents has been, however, refused to the plaintiff in an action of ejectment: *Powell* v. *Powell*, 73 L. T. Jour. 140, but granted in an action by a landlord against his tenant for recovery of land, under a proviso for re-entry: *Gwatkin* v. *Bird*, 52

J. Q. B. 263, and granted in *Real and Personal Advance Co. v. Carthy*, 27 W. R. 706; 40 L. T. 878, an action of ejectment by a mortgagee, where the property was wasting and insufficient, and plaintiff's action had been stayed till another action by defendant inst the plaintiff and others should be ready for tr al. Sec. 17.

An interpleader issue being ordered to try the right to goods seized xecution a receiver and manager of the property may be appointed er this section instead of a sale by the sheriff; *e.g.*, where the perty was a cab business, n going concern: *Howell v. Dowson*, 13 . D. 67.

So in an action to enforce specific performance of a parol agreet to execute a bill of sale of personal chattels, upon an *ex parte* ion before appearance of defendant, there being evidence of imme- danger of the chattels in question being disposed of: *Taylor v. ersley*, 2 Ch. D. 302.

Vendor and Purchaser.—In actions for specific performance, a iver, *pendente lite*, may, in a proper case, be appointed: *Kennedy ee*, 3 Mer. 448; *Holl v. Jenkinson*, 2 V. & B. 125; *McLeod v. Phelps*, r. 962; and see *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740, a of chattels; or in actions to set aside conveyances as obtained by d: *Stillwell v. Wilkins*, Jac. 282; *Huguenin v. Baseley*, 13 Ves. 107; ite & Tud. Lg. Cases 259. Or between vendor and purchaser.

n unpaid vendor of property of a company in voluntary liquida- and unable from insolvency to carry on its works, was appointed ver without security or salary: *Boyle v. Bellws Llantwil Colliery pany*, 2 Ch. D. 726.

reditor's Application.—An injunction to restrain a debtor from ating his property *pendente lite*, cannot in general be obtained by mple contract creditor suing to recover his debt, where the debtor *esse*; nor under such circumstances could a receiver be granted: *onal Provincial Bank of England v. Thomas*, 24 W. R. 1013; v. *Homan*, 4 H. L. C. 1036; *Robinson v. Pickering*, 50 L. J. 527; *Hepburn v. Pallon*, 26 Gr. 597; nor even though the debtor public company: *McCall v. Canada Farmers' Mutual Insurance* 18 C. L. J. 117; *Mills v. Northern Railway of Buenos Ayres Co.*, 5 Cby. 621; nor though the creditor be an unpaid vendor, and the any admit their liability: *Latimer v. Aylesbury & Bedford Rail- Co.*, 9 Ch. D. 385. Interim receiver, when granted on application of creditors.

ut when the debtor is dead, a receiver may be obtained by a e contract creditor against the personal representative, or devisee, ng the assets of the deceased: see *Keene v. Riley*, 3 Mer. 436; f the realty where it appears that the personal estate is insuffi- *Jones v. Pugh*, 8 Ves 71; *Chalk v. Raine*, 13 Jur. 981; Kerr eceivers, 40. Notwithstanding *The Devolution of Estates Act* (R. c. 119), the personalty of a deceased person is still the primary for the payment of his debts, and it would seem to be still sary to establish that the personalty is insufficient as a condi- f obtaining a receiver of the realty: *Re McGarry*, 18 O. L. R. 524.

a creditor's action for administration against an executrix, a e had been made and summons taken out for a receiver; but, ng the summons, the sole defendant died. The Court, on the ation of the plaintiff, appointed an interim receiver, whose

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powers were to extend for ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator, and to accept short notice of motion to discharge the receiver: *In re Parker, Cash* v. *Parker*, 12 Ch. D. 293; *Re Clark, Clark* v. *Clark*, 55 Sol. J. 64.

Where in an administration action the defendant, the sole surviving executor and trustee of the testator, had been personally condemned in costs in an action to test the validity of the will, and an execution had been issued against him, and there had been a return of *nulla bona*, on the application of the present plaintiffs, who were executors of the deceased executor of the testator, who was also a creditor of the testator and a residuary legatee, a receiver of the proceeds of the sale of part of the testator's real estate, and of the rent of the other part, and of the outstanding personal estate was granted: *Gawthorpe* v. *Gawthorpe*, W. N., 1878, 91.

Debenture holders.

A receiver and manager of the property and undertaking of a limited company was granted to a debenture holder of the company, whose debenture was a charge on the property of the company, the security being in jeopardy through the insolvency of the company, even though the principal secured by the debenture was not immediately payable and default had not been made in payment of interest: *McMahon* v. *N. Kent Iron Works Co.*, 1891, 2 Ch. D. 148; *Edwards* v. *Standard Rolling Stock Syndicate*, 1893, 1 Ch. 574; *In re Victoria Steamboats*, 1897, 1 Ch. 158; *Re London P. H. Co., Campbell* v. *London P. H. Co.*, 1905, 1 Ch. 576; 92 L. T. 409; *Re Carshalton Park*, 1908, 2 Ch. 62; 99 L. T. 12; *Re Tilt Copper Co., Trustees* v. *The Company*, 1913, 2 Ch. 588. See also *Hubbuck* v. *Helms*, 56 L. T. 232; and notes to *Rule* 458; but see *Marshall* v. *South Staffordshire T. Co.*, 1895, 2 Ch. 36, where it was held that the Court had no jurisdiction to do this unless the Act authorizing the mortgage conferred it.

Where a receiver is appointed of the assets of a company on behalf of debenture holders, the rights of persons having a prior right to the property in the possession of the company will be protected: e.g., persons who had sold property to the company under a hire purchase agency were, on application to the Court, permitted to remove it, notwithstanding the appointment of the receiver: *Re Morrison, Cookes* v. *The Company*, 108 L. T. 675.

In an action by a debenture holder of a company for foreclosure, the Court has power to appoint an interim manager as well as a receiver: *Makins* v. *Percy Ibotson & Sons*, 1891, 1 Ch. 133; 63 L. T. 515; and a receiver and manager has been appointed at the instance of debenture holders, whose debentures were a first charge on all the property of the company as "a floating security," notwithstanding that no part of the principal or interest was in arrear: *Edwards* v. *Standard Rolling Stock Syndicate*, 1893, 1 Ch. 574; but see *Marshall* v. *South Staffordshire Tramways Co.*, *supra*, where it was held that there is no power to direct a sale, or the appointment of a manager of the undertaking of a joint stock company at the suit of a mortgagee, unless the Act authorizing the mortgage also empowers the Court to give that relief to the mortgagee: and see *Re Woking*, 1914, 1 Ch. 300.

Receivers by way of equitable execution.

Equitable Execution.—Receivers have since the Jud. Act often been appointed as a means of enforcing judgments and reaching property not capable of being seized under an execution, *e.g.*, at the in-

ice of the plaintiff who had recovered judgment, and sued out an Sec. 17.
it against the debtor whose only interest in land was an equity of
emption in fee, for the protection of the property until a decree
d be obtained, under which the equity of redemption could be
hed: see *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Re Watkins*,
h. D. 252; and *Re Pope*, 34 W. R. 693; and it has been held that
e is no need first to issue a *fi. fa.*; see *Ib.*, *Ex p. Evans*, 13 Ch. D.
and *Stuart* v. *Grough*, 15 Ont. App. 309; but see *Thomas* v.
ing, 30 Ont. 123, 388; and see *Re Harrison & Bottomley*, 1899,
1. 465; 80 L. T. 29, where it was held by the Court of Appeal
the appointment of a receiver by way of equitable execution does
create a charge on property which can be enforced by a sale.

n *Kincaid* v. *Kincaid*, 12 P. R. 462, this was called "one of the
usual and ordinary methods of execution," and it was held to
o answer to the motion that the judgment creditor could pro-
y make the amount of his judgment by sale of other property
r common law process, but in *Manchester, etc.*, v. *Parkinson*, 22
. D. 173, it was held that in the absence of any legal impedi-
to obtaining execution of the judgment in the ordinary course of
by *fi. fa.*, or attachment of debts, and of any special circum-
es showing it to be just or convenient, an appointment of a
ver should not be made. See also *I.* v. *K.*, W. N. 1884, 63; and
ilton v. *Brogden*, 1891, W. N. 36; *Horrison* v. *Harrison*, 14 P. R.
Horris v. *Beauchamp*, 1894, 1 Q. B. 801; 70 L. T. 636. Street, J.,
rust & Loan Co. v. *Gorslinc*, 12 P. R. 654, refused an order in a
where a garnishing order would afford a remedy; see also his
ment in *Miller* v. *Thompson*, 19 P. R. 294; and *O'Donnell* v.
ner, 1 O. L. R. 21; and see *Morgan* v. *Hart*, 1914, 2 K. B. 183.
it was in effect laid down by the Court of Appeal, that there
jurisdiction to appoint a receiver by way of equitable execution.
t where prior to the Jud. Act, such an appointment would have
nade by a Court of Equity.

msy, therefore, not be considered to be settled that a receiver
y of equitable execution will only be appointed in respect of
rty which the execution creditor has a right to make available
e payment of his debt: *Holmes* v. *Millage*, 1893, 1 Q. B. 555;
T. 205; but which cannot be reached by execution in the ordin-
ay, or by garnishee proceedings: *Harris* v. *Beauchamp*, 1894, 1
801; *Morris* v. *Taylor*, 32 L. R. Ir. 14; and see *Codogan* v.
Theatre, 1894, 3 Ch. 338; *Re Asselin & Cleghorn*, 6 O. L. R. 170;
facturers' Lumber Co. v. *Pigeon*, 22 O. L. R. 36, 378; 24 O. L. R.

creditor, therefore, who has obtained judgment may apply for a After judg-
er by way of equitable execution, as against property for the ment, re-
, which, though liable to execution, cannot be reached by a writ ceiver may
cution or garnishee proceedings: *Anglo-Italian Bank* v. *Davies*, pointed.
D. 275; *Smith* v. *Hurst*, 1 Coll. 705; 10 Ha. 48; *Wells* v. *Kilpin*,
8 Eq. 298; *Tillett* v. *Pearson*, 43 L. J. Chy. 93; *Faggle* v. *Bland*,
3. D. 711; *Westhead* v. *Riley*, 49 L. T. 776; 25 Ch. D. 413; *Perks*
red, 76 L. T. Jour 336; *Kincaid* v *Reid*, 21 C. L. J. 144; *Kincaid*
aid, 12 P. R. 462; *Book* v. *Ruth*, 20 C. L. J. 193; *Smith* v. *Egan*,
R. 330. Formerly, in such cases, it was necessary, before apply-
a receiver, to sue out a writ of execution; but it would seem

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now that if the property cannot be reached by the writ, such a preliminary is not necessary; but see *supra*.

It was decided in the Chancery Division, that a receiver appointed by way of execution, since *The Creditors' Relief Act* (R. S. O. c. 81), must be ordered to receive and distribute in accordance with the principle of that Act: *Silvester Mfg. Co.* v. *McEachren*, 9 C. L. T. 138, followed: *Stewart* v. *Jones*, 19 P. R. 227; which was, however, subsequently reversed on the ground that the claim was not exigible: 1 O. L. R. 37; and he should probably be an officer of the Court: *Kirk* v. *Burgess*, 15 Ont. 608. But in the other Divisions there were decisions the other way: see *McLean* v. *Allen*, 14 P. R. 84; *McLean* v. *Bruce*, 14 P. R. 190, 202, where it was held that *The Creditors' Relief Act* is not to be extended, by analogy, to cases not actually provided for by that Act.

But it appears to be now the settled practice of the Court that where a receiver is appointed by way of equitable execution, he must be so appointed not merely for the benefit of the applicant, but also of all other creditors of the debtor entitled to participate in the proceeds of an execution under *The Creditors' Relief Act* (R. S. O. c. 81).

In *Cummins* v. *Perkins*, 1899, 1 Ch. 16, an order for the payment of costs out of a married woman's separate property having been made, and the only separate property she had being an interest under a will, which the trustee was about to distribute, a receiver of it was appointed on the application of the party to whom the costs were payable, before taxation.

Receivers granted.

A receiver has been appointed to receive the life interest of a married woman in stock: *Bryant* v. *Bull*, 10 Ch. D. 153; the income of a defendant's reversionary interest under a will: *Fuggle* v. *Bland*, 11 Q. B. D. 711; of the debtor's share of his deceased wife's estate, of which he was administrator, and an injunction was granted to restrain him from dealing with his share: *Smith* v. *Egan*, 17 P. R. 330; a legacy to a debtor expectant upon the death of a tenant for life: *Macnicoll* v. *Parnell*, 35 W. R. 773; a judgment debtor's interest as one of the next of kin of an intestate to whose estate no administrator has been appointed: *Mullane* v. *Aherne*, 28 L. R. Ir. 105; and see *Re McNulty*, 31 L. R. Ir. 391; a judgment debtor's interest in subsisting life insurance policies and in a charge upon land: *Beamish* v. *Stephenson*, 18 L. R. Ir. 319; or in a fully paid up life insurance policy which he had assigned to the plaintiffs as security, reserving to himself the cash surrender value of the policy: *Canadian Mutual L. & I. Co.* v. *Nisbit*, 31 Ont. 562; moneys secured by mortgage held by the debtor who was resident out of the Province: *Parent* v. *Lortie*, 7 C. L. T. 195; also of all debts due within the jurisdiction to judgment debtors, who were a foreign firm: *Goldschmidt* v. *Oberrheinische Metallwerke*, 1906, 1 K. B. 373; 94 L. T. 303; an equitable reversionary interest in personalty, (though it was said by Lindley, L.J., that he could not find that the Court of Chancery had ever done so): *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202; an equitable reversionary interest in freehold and leasehold property: *Re Jones, etc.*, W. N. 1895, 123; the rents and profits of defendant's lands (without prejudice to prior incumbrances), the possession of the lands being ordered to be delivered to the receiver: *Cadogan* v. *Lyric Theatre Co.*, 1894, 3 Ch. 338; see also *Hills* v. *Webber*, 17 T. L. R. 513; the moneys receivable in respect of the debtor's interest in a ship and her freight (without prejudice to prior incumbrancers): *Croshaw* v. *Lyndhurst Ship Co.*, 1897, 2 Ch. 154; and

otber cases whsre proc edings for attachment of debts are not Sec. 17.
icable: ses *Westhead* v. *Riley*, 25 Ch. D. 413; *Book* v. *Ruth*, 20
. J. 193; *Stewart* v. *Jones*, 19 P. R. 227; 1 O. L. R. 34.

he Court has no jurisdiction to appoint a receiver of the future
ings of a judgment debtor by way of equitable execution; nor
ny other case where prior to the Jud. Act the Court of Chancery
d not grant such relief: *Holmes* v. *Millage*, 1893, 1 Q. B. 551;
is v. *Beauchomp*, 1894, 1 Q. B. 801; 70 L. T. 636; *Morgan* v. *Hart*,
2 K. B. 183; 110 L. T. 611.

receiver was appointed of all debts due and owing to a defendant
any which carried on business out of the jurisdiction, and whose
rs could not be examined as to debts owing to the company so as
und attachment proceedings: *Goldschmidt* v. *Oberrheinische Metal-*
e, 1906, 1 K. B. 373; 94 L. T. 303.

gainst Companies.—An *interim* receiver cannot, in general, be Against Railway Company
ted in favour of a creditor against a debtor company: *McColl* v.
da Farmers' Mutual Insurance Co., 18 C. L. J. 117, but after
nent has been obtained, an execution creditor, or a mortgagee,
railway company, may obtain the appointment of a receiver and
ger of the undertaking: *Gelt* v. *Erie & Niagara Railway Co.*, 14
9; *Peto* v. *Welland Railway Co.*, 9 Gr. 455, affirmed on re-hearing,
February, 1864; *Brantford* v. *Grand River Navigation Co.*, 8 Gr.
Gardiner v. *London C. & D. Ry.*, L. R. 2 Chy. 201; Eng. Ry. Act.
In re Knott End Ry., 1901, 2 Ch. 8; *Toronto General Trusts Corp.*
tral Ontario Ry., 6 O. L. R. 1; and see *Breeze* v. *Midland Railway*
6 Gr. 225 (where the plaintiff claimed a mechanic's lien); and as
er public companies, see *Marshall* v. *South Staffordshire Tram-*
Co., 1895, 2 Ch. 36; Kerr on Receivers, 467, 50. The Supreme
has jurisdiction to appoint a receiver of a railway company
instance of a judgment creditor of the company, whether the
y is under Provincial, or Dominion control, unless, in the case
ways under Dominion control, there is any Dominion legislation
ing otherwise: *Wile* v. *Bruce Mines Ry.*, 11 O. L. R. 200. Where a
y company had been ordered to be wound up, and an unpaid
brought a suit to enforce his lien for purchase money, it was held
e was entitled to an injunction restraining the company from
be land until payment of the purchase money: *Allgood* v. *Merry-*
Darlington Ry. Co., 33 Ch. D. 571; and see *Williams* v. *Ayles-*
Buckinghom Ry. Co., 28 L. T. 547; but see *contra*, *Lincoln*
Mills Co. v. *St. Catharines N. C. Ry. Co.*, 19 Ont. 106, and see
Rule 460.

eceiver will not be appointed by way of equitable execution of Receivers refused.
ment debtor's property generally: *Hamilton* v. *Brogden*, No. 1,
V. N. 14; *Harris* v. *Beauchamp*, *supra*; nor to receive all debts
the judgment debtor: *Re Asselin & Cleghorn*, 6 O. L. R. 170
in the case of foreigners: see *supra*); nor of a particular fund
rest after the death of the defendant in the action when the
nas become vested in his legal representative: *Re Shepherd*, 43
131; nor of money payable in respect of insurance of chattels
ed under *The Execution Act* (R. S. O. c. 80), s. 3; the money
he place of the chattels, and is subject to the same protection:
Muter, 19 Ont. App. 94; nor of a debtor's interest in land vested
tees on trust to permit the debtor and his wife and children to
or a home: *Cameron* v. *Adams*, 25 Ont. 229; nor of a fund appli-
or the benefit of the debtor in the discretion of trustees: *Re*

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McInnes v. *McGow*, 30 Ont. 38; nor of a husband and wife's interest in furniture of which they were entitled to the use under a settlement: *Whitoker* v. *Cohen*, 68 L. T. 451; nor of the income of a married woman debtor, becoming due after the date of the judgment, as to which at that date she is restrained from anticipating, even as regards an instalment in arrear at the time of the application: *Hood Barrs* v. *Cothcart*, 1894, 2 Q. B. 559; 70 L. T. 862, 865; and see *Bolitho* v. *Gidley*, 1905, A. C. 98; 92 L. T. 369; nor, in the case of a defendant, a theatre company, to receive the money paid by the public for admission to the theatre: *Codogan* v. *Lyric Theatre Co.*, 1894, 3 Ch. 338; nor of unliquidated damages the subject of a pending action: *Control Bonk* v. *Ellis*, 27 Ont. 583; nor of a sum earned by a judgment debtor but not yet payable, and liable to certain contingent deductions: *Monufocturers' Lumber Co.* v. *Pidgeon*, 22 O. L. R. 36, 378; 24 O. L. R. 354; nor of shares of stock in a foreign company said to be owned by the debtor; nor of the interest of ths debtor in a certain policy of insurance on the life of anotber assigned to the debtor: *Re Asselin & Cleghorn*, *supro*; nor of moneys which may become payable to a judgment debtor hy virtue of his ownership of patenta for inventions: *Edwords* v. *Picurd*, 1908, 2 K. B. 903; 101 L. T. 416: In Ontario, however, patent rights are saleabis in execution by the sheriff: see *The Execution Act* (R. S. O. c. 80), s. 18, which fact might possibly ensble the Court to grant a receiver in such a case.

Semble, in England a debtor's legal remainder in real estate is not a sufficient present interest to justify the appointment of a receiver with a view to realization: see *Re Horrison & Bottomley*, 1899, 1 Ch. 465. In Ontario there is the further reason against the appointment of a receiver in such case, that under *The Execution Act* (R. S. O. c. 80), s. 34, the interest in remainder can be sold under an execution.

Wbere the execution debtor had a mere right of use of cbattel property for life under a settlement, a receiver of such property was refused: *Whitoker* v. *Cohen*, 69 L. T. 451.

Practice.

Practice.—A motion for an *interim* receiver, or a receiver hy way of equitabis execution, is usually made on two days' notice, or, in cases of emergency, *ex porte*, to a Jndge sitting in the Weekly Court—a Local Judge of the Supreme Court may grant a receiver by way of equitable execution: see *Rule* 210, and notes *infra*. A receiver and manager, without limit of time, may be granted in a proper case at the trial or other final disposition of an action. Pending an appeal from a judgment directing the taking of partnership accounts, a receiver was appointed by the Court of Appeal: *McCurdy* v. *Embree* (No. 2), 14 O. L. R. 325.

Where the application is made on behalf of an execution creditor, the application may he made in the action in which the judgment has been recovered, and it is not proper to institute another action for tbe purpose of obtaining a receiver: *Ib.*; *Smith* v. *Cowell*, 6 Q. B. D. 75; *Salt* v. *Cooper*, 16 Ch. D. 544.

Where the plaintiff desires the appointment of a receiver, otherwise than by way of equitable execution, he should claim that relief by the indorsement on his writ of summons, and in his statement of claim.

A defendant in order to obtain the appointment of a receiver must file a counter-claim claiming thst relief, where bis right to such relief arises out of some matter independent of the plaintiff's case: and if

relief is required before he is in a position to file a counter-claim Sec. 17.
oss action must be commenced: *Carter* v. *Fey*, 1894, 2 Ch. 541; where such right arises out of the plaintiff's case, a counter-claim not appear to be necessary; *Sargant* v. *Read*, 1 Ch. D. 600.

Application for Appointment.—The application for the appoint- Application for, to be made in Court.
t of a receiver must in the first instance be made in Court, upon on for that purpose where the appointment is required to be made *lente lite*, or else at the trial, or on motion for judgment in the on; but after a receiver has been appointed, applications to fill ncies subsequently occurring in the office may be made in Cham- *Grole* v. *Bing*, 9 Ha. App. I, but the order for a receiver has been ted in Chambers, by consent: *Blackborough* v. *Ravenhill*, 16 Jur. ; and see 22 Sol. Jour. 914.

defendant may, by his defence or counter-claim, claim an injunc- or the appointment of a receiver, and may, in such a case, before ment, apply for an interim injunction and receiver. He may do notwithstanding that the plaintiff has already served notice of on for the like purpose. In such case, one order will be made on wo motions, but the conduct of it will, in general, be given to laintiff: *Sargant* v. *Read*, 1 Ch. D. 600.

motion for a receiver is made to a Judge sitting in the weekly : see *Rules* 205, 207; whether a Local Judge has power to grant iver under *Rule* 210 has not been settled.

cept in cases of emergency the application should be on notice: *ucas* v. *Harris*, 18 Q. B. D. 134; *Re Potts*, 1893, 1 Q. B. 648; *g* v. *Blythe*, 1899, 1 Q. B. 557; *Re Connolly Bros.*, 1911, 1 Ch. 731; . T. 693. In cases of emergency a receiver will be appointed *rte* not only before appearance: *Taylor* v. *Eckersley*, 2 Ch. D. 302; fore service of writ: *Re H.'s Estate*, 1 Ch. D. 276; *Colebourne* v. *urne*, 1 Ch. D. 690; *Hyde* v. *Warden*, 1 Ex. D. 309; *Evans* v. *Lloyd*, 1889, 171; and not only by way of equitable execution (see v. *Kent*, 11 T. L. R. 197; 72 L. T. 186), where delay might mean f the property.

cases of equitable execution the practice has grown up of apply- *parte*, in cases of emergency, for an interim order for a limited and of applying within such time to continue and make per- t the appointment: see *Stark* v. *Ross*, 17 P. R. 237. This has the effect of an injunction restraining the debtor from dealing he property, as it enables the interim receiver to obtain posses-

dling an application for a receiver by way of equitable execution, been held in England to be not proper with the summons to ause to grant *ex parte* an injunction restraining the debtor from g with the property unless it be shown that there is danger of ing made away with before the hearing of the application: *Bank* v. *Medway U. Nav. Co.*, 1905, 2 K. B. 359; 93 L. T. 224.

an action for the specific performance of an agreement to accept of a farm, in which judgment had been given for the defendant, laintiff having appealed, the Court of Appeal (no previous appli- having been made to the Divisional Court or a Judge) appointed laintiff receiver and manager of the farm without security, on dertaking to abide by any order which the Court might make matter: *Hyde* v. *Warden*, 1 Ex. D. 309.

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Receiver should be disinterested, unless Court appoints one of the parties.

A receiver should in general be wholly disinterested, unless the parties otherwise consent, or the Court is of opinion that the appointment of one of the parties would be beneficial to the estate: *Sargant* v. *Read*, 1 Ch. D. 600. Where a party to the action is appointed it is only on his undertaking to act without salary: *Ib.*; *Wilson* v. *Greenwood*, 1 Sw. 471, 483; *Blakeney* v. *Dufaur*, 15 Beav. 40, 44; Kerr on Receivers, 95. Where a receiver is appointed of trust property, the *cestui que trust* is entitled to have the superintendence of the trustee, as a check upon the receiver; the trustee should not therefore be himself appointed, except under special circumstances: Kerr, 95, 86; and where a receiver is appointed of the property of any person not *sui juris*, the guardian or committee of such person should not be appointed for the same reason, nor yet any person connected with him, or the solicitor in the action: *Re Lloyd*, 12 Ch. D. 447; nor a Master of the Court: *Ex parte Fletcher*, 6 Ves. 427.

Who should be appointed, of trust estate.

The plaintiff may be appointed receiver in cases of emergency: *Taylor* v. *Eckersley*, 2 Ch. D. 302; and under special circumstances: *Hyde* v. *Warden*, 1 Ex. D. 309; but not the plaintiff's solicitor: *In re Lloyd, Allen* v. *Lloyd*, 12 Ch. D. 447; one of the members of a dissolved partnership in certain cases may be appointed receiver: *Sargant* v. *Read*, 1 Ch. D. 600. The manager of a mining company was appointed receiver in an action by debenture holders against the company for foreclosure: *Peck* v. *Trinsmaron Iron Company*, 2 Ch. D. 115.

And the execution creditor is sometimes appointed the receiver by way of equitable execution: *Fuggle* v. *Bland*, 11 Q. B. D. 711. See also *Book* v. *Ruth*, 20 C. L. J. 193; *Hewett* v. *Murray*, 52 L. T. 380; *McGarry* v. *White*, 16 L. R. Ir. 322; but a plaintiff cannot in this way get himself made a sort of general assignee of all his debtor's assets. *Re Asselin & Cleghorn*, 6 O. L. R. 170.

Security.

Security.—The receiver must, as a rule, give security, but, in cases of emergency, an interim receiver will be appointed without security: *Taylor* v. *Eckersley*, 2 Ch. D. 302. Persons who are deeply interested in the proper management of a concern will not always be required to give security: *Boyle* v. *Bettws, etc., Co.*, 2 Ch. D. 726.

Where a receiver is appointed subject to security being given, the appointment does not take effect until the security is perfected, and even where the security is given, the appointment does not relate back to the date of the order: *Ridout* v. *Fowler*, 1904, 1 Ch. 658; 2 Ch. 93; 90 L. T. 147; *Edwards* v. *Edwards*, 2 Ch. D. 291; therefore, where it is desired to intercept a fund, an injunction restraining any dealing with it until the appointment of a receiver is completed should also be obtained, or the object of the receivership order may be frustrated.

Where a trust company, approved by the Lieutenant-Governor of Ontario, is appointed receiver, it need not give security unless otherwise ordered. R. S. O. c. 184, s. 20 (5).

Interim Receiver.—An interim receiver is usually only appointed to maintain things as far as possible in *statu quo* until a permanent appointment is made, or until an action has been tried—but an interim receiver of a partnership may be ordered to sell the assets: *McLaren* v. *Whiting*, 16 P. R. 552.

As to whether interim receiver superseded by judgment, quære?

It has been said that an interim receiver is superseded by the judgment subsequently given in the action, unless he is expressly continued by it: Kerr on Receivers, 2nd ed., 186; *Reeves* v. *Neville*, 10 W. R. 335; Taylor's Orders, 3nd ed., 274; *Gibson* v. *Montfort*, 1 Ves. Sr., 485; but the authorities cited do not appear to bear out the proposition: see Seton, 5th ed., 638. The question would appear to depend

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the terms of the order appointing the receiver; if appointed "until trial," then it would seem clear, that unless continued by the gment pronounced at the trial, he would be superseded by it; but appointed generally without any limitation as to time, or "until Court make order to the contrary," then it would seem that he uld not necessarily be superseded by the judgment subsequently nounced, even though not expressly continued by it: *Davies* v. *Vale Evesham Preserves*, 73 L. T. 150.

Where a receiver has been appointed by the judgment in the action erally, it is not necessary that the judgment on further directions uld continue him: *Re Underwood*, 60 L. T. 384.

A receiver is liable to account, and his sureties are responsible, for moneys coming to his hands in that capacity at any time: *Smort Flood*, 49 L. T. 467; but not for moneys received by him after his nt to act had ceased: *Re Walker*, 1907, 2 Ch. 120; 96 L. T. 864.

Appellate Division.

The appointment of a receiver is in the discretion of the Court, and Appellate Division will not, as a rule, interfere with that discre-: *Nothard* v. *Proctor*, 1 Ch. D. 4.

For the practice in the Master's Office on the appointment of re-ers, and the security, if any, to be given by them: see *Rule* 458, notes.

Appointment not to prejudice prior mortgagees.

Where a receiver is appointed at the instance of a judgment cre-r, it is without prejudice to the claims of prior mortgagees. If : *Lyon* v. *Mathieson*, 2 Giff. 71; *Wildy* v. *Mid-Hants Railway Co.*, V. R. 409; *Potts* v. *Warwick & B. C. Co.*, Kay, 145.

A judgment creditor at whose instance a receiver is appointed is a "secured creditor" within the English Bankruptcy Act: *Re s*, 1893, 1 Q. B. 648; 68 L. T. 229; *sed vide*, *Levasseur* v. *Mason*, , 2 Q. B. 73; 64 L. T. 761.

Effect, and enforcement of order for receiver.

ffect, and Enforcement, of Order.—The appointment of a re-er (at any rate when not accompanied by a direction to any per-to pay) creates no lien or charge on the property of which he is to eceiver, and is not equivalent to a seizure in execution: *Croshow* v. *ihurst Ship Co.*, 1897, 2 Ch. 154; but as to the extent to which it ents the debtor from dealing with the fund prejudicially, and ents other persons from obtaining priority in regard to it: see *Marquis of Anglesey*, *De Gale* v. *Gardner*, 1903, 2 Ch. D. 727; 89 . 384.

The appointing of a receiver operates as an injunction against the es to the action interfering with the receiver in the discharge s duties.

Where a receiver and manager of a partnership business has been inted, it is a breach of the order for one of the partners to set rival business and spread reports that the partnership business out to be closed: *Dixon* v. *Dixon*, 1904, 1 Ch. 161; 89 L. T. 272.

Where a creditor has obtained an order appointing himself receiver s debtor's interest in personal estate, the Court has no jurisdic-to make a declaration of charge in his favour upon such interest: v. *Prentice*, 1892, 2 Ch. 428; 67 L. T. 107; nor to order a sale: *eyrecave* v. *Nicholson*, 97 L. T. Jour. 286; 42 W. R. 702.

s to the effect of an order for a receiver as against a trustee in ruptcy: see *Levasseur* v. *Mason*, 1891, 2 Q. B. 73; *Re Potts*, 1893, B. 648; 68 L. T. 229; *Croshaw* v. *Lyndhurst*, 1897, 2 Ch. 154.

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A receiver appointed by way of equitable execution is not entitled to carry on the debtor's business, but he may prevent the debtor or anyone else from carrying it on, on the debtor's premises. *Cadogan v. Lyric Theatre*, 1894, 3 Ch. 338, 344.

Property in possession of a receiver is not for all purposes *in custodid legis*: *Re Hoare*, 67 L. T. 45; but it is so, so far as to prevent the party ultimately found entitled, from claiming damages for its detention while in his possession: *The Peruvian Guano Co. v. Dreyfus*, 1892, A. C. 166.

A receiver of the debtor's share in an estate which could not be reached by execution in the usual way, after refusal of the debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and, if necessary, for the removal of the executor: *Mones v. McCallum*, 17 P. R. 393.

A person who is not a party to an action has been held not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands: *Brocklebank v. East London Railway Company*, 12 Ch. D. 839; see *Neate v. Pink*, 15 Sim. 450; 3 Mac. & G. 476. *Semble*, the party having the carriage of the proceedings is the proper party to apply in such a case.

Third Persons Claiming Property in the Hands of a Receiver.—A person claiming to be entitled to property taken possession of by a receiver cannot interfere with the receiver's possession without first obtaining the leave of the Court; to do so would be a contempt of Court, even though the right claimed were well funded. On proper application to the Court his rights will be protected: see *Re Morrison, Cooke v. The Company*, 108 L. T. 675.

A third person injuriously affected by the appointment of a receiver may move to rescind it: *McLean v. Allen*, 13 P. R. 255.

Court may award damages, etc.

18. Where the Court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement or against the commission or continuance of a wrongful act, or for the specific performance of a covenant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as may be deemed just. 3-4 Geo. V. c. 19, s. 18.

Damages in lieu of specific performance.

Damages in Lieu of Specific Performance.—This section is taken from R. S. O. 1877, c. 40, s. 40, which was taken from Imp. Act, 21 & 22 Vict. c. 27, s. 2 (6). This section does not enable the Court to grant damages in a case where before the Act damages were not recoverable at law, *e.g.*, in the case of an oral agreement not capable of specific performance in Equity, and in respect of which the defendant, in an action at law for damages, might have successfully pleaded the

atute of Frauds: *Re Northumberland Avenue Hotel Co., Sully's Case*, Sec. 18.
L. T. 76; 33 Ch. D. 16. See also *Lavery* v. *Pursell*, 39 Ch. D. 508.
t where, after part performance of a verbal contract for the sale of
d, the vendor re-sold the land and conveyed it to a third party; in
action for specific performance the Court awarded the plaintiff a
urn of the part of the purchase money which he had paid with
erest thereon, and also damages for the breach of the contract by
ue of its jurisdiction under *The Judicature Act* (R. S. O. (1897)
1), s. 41 (see s. 3, *supra*, p. 3, *et seq.*), although under this section the
rt might not have jurisdiction to give damages in such a case:
intyre v. *Stockdale*, 27 O. L. R. 460.

Damages in Lieu of an Injunction.—The following is stated as Damages in lieu of injunction.
a good working rule," under this section for awarding damages in
of so injunction: "Damages may be given in substitution for an
unction in cases where there are found in combination the four
owing requirements, viz.: where the injury to the plaintiff's legal
hts is (1) small, (2) capable of being estimated in money, (3) can be
quately compensated by a small money payment, and (4) where
case is one in which it would be oppressive to the defendant to
nt an injunction": per A. L. Smith, L.J., in *Shelfer* v. *City of*
don Electric, etc., Co., 1895, 1 Ch. 287; see S. C. *sub nom.*, *Meux*
ondon, etc., 72 L. T. 34; and *Cowper* v. *Laidler*, 1903, 2 Ch. 337;
L. T. 469.

The Court has no jurisdiction under this section to award dam-
where no wrongful act has been actually committed, but only
atened, by the person against whom the injunction is claimed:
per v. *Laidler*, *supra*; *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch. D.
62 L. T. 518; *Martin* v. *Price*, 1894, 1 Ch. 276; 70 L. T. 228; but
Holland v. *Worley*, 26 Ch. D. 578.

ubstantial damages can only be given where there is a proper
for an injunction, and in lieu of it: *Proctor* v. *Bayley*, 42 Ch. D.
38 W. R. 100; *General Accident Assce. Co.* v. *Noel*, 1902, 1 K. B.
86 L. T. 555; but nominal damages may be given in addition to
injunction: *Lipman* v. *Pulmon*, 91 L. T. 132; 1904, W. N. 139.

Where the act sought to be restrained is a continuing actionable
nce, although there is jurisdiction to award damages in lieu of
junction, yet it is said it ought to be exercised under very excep-
l circumstances: *Meux* v. *London, etc., supra*.

here a plaintiff has established his right to a perpetual injunc-
the Court has no power to oblige him to accept damages in lieu
injunction: *Martin* v. *Price*, *supra*; *Krehl* v. *Burrell*, 1 Ch. D.
and *Greenwood* v. *Hornsey*, 33 Ch. D. 471, in which *Holland* v.
y, 26 Ch. D. 378, was distinguished. See also *Allen* v. *Ayres*,
1884, 242.

here the wrongful act has ceased before trial, the Court may
this Act, in lieu of an injunction, which would be useless,
at the trial the damages from the commencement of the wrong-
t, including damages accrued since the writ: *Fritz* v. *Hobson*,
D. 542, 557.

here the wrongful act has been discontinued before suit, without
laintiff's knowledge, it was held that the Court had no jurisdic-
under the above enactment to make a decree for damages:
ington v. *Palmer*, 18 Gr. 488.

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See also *White* v. *Boby*, 37 L. T. 652; *King* v. *Rudkin*, 6 Ch. D. 160; *National Provincial Plate Glass Ins. Co.* v. *Prudential Ass. Co.*, 6 Ch. D. 761; *Krehl* v. *Burrell*, 7 Ch. D. 551; *Pritt* v. *Hobson*, 14 Ch. D. 542; *Rock Portland Cement Co.* v. *Wilson*, 52 L. J. Chy. 217; *Sayers* v. *Collyer*, 28 Ch. D. 103, and *Serrao* v. *Noel*, 15 Q. B. D. 549; *Lawrence* v. *Horton*, 38 W. R. 555; *Ryos* v. *Mutual, etc.*, 1893, 1 Ch. 116; *Elmore* v. *Pirrie*, 57 L. T. 333; *Tamplin* v. *James*, 15 Ch. D. 222.

Relief against penalties, etc.

19. The Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as may be deemed just. 3-4 Geo. V. c. 19, s. 19.

Taken from 49 Vict. c. 16, s. 38; 53 Vict. c. 12, s. 52 (3), which, however, had nt (*a*) the words "and agreements for liquidatsd damages," which were struck out subsequently by 60 Vict. c. 15, sched. (61).

County and Division Courts Acts.

Similar power is conferred on County and District Courts by the *County Courts Act* (R. S. O. c. 50), s. 28, and also on Division Courts by the *Division Courts Act* (R. S. O. c. 63), s. 65; see also sec. 23, *infra*.

Relief in equity formerly where compensation in money is adequate.

Wherever a penalty or a forfeiture is imposed to secure the performance of some act, or the enjoyment of some right or benefit, if the breach of the act, or the withholding of the right or benefit can be adequately compensated in money, relief from the penalty or forfeiture may be decreed: *e.g.*, where the payment of a larger sum is imposed in the event of failure to pay a stipulated sum by a given day, such larger sum is regarded as merely a security for legal interest during the time the money is in default: *Aylet* v. *Dodd*, 2 Atk. 239; *Stoman* v. *Walter*, 1 Bro. C. C. 418; *Sanders* v. *Pope*, 12 Ves. 282; *Davis* v. *West*, 12 Ves. 475. So where the performance of several acts is secured by a covenant to pay a sum, which as to some of the acts, would be too large, and as to others too small, a compensation for the injury, the sum is considered to be a penalty: see *Kemble* v. *Forren*, 6 Bing. 141. But where the damages from the breach cannot be measured, then the sum agreed to be paid in default of performance, is held to be liquidated damages from which no relief can be granted: *Atkyns* v. *Kinnier*, 4 Ex. 776, 783; *Galsworthy* v. *Strutt*, 1 Ex. 659; *Law* v. *Redditch*, 1892, 1 Q. B. 127; 66 L. T. 76; *Elphinstone* v. *Monkland, etc.*, 11 App. Cas. 332. See also note to sec. 19 *infra*, and *Townsend* v. *T. H. & B. Ry. Co.*, 28 Ont. 105, there mentioned.

Agreemant for liquidated damagas.

Relief may be granted under this section in respect of a covenant contained in an instrument made before the passing of the Act, or the Acts on which it is founded, as regards any subsequent breach: *Page* v. *Bennett*, 2 Giff. 117. See further as to cases in which the Court will, or will not, relieve against forfeitures: Story's Eq., chap. 34.

Landlord and Tenant.

By *The Landlord and Tenant Act* (R. S. O. c. 155), s. 20, relief may be given in respect of forfeitures incurred by breach of certain covenants in leases—but certain covenants are exempted from the operation of that section, viz.:—

(*a*) Covenants or conditions against assigning, under letting, parting with the possession, or disposing of the land leased;

(*b*) Conditions of forfeiture in case of the bankruptcy of the lessee, or on his making an assignment under *The Assignments and Preferences Act*—or

(c) On the taking in execution of the lessee's interest, and Sec. 19.

(d) Covenants or conditions in mining leases for allowing the or to have access to and inspect books, accounts, records, weighing chines, or other things,—or to enter and inspect the mine, or the kings thereof.

Relief will be given to a tenant against a forfeiture incurred by the -payment of rent, or other payment, *e.g.*, the non-payment of taxes er a covenant: *Buckley* v. *Beigle*, 8 Ont. 85: *The Landlord and ant's Act* (R. S. O. c. 155), s. 20 (3).

The general leaning of the Court was formerly against granting ef against forfeitures for breach of covenants to repair, in the nce of special circumstances: *Hill* v. *Barclay*, 16 Ves. 402; 18 62; *Gregory* v. *Wilson*, 9 Ha. 683; *Nokes* v. *Gibbon*, 3 Drew. 681; ft v. *Goldsmid*, 24 Beav. 312; *Burt* v. *Gray*, 1891, 2 Q. B. 98; but *Bamford* v. *Creasy*, 3 Giff. 675; *Hughes* v. *Metropolitan Ry. Co.*, pp. Cas. 439; or of covenants to insure: *Green* v. *Bridges*, 4 Sim. 96; her would the Court grant relief against a forfeiture for breach of venant by a lessee not to assign the term without leave: *Hill* v. *ley*, 18 Ves. at p. 63; *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417; 68 L. T. *Eastern Telegraph Co.* v. *Dent*, 1899, 1 Q. B. 835; 80 L. T. 459; but quitable assignment is not a breach of such a covenant: *Gentle* v. *kner*, 1900, 2 Q. B. 267; 82 L. T. 708.

nder *The Landlord and Tenant Act*, as now framed, the Court relieve against forfeitures for breach of covenants to repair or re; but not against covenants not to assign: see *supra*; and see *an* v. *Rose*, 106 L. T. 907 (covenant to repair); *Mulhews* v. *Small-*, 1910, 1 Ch. 777; 102 L. T. 228 (covenant not to sub-let). This on does not enable the Court to relieve a defendant from the ity for "full satisfaction" recoverable under *The Landlord and nt Act* (R. S. O. c. 155), s. 54 (2), where distress had been where no rent is due: *Webb* v. *Box*, 19 O. L. R. 540.

Forfeitures.—The former Court of Chancery had power to relieve st forfeitures. This section seems to confer on the Supreme more ample power. Forfeitures, relief against.

e restrictions in *The Landlord and Tenant Act*, above referred ould seem, however, to preclude the Court from granting relief st forfeitures of leases in respect of breaches of covenants, which xcepted from the operation of sec. 20 of that Act.

rmerly a forfeiture for non-payment of rent could not be re- against, but under *The Landlord and Tenant Act*, as now d, it may be.

lessee, against whom ejectment is brought for non-payment of may stay proceedings at any time before judgment by paying Court all the rent in arrear and the costs of the action: *The rd and Tenant Act* (R. S. O. c. 155), s. 20 (6); *Denison* v. *Mait-* 22 Ont. 166; *Howard* v. *Fonshawe*, 1895, 2 Ch. 581; 73 L. T. 77; v. *Smee*, 1907, 2 K. B. 8.

der this section the Court cannot relieve against the consequence -compliance with the conditions of a policy of insurance, as to and proof, of the death of the insured: *Johnston* v. *Dominion ada Guarantee & A. Co.*, 17 O. L. R. 462.

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Penalties, relief against.

Penalties.—The Court would seem to have no jurisdiction under this section to relieve against the payment of liquidated damages for breach of contract: *Empire Loan & S. Co.* v. *McRoe*, 5 O. L. R. 710; although it had under 58 V. c. 12, s. 52 (3) as originally framed: see *Townsend* v. *T. H. & B. Ry.*, 28 Ont. 195; and see *Clyde Engineer, etc., Co.* v. *Castanedo*, 91 L. T. 666. In deciding whether a sum payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the Court must take into consideration all the circumstances in order to ascertain the intention of the parties. The fact that the sum is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the Court to treat it as a penalty, although it raises a presumption that that was the intention; nor does the fact that the sum had been deposited at the making of the contract compel the Court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties: *Pye* v. *British Automobile, etc.*, 1906, 1 K. B 425.

"Liquidated damages."

Where a stipulation for "liquidated damages" is really in the nature of a penalty, the Court may relieve against it. Notwithstanding an express stipulation that for breach of an agreement a specific sum will be paid as "liquidated damages," the Court may, in view of all the circumstances, find that it is really a "penalty," and as such may relieve against it: *Townsend* v. *Rumboll*, 19 O. L. R. 433; but see *Pelee Island* v. *Doty*, 23 O. L. R. 402; *De Soysa* v. *De Picss Pol.* 1912, A. C. 194; 105 L. T. 642; *Webster* v. *Bosanquet*, 1912, A. C. 394; 106 L. T. 357. And notwithstanding in an agreement it may be provided that a certain sum shall be paid by way of "penalty," the Court may, in view of all the circumstances, come to the conclusion that the specified sum is really "liquidated damages": see *McManus* v. *Rothschild*, 25 O. L. R. 138. Where there is a stipulation in an agreement that if on a certain day the agreement remains wholly or in part unperformed a forfeiture is to be incurred, that stipulation is held to be in the nature of a penalty which may be relieved against on performance of the agreement: *Kilmer* v. *British Columbia Orchard Lands*, 1913, A. C. 319; 108 L. T. 306.

Jurisdiction as to validity of provincial statute.

20.—(1) The Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for Canada, or the Attorney-General of Ontario, for a declaration as to the validity of any statute, or any provision in any statute of this Legislature, though no further relief be prayed or sought, and the action shall be sufficiently constituted if such Attorney-General is a party thereto.

Judgment appealable.

(2) A judgment in the action shall be appealable like other judgments of the Court. 3-4 Geo. V. c. 19, s. 20.

Under this section, or R. S. O. c. 85, cases have been submitted as to the validity of 53 V. c. 56, s. 18: *Re Local Option Act*, 18 Ont. App. 572; 24 S. C. R. 145, 170; 1896, A. C. 348; of 51 V. c. 5 (O.) (remitting of sentences): *Atty.-Gen. for Canada* v. *Atty.-Gen. for Ontario*, 20 Ont. 222; 19 Ont. App. 31; 23 S. C. R. 458; of R. S. O. 1897.

17, s. 11; *Re Assignments and Preferences Act*, 20 Ont. App. 489; Sec. 20.
. A. C. 189; of R. S. O. c. 158, s. 6; *Re Queen's Counsel*, 23 Ont. App.
S. C. *sub nom. Atty.-Gen. for Canada* v. *Atty.-Gen. of Ontario*,
. A. C. 247; *The Lord's Day Act* (R. S. O. 1897, c. 246); *Attorney-*
ral for Ontario v. *Hamilton Street Ry*, *infra*.

s to the questions which should be put under R. S. O. c. 85: see
rney-General for Ontario v. *Hamilton Street Ry. Co.*, 1903, A. C.
89 L. T. 107.

he Supreme Court has no jurisdiction to entertain an appeal from
pinion of a Provincial Court upon a reference made by the Lieut.-
rnor in Council under a Provincial Act, although the statute
des that such opinion shall be deemed a judgment of the Court:
n Colliery Co. v. *A.-G. of Brit. Columbia*, 27 S. C. R. 637.

part from this section the Court would appear to have jurisdiction
ntertain an action to determine the true meaning of a statute
r which officers of the Crown were assuming to act: see *Dyson* v.
ttorney-General, 1911, 1 K. B. 410; 1912, 1 Ch. 158; 103 L. T. 707;
hes v. *The Attorney-General*, 1911, 2 Ch. 139; 1912, 1 Ch. 173; 105
193, 758.

is section enables the Attorney-General for Canada, or the Attor-
eneral for Ontario, to institute actions for the determination of
alidity of any statute, or any provision in any statute of the
io Legislature. It does not extend to Acts of the Dominion
ment.

rther provision is made by section 33, *post*, for the determination
validity of statutes where such questions arise incidentally in
ction; that section, it will be observed, applies both to Provincial
ominion statutes.

Where an action is brought in the Supreme Court cause of action for which a suit or action has been ght and is pending between the same parties or their esentatives in any place or country out of Ontario, Court or a Judge may make an order staying all eedings in the Supreme Court until satisfactory is offered to the Court or a Judge that the suit tion so brought in such other place or country out ntario is determined or discontinued. 3-4 Geo. V. s. 21. Stay of proceedings if action for same cause is pending out of Ontario.

power to stay under this section is a discretionary one, and
glish cases are authorities as to the exercise of discretion.
there is no similar statutory provision in England: *First*
Bank v. *Coleman*, 2 O. L. R. 159.

rule in England is, that where one of two actions for the same English rule.
s pending abroad, the Court has jurisdiction to stay, but the
applying must make out a special case for relief; whereas
all the actions are in England, or *semble* in the King's Courts
re, the concurrent proceedings are *primâ facie* vexatious: *Mc-*
v. Lewis, 21 Ch. D. 202; 22 Ch. D. 397: *The Christiansborg*, 10
1. The Court will not consider the double litigation vexatious

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where there are substantial reasons to induce the plaintiff to sue in both countries; as when he can get judgment in each action, but execution is more easily obtained in one than in the other: *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 225; *Hyman* v. *Helm*, 24 Ch. D. 531; *Direct U. S. Cable Co.* v. *Dom. Tel. Co.*, 8 Ont. App. 416; *Armstrong* v. *Armstrong*, 1892, P. 98.

Whether a Court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority is merely a question for the exercise of judicial discretion: *Phosphate Sewage Company* v. *Molleson*, 1 App. Cas. 780. See *Hounston* v. *M. of Sligo*, W. N. 1884, 29, reversed, p. 151.

There is a discretion to stay proceedings in the Supreme Court for damages for a collision, in respect of which proceedings are being taken *in rem* in a Vice-Admiralty Court: *The Peshawur*, 48 L. T. 796; 8 P. D. 32.

Rule in Ontario.

Under the above section, proceedings were stayed in this Province, where the matter could more conveniently be disposed of in the foreign Court, by reason of the suit being there in a more advanced stage, and the parties being personally subject to the jurisdiction of the foreign Court, and the latter was the most convenient, in view of the evidence to be procured: *Howell* v. *Jewett*, 7 P. R. 69. A stay was also ordered pending an appeal in a foreign Court, terms as to diligence in prosecuting the appeal being imposed: *Huntington* v. *Attrill*, 12 P. R. 36.

Where a Bank was being wound up in Ontario under the Dominion Winding-up Act, an injunction was granted restraining proceedings in a Montreal Court against the Bank, and also proceedings against the liquidators for things done in their official capacity, and from attacking the validity of their appointment: *Baxter* v. *Central Bank*, 20 Ont. 214.

Where there are substantial reasons for double litigation the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court. Thus where a defendant resident in Ontario was sued there on a promissory note, the Court refused to stay proceedings until after the determination of attachment proceedings in a foreign Court, the only effect of which would be to make available towards payment of the note certain stock in a Company domiciled in a foreign country: *First Natchez Bank* v. *Coleman*, 2 O. L. R. 159.

As to staying an action in Ontario where the plaintiff's claim is being prosecuted in bankruptcy proceedings in England: see *Maritime Bank* v. *Stewart*, 13 P. R. 86, 262, 491.

Rules of equity to prevail.

22. In questions relating to the custody and education of infants, and generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail. 3-4 Geo. V. c. 19, s. 22.

See English J. A., 1873, ss. 25, (10), and (11).

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At Common Law the father of an infant (or his testamentary rdian, or guardian appointed by the Court: *Wellesley* v. *Beaufort*. & M. 639), had a *prima facie* right to the custody of the infant, n against the mother, unless the child was of an age to judge for self, or there was an apprehension of cruelty from the father, or amination in consequence of his immorality or gross profligacy. this right may be asserted by the father against persons to whom has by deed agreed to give the custody of his child, because such ements ars contrary to public policy and are revocable: *Re Hutch-n*, 26 O. L. R. 601; 28 O. L. R. 114. Common Law rule.

f the infant was of an age to elect for himself, the Court would ely interfere so far as to get it free from illegal restraint, with-handing it over to anybody: *Rex* v. *Delaval*, 3 Burr, 1435. But hs absence of any right of choice, the Court transferred the infant s proper legal custody. The right to such an election was decided epend upon age alone, and not on mental capacity: see *Reg.* v. *ke*, 7 E. & B. 186; and it was settled that no such choice could ade, at all events by a female infant, under the age of sixteen: *Re Andrews*, L. R. 8 Q. B. 158.

he English Court of Chancery had original jurisdiction over persons and property of infants, springing from the right of the n as *parens patriæ*, and had power to interfere with the Common rights of the father, in the interest of the infant, on the ground s father's cruelty, immorality, etc. (as to the father's right in case, see further notes below, and *Swift* v. *Swift*, 6 N. R. 137; 34 Chy. 209, 394); or of his agreement, express or implied, to his rights: see Simpson on Infants, 136 *et seq.* The jurisdic-was not often exercised except where the Court had the means plying property for the use and maintenance of the infant: *Ib.* existence of the jurisdiction, however, was affirmed in *Re Mc-*, 1892, 2 Ch. 496; 1893, 1 Ch. 143. Equity rule.

nder *The Judicature Act*, the Supreme Court has now jurisdiction regard to the cars and custody of infants; and, in the exercise t jurisdiction, ths rnles of Equity are to prevail. Under Judicature Act.

here an infant is in the custody of some person who is required iver him up, the application may be made for a *habeas corpus ad iendum*, and the Court on the return of ths writ will determine om the future custody of the infant should be committed, but plication may also be mads by originating notice entitled in the r of the infant: *Rule* 10; *Re Smart*, 12 P. R. 312, 435, 625; 9 C. 200; *Re Kenna*, 29 O. L. R. 590.

wife who left her husband's home without reasonable cause, with her their only child, was ordered forthwith to deliver ild into the custody of the fathsr, with liberty to either party ply in Chambers as to access: *Constable* v. *Constable*, 34 W. ; and see *Re Mathieu*, 29 Ont. 546.

abeas corpus should not issue where the person, in whose cus-hs child had been, has parted with the custody of the child t in the case of this being done to evade the process of the snd so is virtually a contempt): *Reg.* v. *Barnardo*, (*Gossage's* 24 Q. B. D. 283; 1892, A. C. 326, *sub nom. Bornardo* v. *Ford*. ling *Reg.* v. *Barnardo*, 23 Q. B. D. 305.

re is no power in the Court or a Judge to order the issue of a *habeas corpus* directed to a person who at the date of the order of the jurisdiction: *Rex* v. *Pinckney*, 1904, 2 K. B. 84.

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Under R.S.O. c. 153.

The rights of the parents as to custody of their infant children have been modified by statute in Ontario. *The Infants Act* (R. S. O. c. 158), s. 2, contains the provisions now in force, as follows:

The Infants' Act (R.S.O. c. 153), s. 2.

2.—(1) The Supreme Court or Surrogate Court, upon application of the mother of an infant, who may apply without a next friend, may make such order as the Court sees fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge the order on the application of either parent, or, after the death of either parent, of any guardian appointed under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise, as the Court may deem just.

Court may make order as to custody and right of access to infants.

Order as to maintenance.

(2) The Court may also make order for the maintenance of the infant by payment by the father, or out of any estate to which the infant is entitled, of such sum from time to time as, according to the pecuniary circumstances of the father, or the value of the estate, the Court deems reasonable.

Taken from Imp. Act, 49-50 Vict. c. 27, s. 5.

Where mother guilty of adultery.

(3) No order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation, or for alimony.

See Imp. Act, 49 & 50 Vict. c. 27, s. 7.

Custody of infants.

The Act mentions no age within which the mother may be given the custody of her children. In case application is made under the Act, the matter is left entirely open to the Court to deal with the infants as may seem best for them: see *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232, 239; *Re Witten*, 57 L. T. 336, W. N. 1887, 167; *Skinner* v. *Skinner*, 36 W. R. 912; *Re Hart*, 3 O. W. N. 1287; *Re Hutchinson*, 26 O. L. R. 113, 601; 28 O. L. R. 114. But the *prima facie* right of a father to the custody of his children will not be interfered with merely because his wife, without any good cause, refuses to live with him: *Re Mathieu*, 29 Ont. 546.

The Infants Act (R. S. O. c. 153), does not affect the right of a father to decide as to the religious education of his children: sec. 36, and see *Re Scanlon*, 40 Ch. D. 200; 36 W. R. 842. The Act empowers the father by deed or will to dispose of the custody and education of his infant children: see sec. 3; but any such agreement by deed is revocable by the father: *Re Hutchinson*, 26 O. L. R. 601; 28 O. L. R. 114; and see *Re Culin*, 5 O. W. N. 662.

Prima facie rights of the father.

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of 21, even though they are wards of Court, and the Court will not interfere with him in the exercise of his parental authority, except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court: *Re Agar Ellis*, 24 Ch. D. 317; *Re Mathieu*, 29 Ont. 546.

Before the jurisdiction of the Court to deprive a father of the guardianship of his children can be called into action, the Court

st be satisfied that he has so conducted himself, or placed him- Sec. 22.
in such a position, as to render it not merely better for the
dren, but essential to their safety or welfare in some very seri-
and important respect, that the father's ordinary rights should
nterfered with; see *Re W——*, 5 N. R. 363; *Smart* v. *Smart*, 1892,
. 425; 67 L. T. 510; *Re Fnulds*, 12 O. L. R. 245.

The affidavits of the mother and others, in answer to a rule for
beas corpus by a father to remove his child (a boy of nine years)
n the custody of the child's maternal grandfather, disclosing
s which shewed the applicant to be a person of intemperate and
ous life, and in the habit of using gross and disgusting language,
well as personal violence to his wife,—the Court declined to inter-
, the present custody of the child being unobjectionable: *In re*
Isworthy, 2 Q. B. D. 75. So the Court, in the interest of the
dren, declined to interfere where it was proved that there had
n a gross breach of marital duty on the husband's part, that he
her desired nor intended that his wife should live with him, and
he did, that he declined to meet or speak to her except at meals,
when the interests of the children required: *Re Elderton*, 25 Ch.
20.

See also *Re Ferguson*, 8 P. R. 556, where the father being imbecile
Court refused to take a child out of the custody of its grand-
her and her brother-in-law.

The father, a medical officer in the army, who was under a covenant
llow his wife access to his children, was held entitled to take
children with him wherever his duties called him: *Hunt* v. *Hunt*,
h. D. 606.

The custody of children was given to a guardian appointed by the
er to be brought up in the faith of the father, it not appearing
e for the benefit of the children to do otherwise: *Re Chittmon*
nts, 25 Ont. 268.

Where a father had secreted two of his children, aged 8 and 11,
their mother, to prevent their being brought up in the Roman
olic religion, he was on petition of the mother under R. S. O.
3, directed to disclose the whereabouts of the younger child, and
s by the mother was provided for. No order was made as to the
r child, who was nearly 12: *Re Keith*, 7 P. R. 138.

The best interests of the children were considered on petitions Interests of the infants considered.
r the former Act, and will be under the present Act: see *Re*
l Davis, 25 Ont. 579; *Re Young*, 29 Ont. 665; *Re Mothieu*, *supra*;
unless what is asked for is for the real benefit of the child
Court will not interfere: *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311.
e Murdoch, 9 P. R. 132, the Court refused under the circum-
es to remove a child from its mother's custody, but allowed the
r to have access; see also *Re Newton*, 1896, 1 Ch. 740. In *Re*
, 8 P. R. 58, a child was allowed to remain with a stranger, having
originally placed there by the mother, the father being dead, and
nother having married again and being in poor circumstances: see
Re Dickson, 12 P. R. 659; *Smart* v. *Smart*, 1892, A. C. 425;
cGrath, 1892, 2 Ch. 496; 1893, 1 Ch. 143; *Witt* v. *Witt*, 1891,
3, 64 L. T. 121; and the interests of the child will prevail even
st the wishes of its father; see *Re Hutchinson*, *supra*; *Re Westa-*
5 O. W. N. 924.

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In *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232, though the mother was the legal guardian of a child, and had not been guilty of any misconduct to disentitle her to its custody, the Court refused to give her the custody, being satisfied that that course was essential for the welfare of the child. The grounds generally upon which a parent's rights may be interfered with were discussed in that case.

Conduct of parents considered.

In exercising its jurisdiction the conduct of the mother is taken into consideration by the Court: *Re Taylor*, 11 Sim. 178; *Re Bartlett*, 2 Collyer, 661; *Shillito* v. *Collett*, 8 W. R. 683; *Re Winscom*, 2 H. & M. 541; *Re Shaw*, referred to in 11 Sim. 182-195; *Re Holliday*, 17 Jur. 56.

As to custody of infants where both parents have been guilty of adultery: see *In re A. & B.*, 1897, 1 Ch. 786, and where the father alone was guilty: *Re Young*, 29 Ont. 665.

Removal of ward out of jurisdiction

Where the Court has made an order respecting the custody of an infant, and directed it to remain within the jurisdiction, it is a contempt of Court, punishable by attachment, to remove such infant out of the jurisdiction: *Fovard* v. *Fovord*, 75 L. T. 664.

The order may be made *ex parte* if the necessity of the case requires it: *Re Taylor*, 11 Sim. 178.

Motion as to custody.

The Court has jurisdiction to summarily order the personal attendance before it of any persons who are supposed to be in a position to give information as to the place of concealment of wards of Court: *Rosenberg* v. *Lindo*, 48 L. T. 478.

On a *habeas corpus* under *The Ontario Habeas Corpus Act* (R. S. O. c. 84), the Court may direct evidence to be taken *viva voce* to examine into the truth of the return: *Re Smart*, 12 P. R. 2.

Illegitimate child.

The desire of the mother of an illegitimate child is primarily to be considered, and unless she is shown to be unfit, she is *primâ facie* entitled to its custody as against the putative father: *Re C.*, 25 O. L. R. 218.

As to the custody of illegitimate children: see *Re Holshed*, 5 P. R. 251; *Re Brandon*, 7 P. R. 347; *Re Smith*, 8 P. R. 23; *Reg.* v. *Bernardo, Jones' Case*, 1891, 1 Q. B. 194; 1891, A. C. 388; *Reg.* v. *Armstrong*, 1 P. R. 6; *Rex* v. *Nash*, 20 T. L. R. 583; *Re Spinlove*, 5 O. W. N. 832.

As to the support of illegitimate children: see R. S. O. c. 154.

Guardians.

Guardians.—*The Infants Act* (R. S. O. c. 153), s. 28, is as follows:—

When mother to be guardian alone or jointly with others.

28.—(1) On the death of the father of an infant, the mother, if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

As to the right of a mother as guardian: see *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311.

When Court may appoint guardian.

(2) Where no guardian has been appointed by the father, or if the guardian appointed by the father is dead, or refuses to act, the Supreme Court or the Surrogate Court may from time to time appoint a guardian or guardians to act jointly with the mother.

When mother may appoint guardian.

(3) The mother of an infant may, by deed or will, appoint any person or persons to be guardian or guardians of the infant after the death of herself and the father of the infant, if the infant be then

narried, and where guardians are appointed by both parents they Sec. 22.
l act jointly.

4) The mother of an infant may, by deed or will, provisionally Provisional appointment of mother.
inate some fit person or persons to act as guardian or guardians
he infant after her death jointly with the father of the infant,
the Court, after her death, if it be shown that the father is for
reason unfitted to be the sole guardian of his children, may con-
the appointment of such guardian or guardians, who shall there-
be empowered to act, or may make such other order in respect
he guardianship as may be deemed just.

5) In the event of guardians being unable to agree among them-
es or with the father upon a question affecting the welfare of an
nt, any of them, or the father, may apply to such Court for its
ction, and the Court may make such order as may be deemed just:
eo. V. c. 35, s. 21.

This Act is in terms similar to Imp. Act, 49 & 50 Vict. c. 27.

The Court has jurisdiction to remove a guardian appointed by the Removal of guardians.
her, under sec. 28 (4), after the father's death, if that course is
the welfare of the infants: *Re McGrath*, 1892, 2 Ch. 496; 1893, 1
143; and see *Re G.*, 1892, 1 Ch. 292, where an appointment by the
her was adopted by the Court though the guardian was not ap-
ted to act jointly with the father.

As to the father's power to appoint a testamentary guardian, and
o the powers of guardians so appointed: see *The Infants Act* (R.
c. 153), s. 3.

Religious Education.—As to the father's right to control the Religious education of infants.
ious education of his children, recognized by *The Infants Act* (sec.
see *Re Agar Ellis*, 10 Ch. D. 49, where the father was held not
ve forfeited his right by promising his wife on their marriage that
children should be brought up of her religion: see also *Re*
nt, 11 Ch. D. 508; *Re Dickson*, 12 P. R. 659; *Re Scanlan*, 40 Ch.
00; 59 L. T. 599; *Re Chillman*, 25 Ont. 268; and *Re Nevin*, 1891,
299; *Re Faulds*, 12 O. L. R. 245; *Re McGrath*, *supra*.

ut the right of a father to control the religious education of his
is not absolute, and in the case of an infant having no religious
ictions of its own, his desire may be overruled by the Court upon
deration of all the circumstances of the case, and having due
d to what is apparently best for the child's welfare: *Re Kenna*, 29
R. 590.

he father's right to have his infant children educated in his reli-
faith may be lost if he allows them to be educated in another
for such a time that it would, in the opinion of the Court, be
ary to the children's interests to alter their religious education.
welfare of the children is of paramount consideration: *Re Newton*,
1 Ch. 740; 73 L. T. 692.

he fact that the infant's mother and sole guardian has married a
n of a religion different from that of the infant, was con-
ed to be no ground for interfering with the guardianship of the
er, when no attempt was made by the step-father to interfere
the infant's religion: *Re X.*, 1899, 1 Ch. 526; 80 L. T. 311.

Condon v. *Vollum*, 57 L. T. 154, a child was allowed to be
ht up of its mother's religion, as it was maintained by her, and

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the father was indifferent and made opposition only for the sake of vexing the mother. It was also held that the father's living in adultery was not a relevant fact to the question of his right to control the religious education of his child.

A Protestant on his marriage with a Roman Catholic, agreed that their children should be brought up as Roman Catholics, but a son should when old enough be permitted to change his religion. A boy was born, baptized and brought up a Roman Catholic. The father died intestate, only expressing a wish that his son should go to an English Protestant School. It was held that having regard to the indication of intention on the father's part, and the present and future benefit of the son, his mother ought to be appointed his guardian, and he be brought up as a Roman Catholic: *Re Clarke*, 2 Ch. D. 817; 31 W. R. 37; 47 L. T. 84; and where there was no father, mother or guardian, and therefore no one entitled to the custody, or to say that the child was to be brought up in any particular religion, and it appearing to the Court to be best for the interest of the child that she should be brought up as a Protestant, it was so directed, notwithstanding that she had been baptized by a Roman Catholic priest: *Re Nevin*, 1891, 2 Ch. 299; 65 L. T. 35. An ante-nuptial agreement that the child should be brought up as a Roman Catholic was held not binding on the father, who was a Protestant: *Ib.*; and see *Re McGrath*, and other cases, *supra*.

Where a testator, a Protestant, appointed his sister to be guardian of his infant daughter, and four years after the sister became a Roman Catholic, it was held in these circumstances that it was for the benefit of the infant who had been brought up as a Protestant that the guardian should be removed: *F. v. F.*, 1902, 1 Ch. 688.

Where both parents of an infant Jew aged 14 were dead, and he desired to be educated as a Christian, he was ordered to be so educated, notwithstanding the objection of his guardian; but a girl of eleven was considered to be too young to make a choice of religion: *Re W. W. & M.*, 1907, 2 Ch. 557.

Where infants interested in real estate in England, whose father was dead, were living with their mother out of the jurisdiction, and she was one of their testamentary guardians, an order was made at the instance of their two other guardians declaring in what faith they should be educated: *Re Montagu*, 28 Ch. D. 82.

Rules of Equity to prevail.

Rules of Equity to Prevail.—This provision in s. 22 is to the same effect as Eng. J.A. 1873, s. 25 (11). In *Re Terry & White*, 32 Ch. D. 14, it was denied by Lord Esher, M.R., that any such difference between the Rules of Law and Equity existed; and see *Pugh* v. *Heath*, 7 App. Cas. 237; *Kearsley* v. *Phillips*, 10 Q. B. D. 41; *Lowe* v. *Dixon*, 16 Q. B. D. 455.

This section relates to matters of substantive law, not mere practice: *Friendly* v. *Carter*, 9 P. R. 41; *Dalyrmple* v. *Leslie*, 8 Q. B. D. 5; *Lo Grange* v. *McAndrew*, 4 Q. B. D. 210; *Horrison* v. *Rutland*, 1893, 1 Q. B. 142. Matters of practice are now governed by the *Rules*.

Examples.

The following decisions illustrate this section:—

The old learning on the subject of "conversion" at law is not imported into the Judicature Act: *Stimson* v. *Block*, 11 Ont. 96, 105.

Where the terms of a bill of sale are such as to bind after-acquired goods in Equity, the title of the claimant must now prevail as against

execution creditor, under this section: *per* Lush, J., W. N. 1875, 3; *per* Archibald, J., W. N. 1876, 64. Sec. 22.

The rule of Equity now prevails that letters of administration, ea obtained, relate back to the death, and it is sufficient if a plain- suing as administrator qualifies before trial: *Trier* v. *Robinson*, 16 t. 433; *Doyle* v. *Diamond Flint Glass Co.*, 8 O. L. R. 499; *Dini* v. *iquier*, 8 O. L. R. 712; *Johnston* v. *Dominion of Canada G. & A. Co.*, O. L. R. 462.

Where assets have come into possession of the executor and ure erwards lost to the estate, the rule in all Courts now is, that the cutor cannot be charged without some wilful default: *Job* v. *Job*, h. D. 562; and see *Barber* v. *Mackrell*, 12 Ch. D. 534.

Since the Judicature Act there is only one Court, and the rules of uity prevail in it; therefore a tenant in possession holding under agreement for a lease (of which specific performance would be reed: *Swain* v. *Ayres*, 21 Q. B. D. at p. 293), has no longer two ates, one a legal tenancy, from year to year, and the other an uitable tenancy under the agreement. He holds as if a lease had n granted: *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Lowther* v. *Heaver*, 41 D. 264; *Re Maughan*, 14 Q. B. D. 956; *Allhusen* v. *Brooking*, 26 D. 559; *Pugh* v. *Heath*, 7 App. Cas. 237; *Crump* v. *Temple*, 7 T. L. R. ; *Magee* v. *Gilmour*, 17 Ont. App. 27; 18 S. C. R. 579; but this triae can only be applied in cases in the County Court in which the rt is competent to exercise equitable jurisdiction: see *Foster* v. *ves*, 1892, 2 Q. B. 255; 67 L. T. 537. The landlord has the same ht of distress as if a lease had been executed, and he cannot dis- in by virtue of a legal title if he cannot distrain under the agree- nt: *Walsh* v. *Lonsdale*, 21 Ch. D. 9; and see *Lowther* v. *Heaver*, 41 D. 248. So in actions to re-enter for breach of covenant in a lease Court will dispose of questions in their equitable rather than their al aspect in cases where under the former practice the Court of ancery would have relieved against a forfeiture: *Buckley* v. *Beigle*, at. 85.

But it would be a mistake to assume that in all cases an equitable ate is equivalent to a legal estate. The equity doctrine that "where equities are equal, the law must prevail," will still give a legal title ority over a purely equitable one. Legal and equitable estates.

Thus, where the solicitor of a lessee fraudulently procured from him memorandum of deposit of the lease as security for a loan by the citor, and upon the security of the lease and memorandum pro- ed a loan from an innocent lender, it was held in an action by the ee against the latter, for the delivery up of the lease, that this ion did not apply to enable the defendant to say that he was a chaser for value without notice, and retain the lease: *James* v. s, W. N. 1880, 170.

It has been held in England that where an executor or adminis- or, after the commencement of a creditor's action for adminis- ion, and before judgment, has voluntarily paid any creditor in full, rule in Equity and not at Law must prevail under this section, and will be held to have made a good payment, and will be allowed it his accounts, even though he may have had notice of the action ore payment: *Re Radcliffe, European Soc.* v. *Radcliffe*, 7 Ch. D. 733; *art* v. *Coles*, 24 Q. B. D. 364; *Re Wells*, 45 Ch. D. 569; but *quære* Equity rule as to payment of creditors by personal representatives.

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whether in Ont. this was the rule in Equity: see *The Trustee Act* (R. S. O. c. 121), s. 53.

Partnership cases.

The rule of Equity in the administration of partnership assets was applied in administering a fund in the sheriff's hands, and joint estate was applied to joint debts, and separate estate to separate debts, to the exclusion of any legal lien acquired by an execution creditor: see further, as to the applications of this rule: *Re Ruby*, 24 Ont. App. 509. Equitable rules are, however, only applied where they would have been applied formerly by a Court of Equity: *e.g.*, the plea of purchase without notice had no effect on a case under the concurrent jurisdiction of Equity where a plaintiff was pursuing a legal title for legal relief: *Monners* v. *Mew*, 29 Ch. D. 725, 734.

See also *Ryon* v. *Fish*, 4 Ont. 335; *Re Hodgson, Beckett* v. *Ramsdale*, 55 L. J. Chy. 241, and Trower on the Prevalence of Equity under the Jud. Act.

Rule of law not abolished because Equity would not enforce it.

The rule of the Common Law in any particular matter is not necessarily superseded, because equity would not enforce by injunction the legal right: see *Morris* v. *Cairncross*, 14 O. L. R. 544. In that case the question how far a tenant for life is liable for permissive waste, was under discussion; and the Court held that the fact that equity would give no relief in the case of permissive waste by such tenants, had not the effect of abolishing the liability of such tenants at law.

Defence of purchaser for value.

The defence of "purchaser for value without notice" may be relied on by the transferee of such a purchaser, although the transferee may himself have had notice: *Lowther* v. *Carlton*, 2 Atk. 242; but this rule cannot be invoked by a trustee who has committed a breach of trust; nor will it enable a person who has committed a fraud to shield himself from the claim of the person he has defrauded: see *Barrow's Case*, 14 Ch. D. 432; 42 L. T. 891; *Gordon* v. *Holland*, 108 L. T. 385.

Sections 16 to 22 to apply to all Courts.

23. The provisions of sections 16 to 22 shall be in force and have effect in all courts so far as the matters to which they relate are cognizable by such courts. 3-4 Geo. V. c. 19, s. 23.

Taken from Eng. J. A. 1873, s. 91.

By this section the Rules of Law, which are enacted by section 16, apply in all Courts: see *Building and Loan, etc.* v. *Heimrod*, 19 C. L. J. 256, and *Pryor* v. *City Offices*, 10 Q. B. D. 504; *Poyser* v. *Minors*, 7 Q. B. D. 329.

See also *Speers* v. *Daggers*, 1 Cab. & E. 503; *Fellows* v. *Owners, etc.*, 1893, 1 Q. B. 104; *Foster* v. *Reeves*, 1892, 2 Q. B. 255.

APPEALS.

The Appellate Division.

Appellate Division.

By the Judicature Act, as originally framed, although the Court was styled "The Supreme Court of Judicature for Ontario," it was constituted of two permanent divisions, viz., "The High Court of Justice" and "The Court of Appeal," in whose names the proceedings in the respective Divisions were carried on. The High Court of Justice under this arrangement was, in effect, the Court of first instance, and the Court of Appeal was, with some exceptions, a purely appellate

ounal. Under the former constitution of the Court, an appeal lay Appellate Jurisdiction.
m a Judge of the High Court to a Divisional Court composed of
ee Judges of the High Court, and in certain cases, an appeal lay
m the Divisional Court of the High Court to the Court of Appeal.
The Law Reform Act, 1909 (9 Edw. 7, c. 28), which took effect on
1st January, 1913, a change was effected, and the Supreme Court
Judicature was reconstituted. Its title was changed to "*The Su-
me Court of Ontario*," which was constituted of two Divisions, *The
h Court Division* and *The Appellate Division*. The High Court
ision is in effect still the Court of first instance, but it is without
appellate jurisdiction except in the case of appeals from the Local
ges, and officers of the Court, and under certain Dominion Statutes:
, see *post*, p. 110. Both the High Court Division and the Appellate
ision are now mere parts of the same Court, namely, "The Supreme
rt of Ontario," in whose name both branches of the Court exercise
ir respective jurisdiction: see sec. 12, *supra*.

The act result of the change thus effected was to abolish the inter-
diate appeal which formerly existed and to give litigants but one
eal from the decisions of Judges of the High Court Division to a
unal constituted somewhat similarly to the former Court of Ap-
l; and at the same time to do away with the semblance of there
ng two Courts.

The Court of Appeal and High Court of Justice formerly constituted
effect separate and distinct Courts; and Judges were appointed to
Judges either of the High Court of Justice, or of the Court of Appeal.

The former Court of Appeal was normally composed of Judges
ointed to the Court of Appeal, but where for any reason a Judge of
Court of Appeal was prevented from sitting, one of the Judges of
High Court of Justice was accustomed to supply the place of the
ent Judge. How far this was constitutional (having regard to the
N. A. Act, s. 96), may perhaps be open to question. Under the
ent arrangement the Appellate Division is no longer composed
mally of the Judges appointed to the Court of Appeal; the first
isional Court is so composed, but the second and any other Divi-
al Court, which may be required, is to be composed of Judges of
High Court Division: see sec. 39, *infra*. The Appellate Division, as
constituted is, therefore composed (*a*) of Judges appointed to the
rt of Appeal: see sec. 39 (1), and (*b*) of Judges to be selected from
e appointed to the High Court Division: see sec. 39 (2) (3).

JURISDICTION OF THE APPELLATE DIVISION.

The jurisdiction of the former Court of Appeal, which is now vested Jurisdiction of Appellate Division.
he Supreme Court, was defined by the Judicature Act (R. S. O.
, c. 51)—section 49 was as follows:—

"49. The Court of Appeal shall continue to be a Superior Court of Jurisdiction of Court of Appeal.
ord with appellate jurisdiction in civil and criminal cases and
ters. 4 Edw. VII. c. 11, s. 2."

Criminal Jurisdiction of the Appellate Division.—This Act Criminal jurisdiction of Appellate Division.
not enlarge the civil jurisdiction of the Appellate Division, and
ourss cannot give it any criminal jurisdiction which it does not
rwise possess: see *Cox* v. *Hakes*, 15 App. Cas. *per* Lord Bramwell.
27. The criminal jurisdiction of the Appellate Division now ex-
s only to those cases in which it is conferred by Dominion legisla-
, and those in which an appeal is given by statute of the Province

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in respect of breaches of laws within the power of the Province to enact: see *Reg.* v. *Ell*, 13 Ont. App. 526; *The Summary Convictions Act* (R. S. O. c. 90); *Reg.* v. *Cushing*, 26 Ont. App. 248; and also from orders made by the High Court Division refusing a *habeas corpus*, or refusing to discharge a prisoner in criminal proceedings upon a return to a *habeas corpus*; see 29 & 30 Vict. c. 45, s. 6 (which is to be found at p. 446 in the volume of the Statutes of Canada and the Provinces, not repealed, and yet not included in R. S. C. 1906); *Reg.* v. *Browne*, 6 Ont. App. 386; *Reg.* v. *Boucher*, 4 Ont. App. 191. In these cases it was held that there was no appeal under the latter statute to the Court of Appeal from a single Judge; but see *contra*, *Reg.* v. *St. Clair*, 27 Ont. App. 308, where *The Ontario Habeas Corpus Act* (R. S. O. c. 84), was assumed to be applicable, but the Appellate Division can now undoubtedly entertain such appeals. Where a *habeas corpus* is refused an appeal lies to the Appellate Division and its judgment is final: see *Taylor* v. *Scott*, 30 Ont. 475. No appeal to the Appellate Division lies from an order of the High Court Division discharging a prisoner on the return of a *habeas corpus* in a civil, and *a fortiori* in a criminal proceeding: see *Cox* v. *Hakes*, 15 App. Cas. 506 (and see *per* Lord Halsbury, L.C., pp. 514 and 522).

The "Court of Appeal" referred to in Cr. Code, s. 1013, was "the Court of Appeal for Ontario": see Cr. Code, s. 2 (7); and that Court is now the Appellate Division of the Supreme Court: see *supra* s. 12 note.

Appeals in criminal cases.

In the case of convictions under Dominion legislation there would seem to be no appeal to the Court of Appeal unless one is given by Dominion legislation.

For instances in which the former Court of Appeal exercised appellate jurisdiction in criminal cases arising from a breach of Provincial Statutes: see *Reg.* v. *Potter*, 20 Ont. App. 516; *Reg.* v. *Sloan*, 18 Ont. App. 482; *Reg.* v. *Hozen*, 20 Ont. App. 633; *Reg.* v. *Elborne*, 19 Ont. App. 439; *Reg.* v. *Hodge*, 7 Ont. App. 246, (where the cases arose under *The Liquor License Act*, R. S. O. c. 215, s. 3), and *Reg.* v. *Edwards*, 19 Ont. App. 706; *Reg.* v. *Wason*, 17 Ont. App. 221 (under R. S. O. c. 90, see s. 11). As to the legislative authority of a Provincial Legislature in regard to offences against Provincial Acts: see *Atty.-Gen. for Ontario* v. *Hamilton Street Railway Co.*, 1903, A. C. 524.

In civil and criminal cases, the jurisdiction of the Appellate Division is appellate only: see *Brown* v. *Collins*, W. N. 1883, 155.

Civil jurisdiction of Appellate Division.

Civil Jurisdiction of the Appellate Division.—The jurisdiction of the Appellate Division in civil cases is partly original and partly appellate. It is entirely of statutory origin, and is regulated by sections 51-56 of *The Judicature Act* (R. S. O. 1897, c. 51), and the Acts referred to in those sections: see *infra*.

Contested Provincial Elections.

It has original jurisdiction in Provincial election cases (s. 12); and see *The Controverted Elections Act* (R. S. O. c. 10), and in cases relating to constitutional or provincial questions referred under *The Constitutional Questions Act* (R. S. O. c. 85).

Where a *habeas corpus* is granted in a civil proceeding, *e.g.*, for obtaining the custody of a child, an appeal lies to the Appellate Division from an order of attachment for disobedience to the writ: R. S. O. 1897, c. 51, s. 74, *infra*; see *Reg.* v. *Barnardo*, 23 Q. B. D. 305; an appeal to the Appellate Division also lies from the order of a single Judge remanding a person to custody upon a return to a *habeas corpus* issued

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der R. S. O. c. 84: see *The Ontario Habeas Corpus Act* (R. S. O. c.), s. 8; *Re Harper*, 23 Ont. 63, and section 26 (2), clause (i) *infra*.

In the Appellate Division is now vested the jurisdiction of the mer Court of Appeal: sec. 12, *supra*.

By *The Judicature Act* (R. S. O. 1897, c. 51), it was enacted:

May quash proceedings. When.

"51. The Court of Appeal shall have power to quash proceedings cases brought before it, in which appeal does not lie, or where such oceedings are taken against good faith. 58 V. c. 12, s. 46."

Where a party had lodged an appeal contrary to an undertaking he d given not to appeal, it was held that the Master in Chambers d jurisdiction to enforce the undertaking by setting aside the pro- dings in appeal: *Dominion* v. *Haldane*, 14 P. R. 106.

The proper mode of invoking the power of the Court is to move quash the appeal at the earliest moment after the appeal is lodged on the motion coming in the Court may dispose of it or direct it to and for argument along with the appeal: *Federal Life Assurance* v. *Siddall*, 22 O. L. R. 96.

By *The Judicature Act* (R. S. O. 1897, c. 51), it was enacted: -

To make whatever order may be required

"52. The Court of Appeal shall have power to dismiss an appeal, give any judgment and make any decree or order which ought to ve been made, and to direct the issue of any process, or the taking any proceedings in the Court below, or to award restitution and yment of costs, or to make such further or other order as the case y require. 58 V. c. 12, s. 47": and see sec. 27 *post*.

The Court may make such order as is justified by the law as then sting, though the effect be to vary a decision of the Court below, ich was in accordance with the then existing law: *Quilter* v. *pleson*, 47 L. T. 561; *Re Gillespie and Toronto*, 19 Ont. App. 713.

Review of questions of fact.

While there is no rule of law or procedure which prevents the preme Court of Canada or any intermediate Court of Appeal from ersing the decision at the trial on the facts: *Dempster* v. *Lewis*, 3; 33 S. C. R. 292; nevertheless the Supreme Court of Canada in discretion has refused to reconsider concurrent findings of the rts below on the facts: see *Matthews* v. *Bouchard*, 28 S. C. R. 580; T. Ry. Co. v. *Rainville*, 29 S. C. R. 201; and see *Allen* v. *Quebec rehouse Co.*, 12 App. Cas. 101; 56 L. T. 30; *Whitney* v. *Joyce*, 95 T. 74; and the rule generally followed by Appellate Courts is not to lew the findings of the Judge of first instance, where his decision ends upon the balance of testimony: *Hale* v. *Kennedy*, 8 Ont. App. ; *Cook* v. *Patterson*, 10 Ont. App. 645; *Sawyer* v. *Hodgson*, 18 O. L. 323.

The appellate Court, however, is not deterred from reversing such udgment merely by the consideration that the Judge of first in- nce had the advantage of seeing the demeanour of the witnesses their manner of giving their evidence, unless the decision of the e rests upon the credibility of the witnesses, and the Judge in ermining the credit to be given to them proceeded upon their eanour: see *Day* v. *Brown*, 18 Gr. 681; *Morrison* v. *Robinson*, 19 480; *Armstrong* v. *Gage*, 23 Gr. 1; *Ryan* v. *Ryan*, 5 S. C. R. 406; *Picton*, 4 S. C. R. 648; *Little* v. *Brunker*, 28 Gr. 191; *The Glan- anta*, 1 P. D. 283; *Bigsby* v. *Dickinson*, 4 Ch. D. 24; *Symington* v. *nington*, L. R. 2 Sc. App. 424; *Gray* v. *Turnbull*, *ib*. 53; *Redgrave Hurd*, 20 Ch. D. 22; *Trumpour* v. *Saylor*, 1 Ont. App. 104; *Taylor Taylor*, *ib*. 264; *Re Randolph*, *ib*. 331; *The Milanese*, 43 L. T. 107;

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Bickford v. *Hawkins*, 19 S. C. R. 362; *Warner* v. *Murray*, 16 S. C. R. 720; *N. British, etc., Co.* v. *Tourville*, 25 S. C. R. 177; *Coghlan* v. *Cumberland*, 1898, 1 Ch. 704; 78 L. T. 540; *Lefeunteum* v. *Beaudoin*, 28 S. C. R. 89; *Hayes* v. *Doy*, 41 S. C. R. 134; *Drake* v. *Caldwell*, 2 O. W. N. 282; *Weller* v. *McDonald McMillon Co.*, 43 S. C. R. 85.

For rules for the ascertainment of facts from the evidence of two witnesses of equsi credibility who contradict one another: see *H. W. Kostor & Son, Etc.* v. *Coleman*, 11 O. L. R. 262.

Where the appellate Court has the same materials before it as the Court whose decision it is reviewing, the above considerations do not apply: *Redgrove* v. *Hurd*, 20 Ch. D. 23; *e.g.*, where evidence was taken by commission: *Molzord* v. *Hart*, 27 S. C. R. 510; and the Court will exercise its judgment on the evidence just as it would on a question of law. It will reverse the judgment if satisfied that it is wrong: *Berdon* v. *Greenwood*, 20 Ch. D. 769 *n.*; *Jones* v. *Hough*, 5 Ex. D. 122; *Prentice* v. *Consolidated Bank*, 13 Ont. App. 69; *Bateman* v. *Middlesex*, 27 O. L. R. 122; otherwise it will affirm it: *Symington* v. *Symington*, *supra*, p. 105; *Hole* v. *Kennedy*, 8 Ont. App. 157. See also *Cord* v. *Cooley*, 4 C. L. T. 248; *Berthier Election Case*, 9 S. C. R. 102; *Grascit* v. *Carter*, 10 S. C. R. 105; *Re Moulton, Grahame* v. *Moulton*, 94 L. T. 454; *sed vide per* Loreburn, L.C., *Lodge Holes C. Co.* v. *Wednesbury*, 1908, A. C., at p. 326.

Where the case does not so turn upon the credibility of the witnesses, but upon the proper inference to be drawn from all the evidence in the case, it is the duty of the Court to review the conclusion arrived at by the Court below upon the questions of fact: *Russell* v. *Lefrancois*, 8 S. C. R. 335. *Cameron* v. *Bickford*, 11 Ont. App. 52. Thus, where, without differing from the Judge as to the credibility of the witnesses, the appellate Court came to a different conclusion upon the evidence, documentary and written, the judgment was reversed: *Cameron* v. *Bickford*, 11 Ont. App. 52. So the appellate Court may review inferences drawn by the Judge below from undisupted facts: *Fleuty* v. *Orr*, 13 O. L. R. 59.

Read v. *Anderson*, 13 Q. B. D. 781, where Brett, M.R., said that the Court of Appeal was not bound by the findings of fact by a Judge who tried the case without a jury, is not inconsistent with the above cases; see also *Sugden* v. *St. Leonards*, 1 P. D. 209.

In appeals to the Judicial Committee of the Privy Council, where there have been concurrent findings of fact by the Courts below, the question in appeal in the P. C. is not what conclusion the P. C. would have arrived at if the matter had come for the first time before them, but whether it has been established that the Courts below were clearly wrong: *Allen* v. *Quebec Warehouse Co.*, 12 App. Cas. 111.

But where a case has been tried by a jury, if there is any evidence to support their finding on a material question of fact, an appellate Court cannot set aside such finding and enter judgment contrary thereto: *Tinsley* v. *Toronto Ry.*, 17 O. L. R. 74; nor even grant a new trial: see *Toronto Ry.* v. *King*, 1908, A. C. 260.

Grounds not taken in Court below.

A Court of Appeal does not consider a ground not previously relied on unless it is satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under

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mination: *The Steamship "Tordenskjold,"* 41 S. C. R. 154. See also *dlaw* v. *Crow's Nest S. Ry. Co.*, 42 S. C. R. 355; *White* v. *Victoria nber Co.*, 1910, A. C 606; 103 L. T. 323.

Question of procedure.

The Supreme Court of Canada refused to interfere with a decision the Court of Appeal in a matter of procedure, viz., whether a ver- of a jury was a general or a special verdict: *Toronto Railway* v. *Balfour*, 32 S. C. R. 239.

Damages awarded by Judge.

The amount of damages awarded by the Judge at the trial will not interfered with by an appellate Court unless clearly unsupported evidence and unreasonable, or there is some error of fact, or law, partiality, on the part of the Judge: *Cossette* v. *Dun*, 18 S. C. R. ; *Montreal Gas Co.* v. *St. Laurent*, 26 S. C. R. 176; in *McGarr Prescott*, 4 O. L. R. 280, the damages were reduced from $1,500 900; but it would seem that this cannot be done except by consent: *tt* v. *Watt*, 1905, A. C. 115; 92 L. T. 480.

The Court has power under this section, and sec. 27 (3) to increase nages awarded to a respondent without a cross appeal by him: *onto Junction* v. *Christie*, 25 S. C. R. 551.

Refund of moneys or costs.

Where moneys and costs are ordered to be refunded by an appellate rt, interest thereon is payable at the rate of 5 per cent. but the lity for interest may be avoided by paying the fund in dispute Court: *Adams* v. *Cox*, 10 O. L. R. 96.

By *The Judicature Act* (R. S. O. 1897, c. 51), s. 53, it was provided ollows:

Powers of Court of Appeal.

"53. The powers of the Court of Appeal may be exercised, notstanding that the appeal is brought against part only of the judgt of the Court below; and may be exsrcised in favour of all or any he respondents or parties, although such respondents or parties not have appealed from, or complained of the judgment. 58 V. 2, s. 48;" and see sec. 27 (3), *post*.

Appeal by some of parties.

One of two or more plaintiffs (*Beckett* v. *Attwood*, 18 Ch. D. 54), or nter-claiming defendants (*Hester* v. *Hester*, 71 L. T. Jour. 153), re the claim or counter-claim respectively is dismissed, may eal, where the others refuse to join, they being made respondents.

When non-appealing party entitled to relief.

As to how far a party not appealing can obtain relief on an appeal snother party: see *Black* v. *Black*, 9 Gr. 413; 2 E. & A. 419; *pson* v. *McArthur*, 8 Gr. 84; *Topping* v. *Joseph*, 1 E. & A. 305, *Kent* v. *Freehold, etc.*, L. R. 3 Chy. 493; *Vaughan* v. *Halliday*, 9 Chy. 561; *Gilbert* v. *Jarvis*, 16 Gr. 275, 279; *Saffron Walden ft Co.* v. *Rayner*, 14 Ch. D. 406, 419; *Dilke* v. *Douglas*, 5 Ont. 63 (as to which see 1 O. L. R. p. 294); *Peterkin* v. *McFarlane*, nt. App. 254; *Re Gabourie*, 12 P. R. 252; *Esdaile* v. *Payne*, 59 T. 804; 40 Ch. D. 520; *Re Rawlins*, 45 Ch. D. 299; *Toronto ction* v. *Christie*, 25 S. C. R. 551; *Harkin* v. *Rabidon*, 7 Gr. 243; *ter* v. *Hunter*, 24 W. R. 527; *Chaltoner* v. *Lobo*, 1 O. L. R. 292; *-Gen.* v. *Simpson*, 1901, 2 Ch. 671; 85 L. T. 325.

Where the effect of a judgment on appeal of one defendant is to blish the validity of a transaction between two defendants, the saction may be declared valid in respect to the other defendant has not appealed: *Lindsay* v. *Imp. Steel & Wire Co.*, 21 O. L. 75.

Appeal by person not a party.

Leave to appeal may be given to a person interested, but not a party: *Re Markham*, 16 Ch. D. 1; *Re Securities, etc., Co.*, 1894, 2 Ch. 410; but only where his interest is such that he might have been made a party by service: *Crawcour* v. *Salter*, 30 W. R. 329; see also *Langtry* v. *Dumoulin*, 11 Ont. App. 544; *Wood* v. *Madras*, 23 Ch. D. 248; *Watson* v. *Cave*, 17 Ch. D. 19; *Re Claggett*, 30 W. R. 374; *Ex p. Tupper*, 12 Ch. D. 308; *Re Youngs, Doggett* v. *Revett*, 33 W. R. 880; 53 L. T. 682; but where a third party obtains leave to appeal in the name of a defendant, it is not competent for him to bring the appeal in his own name: *Descronto Iron Co.* v. *Rathbun Co.*, 11 O. L. R. 433.

By *The Judicature Act* (R. S. O. 1897, c. 51), s. 55, it was provided as follows:—

On an appeal Court of Appeal to have all powers of High Court.

"**55.** For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court. 58 V. c. 12, s. 50."

This corresponds substantially with the second part of the English J. A., 1873, section 19.

This section only conferred additional powers on the Court of Appeal without interfering with the practice under the *Rules*, so that execution for costs, etc., awarded by the Appellate Division is to be issued out of the Court appealed from: *Freed* v. *Orr*, 2 C. L. T. 90; see *Lowson* v. *Canada Farmers' Ins. Co.*, 8 Ont. App. 613; and *Cox* v. *Hakes*, 15 App. Cas. 529.

By *The Judicature Act* (R. S. O. 1897, c. 51) it was provided as follows:—

Jurisdiction subject to Rules, etc.

"**56.** The jurisdiction and power of the Court of Appeal, in respect of the said matters and all others, shall be and are subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed as are now in force or as may be made pursuant to this Act. 58 V. c. 12, s. 51."

See Eng. J. A., 1873, s. 19, first part.

Appeal a statutory right.

A right of appeal must be given by express enactment. It does not exist in the nature of things: *Sandback* v. *N. Staffordshire Ry.*, 3 Q. B. D. 4.

The jurisdiction of the Appellate Division is strictly limited by the provisions of this Act and *Rules*. It has, therefore, no power to hear an appeal from a Referee or Master: *Clarke* v. *Jamieson*, 9 C. L. T. 97; or from the Master in Chambers: *Ball* v. *Cathcart*, 16 Ont. 525; as these are provided for by *Rules* 502-506; and it has no jurisdiction to order a *mandamus* to a magistrate to entertain an information: *Rex* v. *Meehan*, 5 Can. Cr. C. 307; 3 O. L. R. 361; nor has it any original jurisdiction to quash a municipal by-law: see formerly *Landry* v. *Ottawa*, 11 P. R. 442.

The Supreme Court has no jurisdiction to review its own judgments or orders in an action brought for that purpose, on the ground of error apparent on their face. The remedy is now by appeal: *Bright* v. *Sellar*, 1904, 1 K. B. 6.

An appeal will not lie from a judgment which is not impeached, rely for the determination of an abstract point of law upon which opinion is expressed by the Court below, but which is not neces- y for the decision of the question between the parties: *Rex* v. *Louie*, 4, A. C. 412. Appellate jurisdiction.

it would seem that an appeal does not lie from an order where it presses the opinion of the Court, not being a judicial decision, but rely consultative: *Re Arbitration, Knight & Tabernacle, B. S.*, 41 W. 35; 67 L. T. 403; *British Westinghouse Co.* v. *Underground Electric* (1912), 2 K. B. 128; or from a decision of the High Court Division a question submitted to it under a special enactment enabling that rse to be taken: *Ex p. County Council of Kent, etc.*, 39 W. R. 465; where an arbitrator followed the consultative opinion of the Court his award subsequently made, and a Divisional Court refused to his award aside, it was nevertheless held that an appeal lay from order of the Divisional Court, and that it was open to the appellant contend that the consultative opinion which the Divisional Court considered binding on it was erroneous: *British Westinghouse Co. Underground Electric Ry., supra.* Appeals from orders not judicial but consultative.

In giving an opinion on a special case, the jurisdiction exercised by Court is judicial, not consultative, so that its decision is a "judg- nt or order": *Overseers of Walsall* v. *L. & N. W. Ry. Co.*, 4 App. s. 30. Judgment on special case is judicial.

In *Harmon* v. *Park*, 29 W. R. 750; 17 C. L. J. 389, it was held t an appeal would lie to the Court of Appeal from a Divisional rt on a question as to whether a petition against a municipal ction was properly instituted, as being an order of the High Court Justice, though the Act, under which the petition was presented, vided that a decision upon the hearing of the petition should not sppesiable. See also *Corporation of Peterboro'* v. *Wilsthorpe*, 12 B. D. 1.

Appeals from a Single Judge.—The appellate forum for all ap- ls from a single Judge of the High Court Division is now the pellate Division. Appeals from Judge.

The decision upon the trial of an interpleader issue is appealable the same way as any other decision given at a trial in Court: see . 26 (1) *a*, *supra*, and *Graham* v. *Temperance, etc.*, 17 P. R. 271. Interpleader issue.

Ex parte Orders.—Orders made *ex parte* need not be appealed m, but any party affected thereby may move to reopen the matter, to set aside the order: see *Rule* 217. Ex parte orders reopen.

Appeal from Orders Obtained by Default.—An order obtsined default in appearing to oppose it, may also be moved against: *Rule* ': see *Re Morris, Ex p. Strecter*, 19 Ch. D. 216; *Walker* v. *Budden*, Q. B. D. 267; *Allum* v. *Dickenson*, 30 W. R. 930. Orders obtained by default.

Habeas Corpus.—A decision of a Judge in Chambers on a *habeas rpus* application, under *The Ontario Habeas Corpus Act* (R. S. O. c.), s. 2, is appealable to the Appellate Division, as provided by sec. f thst Act: *Re Harper*, 23 Ont. 63. Habeas corpus.

Dominion Railway Act.—Under *The Railway Act* (R. S. C. c. 37), 209, an appeal lies by either party from an award of compensation Under Railway Act

Appellate jurisdiction.

exceeding $600, to the Appellate Division: *Re Birely and T. H. & B. Ry Co.*, 25 Ont. App. 88.

An appeal from an award under *The Railway Act* (R. S. C. c. 37, s 209, may be either to a Judge in Court: *Re Potter & Central Counties Ry.*, 16 P. R. 16; *Re Montreal & Ottawa Ry. Co. and Ogilvie*, 18 P. R 120; or to a Divisional Court: *James Bay Ry. Co.* v. *Armstrong*, 38 S. C R. 511; 1909. A. C. 624, and in either case the decision is final: *Ib.*

Appeals by persons in contempt.

Appeal by a Party in Contempt—The rule is not universal that a party in contempt can take no steps in the action; he is entitled to take the necessary steps to defend himself: *Small* v. *American Federation of Musicians*, 5 O. L. R. 456, and may proceed with the action in the ordinary way; *sed vide*, 3 Gilbert's Chy. Pr. 102.

The contempt is only a bar to his asking the Court for an indulgence: *Ferguson* v. *Elgin*, 15 P. R. 399. He may of course appeal from the order putting him in contempt: *McGregor* v. *McDonald*, 7 C. L. T. 20; and also from the order which he has disobeyed: *Ferguson* v. *Elgin*, *supra*; *McLeod* v. *Noble*, 24 Ont. App. 459; *Copeland-Chatterson Co.* v. *Business Systems*, 14 O. L. R. 337.

Criminal or quasi criminal proceedings.

Appeals in Criminal or Quasi Criminal Proceedings. — The express provisions of sec. 47 of the Eng. Jud. Act of 1873, prevent an appeal "in any criminal cause or matter," and so prevent an appeal from an order punishing a stranger to an action for contempt of Court, where the contempt is of a criminal character, though not perhaps indictable, *e.g.*, for publishing statements calculated to prejudice the fair trial of an action, such an order being n criminal cause or matter: *O'Shea* v. *O'Shea*, 15 P. D. 59; 62 L. T. 713; *Ellis* v. *The Queen*, 22 S. C. R. 7; but see *Scott* v. *Scott*, 1913, A. C. 417; 109 L. T. 1, where it was held that proceedings for contempt of Court in a civil case are not "criminal proceedings." In Ontario it seems doubtful whether an appeal lies in such a case: see Jud. Act., sec. 151, *infra*, though an appeal was entertained in *Reg. ex rel. Frelitz* v. *Howland*, 14 Ont. App. 184; 16 S. C. R. 197, where no objection to the jurisdiction appears to have been raised (see the remarks in *Ellis* v *The Queen*, 22 S. C. R. at p. 13); but an order adjudging n party to be in contempt for not obeying an order of the Court is an order in a civil proceeding, and an appeal from it lies in England: *Reg.* v. *Barnardo*, 23 Q. B. D. 305; *Re Preston*, 31 Q. B. D. 545; *Re Dudley*, 12 Q. B. D. 44; *Re Hardwick*, 12 Q. B. D. 148; *Re Johnson*, 20 Q. B. D. 68; *Re Wray*, 36 Ch. D. 138; *Eccles* v. *Louisville & Nashville Ry. Co.*, 1912, 1 K. B. 135, and probably in Ontario an appeal will lie to the Appellate Division, as in the case of any other judgment or order in a civil proceeding.

Contempt.

As to appealing from a refusal to commit for contempt: see *Jarmain* v. *Chatterton*, 20 Ch. D. 493; *Ashworth* v. *Outram*, 5 Ch. D. 943; *Debenham* v. *Wardroper*, 48 L. T. 235; *Krehl* v. *Burrell*, W. N. 1883, 177.

As to appeals under the Criminal Code (R. S. C. c. 146): see ss. 1013 *et seq.* of that Act.

Appeals Provided for by other Statutes, Dominion and Provincial.—The appellate Division has in addition to its jurisdiction t entertain appeals in actions, a jurisdiction to entertain appeals in other matters: *e.g.*, in proceedings under *The Landlord & Tenant Act* (R S O. c. 155), Part III against overholding tenants: *Re Scottish Ont and*

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n, Land Co., 21 Ont. 676; or upon a special case stated by arbitra- s under *The Arbitration Act* (R. S. O. c. 65), s. 17: *Re Geddes & chrane*, 2 O. L. R. 145; and see also sec. 26 (2) *post*.

Appeals under Dower Act.

The Appellate Division has no jurisdiction in appeal from an order der *The Dower Act* (R. S. O. c. 70), s. 14, dispensing with a wife's ncurrence in a bar of her dower: *Re Rush*, 28 C. L. J. 127. The Judge der that provision acts not as a Judge in Chambers, but as a *persona signata* for the purposes of the Act: *Re McMillan & The Guelph nction Ry. Co.*, 12 P. R. 294. As to appeals in such cases: see *The dges' Orders Enforcement Act* (R. S. O. c. 79), s. 4.

When Judge acts as persona designata.

Appeals under Winding-up Act (R. S. C. c. 144).

The Appellate Division has jurisdiction to entertain appeals from ders of a Judge in Chambers made under the *Dominion Winding-up t* (R. S. C. c. 144), s. 102, as amended by 7-8 Edw. VII., c. 10, s. 2: *Sarnia Oil Co.*, 15 P. R. 182; *Re Central Bank* (Divisional Court, 16 ne, 1898).

APPEALS.

Certain orders not subject to appeal.

24. No order of the High Court Division or of a Judge ereof made with the consent of parties shall be subject appeal, and no order of the High Court Division or of Judge thereof as to costs only which by law are left to e discretion of the Court shall be subject to appeal [on e ground that the discretion was wrongly exercised, or at it was exercised under a misapprehension as to the cts or the law or on any other ground], except by leave the Court or Judge making the order. 3-4 Geo. V. 19, s. 24.

Taken from Eng. J. A., 1873, s. 49, which, however, had not the rds in brackets, and, as did R. S. O. 1897, c. 51, s. 72, allowed an peal from a consent order by leave. It is not now clear whether a nsent order is now appealable with leave: see *infra*; but the limitaon of appeals as to costs is made clearer by the words in brackets.

Appeals from discretionary orders.

Discretionary Orders.—Where a judgment or order is appealable, remains appealable though made in the exercise of judicial discreon. In such case, however, the Court does not in general interfere hough it may disapprove), unless in a strong case, or when the disetion was exercised on a wrong principle: *Golding* v. *Wharton*, 1 Q. D. 374; *Watson* v. *Rodwell*, 3 Ch. D. 380; *Huggons* v. *Tweed*, 10 Ch. 359, cases respecting the striking out of pleadings: *Byrd* v. *Nunn*, Ch. D. 286, 287; *Laird* v. *Briggs*, 16 Ch. D. 663 (allowance of amendents): *Swindell* v. *Birmingham Syndicate*, 3 Ch. D. 127; *Ormerod* v. *dmorden*, 8 Q. B. D. 664 (the mode of trial): *Papayanni* v. *Coutpas*, N. 1880, 109; *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685, 709 llowing a defendant to defend on a motion under former C. R. 603). e also *Jarmain* v. *Chatterson*, 20 Ch. D. 493.

No exception is made of cases involving a question of law or prin ple: *per* Lindley, M.R., in *Adlington* v. *Conynham*, 1898, 2 Q. B 2; but see *McCausland* v. *Quebec Fire Insurance Company*, 25 Ont. ; *Bew* v. *Bew*, 1899, 2 Ch. 467; 81 L. T. 284; and *Civil Service*

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Co-operative Soc. v Gen. Steam Navigation Co., 1903, 2 K. B. 756; see also notes to sec. 70 *post*.

Consent orders, what are not.

A judgment in which some of the terms have been inserted at the suggestion of a party struggling for the best possible terms, in a decision adverse to him, cannot be regarded as a consent judgment. *Sweeney* v. *Sweeney*, 16 Ont. 92; so also the mere initialing of the minutes of an order, does not make the order a consent order; it merely amounts to an admission that the minutes correctly embody the order pronounced: *McMaster* v. *Rodford*, 16 P. R. 20; and where a party accepts an alternative order offered by the Court, his acceptance does not make the order a consent order: *Aldam* v. *Brown*, 39 L. T. Jour. 116; 34 Sol. Jour. 525; and a consent to a Judge or officer entertaining jurisdiction does not make the order made on the application a consent order: *Davis* v. *Winn*, 22 O. L. R. 111.

Where a party is offered an option as to the judgment to be pronounced, his acceptance of one of the alternatives offered does not make the judgment a consent judgment within this section: *Sun Life* v. *Elliott*, 31 S. C. R. 91.

There can be no appeal from an order appearing on its face to be made by consent unless by leave of the Court or Judge making it, even though the appeal is on the ground that no such consent was given: *Re Justin*, 18 P. R. 125.

A consent order made by the Master in Chambers, or officer having the like jurisdiction, would seem to be within this section: see *Re Solicitor*, 18 C. L. T. 224, 261.

Where an undertaking equivalent to an injunction asked by plaintiff was given, and the case was tried on the question of costs only, it was held that there was no appeal, both because the judgment was as to costs within this section, and, except so far as the costs were concerned, the judgment was by consent: *Hadida* v. *Fordham*, 10 T. L. R. 139.

An interpleader matter tried summarily by consent by a Judge in Chambers under R. S. O. 1877, c. 54, s. 5, was formerly within this section: *Edd* v. *Winsor*, W. N. 1878, 88; *Turner* v. *Bridgett*, 9 Q. B. D. 55; *Lyon* v. *Morris*, 19 Q. B. D. 139; but now *Rule* 632, which has superseded the above sec. 5, provides for an appeal, and see sec. 26 (1) (*a*) *infra*.

Not only is there no appeal from a consent judgment (except, perhaps, by leave), but there is no jurisdiction in the Judge who pronounced it to re-open the matter and re-hear it on the ground of mistake, and it can only be set aside by bringing a fresh action: *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673; 74 L. T. 193; and see *Wilding* v. *Sanderson*, 1897, 2 Ch. 534; 77 L. T. 57. See also notes to *Rule* 521.

Appeals as to costs.

Appeals as to Costs.—Where a defendant is ordered to pay costs of an action, but no further relief is given, an appeal from the judgment is not an appeal as to costs within the section: *Fleming* v. *Toronto*, 19 Ont. App. 318.

Where pending an appeal from an order refusing to quash a by-law, the by-law was repealed, the Supreme Court refused to entertain the appeal as it involved costs only: *Moir* v. *Huntington*, 19 S. C. R. 363.

'osts awarded to a third party are in the discretion of the Court, within this section: *Russell* v. *Eddy*, 5 O. L. R. 379. Sec. 24.

Where a Judge decided that a defendnnt had committed n brench n injunction, and no committal heing pressed for on the other side, oly ordered the defendant to pay the costs, it was heid that the r was not one as to costs only in the discretion of the Court. in the menning of this section, and that an appenl lay: *Witt* v. *oran*, 2 Ch. D. 69; followed in *Stevens* v. *Metropolitan Ry.*, 29 D. 60; and see *Scott* v. *Scott*, 1913, A. C. 417; 109 L. T. 1. See *Miller* v. *Macdonald*, 14 P. R. 499; *Re Evans*, 68 L. T. 271; *Ellam artyn*, 79 L. T. 510. On the other hand, where a Judge, being d to commit for contempt, made an order, within his power but different kind, viz.: to deliver a deed within a certain time, and osed of the costs: *Krehl* v. *Burrell*, W. N. 1883, 177, and in another ance refused to commit, and made the costs, costs in the cause: *worth* v. *Outram*, 5 Ch. D. 943, it was held that no appeal lay. See *Jormoin* v. *Chatterson*, 20 Ch. D. 493; *Re Wray*, 36 Ch. D. 138. Costs on motion to commit.

y section 74 (2), the right which certain classes of persons, such as tees, mortgagees, etc., had in Equity to costs out of a particular e or fund, is preserved. Such costs are not in the discretion e Court, and are therefore a proper subject of appeal, if no other iction on the right of appeal lies. See notes to *Rule* 632. Trustees' and executors' costs

here a settlement is set aside in an action by the settlor, the ee has no claim to his costs as a matter of right, there being no ract in existence, and therefore where costs were given against it was held that, under this section, no appeal lay: *Dutton* v. npson, 23 Ch. D. 278; *sed vide*, *Ideal Bedding Co.* v. *Holland*, 1907, . 157; 96 L. T. 774.

o an order directing an execution to pay costs of an administration n, on the ground that he had caused the litigation by refusal to sh accounts, is appealable, as he is entitled to costs unless the is dispisced by misconduct, and whether there was misconduct e subject of appeal: *Re Pugh*, 57 L. T. 858.

n appeal lies from an order depriving a trustee of costs on the nd that he severed from his co-trustee in an action to administer state: *Re Isaac*, 1897, 1 Ch. 251.

here is a distinction between "costs" and "charges and expenses." re a trustee defended an action unreasonably (though by the e of counsel), and paid the costs of it, there were allowed in quent administration proceedings, and were heid to be not costs e administration proceedings but "charges and expenses," and fore not costs in the discretion of the Judge. An appeal as to llowance of these costs in the trustee's accounts was therefore to lie, and the costs were disallowed: *Re Beddoe*, 1893, 1 Ch. but an appeal from an order for payment of costs, charges and ses will not lie as to the "costs" only, if the order is right as arges and expenses: *Bew* v. *Bew*, *infra*.

he effect of this section is that a mortgagee may appeal from an depriving him of costs out of the estate for misconduct; (be- if there was no misconduct the costs are not in the discretion Court under sec. 74 *post*); but a mortgagor cannot appeal from der negativing misconduct and allowing a mortgagee costs out Mortgagees' costs.

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of the estate, (because misconduct, if proved, would bring the costs within the discretion of the Judge): *Charles* v. *Jones*, 33 Ch. D. 80; in that case it was held that even though the Judge does not exercise his discretion, there could be no appeal, but *Bew* v. *Bew*, 1899, 2 Ch. 467; 81 L. T. 284, overrules *Charles* v. *Jones* in this respect, and decides that if a Judge has not exercised his discretion, but has applied some rule which excluded his discretion, an appeal lies without leave; and see *The City of Manchester*, 1880, 5 P. D. 221; 42 L. T. 521; and *Re Brodford*, *infra*.

Receiver ordered to pay costs.

An order directing an official receiver in bankruptcy to pay costs was held to be appealable without leave; but an order refusing him costs was considered to be discretionary, and therefore not appealable without leave: *Re Raynes Park Golf Club*, 1899, 1 Q. B. 961; and see *Re Silver Valley Mines*, 1882, 21 Ch. D. 381.

Costs out of estate.

Where costs are improperly ordered to be paid out of an estate, such order is appealable without leave: *Crawford* v. *Bradley*, 18 P. R. 233; *Bew* v. *Bew*, *supra*.

Costs ordered to be paid by solicitor personally.

The Court has a discretion to order costs to be paid personally by a solicitor where there has been misconduct or negligence, but an appeal lies on the question whether there has, in fact, been misconduct or negligence: *Re Bradford*, 15 Q. B. D. 636; overruling 11 Q. B. D. 373; and see *Charles* v. *Jones*, *supra*; *Re Rotch*, 127 L. T. J. 617.

Examples of costs in discretion of Court

The following are instances of costs in the discretion of the Court and therefore within this section:—

Costs of an interpleader issue disposed of in Chambers: *Hartmont* v. *Foster*, 8 Q. B. D. 82; costs given over to a defendant against a third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; costs refused to a third party: *Tomlinson* v. *Northern Ry.*, 11 P. R. 526; costs given or refused to a plaintiff on confessing a defence under *Rule* 164; *Perkins* v. *Beresford*, 47 L. T. 515; and costs of inspection of property under *Rule* 370: *Mitchell* v. *Dorley M. C. Co.*, 10 Q. B. D. 457; and costs on dismissal of an action for want of prosecution: *Snelling* v. *Pulling*, 28 Ch. D. 85. See also notes to sec. 74 *post*.

In a suit to settle the priorities between incumbrancers, B., one of the defendants, was ordered to pay the costs of the plaintiff and his co-defendant. B. appealed, and the decision being affirmed on the merits the Court refused to vary the order as to costs, as that would be practically allowing an appeal for costs: *Harpham* v. *Shacklock*, 19 Ch. D. 215; *Harris* v. *Jaron*, 4 Ch. D. 749.

Notwithstanding this section, an appeal from a decision as to costs will lie, without leave, if the Judge has not exercised his discretion, or has decided on grounds which were not open to him: *Civil Service Co-operative Soc.* v. *Gen. Steam Navigation Co.*, 1903, 2 K. B. 756; or if he has proceeded on an erroneous principle, and so has not exercised his discretion: see *per* Lindley, L.J., in *Young* v. *Thomas*, 1892, 2 Ch. at p. 137; *McCausland* v. *Quebec F. Ins. Co.*, 25 Ont. 330.

Cases where appeals as to costs permitted

The following are instances in which appeals involving questions of principle on the subject of costs have been permitted:

Where the question was the right of a claimant in interpleader proceedings to recover from the execution creditor the charges of the sheriff as costs: *Goodman* v. *Blake*, 19 Q. B. D. 77; where costs were directed to be first paid out of a fund, and then various incumbrancers in order of priority, and the fund, after payment of costs,

not sufficient to pay the first incumbrancer, who appealed: *John-* Sec. 24.
e v. *Cox*, 19 Ch. D. 17; where an order imposed, as a condition
new trial, the payment within a certain time of the costs of the
trial: *Metropolitan Asylum District* v. *Hill*, 5 App. Cas. 582:
re at the trial of an action for the infringement of a copyright of
vel, it appeared that the defendant before trial discontinued the
of the title of the novel objected to, and therefore the only order
s was that defendant pay the costs of the action: *Dicks* v. *Yates*,
h. D. 76; and where a defendant who had disclaimed was ordered
y costs: *Wansley* v. *Smallwood*, 11 Ont. App. 439.

Where leave to appeal is given on questions of costs in the discre-
of the Court, the Appellate Court ought to have the same regard
he discretion of the Judge as in other cases in which his discre-
is subject to review, and it ought not to interfere unless there has
a manifest disregard of principle or misapprehension of facts:
Baggallay, L. J., in *Re Gilbert, Gilbert* v. *Huddlestone*, 28 Ch. D.
Young v. *Thomas*, 1892, 2 Ch. 134; *Huxley* v. *W. L. Extension, etc.*,
. B. D. 373; *Russell* v. *Russell*, 1892, P. 152.

s to the principle upon which the Appellate Court proceeds in
als on matters of discretion: see notes *supra*, pp. 111-112.

n appeal lies from the decision of a Judge as to the scale on Other cases.
h costs should be taxed, but the Court will not interfere unless
as proceeded upon a wrong principle, or made a manifest slip:
Terrell, 22 Ch. D. 473. See also as to charges the allowance of
h is in the discretion of the taxing officer: *McGannon* v. *Clark*, 9
555.

eave to Appeal.—Where the time for appealing as of right has Leave to
suffered to elapse, then it is necessary before an appeal can be appeal
ght, to obtain leave to appeal. Such applications are in the dis- generally.
on of the Court: *Rule* 176, and neglect to proceed owing to the
s of the applicant's solicitor is not alone sufficient ground for
ing such leave: *Cain* v. *Pearce*, 4 O. W. N. 70; but see *Rumbold* v.
on C. C., 100 L. T. 259.

eave to appeal will not be granted unless the appellant makes
prima facie case for attacking all the grounds on which the judg-
or order sought to be appealed from is based; wherever any one
.l is sufficient to support the order or judgment leave will be
ed: *Appleby* v. *Turner*, 19 P. R. 173; *Ray* v. *Port Arthur*, 7 O. L.
7.

Where the decision is final and conclusive, no appeal can be had
it, even by leave: *Van Laun* v. *Baring*, 1903, 2 K. B. 277; 89
120.

acies in making the application may be a ground for refusing it:
Port Arthur, *supra*.

eave may be refused where the amount involved is small and the
involves matters of infrequent occurrence: *Ford* v. *Mason*, 15 P.
8; *Hubbert* v. *Home Bank*, 20 O. L. R. 651; *Goodwin* v. *Ottawa*, 12
R. 603; where in such a case leave is granted on the terms of the
lant agreeing in any event to pay the costs of the appeal of both
it was held in the circumstances, to be a proper term to impose:
v. *Great Western Ry.*, 136 L. T. Jour. 197. Leave to appeal will
e given after the time for appealing has elapsed merely on the

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ground of the law having been subsequently altered by statute, even though it be retroactive: *Eyre* v. *Wynn-Mackenzie*, 1896, 1 Ch. 135; 73 L. T. 571; or by reason of other Judges having refused in subsequent cases to follow the decision in question: *Re Bradshaw*, 120 L. T. Jour 591.

No appeal from order granting leave to appeal, etc.

No appeal lies from an order granting or refusing leave to appeal: *Lane* v. *Esdaile*, 1891, A. C. 210; *Re Sarnia Oil Co.*, 15 P. R. 348; *Kay* v. *Briggs*, 22 Q. B. D. 343; *Ex p. Stevenson*, 1892, 1 Q. B. 609; *Re Central Bank*, 17 P. R. 395; *Farquharson* v. *Imperial Oil Co.*, 35 C. L. J. 230; 30 S. C. R. 188; but see in the case of a refusal of leave: *Moore* v. *Peachey*, 8 T. L. R. 406.

Leave to appeal as to costs.

Leave to appeal on a question of costs should be asked for when the judgment in question is given: *May* v. *Thompson*, W. N. 1882, 53.

Consent Order.—It would appear that the concluding clause of section 24 applies to the whole section. It certainly did in the section as originally framed, but it may be contended that as the section is now framed it only applies to appeals as to costs. If it applies to the whole section, then appeals from consent orders may be brought with the leave of the Court or Judge making the order. But it may be observed that if the consent is admitted, an appeal could hardly ever be successful; and if on the other hand the contention is that the order does not carry out or follow the terms of the consent, the motion should be to the Judge who made the order to amend it, rather than to the Appellate Division by way of appeal.

Appeals from interlocutory orders.

25.—(1) There shall be no appeal to a Divisional Court from an interlocutory order of the High Court Division, whether made in Court or Chambers, where before *The Ontario Judicature Act, 1881*, there would have been no relief from a like order by an application to a superior court.

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Determining what are interlocutory.

(2) Any doubt which may arise as to what orders are interlocutory shall be determined by the Divisional Court. 3-4 Geo. V. c. 19, s. 25.

For the cases in which, before the Ont. Jud. Act, there was an appeal to the Court of Appeal: see R. S. O. 1877, c. 38, and *Whiting* v. *Hovey*, 12 Ont. App. 119.

Prior to the Judicature Act, 1881, appeals from all orders made by a Judge in Court or in Chambers, either in Chancery or at Common Law, lay to the full Court: see Chy. Ord. 323; R. S. O. 1877, c. 39, ss. 22, 26; and 37 Vict. c. 7, ss. 17, 19, 20.

This section does not apparently prohibit appeals from all interlocutory orders of the High Court Division, but only from such as prior to the Judicature Act, 1881, were not appealable. In many of the cases in which an order is held to be interlocutory, therefore an appeal would lie: *e.g.*, orders granting interlocutory injunctions were appealable: see *McLaren* v. *Caldwell*, 5 Ont. App. 363; 8 S. C. R. 435; 9 App. Cas. 392. The question whether a given interlocutory order is appealable, must depend on whether it was so prior to the Jud. Act, 1881.

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Interlocutory judgments or orders.

an order or judgment is said to be *interlocutory* unless the decision, whichever way it might be given, would finally dispose of the action: a decision dismissing an action on a point of law raised on the pleadings was held to be interlocutory, because if the decision had been the other way it would not have disposed of the action: *Sulaman v. Farner*, 1891, 1 Q. B. 734; but *see Bozson v. Altrincham*, 1903, 1 K. B. 547. In the earlier case of *Trowell v. Shenton*, 8 Ch. D. 318, an order overruling a demurrer was held not to be interlocutory.

See generally as to the distinction between final and interlocutory orders: *White v. Will*, 5 Ch. D. 589, 591; *Physick v. Physick*, 12 Ch. D. 305, 307; *Whiting v. Hovey*, 12 Ont. App. 119; *Haleley v. Montreal Despatch Co.*, *Ib.* 640, and notes to sec. 17, *supra*.

The right of appeal from a Judge in Chambers is, under the *Rules*, much restricted: see *Rule* 507.

What orders are considered interlocutory

Interlocutory Orders.—The following have been held to be interlocutory orders: An order that a case be tried by jury: *Sucindell v. Birmingham*, 3 Ch. D. 127; a rule absolute for a new trial: *Highton v. Heberne*, 48 L. J. Ex. 167; an order discharging a rule for a new trial: *Wilks v. Judge*, W. N. 1880, 98; a refusal to remit an award to arbitrator: *Re Delagoa Bay Ry., etc.*, 37 W. R. 578; an order setting aside an award for misconduct of the arbitrator: *Re Crossdell & Cornell*, 1906, 2 K. B. 569; 95 L. T. 441; an order on the trial of an interpleader issue: *McAndrew v. Barker*, 7 Ch. D. 701; *McNair v. Denshaw*, 1891, 2 Q. B. 502 (but see *Whiting v. Hovey*, *supra*); order for final judgment under *Rule* 57: *Standard Discount Co. v. Grange*, 3 C. P. D. 67; *sed vide contra: Castle v. Kourl*, 18 O. L. R. 4; an order dismissing an action as frivolous: *Re Page, Hill v. Flad-*, 1910, 1 Ch. 489; 102 L. T. 388; an order setting aside a demurrer frivolous: *Kendick v. Morrison*, 2 S. C. R. 14; an order providing for defendant's costs, the action not being further proceeded with: *Re Ellis*, 31 Ch. D. 623; the judgment in a Divisional Court affirming the judgment of a County Court in an interpleader issue: *Hughes v. Pike*, 18 Q. B. D. 32, reversing 17 Q. B. D. 204; an order after final judgment in regard to a set-off of costs, payable under the judgment: *Blakey v. Latham*, 43 Ch. D. 23; an order striking out a statement of claim: *Jones v. Insole*, 64 L. T. 703; an order directing a review of taxation: *Ex p. Phillips*, 19 Q. B. D. 234; an order dismissing application to review a taxation between solicitor and client: *Re Hume*, 1907, 2 Ch. 145; 96 L. T. 666; an order refusing a motion to set aside a judgment signed on default: see *O'Donohoe v. Bourne*, 27 S. C. R. 54; an order refusing application to have issues tried by a jury: *Peters v. Bank of Montreal*, 27 S. C. R. 197; and an order directing an interpleader issue: *Hunter v. Hunter*, 18 C. L. T. 114; an order striking out a statement of claim as disclosing no reasonable cause of action, and as being frivolous and vexatious: *Bright v. River Plate, &c. Co.*, 17 T. L. R. 708; and an order for security for costs and directing if it be not given within a limited time that the action be dismissed: *Stewart v. Royds*, 118 L. T. Jour. 176. So also the decision of the Court upon a special case stated by an arbitrator who is therein to make his award is an interlocutory order: *Collins v. Vestry of Paddington*, 5 Q. B. D. 368; but in *Shubrook v. Tufnell*, 9 Q. B. D. 621, it was held that a decision on a special case must be treated as a final order, unless the decision of the Court could not in any event necessitate the entering of final judgment; but where the arbitrator embodied in his award the result of the decision on the special case, the award may

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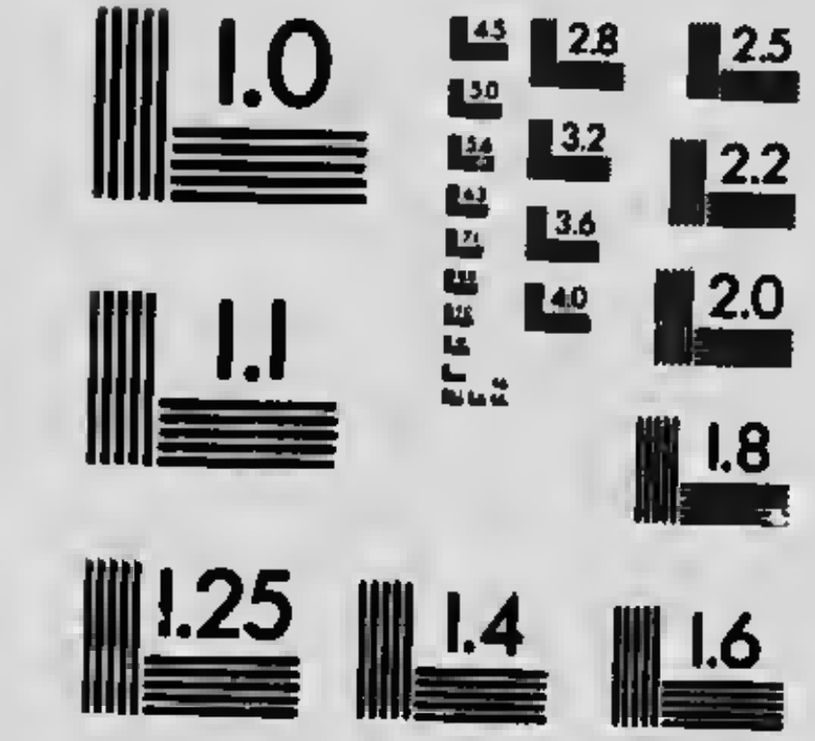

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nevertheless be appealable: *British Westinghouse Electric & Mfg. Co.* v. *Underground Electric Ry. Co.*, 1912, A. C. 673; 107 L. T. 325.

What orders considered final.

Final Orders.—The following have been held to be final orders:—A judgment for foreclosure even before final order: *Smith* v. *Davies*, 55 L. J. Cby. 496; 54 L. T. 578; an order made on an application for the delivery and taxation of a bill of costs, whether granting or refusing it: *Re Reeves*, 1902, 1 Ch. 29; 85 L. T. 495; an order refusing a motion to set aside a judgment signed by default, for irregularity, though the order reserved to the defendant leave to apply again on the merits: *Voight* v. *Orth*, 5 O. L. R. 443; a judgment on an issue raised on a suggestion of further breaches in an action on a bond: *Smort* v. *Dana*, 9 O. L. R. 427; an order staying proceedings until the determination of another action to be brought in the Province of Quebec: *Gibbons* v. *Berliner Gramophone Co.*, 4 O. W. N. 1068; an order giving plaintiff leave to sign judgment unless a sum of money should be paid into Court: *Castle* v. *Kouri*, 18 O. L. R. 462. An order made on a summary application to enforce a solicitor's undertaking: *Re Marchant*, 1908, 1 K. B. 998; 98 L. T 823; an order dismissing an appeal from a final judgment in a County Court: *Johnson* v. *Refuge Assurance Co.*, 1913, 1 K. B. 259.

Interlocutory orders which are appealable.

Interlocutory Orders, when Appealable.—It must be observed that the effect of this section is negative. It does not authorize an appeal from any interlocutory order, but in effect declares that no appeal shall be had from any interlocutory order unless an appeal would have lain therefrom prior to the Jud. Act, 1881.

The section does not prevent an appeal to a Divisional Court from an order of a Judge in Chambers on appeal from a certificate of taxation: *Talbot* v. *Poole*, 15 P. R. 274; but see *Rule* 507.

An order made by a Judge in Court directing the execution by defendants (mortgagees) of a conveyance or discharge directed by a previous judgment, was said not to be interlocutory. But if interlocutory it was held to be appealable notwithstanding this section: *Bull* v. *N. British, etc., Co.*, 12 P. R. 284.

Appeals to Divisional Court.

26.—(1) Subject to sections 24 and 25 and to the Rules regulating the terms and conditions on which appeals may be brought, an appeal shall lie to a Divisional Court from—

(*a*) any judgment, order or decision of a Judge of the High Court Division in Court, whether at the trial or otherwise;

(*b*) any judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure which affects the ultimate rights of any party, and subject to the Rules from any other judgment, order or decision of a Judge in Chambers in regard to a matter of practice or procedure.

(2) A Divisional Court shall also have jurisdiction as provided by — Sec. 26. Additional jurisdiction under certain statutes.

(a) *The Ontario Voters' Lists Act;* Rev. Stat. c. 6.

(b) *The Ontario Election Act;* Rev. Stat. c. 8.

(c) *The Ontario Controverted Elections Act;* Rev. Stat. c. 10.

(d) *The Registry Act;* Rev. Stat. c. 124.

(e) *The Ontario Companies Act;* Rev. Stat. c. 178.

(f) *The Assessment Act;* Rev. Stat. c. 195.

(g) *The Liquor License Act;* Rev. Stat. c. 215.

(h) *The Ontario Summary Convictions Act;* Rev. Stat. c. 90.

(i) *The Ontario Habeas Corpus Act;* Rev. Stat. c. 84.

(j) *The Mechanics' and Wage Earners' Lien Act;* Rev. Stat. c. 140.

(k) *The Criminal Code;* R.S.C. c. 146.

(l) *The Winding-up Act;* of Canada. R.S.C. c. 144.

(m) *The Municipal Drainage Act;* Rev. Stat. c. 198.

(n) *The Succession Duty Act;* Rev. Stat. c. 24.

(o) *The Surrogate Courts Act;* Rev. Stat. c. 62.

(p) *The County Courts Act;* Rev. Stat. c. 59.

(q) *The Division Courts Act;* Rev. Stat. c. 63.

(r) *The Water Privileges Act;* Rev. Stat. c. 129.

(s) *The Rivers and Streams Act;* and Rev. Stat. c. 130.

(t) Any other Act of the Parliament of Canada or of this Legislature.

(3) A Divisional Court shall also have jurisdiction to hear and determine applications for new trials and applications to set aside verdicts and findings of juries in actions and matters tried or heard in the High Court Division. New trials.

(4) Nothing in this section shall limit the generality of the provisions of subsection 1 of section 12. 3-4 Geo. V. c. 19, s. 26. Generality of subsec. 1 of sec. 12 not affected.

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Rights of appeal.

A suitor dissatisfied with the judgment of the High Court Division may, subject to the provisions of the Jud. Act, ss. 24 *et seq.*, appeal therefrom to the Appellate Division, or, by consent of all parties, he may appeal directly to the Supreme Court of Canada: R. S. C. c. 139, s. 42 (*a*); or, by leave of the Supreme Court, he may also appeal directly to that Court, where the judgment or order to be appealed from is pronounced in any action, cause or matter, or other judicial proceeding, in the nature of a suit or proceeding in equity; or in other cases, when the judgment is a final judgment: *Ib.*, s. 42 (*b*), (*c*). Cass. S. C. Pr., 19, 20; but to obtain such leave special circumstances must be shewn: *Schultz* v. *Wood*, 6 S. C. R. 585; *Bank of B. N. A.* v. *Walker*, Cass. Dig. 382; *Sewell* v. *British Columbia Towing Co.*, *Ib.*, 381; *Moffatt* v. *The Merchants Bank*, 11 S. C. R. 46; Cass. Dig. 382; *Langtry* v. *Dumoulin*, *Ib.*; *Kyle* v. *Canada Company*, 15 S. C. R. 188; *Hislop* v. *McGillivray*, *Ib.*

The *Rules* regulating appeals from the High Court Division to the Appellate Division apply, so far as appropriate, to appeals from the Drainage Referee: *Re Raleigh*, 18 P. R. 73; see *The Municipal Drainage Act* (R. S. O. c. 198), ss. 110, 116.

This section does not contain an enumeration of all the matters in respect of which a Divisional Court has jurisdiction, *e.g.*, see *The Public Works Act* (R. S. O. c. 35), s. 32.

Appeals to Divisional Court.

The Divisional Court referred to in this section is a Divisional Court of the Appellate Division. The effect of the section is to transfer to the Appellate Division all appeals which were formerly heard by the former Divisional Court of the High Court of Justice.

Judgments or Orders of a Judge at the Trial.—See as to these, *Rule* 491, and notes; and see *infra* notes to this section.

An appeal lies from an order at the trial directing a case to stand over to add parties: *Payne* v. *Caughell*, 24 Ont. App. 556.

Judgments or Orders of a Single Judge in Court, not at the Trial.—In this class of decisions an appeal lies to a Divisional Court in every case under clause (*a*) *supra*.

Appeals from Weekly Court.

Judgments or Orders Pronounced in the Weekly Court.—Appeals from such orders are regulated by *Rules* 491-494.

Where such a judgment or order has been pronounced *ex parte*, or in the absence of the opposite party, there is a jurisdiction in the Judge making the same to set aside the judgment or order on the application of any party affected thereby who was not present or represented when it was pronounced: see *Rule* 217: and in such cases that procedure should be resorted to rather than appeal, where the Court would have to say whether or not, on the evidence before the Court, the judgment or order was properly granted.

Appeals from Judge in Chambers.

Orders of a Judge in Chambers.—Appeals in such cases are regulated by *Rule* 507.

An appeal does not lie to the Appellate Division from the order of a Judge under *The Dower Act* (R. S. O. c. 70), s. 14, dispensing with the concurrence, for the purpose of barring dower, of the wife of an owner of land selling or mortgaging it free from dower: *Re Rush*, 10 C. L. T. 184; and see *Judges' Orders Enforcement Act* (R. S. O. c. 79), s. 2.

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Appeals from judgment at trial.

Appeals from Judgments at Trials.—Where the judgment is pronounced in the absence of a party an appeal is not necessary, nor a motion to the Appellate Division, but the Judge at the trial may set it aside and grant a new trial: see *Rule* 499.

Judgment of nonsuit.

Judgment of Non-suit.—A judgment of non-suit was, at Common Law, no bar to another action for the same cause. By C. R. 779, it was provided:

"A judgment of non-suit, unless otherwise directed, has the same effect as a judgment upon the merits for the defendant, but may be set aside on such terms as may seem just."

This Rule has not been continued, but its omission is probably not intended to operate as a change of the practice in this respect. The old Common Law form of judgment of nonsuit is now very rarely, if ever pronounced; where a plaintiff fails to make out a case, his action is generally dismissed, and if it is thought that he should not be precluded from bringing another action, the judgment is declared to be "without prejudice to any other action by the plaintiff in respect of the matters in question;" unless such a clause is inserted the judgment may be pleaded in bar to a fresh action for the same cause: *Bywater v. Dunne*, 10 L. R. Ir. 380; and if the non-suit be reversed on appeal, the defendant is not entitled, as of right, to a new trial for the purpose of adducing evidence on his behalf, where the action is tried without a jury: *Macdonald v. Worthington*, 7 Ont. App. 531, 563 (as to which see *Craig v. McKay*, 8 O. L. R. 651); but where the action is tried by a jury, *semble*, the defendant is so entitled: *Baker v. The Grand Trunk Ry.*, 11 Ont. App. 68.

C. R. 779, which provided that a judgment of non-suit should be equivalent to a judgment for the defendant on the merits unless otherwise provided, was held to be not applicable to Division Courts under sec. 65 or sec. 227 of *The Division Courts Act* (R. S. O. c. 63): *Building & Loan Ass. v. Heimrod*, 3 C. L. T. 361: *Bank of Ottawa v. McLaughlin*, 1 Ont. App. 543.

A plaintiff has now no right to demand a non-suit, and he cannot discontinue at the trial without the leave of the Judge: *Fox v. The Car.* 1898, 1 Q. B. 636; 78 L. T. 311; 1900, A. C. 19; 81 L. T. 562.

The Judge at the trial has no power to give judgment of non-suit on the opening statement of counsel without hearing evidence, unless the plaintiff's counsel consents to that course: *Fletcher v. London & N. W. Ry.*, 1892, 1 Q. B. 122; 65 L. T. 605; *Isaac v. Evans*, 16 T. L. R. 10; 1899, W. N. 261; and in *Argent v. Donigan*, 8 T. L. R. 432; and in actions for negligence the power of the Judge to non-suit on the ground of contributory negligence is restricted to cases where it is plain and indisputable that the injury of which the plaintiff complains would not have occurred but for his own negligence; where there is any dispute as to the facts, or as to the inference from the facts, the case should be submitted to the jury: *Servier v. Lowe*, 32 Ont. 290; and the ruling of the Judge at the trial that there is no evidence in support of a particular issue may be reviewed on appeal: see *McCord v. Cammell*, 1896, A. C. 57.

A non-suit may be ordered, although there is some evidence adduced by the plaintiff, provided it be of such a character that the jury could not reasonably give a verdict in his favour: *Hiddle v. National F. & A. Ins. Co.*, 1896, A. C. 372; *Ryder v. Wombwell*, L. R. 4 Ex. 38; but where his witnesses established contributory negligence as above

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mentioned: *Danger* v. *London St. Ry.*, 30 Ont. 493; *Wakelin* v. *London & S. W. Ry.*, 12 A. C. 52; and see *O'Hearn* v. *Port Arthur*, 4 O. L. R. 209; and it may be ordered at the close of the whole case though the Judge refused a motion for non-suit at the close of the plaintiff's case: *Skeate* v. *Slaters*, 1914, 2 K. B. 429; 110 L. T. 604.

Defendant stopped by Court.

Where a defendant at the close of the plaintiff's case moves for a non-suit, and intimates that he will renew the motion at the close of the case, and then proceeds to call evidence until stopped by the Court, and a non-suit is entered, the defendant, in the event of a successful appeal from the non-suit, will be liable to pay the costs of the trial and appeal, notwithstanding that in deference to the Court he did not complete his evidence: *Mills* v. *Hamilton St. Ry.*, 17 P. R. 74.

Where, in an action for negligence, the plaintiff claimed alternative relief against two defendants and at the trial was non-suited as to one, and a verdict was found in favour of the other defendant: it was held on appeal that although the verdict must stand, yet that the plaintiff might nevertheless be entitled to a new trial as against the defendant as to whom he was non-suited: *Lilley* v. *Thomas Tilling*, 134 L. T. Jour. 61.

Disagreement of jury.

Disagreement of Jury or Neglect to Answer Questions.—Where a jury disagrees, or refuses to answer questions, or answers questions in a conflicting way, the Judge presiding may direct a retrial: see *Rules* 500, 501; or the action may be dismissed: see *post*, c. 30. If it is contended that the Judge erred an appeal would lie.

Motions for a new trial.

Actions Tried with a Jury.—Where there has been a trial with a jury, an application for a new trial, whether made for that relief alone, or combined with, or as an alternative of, a motion by way of appeal from the judgment, must be made to the Appellate Division.

Motions against judgment, not involving a new trial.

In actions tried with a jury, a party may appeal,—

Upon the ground that the judgment is contrary to the findings of the jury; or,—

That, notwithstanding the findings of the jury, the applicant is entitled to judgment;

Where the Judge at the trial does not pronounce a judgment, but orders the case to stand over to add parties, either party, or both, may appeal from his decision to a Divisional Court: *Munro* v. *Toronto Ry.*, 4 O. L. R. 36, and consent to the Court's giving judgment on the merits: *Payne* v. *Caughell*, 24 Ont. App. 556.

Jury cases.

The party against whom a judgment is given in a jury action has always to consider, in moving against it, whether his complaint is as to the findings of fact, and this consideration will determine whether his remedy is to move for a new trial, or for such judgment as may be the proper one.

New trial.

In jury actions a motion for a new trial is proper where the jury has made an error which the applicant is entitled to complain of, or where the Judge has prevented the facts from being properly brought forward, such as by misdirection, rejection of evidence, non-suiting of the plaintiff, etc. In such cases the objection is not to the conclusions of the Judge from the findings, and his consequent entry of judgment upon them; but the objection is to the correctness of the findings themselves; for instance, where the Judge misdirects the

ry: *Hamilton* v. *Johnson*, 5 Q. B. D. 263, 266; or non-suits the Sec. 26.
aintiff: *Etty* v. *Wilson*, 3 Ex. D. 359; or refuses to do so, and a verdict found for the plaintiff and judgment directed to be entered thereon: rries v. *Felix*, 4 Ex. D. 32; or where the Judge gives judgment for e party on the findings of the jury, and it is contended that the find- gs are not warranted by the evidence: *Hamilton* v. *Johnson*, 5 Q. B. D. 3; or where, the facts being undisputed, the Judge directs the jury find for one party, and it is contended that the finding should have en the other way: *Yetts* v. *Foster*, 3 C. P. D. 437; or after leaving the se to the jury the Judge thinks on reflection that there was no evi- nce to go to the jury and directs judgment to be entered for defen- nt: *Rocke* v. *McKerrow*, 24 Q. B. D. 463. In all these cases, though e action is that of the Judge, the dispute is in respect to the propriety the findings of the facts, and the motion should therefore ordinarily for a new trial.

Where there is any evidence on which the findings of the jury can operly be supported, a new trial will not ordinarily be granted; but ere the finding of a jury on a material fact is unsupported by any dence, such finding may properly be set aside and a new trial anted: *Reiffenstein* v. *Day*, 28 O. L. R. 491. In this case after two ials before a jury at one of which the jury had disagreed, and the other d given a verdict not warranted by the evidence, the Court granted ew trial to be had before a Judge without a jury, but on appeal this on was struck out.

Where the Court considers that it has all the needful evidence When it may be dispensed with.
fore it, it may, under s. 27 *post*, instead of directing a new trial, ect the proper judgment to be entered.

Non-jury Actions.—Where the trial has been had before a Judge Non-jury cases
hout a jury, an appeal to the Appellate Division lies under this tion, whether the findings of fact, or the conclusions deduced from m, are questioned, and whether it is proper to direct a new trial or enter a different judgment.

In such cases the remedy is generally by motion to the Appellate ision to reverse the judgment, and, if the Judge has improperly re- ted evidence, the Court has power to let in the evidence improperly ected, and give such judgment as, upon the admission of such evi- ce, may seem proper, instead of directing a new trial: see *Dollman* Jones, 12 Ch. D. 553; and *Rule* 232.

The practice adopted by the Court of Appeal in such cases in Eng- Judgment may be given.
d is thus explained by Lord Justice Cotton, in *Jones* v. *Hough*, 5 D., at p. 125: "When the appeal comes before us, the Court of peal has the full right, if it thinks necessary, although there is no tion for a new trial, to say that the conclusion of fact arrived at is satisfactory; and as they have not the materials before them to ive at a proper conclusion, the Court will order a new trial; and an instance a case where this would be done; where the question ns on the credibility of witnesses who had been heard *viva voce*, l seen by the Judge, who himself has tried the case. In such a case, n although the Court had thought the conclusion was not a correct , they might direct that the case should go back for a new trial. re the case is not one which turns on the amount of credibility to Credibility of witness.
given to the different witnesses, but on the conclusion of fact from tain letters, and from certain evidence which was taken upon mission. Under those circumstances, it is our duty to deal with

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the matter; and if we see before us the materials for arriving at a conclusion on the facts contrary to that which was arrived at by the learned Judge, we ought not, in my opinion, to put the parties to the expense and delay of sending the matter back for a new trial. Of course I need not say in all questions of fact, especially where there has been *viva voce* evidence before the Judge in the Court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion which the Judge has arrived at when he has had the opportunity, which the Court have not, of seeing the witnesses, and judging of their demeanour": see also *Bateman* v. *Middlesex*, 27 O. L. R. 122.

Finding of Judge on facts.

It would seem clear that the Court, under this *Rule*, has full power to review the decision of the Judge upon the facts. See also the language in *Jones* v. *Hough*, 5 Ex. D., at p. 122 (quoted with approval in *Prentice* v. *Consolidated Bank*, 13 Ont. App. 74), where Bramwell, L.J., says: "If upon the materials before the learned Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to, and not accept his finding. . . . A great difference exists between a finding by the Judge, and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts then the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty." See also the observations of Brett, M.R., in *Read* v. *Anderson*, 13 Q. B. D. 781, and *N. British, etc., Co.* v. *Tourville*, 25 S. C. R. 177; *Coghlan* v. *Cumberland*, 1898, 1 Ch. 704; 78 L. T. 540.

The finding of a Judge on a question of fact will be regarded by an appellate Court as *primâ facie* right, and will not be interfered with unless the appellant can clearly shew that it is wrong: *Colonial Securities Co.* v. *Massey*, 1896, 1 Q. B. 38; 73 L. T. 497; *Hayes* v. *Day*, 41 S. C. R. 134; *Leslie* v. *Hill*, 25 O. L. R. 144; 28 O. L. R. 48.

When it may be rejected.

But if it is clear from the reasons given by the Judge that he has misapprehended the effect of the evidence, or failed to consider a material part of it, and the evidence which has been believed by him when fairly read and considered as a whole leads the appellate Court to the conclusion that the findings of the Judge at the trial are erroneous, the Court will reverse his findings: *Beal* v. *Michigan Central Ry.*, 19 O. L. R. 502; *Gordon* v. *Goodwin*, 20 O. L. R. 327; *Ryan* v. *McIntosh*, *Ib.*, 31; *Palo* v. *Canadian Northern Ry.*, 29 O. L. R. 413; *Annable* v. *Coventry*, 46 S. C. R. 570: or may reduce the damages awarded by him: *Bateman* v. *Middlesex*, 27 O. L. R. 122; or increase them: *Vanhorn* v. *Verral*, 3 O. W. R. 1567.

Conflict of evidence.

Where there was a conflict of evidence and the Judge who tried the case attributed greater weight to the evidence of some witnesses than others, but in the opinion of the appellate Court took a wrong view of the law, the Court refused to pronounce a judgment upon the evidence, and sent the case for a new trial: *Canada Landed Credit Co.* v. *Thompson*, 3 C. L. T. 158.

In a non-jury case if evidence has been improperly admitted the appellate Court may reject it and maintain the judgment if the remaining evidence warrants it: *Merritt* v. *Hepenstall*, 25 S. C. R. 150.

As to the principles upon which Courts act in reviewing the find- Sec. 26.
gs of a Court of first instance on the facts, see also *supra*, p. 106.

Where a Judge refers it to a Master to assess damages and gives Assessment of damages.
dgment for the amount assessed: *Semble*, a motion for a new trial re-assessment of damages must be made to the Appellate Division: *Dunlop Pneumatic Tire Co.* v. *New Garage Motor Co.*, 108 L. T. 361; *tide Rules* 400, 502.

Practice.—Where there is a general judgment against several Practice.
endants, they are not entitled to sever, and appeal to several Courts a case where an appeal lies to different tribunals at the election of appellant; but they must all appeal to the tribunal to which the endant who takes the first step has appealed: *per* Armour, J., in *teley* v. *Merchants Despatch Co.*, 4 Ont. 723.

Where some, or one, of the parties only appeal, the judgment will Appeal by some of parties.
on such appeal, as a general rule, be varied in favour of any pondent who has not appealed, unless the result of the appeal kes it improper that the judgment against the non-appealing de- dant should stand: *Challoner* v. *Lobo*, 1 O. L. R. 272; *Attorney-eral* v. *Simpson*, 1901, 2 Ch. 671; 85 L. T. 325. Where the re- ndent also seeks a reversal or variation of the judgment in any ticular, he should give notice of motion by way of cross-appeal. is, at least, was the uniform practice in the former Divisional rts: *sed vide*, *Hunter* v. *Hunter*, 24 W. R. 527. The rule may be erent in the Appellate Division, see Jud. Act, sec. 27, and notes.

On a motion for a new trial the evidence of persons who had been Affidavits of witnesses rejected.
nesses to the effect that the evidence they gave was untrue, and t statements made by them to the plaintiff's solicitor before trial e true, is inadmissible: *Pushton* v. *Grand Trunk Ry.*, 6 O. L. R. 425.

Where a motion for a new trial was made conditionally upon the Conditional motion for new trial.
lt of a decision pending in the Court of Appeal, it was held that usual steps, to bring the motion on within the usual time, should taken, and that, if necessary, application should be made to the rt to postpone the hearing of the motion till the decision of the rt of Appeal should be given. The Court has full discretion over n an application to extend the time for giving notice of such motion. is not limited to cases where the party has been misled: *Peckett hort*, 32 W. R. 123.

On an appeal by a plaintiff from a judgment dismissing the action, Third party.
ird party who had obtained leave to appear and oppose the plain- s claim, was held not entitled to be heard: *Ewing* v. *Toronto*, 18 R. 137.

Procedure on Appeals.—See *Rules* 491-4 and notes.

Interpleader Issue.—Where a Judge has directed judgment to be Inter-pleader.
ered on an interpleader issue, an appeal lies under this section: t v. *Parker*, 25 W. R. 518; see *Wilson* v. *Kerr*, 18 U. C. Q. B. 470; *ds* v. *Shepherd*, 1 Ex. D. 75; 45 L. J. Ex. 457; *Withers* v. *Parker*, . J. Ex. 383; *Robinson* v. *Tucker*, 14 Q. B. D. 371; *Dawson* v. *Fox*, Q. B. D. 377.

Costs.—The costs of the former trial, and of the applications for a Costs.
trial, are in the judicial discretion of the Court: Jud. Act, s. 74 .

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Where a new trial was granted on the ground that the Judge at the trial improperly non-suited the plaintiff, the defendant was ordered to pay the costs, though the Judge acted *mero motu*, and the defendant forebore to give his evidence in deference to his ruling: *Mills* v. *Hamilton St. Ry.*, 17 P. R. 74.

New Trials.—For the principles on which the Court acts in granting new trials: see *post*, s. 28 and notes.

County Court Appeals.—Appeals from County Courts and District Courts are regulated by *The County Courts Act* (R. S. O. c. 59), ss. 38-46, and the Jud. Act. s. 26, *supra*.

The above-mentioned sections, 38-46 of *The County Courts Act* (R. S. O. c. 59), are as follows:—

Meaning of "party to a cause or matter" and "appellant."

38. The terms "party to a cause or matter," and "appellant," hereinafter used, shall include persons suing or being sued in the name of another, and a person an whose behalf or for whose benefit an action is prosecuted or defended: 10 Edw. 7. c. 30. s. 38.

Appeals to Divisional Courts.

39.—(1) Any party to a cause or matter may appeal to a Divisional Court from any judgment directed to be entered at or after the trial, or from a refusal to enter a judgment: 10 Edw. 7, c. 30, s. 39 (1); 2 Geo. 5, c. 17, s. 11 (3).

(2) A motion for a new trial shall be deemed an appeal and shall be made to a Divisional Court:" 10 Edw. 7. c. 30. s. 39 (2).

Moving for new trial on discovery of new evidence.

A Divisional Court on appeal from a County Court may under *Rule* 232 admit new evidence: *Butler* v. *McMicken*, 32 Ont. 422.

The Court formerly refused to entertain an appeal where the decision turned wholly upon the evidence, and involved no point of law: *Fowler* v. *McDonald*, 3 U. C. Q. B. 385; *Bradley* v. *Crane*, 4 U. C. Q. B. 122; *Manning* v. *Ashall*, 23 U. C. Q. B. 302; *Clark* v. *Hurlburt*, 6 C. P. 438; *McKinstry* v. *Furby*, 24 U. C. Q. B. 176; *Harris* v. *Robinson*, 25 U. C. Q. B. 247. In such a case, where the trial has been by jury, the remedy will ordinarily be a motion for a new trial. In a non-jury case, the decision of the County Court Judge will not be interfered with, except upon the same principles as are observed in the case of other appeals from a Judge of first instance upon the evidence: see notes to *Rule* 491, and *supra*, p. 123. Where, therefore, the Judge of the County Court who has heard the witnesses finds in favour of the respondent on contradictory evidence, the Appellate Division will not interfere, even though it may think that, if the matter had come before it in the first instance, it would have decided otherwise: *Rees* v. *McKeown*, 7 Ont. App. 521. See also cases referred to in note to sec. 12 of the Act, *supra*, p. 124.

A respondent, the plaintiff in the action, who has recovered part only of his claim, cannot, on an appeal by defendant, without a cross-appeal, obtain judgment for the whole of his claim: *Spears* v. *Harnden*, 17 C. L. T. 84; but see *Toronto Junction* v. *Christie*, 25 S. C. R. 551, and formerly *Hutson* v. *Valliers*, 19 Ont. App. 154.

Appeals from C. C. as to costs.

Appeals as to Costs.—An appeal as to a question of costs, where a question of principle is involved, has been entertained: *Mitchell* v. *Vandusen*, 14 Ont. App. 517, in which, however, it was pointed out as a reason for entertaining the appeal that leave to appeal had been

anted: see also *McDermid* v. *McDermid*, 15 Ont. App. 287; *Weaver* Sec. 26.
Sawyer, 16 Ont. App. 422; *Grove* v. *Bender*, 36 C. L. J. 161; 20 C. L.
Occ. N. 93. And see *The County Courts Act*, s. 40 (1) (*d*), *infra*.

40.—(1) An appeal shall also lie to a Divisional at the instance Appeals from decision of Judge.
any party to a cause or matter from,—

(*a*) Every decision of a Judge u.. any of the powers conferred upon him by any Rules of Court, or by any statute, unless provision is therein made to the contr.. y.

[This clause is held to refer to decisions or orders, other than those expressly provided for in clauses (*b*), (*c*) and (*d*): *Gibson* v. *Hawes*, 24 O. L. R. 543. The orders referred to in this clause must be in their nature final: see sub-sec. 2.]

(*b*) Every decision or order made by a Judge in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts, and proceedings against garnishees.

[Prior to 45 Vict. c. 6, now sec. 40 (b) *supra*, there could be no appeal from a County Court in garnishee proceedings. *Soto* v. *Hubbard*, 6 Ont. App. 546.

This section does not apply to cases coming under sec. 39, *supra*: *Weaver* v. *Sawyer*, 16 Ont. App. 422; *Irvine* v. *Sparks*, 31 Ont. 603.]

(*c*) Every decision or order in any cause or matter disposing of any right or claim and from

["*Right of claim.*" The right of claim referred to is that which forms the subject of the action, not the right to take any particular piece of procedure in the course of the action: *McPherson* v. *Wilson*, 13 P. R. at p. 340.]

(*d*) Any decision or order of a Judge whether pronounced or Appeals as to costs.
made at a trial, or an appeal from taxation or otherwise, which has the effect of depriving the plaintiff of County Court costs on the ground that his action is of the proper competence of the Division Court, or of entitling him to County Court costs on the ground that the action is not of the proper competence of the Division Court. 10 Edw. VII. c. 30, s. 40 (1); 2 Geo. V. c. 17, s. 11 (4).

(2) This section shall not apply to an order or decision which is final in its nature but is merely interlocutory, or where jurisdiction given to the Judge as *persona designata*. 10 Edw. VII. c. 30, s. 40; Geo. V. c. 17, s. 11 (5).

The proviso of sub-section (2) governs the whole section, so that, matters and the other proceedings specified in clauses (*a*), (*b*) and (*d*), an appeal does not lie unless the order appealed from n its nature final: see *Baby* v. *Ross*, 14 P. R. 440; *Hunter* v. *Hunter*, C. L. T. 114; *Arnold* v. *Van Tuyl*, 30 Ont. 663; and *Gibson* v. *Hawes*, O. L. R. 543.

Final or Interlocutory Order.—The question as to when an order inal, and when interlocutory, has arisen under various Acts, and y be answered differently under each, according to the intention the enactment.

Sec. 26.

Interlocutory or final orders, what are.

For the purpose of determining the time for appealing under English (1883), R. 867, a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finaly determine the matter in litigation: *Saloman* v. *Warner*, 1891, 1 Q. B. 734; *Standard Discount Co.* v. *LeGrange*, 3 C. P. D. 67, 71; or disposes of the matter in dispute between the parties, even though inquiries have to be carried out after the order: see *Re Herbert Reeves & Co.*, 50 W. R. 252; 1901, W. N. 213.

For the same purpose an interlocutory order includes an order for working out the rights given by a final judgment, *e.g.*, an order setting off costs subject to a solicitor's lien: *Blakey* v. *Latham*, 43 Ch. D. 23, and see *Leonard* v. *Burrows*, 7 O. L. R. 316.

See also notes to sec. 25 of the Jud. Act, *supra*, p. 116.

An order interlocutory under the above English Rule is not necessarily interlocutory under the above section 40 (2); see *Rural Mun. of Morris* v. *London & Canadian, etc., Co.*, 19 S. C. R. at p. 442.

An order has been considered final because there remains nothing further to be done under it: *Re D. A. Jones Co.*, 19 Ont. App. 63; and thus an order to sign judgment (under former C. R. 603), was considered not final, and therefore not appealable under the Supreme Court Act (R. S. C. c. 135, ss. 24 to 28). Such an order would, however, seem to be final within above section 40 (1) (*d*); see *Nelson* v. *Thorner*, 11 Ont. App. 616; *Collins* v. *Hickok*, *Ib.*, 620; *Bank of Minnesota* v. *Page*, 14 Ont. App. 347, and so also, is an order allowing a defendant to defend on payment of money into Court: *Costle* v. *Kourt*, 18 O. L. R. 462; though if judgment were denied to the plaintiff on such a motion, the matter in litigation would not have been determined, and an appeal would thus be excluded, if the rule in *Saloman* v. *Warner*, *supra*, were applied. A decision on an application under *Rule* 57, would seem now, beyond doubt, to be appealable if judgment is obtained in the action; *sed quære*, if the motion is refused, as such an order is not final.

In view of the cases in which appeals have been entertained under sec. 40 it would seem that a "decision or order in its nature final and not interlocutory" within the meaning of the section, is a decision or order, whether before, or after, or by, the final judgment, (other than a judgment or order to which sec. 39 applies), by which the status of the parties is determined with respect to the matter in dispute, but it is not essential that nothing further has to be done to work out the rights thus determined, nor that the decision, had it been in respondent's favour, would necessarily end the matters in dispute: see cases *infra* and *Standard Discount Co.* v. *LeGrange*, 3 C. P. D. 67, 71; *Rural Mun. of Morris* v. *London & Can. L. & A. Co.*, 19 S. C. R. 434; *Baptist* v. *Baptist*, 21 S. C. R. 425; *Babcock* v. *Standish*, 19 P. R. 195; but see *Hunter* v. *Hunter*, 18 C. L. T. 114.

Judgments and Orders Appealable:—

County Court judgments and orders, appealable.

Appeals have been entertained in the following cases:—From a judgment in a partition matter under *The Partition Act* (R. S. O. c. 114): *Furness* v. *Mitchell*, 3 Ont. App. 510; an order refusing to set aside a judgment for partition under *The Partition Act*: *Jenking* v. *Jenking*, 11 Ont. App. 92; an order or judgment disposing of an issue directed in a garnishing matter: *Henderson* v. *Rogers*, 15 P. R. 241; or in interpleader proceedings: *Feehan* v. *Bank of Toronto*, 10

C. P. 32, see also *Whiting* v. *Hovey*, 12 Ont. App. 119; *Rural Mun.* Sec. 26.
of Morris v. *London and Canadian, etc.*, 19 S. C. R. at p. 442; a judgment on a special case: *Osler* v. *Muter*, 19 Ont. App. 94; *Re Shaver* v. *Hart*, 31 U. C. Q. B. 603; an order for judgment under former C. R. 603: *Costie* v. *Kourt*, 18 O. L. R. 462; *Nelson* v. *Thorner*, 11 Ont. App. 816; *Collins* v. *Hickok*, *Ib.*, 620; *Bank of Minnesota* v. *Page*, 14 Ont. App. 347; *Sydenham* v. *Williams*, Divisionni Court, 16th January, 1897; an order imposing terms on a defendant as a condition of giving him leave to defend: *McVicar* v. *McLaughlin*, 16 P. R. 450; or striking out certain paragraphs of a defence as shewing no reasonable answer: *Smith* v. *Traders Bank*, 11 O. L. R. 24; or refusing an application to set aside a judgment entered for default of defence, on the ground of irregularity: *Voight* v. *Orth*, 5 O. L. R. 443; an order (made at the instance of a contesting creditor, under *The Creditors' Relief Act*), setting aside a judgment and execution: *Bowerman* v. *Phillips*, 5 Ont. App. 679; *Molson's Bank* v. *McMeckin*, *Ib.*, 535; an order allowing, or refusing to allow, execution to issue on a judgment: *Moson* v. *Johnston*, 20 Ont. App. 412; *McMahon* v. *Spencer*, 13 Ont. App. 30; an order allowing a set off of costs which were not in the discretion of the Judge, contrary to right of plaintiff: *Babcock* v. *Standish*, 19 P. R. 195, an order in proceedings under *The Joint Stock Companies Winding-up Act* (R. S. O. c. 178, Part xiii), approving of a sale by the liquidator, of the assets of a company *en bloc*, and making certain provisions for distributing the purchase money: *Re D. A. Jones Co.*, 19 Ont. App. 63; an order for the examination of the wife of a judgment debtor under *Rule* 562, as a person to whom the judgment debtor had made a transfer of his property: *Goodeve* v. *White*, 5 P. R. 433; an order for the committal of a judgment debtor under Rule 587 for unsatisfactory answers on his examination as a judgment debtor: *Boby* v. *Ross*, 14 P. R. 440; and see *Re Anderson* v. *Vanstone*, 5 P. R. at p. 246; (but see *New Homburg* v. *Burden*, *infra*, p. 130).

An order respecting the person having the right to continue an action after the death of the plaintiff would also seem to be final within the meaning of the section: see *Baptist* v. *Baptist*, 21 S. C. R. 425. So also a judgment or order made otherwise than at the trial determining a right and providing for the proceedings for working it out: *e.g.*, by taking an account, though such an order may not be final for some purposes: see *The Queen* v. *Clark*, 21 S. C. R. 656; *Re Alexander*, 1892, 1 Q. B. 216; and an order perpetually restraining plaintiff from proceeding with an action (which is not a final order within *The Supreme and Exchequer Court Act*); *Maritime Bank* v. *Stewart*, 20 S. C. R. 105.

An appeal now lies from an order or decision as to the scale of costs under a final judgment: sec. 40 (1) (*d*), *supra* (see formerly *Leonard* v. *Burrows*, 7 O. L. R. 316).

Judgments and Orders not Appealable:—

Appeals have not been entertained in the following cases, as being from orders not in their nature final:—From an order setting aside a judgment and letting defendant in to defend: *Schroeder* v. *Rooney*, 4 Ont. App. 673; *O'Donnell* v. *Guinane*, 28 Ont. 389 (but in *McVicar* v. *McLaughlin*, 16 P. R. 450, an appeal was entertained from an order setting aside a judgment obtained on a specially endorsed writ under former C. R. 603, in regard to the terms imposed upon

County Court judgments and orders, not appealable.

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defendant as a condition of being let in to defend); from an order dismissing a motion for judgment under C. R. 603: *Fisken* v. *Stewart*, 17 C. L. T. 82; see *Rural Mun. of Morris* v. *London & Can. L. & A. Co.*, 19 S. C. R. 434; an order enlarging until after a named event, a motion to dismiss an action for want of prosecution: *Slater* v. *Mader*, 17 C. L. T. 82; an order striking out a jury notice: *McPherson* v. *Wilson*, 13 P. R. 339; an interpleader order directing an issue: *Hunter* v. *Hunter*, 18 C. L. T. 114; an order on an application to amend: *Branigan* v. *Stinson*, 10 U. C. Q. B. 403; and see *Anglin* v. *Kingston*, 16 U. C. Q. B. 121; the decision of a Judge as to the right to begin: *Hastings* v. *Earnest*, 7 U. C. Q. B. 520; or on a motion to vary the minutes of a judgment: *Re Taggart* v. *Bennett*, 6 O. L. R. 74; an order dismissing an application to commit a defendant for contempt for refusing to be sworn on an examination: *New Hamburg* v. *Burden*, 37 C. L. J. 420; or ordering a discharge from custody under a *ca. sa.*: *Gallagher* v. *Gallagher*, 31 Ont. 172; an order refusing a new trial: *Booth* v. *Can. Pac. Ry.*, 13 O. L. R. 91; an order dismissing an action as frivolous: *Re Page, Hill* v. *Fladgate*, 102 L. T. 588; an order for arrest or *mesne* process, is held not to be appealable, but an order made on a motion to discharge a prisoner from custody is held to be appealable: *Bank of Montreal* v. *Partridge*, 3 O. W. N. 149.

An appeal will not lie from a judgment or order pronounced in a matter in which the Court below had no jurisdiction: *Teskey* v. *Neil*, 15 P. R. 244; but see *Sweetland* v. *Turkish Cigarette Co.*, 80 L. T. 472; 47 W. R. 511; nor can a question as to jurisdiction be raised in appeal, if not taken in the County Court: *Taylor* v. *National A. A. Society*, 110 L. T. 696.

Judge acting as persona designata.

Where a Judge is persona designata.—In such case *Judges' Orders Enforcement Act* (R. S. O. c. 79), s. 4, applies, which provides that there shall be no appeal from the order of a Judge so made, unless an appeal is expressly authorized by the statute giving the jurisdiction, or unless special leave is granted by the Judge making the order, or by a Judge of the High Court Division, in which case an appeal may be had to a Divisional Court of the Appellate Division, whose decision is final: see *Re Toronto H. & B. Ry. Co.*, 17 P. R. 199; *Re Simpson* v. *Clafferty*, 18 P. R. 403.

The County Court Act (R. S. O. c. 59), provides:—

Appeal after judgment signed.

41. An appeal may be had notwithstanding judgment has been signed: 10 Edw. VII. c. 30, s. 41.

Pleadings, etc., to be certified.

42.—(1) The Judge shall, at the request of the appellant, certify under his hand to the proper officer of the Supreme Court, the pleadings in the cause and all motions or orders made, granted or refused therein, and his judgments or decision, and, where a trial has been had, his charge to the jury, if any, the evidence and all objections and exceptions thereto, or to his charge, and all other papers in the cause affecting the question raised by the appeal.

Certifying proceedings under ss. 40 or 41.

(2) The Judge shall be required to certify only the pleadings, motions, orders, affidavits, evidence and other material, necessary for the full understanding of the matter in appeal, together with his judgment or decision: 10 Edw. VII. c. 30, s. 42.

["The proper officer" is now the Registrar of the Appellate Division of the Supreme Court. The "judgment or decision" means the formal order or judgment, not the Judge's reasons for judgment: these should also be sent, however, when in writing.]

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Staying proceedings on appeal.

43. Subject to the next following section, any Judge of the County District Court appealed from may, upon application to him, stay proceedings in the action to enable the appeal to be brought upon such terms and for such time as he may deem just: 10 Edw. VII. c. 30, s. 43.

[In the event of a Judge refusing the application, no appeal would appear to lie from his decision: see s. 40 (2), *supra*.]

Setting down appeals.

44.—(1) The appeal shall be set down for argument at the first sittings of a Divisional Court which commences after the expiration of thirty days from the judgment, order, or decision complained of.

Extension of time for appeal.

(2) Subject to Rules of Court, a Divisional Court or a Judge of the Supreme Court, notwithstanding that the Judge of the County District Court has not certified the pleadings and other papers, or that they have not been filed in the Supreme Court, may extend the time for setting down the appeal or for giving notice of setting down, or for doing any act or taking any proceeding in or in relation to the appeal; and may, if the certificate is incomplete or incorrect, direct the same to be amended or sent back to the Judge for amendment: 10 Edw. VII. c. 30, s. 44.

See *Hunter* v. *Patterson*, 2 O. W. N. 61.

Powers to amend and receive further evidence.

45.—(1) The Divisional Court shall have all the powers and duties, as to amendment and otherwise, of the Judge appealed from, and full discretionary power to receive further evidence upon questions of fact, either by oral examination before the Court, or as may be directed.

(2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision complained of.

[See *Butler* v. *McMicken*, 32 Ont. 422.]

(3) Except as provided by sub-section 2, upon an appeal from a judgment, order or decision given upon the merits at the trial or hearing, such further evidence shall be admitted on special grounds only, and not without the special leave of the Court: 10 Edw. VII. c. 30, s. 45.

[See *Rule* 232, and notes.]

Order of Divisional Court on Appeal.

46.—(1) On an appeal to the Divisional Court may set aside the judgment, and may direct any other judgment to be entered, or may direct a new trial to be had, and make such other order as to costs and otherwise as appears just.

(2) The decision of the Divisional Court shall be certified by the Registrar of the Appellate Division to the Clerk of the Court in whom the judgment or order appealed from was entered, who shall thereupon cause the same to be entered in the proper judgment or order book, and all subsequent proceedings may be taken thereon, as if the decision had been given in the Court below. 10 Edw. VII. c. 30, s. 46.

[This sub-section requires the judgment of the Divisional Court in this particular class of appeals to be in the form of a certificate. It also seems to imply that all judgments or orders appealed from must have been entered before the appeal is lodged, but see s. 41, *supra*.]

Sec. 20.

Procedure on County Court and District Court Appeals.—Formerly there could be no appeal after judgment entered: *Murphy* v. *Northern Ry. Co.*, 13 C. P. 32; *Duffil* v. *Dickinson*, 14 C. P. 142; *Wood* v. *Grand Trunk Ry. Co.*, 16 C. P. 275; but now there may: see sec. 41, *supra*.

Certifying proceedings.

The certifying of the proceedings under section 42 is a necessary preliminary to setting down the appeal: *Smith* v. *Hay*, 35 C. L. J. 421; *McCarron* v. *Metropolitan Life Insce. Co.*, 19 C. L. T. Occ. N. 230; *Reekie* v. *McNeil*, 31 Ont. 444; and see *Morse* v. *Thompson*, 19 C. P. 94; *Baby* v. *Ross*, 14 P. R. 440; *Gilmor* v. *McPhail*, 16 P. R. 151. In *Lucas* v. *Holliday*, 8 O. L. R. 541, the Court entertained the appeal notwithstanding the omission to certify the proceedings, no objection having been raised.

The Judge should not refuse to certify the papers in a case which is not appealable; it is for the appellate Court to decide whether the appeal can be entertained or not: *Re Taggart* v. *Bennett*, 6 O. L. R. 74.

Papers to be certified.

In appeals from County Courts, the pleadings, motions, orders and other papers to be certified to the proper officer of the Appellate Division under *The County Courts Act* (R. S. O. c. 59), s. 42, should include:

(*a*) The original pleadings: see *Lees* v. *Ottawa & N. Y. Ry. Co.*, 31 Ont. 567; 20 C. L. T. 75.

(*b*) Notices of motion, and orders affecting questions raised by the appeal;

(*c*) The judgment or order appealed from and the written opinion or decision of the Judge;

also where a trial has been had

(*d*) The Judge's notes, or where the evidence has been taken by a stenographer, his notes, of the evidence and of any objections and exceptions thereto, and of the rejection of any evidence, and of the Judge's charge, and of all objections or exceptions thereto;

(*e*) The exhibits put in at the trial.

It is not necessary to certify or transmit the evidence or the objections or exceptions thereto, where the appeal is from a judgment or decision upon the pleadings, or upon a motion not founded upon the evidence.

Where the appeal is brought under *The County Courts Act* (R. S. O. c. 59), s. 40 (*d*), as to the papers to be certified: see *Ib.*, s. 42.

It is not a valid objection to an appeal that the Judge has not expressed in his certificate that the proceedings are certified "to the proper officer of the Supreme Court": see *Baby* v. *Ross*, 14 P. R. 440.

What a Judge certifies as his judgment will be treated as conclusive: *Huddlestone* v. *Furness Ry.*, 15 T. L. R. 238.

Certifying proceedings under s. 42.

The Judge should only be required to certify the motions, rules, orders, affidavits, evidence, and other materials, necessary for the full understanding of the matter in appeal, together with his judgment or decision on the same.

The certifying of the papers may be compelled by mandamus where the Judge has been applied to, and has refused to certify, and the right

to appeal still exists: see *Reg.* v. *Wells*, 17 U. C. Q. B. 545; *Re Keenahan* v. *Preston*, 21 U. C. Q. B. 461; *Orr* v. *Barrett*, 9 C. L. T. 72. Sec. 28.

For Form of Certificate of County Court Judge: see H. & L. Forms No. 1197. The first paragraph of this form requires modification, owing to the changes made by the revision of *The County Courts Act* since the publication of those forms. Form of certificate.

The certified papers should be fastened together and transmitted to the Central Office, and the same are to be returned to the County Court when the appeal is disposed of.

Staying Execution.—As to stay of execution, or proceedings, in a County Court case, pending an appeal: see sec. 43, *supra*.

Setting Down Appeals.—The appeal is set down with the Registrar of the Appellate Division within the time limited by s. 44 (1) *supra*, and see *infra*.

The sittings of the Appellate Division commence on the 1st Monday in each month, unless it be a non-juridical day, and then on the next day thereafter—except in the months of January, July, August, and September. There are no sittings in the Christmas or Long Vacations, and the sittings in January commence on the first Monday after the 6th January, and the sittings in September commence on the first Monday after the 15th September: see *Rule* 171 (1), (8 Nov., 1913); but see Jud. Act, s. 42 (1).

The 30 days' run from the date of the delivery of the judicial decision, oral or written, and the order or judgment founded on it must be referred to that date: *Fawkes* v. *Swayzie*, 31 Ont. 256. If the decision is not given in open Court, it cannot be said to be pronounced until the parties are notified of it: *Ib.*

Sunday is not reckoned in the thirty days when it is the first day: *Cooper* v. *Dixon*, 3 C. L. T. 198 (*sed quære*): nor where it is the last day: see *Rule* 174.

The appeal must be set down for a Divisional Court, which begins its sittings not later than 30 days from the decision, but may be set down for an earlier sittings: *Lees* v. *Ottawa & New York Ry. Co.*, 31 Ont. 567. The appeal cannot be set down until the Judge has certified the papers under *The County Courts Act* (R. S. O. c. 59), s. 42: *Reekie* v. *McNeil*, 31 Ont. 444. After the time limited for setting down has expired there was formerly no jurisdiction to hear the appeal: *Ib.*: but now the Divisional Court has jurisdiction to extend the time: s. 44 (2), *supra*, p. 131, and see *Rule* 176.

The fact that a stay of proceedings has been granted by the County Court Judge under *The County Courts Act*, s. 43, for a time extending beyond the commencement of the sittings at which the appeal should be set down under s. 44 does not absolve the appellant from the necessity of complying with that section: *Paul* v. *Rutlidge*, 16 P. R. 140; an extension of the time may be obtained under s. 44 (2), *supra*, p. 131, and see *Rule* 176.

Where notice of hearing is given, but the case is not set down, *Rule* 560 seems to apply. If it does not, an application for the dismissal of the appeal, or for the costs of an abandoned appeal may be made to the Divisional Court on the return day named in the notice of hearing: see notes to *Rule* 215, *infra*, and *O'Donnell* v. *Guinane*, 28 Ont. 389.

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Notice of appeal.

Notice of Appeal.—For form of notice of appeal: see H. & L. Forms, No. 1199. No express provision is made for giving notice, but it seems to be none the less necessary.

Motion relating to appeals.

Interlocutory Motions Relating to Appeals.—A motion to strike out or quash an appeal must be made to the Divisional Court: see C. C. Act, s. 44 (2), *supra; O'Donnell* v. *Guinane*, 28 Ont. 389.

A motion to extend the time for setting down an appeal, or for doing any act or taking any proceeding in reference to the appeal may be made to a Divisional Court of the Appellate Division, or to a Judge of the High Court Division; section 44 (2) *supra;* such motion may be made before the papers are (under sec. 42) sent up to the Appellate Division.

Costs of C. C. appeals.

Costs.—Costs of the action and of the application are in the judicial discretion of the Court; Jud. Act, s. 74, *post*, they are usually ordered to follow the event of the motion, even though the Judge below has *ex mero motu* made an erroneous adjudication: *Mills* v. *Hamilton Street Ry. Co.*, 17 P. R. 74; *Eddy* v. *Ottawa, etc.*, 31 U. C. Q. B. 569, 576, but see *Harris* v. *Robinson*, 25 U. C. Q. B. 247; and though the Court has no jurisdiction to hear the appeal: *Cote* v. *Halliday*, 33 C. L. J. 120; S. C., *sub nom., Cote* v. *Halliday*, 17 C. L. T. 53; and see *Teskey* v. *Neil*, 15 P. R. 244; *Hewgill* v. *Chadwick*, 18 P. R. 359; but see *contra, Powley* v *Whitehead*, 16 U. C. Q. B. 589; and per Hagarty, C.J., 20 C. P., pp. 198-9; but they may be ordered to abide the result of a new trial, or the applicant, though successful, may be ordered to pay them as a condition of getting a new trial.

Abandonment of C. C. appeals.

Abandonment or Non-prosecution of a County Court Appeal.—Where an appeal has been properly lodged in the Supreme Court, in case of its abandonment or non-prosecution after service of notice, *Rule* 660 is applicable, and a motion to dismiss it is unnecessary: *Re Toronto Ry. Co. and City of Toronto*, 18 P. R. 489.

Setting down appeals.

The appeal must be set down for argument at the first sittings of a Divisional Court of the Appellate Division which commences after the expiration of thirty days from the judgment, order or decision complained of: see pp. 131, 133, *supra*.

A Divisional Court or a Judge of the High Court Division may extend the time for setting down the appeal, or for giving notice of setting down or for doing any act or taking any proceedings in or in relation to the appeal, and may if the certificate is incomplete or incorrect, direct the same to be amended, or to be sent back to the Judge for amendment: sec. 44 (2), *supra*.

The 30 days begin to run from the day on which the order or judgment appealed from was pronounced, but if not delivered in open Court it is not to be considered to be delivered until the parties are notified of it: *Fawkes* v. *Swayzie*, 31 Ont. 256; but the appellant is not obliged to wait the expiration of 30 days from the judgment or order before setting down the appeal: *Lees* v. *Ottawa & N. Y. Ry.*, 31 Ont. 567; *Smith* v. *Baptist Church*, 1 O. L. R. 195.

Judgment on C. C. appeals.

Judgment of Appellate Division.—The judgment of the Court on appeals from the County Court, is issued in the form of a certificate: see *The County Courts Act*, sec. 46 (2), *supra*, p. 131.

Semble, the judgment, where the certificate has been drawn up and issued, is final, and cannot be reopened: *Hessin* v. *Jones*, 1914, 2 K. B. 421; 110 L. T. 773.

Appeals from Surrogate Courts.—Appeals from Surrogate Courts are regulated by the following provisions in *The Surrogate Courts Act*, (R. S. O. c. 62). Sec. 26. Appeals from Surrogate Courts.

34.—(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court. To what Court

(2) No such appeal shall lie unless the value of the property to be affected by such order, determination or judgment, exceeds $200. When permitted

(3) The practice and procedure upon and in relation to an appeal shall be the same as is provided by *The County Courts Act*, as to appeals from the County Court. Practice Rev. Stat., c. 59

(4) A motion for a new trial after a trial by jury under section 28 shall be deemed to be an appeal and shall be made to a Divisional Court: 10 Edw. VII. c. 31, s. 34.

(5) An appeal shall also lie from any order, decision or determination of the Judge of a Surrogate Court, on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure upon and in relation to the appeal, shall be the same as upon an appeal from such a report. Appeal from audit of accounts.

(6) Sub-sections 2 and 3 shall not apply to the appeal provided for by sub-section 5: 1 Geo. V. c. 18, s. 2.

It will, therefore, be seen that in all appeals from a Surrogate Court except as to a decision on taking of accounts, the appeal is to be brought and prosecuted in the Appellate Division of the Supreme Court in like manner as appeals from a County Court: as to which, see *supra*, pp. 125-134. In what cases appeal lies from Surrogate Court.

An appeal lies to the Appellate Division from an order of a Surrogate Court Judge allowing compensation to an executor under *The Trustee Act* (R. S. O. c. 121), s. 67 (3): *Re Alexander*, 31 Ont. 167.

An appeal under *The Surrogate Courts Act* (R. S. O. c. 62), cannot be entertained unless lodged before any removal of the matter into the Supreme Court under s. 32 of that Act. Upon the making of an order for removal the matter becomes an action in the Supreme Court, and the practice to be followed is the practice prescribed in a Supreme Court proceeding: *Justin* v. *Goodison*, 18 P. R. 174. Must be lodged before removal of action.

Appeals under sub-section 5 in regard to decisions on the taking of accounts, are to be brought and prosecuted as nearly as may be in accordance with the practice relating to appeals from Masters' reports; as to which: see *Rules* 503-506. Presumably, in order to comply with these *Rules*, the certificate or order of the Judge appealed from should be filed in the Surrogate Court, and notice of filing served on the opposite party, and seven clear days' notice of the appeal must then be served on the respondent within one month from the date of service of the notice of filing. The appeal in this case is to a Judge of the High Court Division in the Weekly Court, and it would seem that an appeal would lie from his decision to the Appellate Division under the Jud. Act, s. 26, unless precluded by Jud. Act, sec. 25.

Security for Costs of Appeal.—By Rule 57 of the Surrogate Court Rules, in appeals under s. 34, s.-s. 1 and 2, the appellant was required to give security for costs in the sum of $200. As the practice and procedure on appeals from the Surrogate Court (except under s. 34 (5)) Security for costs of appeal from Surrogate Court.

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are now to be the same as is provided by *The County Courts Act*, and under that Act no security for costs of an appeal is required, it is probable that the Surrogate Court Rule 57 may be held to have been impliedly abrogated.

The service of a notice of appeal, and the deposit with the Registrar of the Surrogate Court, as security, of an unmarked cheek for $100, payable to the order of the Registrar, but never cashed by him, was held not to be compliance with Surrogate Court Rule 57, and, therefore, the appeal, not having been lodged and brought within the time required by *The Surrogate Courts Act*, was quashed: *Re Wilson*, 17 P. R. 407.

If Surrogate Court Rule 57 is not abrogated then on an appeal from an order of the Surrogate Court, coming under s. 34 (1), security must be given, and an affidavit of the value of the property affected filed, as required by Surrogate Court Rule 57. Unless this be done an appeal is not properly lodged, and may be quashed: *Re Nichol*, 1 O. L. R. 213.*

Affidavit of value of properties in question.

Affidavit of Value of Property.—Whether the filing of an affidavit of the value of the property in question as required by Surrogate Court Rule 57 (4) is necessary in appeals under s. 34 *supra*, is also problematical, no such affidavit being required according to the practice in County Court Appeals.*

Notice of appeal.

Notice of Appeal.—Service of notice of appeal would appear to be necessary though not expressly provided for: see *supra*, p. 134.

A notice of appeal not specifying that it was to a Divisional Court, or any Court, and a bond reciting that the appellant desired to appeal to the Court of Appeal, were held not to be defects sufficient to have an appeal quashed: *Taylor* v. *Delaney*, 3 O. L. R. 380. Certain defects in Surrogate Court Rule 59 and forms are pointed out in this case.

Division Court appeals.

Division Court Appeals.—Appeals from Division Courts are regulated by *The Division Courts Act* (R. S. O. c. 63). The following are the provisions of that Act relating to appeals:

Parties may agree not to appeal.

107. An appeal shall not lie if, before the commencement of the trial, there is filed with the clerk an agreement in writing not to appeal, signed by the parties, or their agents, and the Judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence on that point. 10 Edw. VII. c. 32, s. 107.

Appeals to Divisional Court.

125. Subject to the provisions of section 107 an appeal shall lie to a Divisional Court from the decision of a Judge at or after the trial, or upon an application for a new trial, except in cases where a new trial has been granted,—

(*a*) In an action or garnishee proceeding where the sum in dispute exceeds $100 exclusive of costs;

* I am informed by Mr. Justice Middleton that it has been ruled in the Appellate Division that the effect of the provision of *The Surrogate Court Act* as to appeals is to abrogate the Surrogate Court Rules on that subject, but I have been unable to find the case in which that ruling was made.—G.S.H.

(*b*) in interpleader where the money or the value of the goods or chattels claimed or proceeds thereof exceeds $100, or where the damage claimed by or awarded to either party against the other or against a bailiff exceeds the sum of $60; Sec. 26.

(*c*) Where the parties consent to an appeal; or

(*d*) Where the effect of the decision is to determine that any general assessment made by a mutual insurance company is invalid; but the company, unless the Divisional Court otherwise directs, shall pay the respondents' costs of the appeal between solicitor and client on the County Court scale in any event. 10 Edw. VII. c. 32, s. 125.

Agents for service where right to appeal.

126.—(1) Where an appeal lies, each party shall, before or at the trial, leave with the clerk a memorandum in writing of the name and place of abode of some person resident within the county town upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or in his absence, at his place of abode, shall be sufficient; and in the event of failure to leave such memorandum, all papers requiring service upon the party so failing may be served upon the clerk or left at his office, and the clerk shall forthwith send, by registered post, all papers so served upon him, to the person entitled thereto.

Case of Judicial District.

(2) This section shall not apply to a Provisional Judicial District: 10 Edw. VII. c. 32, s. 126.

Certified proceedings, etc., to be furnished by Clerk.

127. The Clerk shall at the request of the appellant, or his agent, certify under his hand to the Clerk of the Central Office at Osgoode Hall, Toronto, the summons with all notices indorsed thereon, the claim, and any notice of defence, the evidence and all objections and exceptions thereto, and all motions or orders made, granted or refused therein, together with such notes of the Judge's charge as may have been made, the decision when in writing, or the notes thereof, and all affidavits and other papers in the action, the whole hereinafter called the appeal case; and the clerk shall furnish to the parties, when required so to do, copies of the proceeding so certified, or such part thereof as may be required, and for every copy he shall be entitled to receive five cents for every one hundred words: 10 Edw. VII. c. 32, s. 127.

Procedure upon appeal from Division Court.

128.—(1) The appellant shall, within two weeks after the date of the decision complained of or within such other time as the Judge may order, file the appeal case with the proper officer of the Supreme Court, and shall set down the appeal to be heard at the latest two clear days before the first sittings of a Divisional Court which commences after the expiration of thirty days from the decision complained of, and shall give notice thereof and of the appeal, stating the grounds thereof, to the respondent, his solicitor or agent, at least seven days before the commencement of such sittings; and the Divisional Court shall have power to dismiss the appeal or to give any judgment and make any order which ought to have been made, or to grant a new trial, and shall give such order or direction to the Court below touching the decision or judgment to be given in the matter as the law requires, and may award costs in its discretion which shall be certified to and form part of the judgment of the Court below, and upon receipt of such order, direction and certificate, the Court below shall proceed in accordance therewith.

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Powers of Divisional Court on appeal.

(2) The Divisional Court shall be deemed to be seized of the appeal if and when the appeal case is filed; and subject to Rules of the Court, may extend the time for setting down the appeal and for giving notice thereof and of the appeal, and for doing any act or taking any proceeding in or in relation to the appeal; and may, if the appeal case is incomplete or inaccurate, direct the same to be amended or to be sent back to the clerk for amendment; and may also allow the notice of appeal to be amended.

Stay of proceedings.

(3) After the appeal has been set down to be heard, the execution of the judgment appealed from shall be stayed pending the appeal, unless otherwise ordered by a Judge of the Supreme Court. 10 Edw. VII. c. 32, s. 128.

Taxable costs on appeal.

129. The costs taxable, between party and party of and incidental to an appeal, shall be the actual disbursements, and no greater amount over and above actual disbursements than $15, inclusive of counsel fee; the costs of an appeal between solicitor and client shall be taxable on the County Court scale. 10 Edw. VII. c. 32, s. 129.

Where a new trial is desired, an appeal does not lie until a new trial has been applied for and refused: see sec. 125 *supra*, and *Cole* v. *Halliday*, 33 C. L. J. 120; 17 C. L. T. 53.

Omission to take notes of evidence.

The right of appeal from a Division Court is not lost because the Judge of the Division Court omits to take notes of the evidence: see *Sullivan* v. *Francis*, 18 Ont. App. 121; *Wohlgemuthe* v. *Coste*, 1899, 1 Q. B. 501; 80 L. T. 529. Where the evidence in such a case cannot be agreed on, or otherwise supplied, it may be necessary for the Divisional Court to remit the case to the Judge to take the evidence upon a new trial: *Davidson* v. *Head*, 18 C. L. T. 260; 34 C. L. J. 415.

The agreement not to appeal under s. 107 *supra*, where the amount claimed exceeds $100, must be in writing and filed: a verbal consent is not sufficient: *Davidson* v. *Head*, 18 C. L. T. 260; 34 C. L. J. 415.

Appeal, when lodged.

The filing of the appeal case and the giving of notice of setting down for argument before the Divisional Court, with the grounds of appeal required by sec. 128 (1) *supra*, is a condition precedent to the right to appeal, and if not given the Divisional Court has no jurisdiction to deal with the appeal: *Bradley* v. *Wilson*, 8 O. L. R. 184.

The Divisional Court has no jurisdiction to extend the time for taking steps in a Division Court appeal prior to the case being lodged; such a matter is for the Judge of the Court below: *Owen* v. *Sprung*, 28 Ont. 607.

After a certified copy of the proceedings has been filed in the office of the Registrar of the Appellate Division in proper time, the appeal is lodged, and the subsequent proceedings relating to the appeal, are in the discretion of the appellate Court, and that Court may allow an amendment and enlarge the time, etc.: see sec. 128 (2) *supra*.

Further opportunity was given to supply a notice of appeal, where it could be given within the proper time: *Smith* v. *Port Colborne, etc.*, 1 O. L. R. 195.

An appeal may be quashed where "the sum in dispute upon the appeal" does not exceed $100, exclusive of costs: *Lambert* v. *Clarke*, 7 O. L. R. 130; see sec. 125 (*a*) *supra*, unless the case is one within

sec. 125 (*b*); and an appeal which has been duly lodged may be dismissed if not set down 2 clear days before the sitting of the Divisional Court commencing next after the expiration of 30 days from the decision complained of: see *Heise* v. *Shanks*, 1 O. L. R. 48; and *supra*, s. 128 (1); but the time may be extended by the Divisional Court: see s. 128 (2) *supra*. Sec. 26.

Procedure.—The appeal, if any, is to the Appellate Division of the Supreme Court. The sittings of the Divisional Court of that Division commence on the first Monday in each month, except during vacations, or where such day is a holiday and then on the next juridical day thereafter; and except during January and September, when the sittings commence on the first Monday after the 6th of January, and the first Monday after the 15th day of September. Procedure on appeals from Division Courts.

The appeal case must be certified by the Clerk of the Division Court, as required by s. 127 *supra*, and filed with the Registrar of the Appellate Division within two weeks from the date of the decision complained of, or within such further time as the Judge of the Division Court may allow. But *semble*, he cannot extend the time for filing the case so as to extend the time prescribed for setting down the appeal.

The appeal must be set down two clear days before the sittings, commencing thirty days next after the decision complained of: s. 128 (1) *supra*. Setting down.

The Appellate Division is not seized of the appeal until the case is filed: s. 128 (2) *supra*, and until then, it would seem to have no power to entertain any interlocutory application regarding the appeal. After it is filed it may extend the time for setting down the appeal or giving notice thereof and of the appeal, and may refer the case back to the Clerk of the Division Court for correction or amendment if necessary: *Ib.*, and may also allow the notice of appeal to be amended. Probably under *Rule* 207 (4) all interlocutory motions of that kind may be made to a Judge in Chambers.

Notice of Appeal.—The notice of the appeal may be served on the person named in the notice required to be filed with the Clerk of the Division Court as provided by s. 126 *supra*, or on some grown up person at his abode, or if no notice has been filed, then the notice may be left with the Clerk of the Division Court with the necessary postage for its transmission in a prepaid registered letter to the person "entitled thereto" that is to say, the respondent in the appeal. The notice of appeal is to state the grounds thereof, and must be served as above mentioned, at least seven days before the commencement of the sittings for which the appeal is set down to be heard; for form of notice: see H. & L. Forms, No. 1199a. Notice of appeal.

Stay of Proceedings Pending Appeal.—The setting down of the appeal (not the filing of the case), operates as a stay of execution pending the appeal: s. 128 (3) *supra*. Stay of proceedings.

Judgment on Appeal.—The judgment of the Appellate Division should be in the form of a certificate as in the case of County Court appeals: see s. 128 (1). The form in H. & L. Forms, 955-960, therefore, should now be followed, and not Nos. 960 and 961. Judgment.

Sec. 28. APPEALS UNDER OTHER ACTS ENUMERATED IN JUD. ACT, s. 26.

Appeals under R. S. O. c. 6. Appeals under *Voters' List Act* (R. S. O. c. 6), see s. 39: *Re Norfolk*, 15 O. L. R. 108.

R. S. O. c. 8. Appeals under *Ontario Election Act* (R. S. O. c. 8), see s. 144. According to this section the appeal is to a Judge of the Appellate Division.

R. S. O. c. 104. Appeals under *The Ontario Controverted Elections Act* (R. S. O. c. 104), see ss. 60-70.

R. S. O. c. 124. Appeals under *The Registry Act* (R. S. O. c. 124), see s. 86 (3).

R. S. O. c. 178. Appeals under *The Ontario Companies Act* (R. S. O. c. 178), see s. 186; an appeal under that section is to a Judge in Chambers: and see s. 200, an appeal under that section is to the Appellate Division, and subject to any special rules the procedure would appear to be governed by *Rules* 491-494 as far as possible.

Appeals under R. S. O. c. 195. Appeals under *The Assessment Act* (R. S. O. c. 195), see s. 80. The procedure in such appeals is governed by that of appeals from County Courts as nearly as may be: *Ib.*, s.-s. 7.

R. S. O. c. 215. Appeals under *The Liquor License Act* (R. S. O. c. 215), see ss. 112, 113: *Rex* v. *Farrell*, 21 O. L. R. 540.

R. S. O. c. 90. Appeals under *The Ontario Summary Convictions Act* (R. S. O. c. 90), see s. 11. The Court is empowered to make *Rules* regulating such appeals but has not done so: but see *post*, s. 63, as to procedure on motion to quash convictions.

R. S. O. c. 84. Appeals under *The Ontario Habeas Corpus Act* (R. S. O. c. 84), see s. 8.

R. S. O. c. 140. Appeals under *The Mechanics' and Wage Earners' Lien Act* (R. S. O. c. 140), see s. 40. The procedure on such appeals is governed by *Rules* 491-494.

R. S. C. c. 146. Appeals under *The Criminal Code* (R. S. C. c. 146).

Applications to quash convictions are regulated by the following:—

RULES PASSED 27TH MARCH, 1908, UNDER THE CRIMINAL CODE.

Rules of Court, notice of motion in lieu of certiorari. **1279.** In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by *certiorari*, or by rule or order *nisi*.

This Rule was considered to be *ultra vires* in so far as it purports to abolish the writ of *certiorari*: *Rex* v. *Titchmorsh*, 6 O. W. N. 317.

Service of notice. **1280.** The notice of motion shall be served at least six days before the return day thereof, upon the Magistrate, Justice or Justices making the conviction or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant (if any), and upon the Clerk of the Peace if the proceedings have been returned to his office, and it shall specify the objections intended to be raised.

Indorsement of notice. **1281.** Upon the notice of motion shall be indorsed a copy of Rule Number 1282 together with a notice in the following form, addressed as the case may be;

"You are hereby required forthwith after service hereof to return to the Central Office at Osgoode Hall, Toronto, the conviction (or as the case may be) herein referred to, together with the information and evidence, if any, and all things touching the matter, as fully and as entirely as they remain in your custody, together with this notice. Sec. 26.

Dated

To A. B.

Magistrate at (*or as the case may be*).

C. D.,

Solicitor for the applicant."

1282. Upon receiving the notice so endorsed, the Magistrate, Justice or Justices, Coroner or Clerk of the Peace, shall forthwith return to the Central Office at Osgoode Hall, Toronto, the conviction, order, warrant or inquisition, together with the information and evidence, if any, and all things touching the matter, and the notice served upon him with a certificate endorsed thereupon in the following form: Return thereto.

"Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say:

"1. The conviction (*or as the case may be*);

"2. The information and the warrant issued thereon;

"3. The evidence taken at the hearing;

"4. (*Any other papers or documents touching the matter*)."

"And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in the said notice of motion."

1283. The certificate shall have the same effect as a return to a writ of *certiorari*. Effect of return.

1284. The notice shall be returnable before a Judge of the High Court of Justice* for Ontario sitting in Chambers. To whom to be made.

1285. The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a Justice or Justices of the County within which the conviction, order or inquisition was made or the warrant issued or before a Judge of the County Court of the said County or before a Judge of the High Court, and which recognizance with an affidavit of the due execution thereof shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the applicant is shewn to have made the deposit of the like sum of $100, with the Registrar of the Court in which such motion is made with or upon the condition that he will prosecute such application at his own costs and charges without any wilful or affected delay and that he will pay the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the course of the Court in case the conviction, order or other proceeding is affirmed. Security required.

*These Rules appear to need amendment here: see 3-4 Geo. V. c. 50, s. 2 D.

Sec. 26. Power of Judge.

1286. The Judge shall have all the powers of the Court in the like matters and may order the production of papers and documents as he may deem necessary.

Appeal from Judge.

1287. An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court.*

Repeal

1288. The Rule passed by the High Court on the 17th day of November, 1886, under the authority of 49 V., c. 49, s. 6 (D.), and all Rules and parts of Rules inconsistent with the next preceding nine Rules are hereby repealed.

These Rules shall come into force on the first day of September next.

The above Rules are still in force and applicable to criminal proceedings in the Supreme Court of Ontario as at present constituted: *Rex* v. *Titchmarsh*, 6 O. W. N. 317.

Cr. Code.

As to appeals from convictions: see the *Cr. Code*, ss. 1012-1021.

Cr. Code.

And as to appeals to the Supreme Court of Canada: see *Ib.*, s. 1024; and as to appeals to His Majesty in Council: see *Ib.*, s. 1025.

R. S. C. c. 144.

Appeals under *The Winding-up Act* of Canada (R. S. C. c. 144), see ss. 102, 104, 106. The procedure on such appeals is governed as near as may be by *Rules* 491-4: see *The Winding-up Act*, s. 108.

R. S. O. c. 198.

Appeals under *The Municipal Drainage Act* (R. S. O. c. 198), see ss: 68 (2), 116. The procedure on such appeals would appear to be governed by *Rules* 491-494, as on an appeal from a Judge of the High Court Division: see *The Municipal Drainage Act*, s. 116 (2).

R. S. O. c. 124.

Appeals under *The Succession Duty Act* (R. S. O. c. 124), see s. 14: *Re Marshall*, 20 O. L. R. 116. The procedure on such appeals would appear to be governed by *Rules* 491-494 so far as possible.

R. S. O. c. 129.

Appeals under *The Water Privileges Act* (R. S. O. c. 129), see s. 17. The procedure on such appeal, except as specially provided by the Act, or by the Judge who grants leave to appeal, is to be the same as on County Court Appeals: *Ib.*, s.-s. 6. The costs of such appeals are in the discretion of the Divisional Court, and are not part of "the practice and procedure upon the appeal," which are subject to regulation by the Judge to whom application for leave is made, under s. 17 (4): *Re Burnham*, 16 P. R. 390.

R. S. O. c. 130.

Appeals under *The Rivers and Streams Act* (R. S. O. c. 130); see s. 12, which governs the procedure on such appeals.

Appeals under *The Dominion Railway Act* (R. S. O. c. 37): see *Re Birely* v. *T. H. & B. Ry.* in note preceding s. 24, *supra*, p. 119.

Court may pronounce proper judgment.

27.—(1) The Court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

*These Rules appear to need amendment here: see 3-4 Geo. V. c. 50, s. 2 D.

Sec. 27.

Power to draw inferences of fact and to give judgment if all necessary materials before the Court.

2) The Court shall have power to draw inferences of t not inconsistent with any finding of the jury which not set aside, and if satisfied that there are before the urt all the materials necessary for finally determining matters in controversy, or any of them, or for awarding any relief sought, the Court may give judgment ordingly, but if the Court is of opinion that there are sufficient materials before it to enable it to give judgnt the Court may direct the appeal to stand over for ther consideration and may direct that such issues or stions of fact be tried and determined and such neunts be taken and such inquiries be made as may be emed necessary to enable the Court on such further sideration finally to dispose of the matters in conversy.

Or to direct further inquiry.

Where appeal is against part only.

3) The powers conferred by sub-sections 1 and 2 y be exercised notwithstanding that the appeal is as to rt only of the judgment, order or decision, and may be ercised in favour of all or any of the parties, although y may not have appealed. 3-4 Geo. V. c. 19, s. 27.

Notwithstanding the general terms of this section it would not n possible for the Court to reverse a judgment in respect of which e was no appeal, *e.g.*, if an action has been dismissed against a endant at the trial, and there is no appeal by the plaintiff against dismissal it would not appear possible for the Court, upon an al against another defendant, to reverse the judgment as to the endant as to whom there was no appeal. But a variation in favour a non-appealing party may sometimes be made: see *infra*. Subion 2 is based on C. R. 817. It also appears to be based to some ent on the provisions of C. R. 615, which provided that,—

On motion for judgment or new trial final judgment may be given by Court.

Upon a motion for judgment, or for a new trial, the Court might, t was satisfied that it had before it all the materials necessary finally determining the questions in dispute, or any of them, or awarding any relief sought, give judgment accordingly, or might t was of opinion that it had not sufficient materials before it to ble it to give judgment, direct the motion to stand over for further sideration, and direct such issues or questions to be tried or deterd, and such accounts and inquiries to be taken and made as it ht think fit.

That Rule has not been continued, and its provisions, so far as ered by sub-sec. 2, *supra*, now apply only on appeal to the Appellate ision, and no longer to motions for judgment, but it is probable no material change in the practice in this respect has been made. er a Rule in England, similar to sub-sec. 2, *supra*, it was held that n the Court is satisfied that the verdict is against the weight of dence, and considers that all the facts are before it, and the inferes to be drawn are such as no jury could properly find differently, it enter judgment accordingly, instead of ordering a new trial:

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Millar v. *Toulmin*, 17 Q. B. D. 603; 12 App. Cas. 746; *Altcock* v. *Hall*, 1891, 1 Q. B. 444; *Bryant* v. *N. M. Tramways Co.*, 6 T. L. R. 396; *Paquin* v. *Beauclerk*, 1906, A. C. 148; 94 L. T. 350; but see *infra*.

An appellate Court has power to enter a verdict in accordance with what it deems to be the true construction of the findings, coupled with other facts, either admitted, or so clearly proved, that there could be no controversy about them, but has no power to enter a verdict in direct opposition to the finding of the jury upon a material issue, upon which there was evidence to go to the jury: *Moore* v. *Connecticut Mutual*, 6 App. Cas. 644; see also *Perkins* v. *Dangerfield*, 51 L. T. 535; W. N. 1879, 172; *Jones* v. *Hough*, 5 Ex. D. 122; and *Millissich* v. *Lloyds*, 40 L. J. C. P. 404; W. N. 1877, 36; *Sewell* v. *B. C. Towing Co.*, 20 C. L. J. 170; 4 C. L. T. 844; 9 S. C. R. 527; *Macdonald* v. *Mail Pub. Co.*, 32 Ont. 163.

Judgment contrary to finding of jury.

Appellate Courts have, however, assumed to give judgment not in accordance with the finding of the jury, where the Court considered that the most convenient course was not to send the case for the opinion of another jury, but to enter a judgment in accordance with its own views, upon the whole case, and where it considered that it had the proper materials before it upon which to decide: see *Hamilton* v. *Johnson*, 5 Q. B. D. 263, 266; *Lancey* v. *Brake*, 10 Ont. 428; *James* v. *Clement*, 13 Ont. 115; *Palmer* v. *Miller*, *Ib.*, 576; *Campbell* v. *Cole*, 7 Ont. 127; *St. Denis* v. *Baxter*, 15 Ont. App. 387; *Sibbald* v. *Grand Trunk Ry.*, 18 Ont. App. at p. 197 (see, however, per Burton, J.A., at p. 207), *Clayton* v. *Patterson*, 32 Ont. 435; *Jackson* v. *Grand Trunk Ry.*, 2 O. L. R. 689; 32 S. C. R. 245; or finally determine all questions in dispute though the jury might not have found upon them all: *Sewell* v. *British Columbia Towing Co.*, *supra*; *Smith* v. *Northern Construction Company*, 30 O. L. R. 494. And where the case was one in which no additional facts remained to be proved, and in which, upon the facts proved, no jury would be justified in finding a verdict against the party in whose favour the Court thought that judgment should be given; the Court held that it had before it all the materials necessary for finally determining the questions in dispute, and acted under C. R. 615: *Yorkshire Banking Company* v. *Beatson*, 5 C. P. D. 109, 127; *Bobbett* v. *S. E. Ry. Co.*, 9 Q. B. D. 430; *Stewart* v. *Rounds*, 7 Ont. App. 515, 519; *McConnell* v. *Wilkins*, 13 Ont. App. 438; *Sheppard Pub. Co.* v. *Press Publishing Co.*, 10 O. L. R. 243; *Paquin* v. *Beauclerk*, 1906, A. C. 161; and this was done, where the parties did not object, in a case where the Court was of opinion that the Judge at the trial had improperly usurped the functions of the jury on a question of fact which should have been left to them: *Pearce* v. *Lansdowne*, 69 L. T. 316.

Whether verdict of jury can be disregarded.

But later cases seem to indicate that where a case has been tried by a jury, and the Appellate Court is dissatisfied with the verdict, it ought not in any circumstances, without the consent of both parties, to usurp the functions of a jury, but ought, unless it affirms the judgment, to order a new trial: see *Toronto Railway* v. *King*, 1908, A. C. 260; *Watt* v. *Watt*, 1905, A. C. 115; 92 L. T. 480; and where a case had been properly submitted to a jury and the jury had disagreed it was considered not to be proper to act under sub-sec. 2, because further evidence might be produced on a new trial which would support a verdict for the plaintiff: *Skeate* v. *Slaters*, 1914, 2 K. B. 429; and where some of the findings of the jury are set aside, but others are left undisturbed, the Court cannot direct a judgment to be entered upon its own view of the facts, where such a view is irreconcilable with the

nquestioned findings of the jury: *Ogilvie* v. *West Australian M. & A.* Sec. 27.
orp., 1896, A. C. 257; 74 L. T. 201. Where a case was tried by a Judge
ithout a jury the Court refused to interfere with the finding of the
udge on conflicting evidence: *Sawyer* v. *Hodgson*, 18 O. L. R. 333; and
here there was a conflict of evidence, and the Judge who tried the
use without a jury, attributed greater weight to the evidence of some
itnesses than others, but in the opinion of the Court, took a wrong
ew of the law, the Court refused to give judgment on the evidence,
nd sent the case for a new trial: *Canada Landed Credit Co.* v. *Thomp-*
n, 8 Ont. App. 696.

The power to enter a judgment contrary to the finding of a jury, if
exists, at all events, ought to be most sparingly and cautiously exer-
sed: see *per* Wilson, C.J., in *Stewart* v. *Rounds*, *supra*; and *Clayton*
Patterson, 32 Ont. 435; and will not be exercised where there is evi-
nce which ought properly to go to a jury: *Brewster* v. *Durrand*, W.
1880, 27; or where, if a new trial were ordered, further evidence
ight be adduced: *Clark* v. *Molyneux*, 3 Q. B. D. 237, 245; see *Baker*
Grand Trunk Ry. Co., 11 Ont. App. 72: *Hardman* v. *Putnam*, 18
C. R. 714.

In *Millasich* v. *Lloyds*, 46 L. J. C. P. 404; W. N. 1877, 36, an action
libel, the Court held that whether the report of a trial in question
s a fair one or not, was a question for the jury, which the Court
uld not withdraw from them: see also *Clouston* v. *Corry*, 1906, A. C.
2; but in *McGuire* v. *Western Morning News*, 1903, 2 K. B. 100; 88
T. 757; which was an action for libel contained in a criticism of a
y, the Court held that if the alleged libel only amounted to fair
mment it was the duty of the Judge at the trial to withdraw the case
om the jury.

If the Appellate Court finds that the damages awarded by a jury Damages excessive.
e excessive, it must grant a new trial, it has no power, unless both
rties consent, to reduce the damages to a sum which it thinks pro-
r: *Watt* v. *Watt*, *supra*.

See *Mercier* v. *Williams*, 9 Q. B. D. 337; 10 App. Cas. 1, where judg- Cases where Court acted under s.-s. 2.
nt was entered for defendant upon a motion for a new trial in an
erpleader issue: *Daun* v. *Simmins*, 40 L. T. 556; 41 L. T. 783; 28 W.
129; W. N. 1879, 178, where a non-suit was entered, after a verdict
plaintiff, and though the rule only asked for a new trial, the Court
ng of opinion that there was really no evidence in support of the
lings; also *Batty* v. *Clever*, 71 L. T. Jour. 43; and *Waddell* v. *Block-*
. 10 Ch. D. 416; *Eastland* v. *Burchell*, 3 Q. B. D. 432; 38 L. T. 563;
senberger v. *Grand Trunk Ry. Co.*, 32 C. P. 349, 365; 8 Ont. App.
; 9 S. C. R. 311; *Standard Bank* v. *Dunham*, 14 Ont. 67; *Heath* v.
gh, 6 Q. B. D. 355; *Sheppard Publishing Co.* v. *Press Publication*
. 10 O. L. R. 243.

The Court declined to act under C. R. 615 in *Garland* v. *Thompson*, 9
. 376; see also *Hislop* v. *McGillivray*, 7 C. L. T. 37; *Clouston* v.
rry, 1906, A. C. 122.

An appellate Court has pronounced the proper judgment on the
lings of the jury in a case where the Judge who tried the action
sidered the findings insufficient to warrant a judgment for either
ty: *Stevens* v. *Grout*, 16 P. R. 210.

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Under this section the Appellate Division may vary a judgment appealed from in favour of a respondent who has not given any notice of cross appeal: *Attorney-General* v. *Simpson*, 1901. 2 Ch. 671; 85 L. T. 325; see also *Challoner* v. *Lobo*, 1 O. L. R. 292; 32 S. C. R. 505, where such variation is necessarily consequent on the relief given to the appellant.

Court equally divided costs.

Where the Court of Appeal is equally divided the judgment in appeal is affirmed, and usually with costs; *Long* v. *Hancock*, 12 Ont. App. 156; but the Court may refuse to give costs: *Re Stratford & Huron Ry. & Perth*, 38 U. C. Q. B. 112; and where, on a motion to quash the Court was equally divided in opinion as to their jurisdiction to hear the appeal, no costs were given: *Whiting* v. *Hovey*, 12 Ont. App. 119.

In the Supreme Court of Canada the practice in such a case seems uniformly to have been to give no costs, though the Court may give the respondent costs where it thinks that course would be proper: see *Poulin* v. *Quebec*, 9 S. C. R. 185, and Cassel's Dig. p. 676.

In the House of Lords where an appeal is dismissed on the ground of an equal division of opinion, no costs are ever given: see *per* Loreburn, L.C., *Paquin* v. *Beauclerk*, 1906, A. C. 148; 94 L. T. at p. 354; and see *Smith* v. *Lion Brewery Co.*, 1911, A. C. 150; 104 L. T. 421.

Where a decision is affirmed in consequence of the appellate Court being equally divided, it has been held that the appellate Court is not bound by the decision, where the point involved arises in a subsequent case: *Re Stanstead Election*, 20 S. C. R. 12; see also *Clarkson* v. *Atty.-Gen.*, 16 Ont. App. 202.

Costs.

As to costs in the case of a non-suit set aside, where respondents contended that the Judge had acted *ex mero motu*: see *Mills* v. *Hamilton St. Ry.*, 17 P. R. 74.

Where an objection, held to be fatal, was taken by an applicant on appeal, but had not been taken in the Court below, the appellant was allowed costs of the appeal, but not costs of the hearing in the Court below: *Re O. C. S., a Debtor*, 1904, 2 K. B. 161. See also *Horton* v. *Bosson* 1899 W. N. 23, 38.

New trial not to be granted in certain cases.

28.—(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned.

Judgment as to one part and new trial as to others.

(2) If it appears that a substantial wrong or miscarriage was so occasioned but it affected part only of the matter in controversy or some or one only of the parties, the Court may give final judgment as to any part or any party not so affected, and direct a new trial as to the other part only, or only as to the other parties. 3-4 Geo. V. c. 19, s. 28.

Grounds for New Trial.—The following are grounds for granting new trial:— Sec. 28.

Grounds for new trial

1. Improper admission, or rejection, of evidence.

2. The improper non-suiting of the plaintiff.

3. Misdirection of the jury.

4. Perverse verdict, or verdict against the weight of evidence.

5. Verdict for too small, or too great damages; or damages assessed improper basis.

6. Surprise, and discovery of new evidence: see Arch. Pr., 13th ., 1210.

7. Mistrial: *e.g.*, improper conduct of the parties or others, which s prejudiced the fair trial of the action: *e.g.*, by interfering with e jury: see *Tiffony* v. *McNee*, 24 Ont. 551; *Stewart* v. *Woolman*, Ont. 714; or where one of the parties has been denied his right of allenge unc : R. S. O. c. 64, ss. 74, 75; or allowed, in spite of protest, ore challenges than he was entitled to: *Empey* v. *Carscallen*, 24 t. 658; misconduct of juror: *Laughlin* v. *Harvey*, 24 Ont. App. 8; bias of jury, or inclusion in jury of a person not on the jury nel, or of a person too deaf to hear the evidence: *Comeron* v. *tawa E. Ry.*, 32 Ont. 24; discussion of case by litigant and his wit- sses with two of the jurors: *Kellum* v. *Roberts*, 31 O. L. R. 159. Mistrial.

"Substantial Wrong or Miscarriage."—Substantial wrong was nsidered to have occurred where, amongst other things, inadmis- le evidence was received after objection to it, and was commented by the Judge in his charge, as being important: *Bank of Hamilton Isaacs*, 16 Ont. 450; so also in an action under *The Workmen's Com- nsation Act* evidence was given that the plaintiff was indemnified ainst loss in respect of the injury complained of, although the dge warned the jury that they were not to take it into accoun ughead v. *Collingwood Shipbuilding Co.*, 16 O. L. R. 64; and the king of the question whether the defendants were not indemnified, ough not answered, was held to be a ground for a new trial: *Hynd- n* v. *Stephens*, 48 C. L. J. 684; 19 Man. 167. "Substantial wrong," or miscarriage.

In an action for libel where there has been misdirection as to any terial part of the alleged libel, there is a "substantial wrong." d a new trial must be ordered, although the Court may be of opin- that other parts of the libel were sufficient to justify the damages en: *Bray* v. *Ford*, 1896, A. C. 44; 73 L. T. 609; but see *Floyd* v. *Gib- r*, 100 L. T. 761. Libel actions.

A new trial was refused on a point not taken at the trial in *Eyre Highway Board, etc.*, 8 T. L. R. 648; but there is no hard and fast e which absolutely forbids the Court from entertaining an objection misdirection though not taken at the trial: *Brenner* v. *Toronto Ry.*, O. L. R. 195; 40 S. C. R. 540; see also *Mognussen* v. *L'Abbe*, 24 O. R. 376. Point not taken at trial.

Where the real issue has not been passed on by the jury a new trial uld be granted: *Dunsmuir* v. *Lowenberg*, 34 S. C. R. 228; *Burmon Ottawa Electric Ry.*, 21 O. L. R. 446. A new trial was granted on ms as to costs, where the senior counsel of the defendant was de- ned at the Assizes at another place, and the junior counsel after uccessfully applying for a postponement withdrew from the case, d it was tried in the absence of anyone representing the defendant: ahen v. *Toronto Ry.*, 2 O. W. N. 1263. The admission of more than Real issue not passed upon.

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three experts as witnesses contrary to *The Evidence Act* (R. S. O. c. 76), s. 10, was held to be ground for granting a new trial: *Rice* v. *Sockett*, 27 O. L. R. 410.

Cases of "substantial wrong."

For other cases as to what amounts to "substantial wrong," see *Pickup* v. *Thames Insurance Co.*, 3 Q. B. D. 594; *Shapcott* v. *Chappell*, 12 Q. B. D. 58 (rejection of evidence); *Swift* v. *Nunn*, W. N. 1878, 217; *McDonald* v. *Murray*, 5 Ont. 559 (misdirection); *Howell* v. *Listowel Rink & Park Co.*, 13 Ont. 476 (misdirection); *Wells* v. *Lindop*, 15 Ont. App. 695 (misdirection); *Hesse* v. *St. John Ry. Co.*, 30 S. C. R. 218 (misdirection); *Dakyl* v. *Labouchere*, 96 L. T. 399; *Hunt* v. *Star*, (1908) 2 K. B. 309 (misdirection in libel).

Cases in which no "substantial wrong."

A plaintiff is not entitled to a new trial for rejection of evidence, which on the pleadings he was not entitled to give: *Milligan* v. *Jamieson*, 4 O. L. R. 650. Nor where the case has been improperly withdrawn from the jury and judgment given for defendant, if the appellate Court finds that the only verdict which could be properly given by a jury would be in favour of the defendant: *Goddard* v. *Midland Ry.*, 80 L. T. 624; nor will a new trial be granted to a plaintiff where he would only be entitled to nominal damages: *Simonds* v. *Chesley*, 20 S. C. R. 174; *Scammell* v. *Clarke*, 23 S. C. R. 307; *Milligan* v. *Jamieson*, *supra*, or where on the findings, the damages were inappreciable: *Kerry* v. *England*, 1898, A. C. 742.

So also a new trial was refused where the jury negatived contributory negligence, notwithstanding that the plaintiff's conduct had been characterized by some degree of recklessness: *Milligan* v. *Toronto Ry.*, 17 O. L. R. 530; 42 S. C. R. 238.

Refusal to allow witness to be treated as hostile.

The defendant's counsel, in order to shew that a witness called by him was hostile, and to treat him as such under s. 22 of the C. L. P. Act (Eng.), asked the Judge to look at the affidavit of a witness in a former action. As there was nothing in the witness's demeanour, or way in which he gave his evidence, to shew that he was hostile, the Judge refused to look at the affidavit, and it was held on motion for a new trial that the Judge's discretion was absolute, and the Court had no jurisdiction to review his decision: *Rice* v. *Howard*, 16 Q. B. D. 681.

Conduct of counsel at trial.

An appeal by counsel to the local prejudices of the jury was held by Robertson, J., to be a ground for a new trial; see *Forwood* v. *Toronto*, 22 Ont. 362-3; but a new trial was refused on the ground that counsel at the trial improperly inflamed the minds of the jury, the objection not having been taken at the trial: *Sornberger* v. *Canadian Pacific Ry. Co.*, 24 Ont. App. 263. The exhibition of the injury for which the action is brought, to the jury, for the purpose of having it explained by a medical witness is admissible: *Ib.*: but not for the purpose of enabling the jury to form their own opinion and conclusions therefrom, and, if so used, a new trial will be ordered: *Laughlin* v. *Harvey*, 24 Ont. App. 438.

Although it is improper for counsel to state to the jury the amount of damages claimed where the action is in tort (see *per* Lord Halsbury, L.C., *Wott* v. *Watt*, 1905, A. C. 115) still such statement was held not to be of itself sufficient ground for granting a new trial: see *Bradenburg* v. *Ottawa Elec. Ry.*, 19 O. L. R. 34.

Questions to jury.

A new trial was refused for error in the form of questions submitted to a jury, when no wrong or miscarriage of justice was occasioned thereby: *Winnipeg Electric Ry.* v. *Wald*, 41 S. C. R. 431. Where a jury found in answer to questions that the defendants had been guilty of

gligence in omitting to do a certain act, which as a matter of law Sec. 28.
e Court found to be no negligence, a new trial was refused, the ap-
llate Court considering that the effect of the finding was to negative
e other grounds of alleged negligence submitted to the jury: *Mc-
ow v. Toronto Ry.*, 18 O. L. R. 154.

Where a jury are entitled to find, and do find, a general verdict, it
not competent for the Judge to put a question to the jury and give
igment upon their finding on that question contrary to the verdict:
nold v. Jeffreys, 110 L. T. 296.

The omission to swear a juror, where no injustice was done, is not Omission to swear juror.
ground for a new trial: *Goose v. G. T. Ry. Co.*, 9 C. L. T. 403; nor
e fact that a juryman was challenged for cause, the party moving
the new trial having accepted the opinion of the Judge that there
s no cause, and having proceeded with the trial: *Wood v. McPherson*,
Ont. 163.

Where defendants, separately defending, and separately represented Improper allowance of challenge.
the trial, claimed the right of 4 peremptory challenges each, which
spite of objection was allowed them, a new trial was ordered:
pey v. Carscallen, 24 Ont. 658.

Where a jury have been allowed to separate before giving their Misconduct of jury, or suitors.
dict, but their verdict is subsequently taken without objection,
with knowledge of the fact, the objection to their having been
wed to separate is waived: *Coleman v. Toronto*, 23 Ont. 345; and
ere, pending the trial, a newspaper containing comments calculated
prejudice the fair trial has been read by many of the jurors, and,
h knowledge of the fact, the parties go on with the trial without
ection, the objection is waived: *Tiffany v. McNee*, 24 Ont. 551.
ere a plaintiff had had conversations with a member of the jury
ing the trial, and his brother, and also his solicitor, had treated
e of them to drinks, a new trial was ordered: *Stewart v. Woolman*,
Ont. 714; and see *Kellum v. Roberts*, *supra*, p. 147.

But a new trial ought not to be granted merely because the appel- Inferences.
Court does not agree with the inferences drawn by the jury from
evidence: *Toronto Ry. v. King*, 1908, A. C. 260; 98 L. T. 650.

Where during the defendant's evidence the jury stated that they
heard enough evidence, and the defendants thereupon refrained
adducing further evidence, and the jury found a verdict for the
ntiff, a new trial was ordered: *Biggs v. Evans*, 106 L. T. 796.

Where a jury disagree and the parties agree to accept the verdict Agreement to accept majority verdict.
he majority, such agreement does not preclude either party from
ing against the verdict: *Groom v. Shuker*, 69 L. T. 293. The
ement is no more than to accept the verdict as if it had been
nimous.

Misdirection.—Formerly a misdirection by the Judge in point of Misdirection.
or the improper admission or rejection of evidence in any
erial matter was, at Law, ground for a new trial as of right. The
mon Law Courts had only the power to grant a new trial of the
on generally: see *Faund v. Wallace*, 35 L. T. 361. This practice
altered by *The Administration of Justice Act*: see R. S. O. 1877,
. s. 239, which contained a provision to the same effect as the
ent section.

Sec. 28. A new trial may now be ordered on a particular question: see also s. 29 *post*.

Contributory negligence. "Was the plaintiff guilty of contributory negligence?" is an improper question to put to a jury, involving as it does both fact and law: *Brown* v. *London St. Ry.*, 2 O. L. R. 53. It is preferable to ask "could the plaintiff by the exercise of reasonable care have avoided the accident?" If so, in what respect do you think the plaintiff omitted to take reasonable care?": *Ib.*, but an error in the form of a question submitted to the jury will not be sufficient to warrant the granting of a new trial if no substantial injustice has been done thereby: *Winnipeg Electric Ry.* v. *Wold*, 41 S. C. R. 431.

Fraud. Refusal to charge a jury as to what would constitute fraud under the Statute of Elizabeth, in an action to set aside an alleged fraudulent conveyance, was held to be misdirection and a new trial was ordered: *Griffiths* v. *Boscovitz*, 1 S. C. Cas. 245. So also, an omission to charge the jury as to the manner in which they should apply the law to their finding of facts in a case where negligence was in issue was held to be misdirection: *Spencer* v. *Alaska Packers Association*, 35 S. C. R. 362. So also the withdrawal from the jury of material evidence: *Burman* v. *Ottawa Elec. Ry.*, 21 O. L. R. 446; *Brenner* v. *Toronto Ry.*, 13 O. L. R. 423; but this last case was subsequently reversed on appeal because the appellate Court came to the conclusion that the Judge at the trial had not in fact withdrawn the evidence: S. C. 15 O. L. R. 195; 40 S. C. R. 540.

Rejection of evidence. The rejection of material evidence is a ground for a new trial: *Clarke* v. *Union Stock Co.*, 13 O. L. R. 102; 14 O. L. R. 198.

Uncorroborated evidence. The omission of a Judge to caution a jury not to find a verdict on uncorroborated evidence in a case where corroborative evidence is necessary, would appear to be a "substantial wrong or miscarriage": see *Rex* v. *Tait*, 1908, 2 K. B. 680.

The discretion of the Judge at the trial as to the questions to be answered by witnesses under examination is not lightly to be interfered with, and it has been held that the appellate Court is not justified in ordering a new trial because the Judge at the trial directed a witness not to answer a question which did not, at the time it was put, have relevancy to any of the issues: *Brownell* v. *Brownell*, 42 S. C. R. 368.

Joint tort, improper assessment of damages. Where by his pleadings the plaintiff charges a joint tort, even though separate torts be proved, the jury cannot properly assess damages for different amounts against the defendants, but can only render a verdict for one sum against all, and where the contrary was done a new trial was ordered: *Greenlands* v. *Wilmshurst*, 1913, 3 K. B. 507; and see *Smith* v. *Streatfield*, 1913, 3 K. B. 764.

Non-direction. Want of explicit directions as to the law affecting the *locus in quo* (the right of way of a railway company) was held to be ground for a new trial: *Blue* v. *Red Mountain Ry.*, 1909, A. C. 361

Misdirection. Where a Judge wrongly directed the jury that there was no evidence to support a finding for the defendant, a new trial was ordered: *Wood* v. *Rockwell*, 38 S. C. R. 165.

Where the misdirection complained of was to the effect that the evidence warranted a finding that the injury to the plaintiff's eye which was in question, was permanent, but the damages awarded were

o greater than the injury proved warranted, it was considered that "substantial wrong or miscarriage" had taken place, and a new rial was refused: *Floyd* v. *Gibson*, 100 L. T. 761. Sec. 28.

Where there is some though very slight evidence in support of he plaintiff's case, it ought not to be withdrawn from the jury, and it is, a new trial will be ordered: *Jones* v. *Toronto & York Ry.*, 20 L. R. 71; 21 O. L. R. 421. Withdrawal from jury.

Quære, whether "misdirection" in this section applies to the case the Judge ruling that there is no evidence to go to the jury, and herefore withdrawing the case from them, and giving judgment for efendant: see *Hall* v. *Jupe*, 43 L. T. 411.

Exceptions to the putting or not putting questions to a jury which ere not taken at the trial, will not as a rule be entertained on appeal, nless it is manifest that some substantial injustice has been done: ee *Gowganda Queen Mines* v. *Borckh*, 24 O. L. R. 293; 46 S. C. R. 645; O. L. R. 643. As to putting question improperly to the jury: see rnold v. *Jeffreys*, *supra*, p. 149. Questions to jury

But it was said by Osler, J.A., in *Brenner* v. *Toronto Ry.*, 15 O. L. 196, at p. 198, that there is no hard and fast rule which prohibits n Appellate Court from entertaining an objection on the ground of isdirection, merely because it was not taken at the trial.

The refusal of the Judge to submit some particular question to the ry is no ground for a new trial; but if the Judge refused to charge e jury in respect to any material matter which counsel desired to ave submitted to them, it may amount to non-direction, for which a ew trial may be granted: *Turner* v. *Burns*, 24 Ont. 28.

Where a new trial is moved for on the ground of misdirection, the ous of shewing that the misdirection did not cause a miscarriage of stice lies upon the party shewing cause: *Anthony* v. *Halstead*, 37 T. 433. Onus of showing miscarriage of justice.

In considering an objection for misdirection the question is not hether every expression in a charge is perfectly accurate, but whether ere is any reason to believe that a verdict, which is warranted by e evidence, has been caused or induced by an erroneous enunciation the law by the Court: *Wells* v. *Lindop*, 15 Ont. App. 695; and see lue v. *Red Mountain Ry.*, 1909, A. C. 361.

It is not misdirection for the Judge to tell the jury his own opinion the issue before them: *Smith* v. *Dart*, 14 Q. B. D. 105, 108.

Where the Judge misdirects the jury as to the burthen of proof, new trial will be ordered: *Kingston* v. *Kingston*, 1897, A. C. 509.

An improper definition of "malice" by a Judge is misdirection: Malice.
nglish v. *Lamb*, 32 Ont. 73.

Where a new trial is granted on the ground of misdirection the Costs.
ourt, as a general rule, will order the costs to abide the event: *Jones* *Richards*, 15 T. L. R. 398; but they are in the discretion of the ourt: *Hamilton* v. *Seal*, 1904, 2 K. B. 262.

Where the Judge at the trial reported to the Court that he did not ake certain remarks which it was contended were objectionable, and ated what he did actually say, this course was held not to be objec- onable: *Dickie* v. *Campbell*, 34 S. C. R. 265.

Sec. 26.

Verdict against weight of evidence.

Verdict against Evidence. — It is the practice in England, adopting the practice of the former Court of Queen's Bench, not to grant a new trial, on the ground that the verdict is against the weight of evidence, where the damages are under £20, except under peculiar circumstances, such as the trial of a right, or where the personal character of a person may be injured: *Joyce* v. *Metropolitan Board of Works*, 44 L. T. 810; 17 C. L. J. 411; *Booth* v. *Briscoe*, 2 Q. B. D. 496; followed *Crerar* v. *Holbert*, 17 P. R. 283; see also *Jenkins* v. *Morris*, 14 Ch. D. 674.

The ordinary reasoning according to which the verdict of a jury on a question of fact ought not to be disturbed unless the preponderance of evidence against the verdict is strong and clear, does not apply to cases in which the verdict depends upon a question of science which is not fully solved, but is still within the region of *bonâ fide* controversy. The importance of the verdict to others besides the parties to the litigation, and the novelty of the question are elements to be taken into consideration. Where a new trial is granted on the ground of the unsatisfactory nature of the verdict, a condition should not be imposed, that the party applying for the new trial should pay the costs of the previous trial: *Managers of Metropolitan Asylum* v. *Hill*, 47 L. T. 29.

On an application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the Court do substantial justice, and, if not, does the evidence warrant interference: *Grieve* v. *Molson's Bank*, 8 Ont. 162, and the Court though considering that a different verdict would have been more satisfactory, may refuse to interfere, the question being one proper for the decision of a jury: *Malcolmson* v. *Hamilton Prov. & L. Soc.*, 10 Ont. App. 610; *Ferrand* v. *Bingham*, 8 T. L. R. 70. In an action for slander the jury is not bound to return a verdict for the plaintiff, although the defamatory words are proved: *Milligan* v. *Jamieson*, *supra*, p. 148.

Verdict against evidence or weight of evidence.

A new trial, on the ground that the verdict is against the weight of evidence, should not be granted, unless the verdict was one which the jury viewing the whole evidence reasonably, after proper directions, could not properly find: *Webster* v. *Friederberg*, 17 Q. B. D. 736, correcting *Solomon* v. *Bitton*, 8 Q. B. D. 176; see also *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152, as explained in *Jones* v. *Spencer*, 77 L. T. 536; 14 T. L. R. 4; *Phillips* v. *Martin*, 15 App. Cas. 193; *Quinlone* v. *Murnane*, 18 L. R. Ir. 53; *Commissioners for Railways* v. *Brown*, 13 App. Cas. 133; *Dallas* v. *Great Western Ry.*, 57 J. P. 584; *Proed* v. *Groham*, 24 Q. B. D. 53; *Hompson* v. *Guy*, 64 L. T. 778; *Beckett* v. *G. T. Ry.*, 13 Ont. App. 184; see 16 S. C. R. 713; *Logg* v. *Ellwood*, 14 Ont. App. 496; *Brisbane* v. *Martin*, 1894, A. C. 249; *Australian Newspaper Co.* v. *Bennett*, *Ib.*, 284; *Cox* v. *English & Scottish & Australian Bank*, 1905, A. C. 168; *Wabash Ry.* v. *Misener*, 38 S. C. R. 94; *Windsor Hotel Co.* v. *Odell*, 39 S. C. R. 337; see also remarks in 31 Sol. Jour. 135. Where the question at issue turns upon a matter involving scientific and expert evidence, and the weight of expert testimony is overwhelmingly in favour of one view, against which there is only the evidence of persons without much practical experience, a verdict based on the latter evidence cannot stand: *Jackson* v. *Grand Trunk Ry.*, 2 O. L. R. 689; 32 S. C. R. 245.

Where the jury find negligence and specify in what it consisted but there is no evidence to support the specific finding, the Court may

n its discretion order a new trial, notwithstanding that there is vidence of negligence in other respects: *Cobban* v. *Can. Pac. Ry. Co.*, 23 nt. App. 115. Sec. 28.

Though the report of the Judge who presided as to whether he was atisfied or dissatisfied with the verdict is not conclusive, great weight ill be attached to it: *Webster* v. *Friederberg*, 55 L. T. 295; affirmed n appeal: *Ib.*, 49; 17 Q. B. D. 736. Judge's opinion of verdict.

A new trial should not be granted merely because the Judge who ried the case, or the Court applied to for a new trial, is dissatisfied ith the verdict of the jury: *Solomon* v. *Billon*, 8 Q. B. D. 176; see *enkins* v. *Morris*, 14 Ch. D. p. 684; *Wilcocks* v. *Howell*, 5 Ont. 360; *urtagh* v. *Barry*, 24 Q. B. D. 632; *Fraser* v. *Drew*, 30 S. C. R. 241; nless the Court can say that the verdict is one which could not pro- erly be found on the evidence: see *Clouston* v. *Corry*, 1906, A. C. 122; ut where the evidence has been fairly submitted to the jury, it was eld to be no ground for a new trial because the Judges in appeal took different view from the jury as to the inferences proper to be drawn herefrom: *Toronto Ry.* v. *King*, 1908, A. C. 260. And where a case tried by a Judge without a jury, his finding of facts on conflicting vidence will not as a rule be disturbed by an appellate Court: *awyer* v. *Hodgson*, 18 O. L. R. 333. Judge dissatisfied with verdict.

Appellate Court dissatisfied with verdict.

The Court has in its discretion to weigh the delay, vexation and xpense of a new trial, all in fact which forms the foundation of he maxim *"Interest reipublicæ ut sit finis litium"* against the in- ustice which may be worked in a particular instance, and may treat s conclusive a verdict which is not perfectly satisfactory: *Metro- olitan District Asylum* v. *Hill*, 47 L. T. 29; *Beckett* v. *G. T. Ry.*, 3 Ont. App. 207; see 16 S. C. R. 713; *Winch* v. *Conservators of the hames*, L. R. 7 C. P. 472. Relative advantages and disadvantages of new trial.

Where cross-actions involving the same question of law and fact re severely tried with the result that contradictory verdicts are btained, if the evidence is so fairly balanced that the jury might easonably find either way, both cases ought to be tried again, not eparately, but together. The Court cannot be called upon either o exercise the functions of a jury, or to issue contradictory judg- ents: *Australian, etc., Co.* v. *Smith*, 14 App. Cas. 321.

Excessive Damages.—The granting or refusing a new trial on he ground of excessive damages depends to some extent on the ature of the action, *e.g.*, where the action is on contract, and the mount properly payable depends on computation, in case of error he Court would more readily interfere, even though the amount in ress is small, than in a case of tort, where the jury may properly ve vindictive damages. Excessive damages.

A verdict will not be very readily disturbed on the ground of exces- ve damages: see *Sornberger* v. *C. P. Ry. Co.*, 24 Ont. App. 263; aston v. *Brantford E. Ry. Co.*, C. P. D. Sept., 1897, nor where the idence as to damages is conflicting: *McCullough* v. *Anderson*, 27 Ont. (note); *Ferguson* v. *Southwold*, *Ib.*, 66.

It was formerly held that the Court may, in its discretion, refuse new trial on the consent of the plaintiff alone to the damages being duced to such an amount as the Court may think, if given by the ry, would not have been excessive: *Belt* v. *Lawes*, 12 Q. B. D. 356; *Denis* v. *Baxter*, 15 Ont. App. 387; *Easton* v. *Brantford E. Ry.* New trial in case of.

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Co. (before C. P. D. 20th Nov., 1897); *Fraser* v. *London St. Ry.*, 29 Ont. 411; *Curran* v. *Grand Trunk Ry.*, 25 Ont. App. 407; *Colbier* v. *Michigan Central Ry.*, 27 Ont. App. 630; *Sibbald* v. *Grand Trunk Ry.*, 19 Ont. 164; 18 Ont. App. 184; 28 C. L. J. 245; but all these cases have been over-ruled in the House of Lords, where it has been held that, in an action of tort, where the Court finds the damages to be excessive, it must grant a new trial unconditionally, and except by consent of both parties, it has no power to reduce the damages: *Watt* v. *Watt*, 1905, A. C. 115; 92 L. T. 480; but where the Court is satisfied with the judgment except as to the amount of damages, a new trial need not be directed generally, but may under Jud. Act, ss. 28, 29, be limited to the quantum of damages: *Hockley* v. *G. T. Ry. Co.*, 10 O. L. R. 363; *Clarke* v. *London St. Ry.*, 12 O. L. R. 279. Where, however, the damages are assessed by a Judge, an appellate Court may, if it sees fit, reduce them: *Sheahen* v. *Toronto Ry.*, 25 O. L. R. 310; or increase them: *Vanhorn* v. *Verrall* (Divisional Court, 28 June, 1902).

In an action for personal injuries against a street railway the plaintiff, who was a mining engineer earning $6,000 per annum, was found to have been permanently incapacitated for work, and a verdict of $30,000 was given. The Court refused a new trial considering that the damages, in the circumstances, were not excessive: *Bradenburg* v. *Ottawa St. Ry.*, 19 O. L. R. 34; and see *Morin* v. *Ottawa Electric Ry.*, 18 O. L. R. 209; but in an action under *The Fatal Accidents Act*, for the death of a married woman aged 62, a verdict of $3,325 apportioned among the executors of her husband, who survived her, and her adult children, was held to be grossly excessive: *Ronson* v. *Can. Pac. Ry.*, 18 O. L. R. 337.

Where the jury has given a specific sum for damages in respect of some particular claim, for which the Court finds there was no evidence, it may disallow that sum, without granting a new trial or disturbing the verdict in other respects: *Wright* v. *Toronto Ry.*, 20 O. L. R. 498.

Libel actions.

In an action for libel the Court will not grant a new trial on the ground of excessive damages, unless it thinks that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably give them: *Praed* v. *Graham*, 24 Q. B. D. 53; and in assessing damages the jury are entitled to take into consideration the whole conduct of the defendant in the matter from the time the libel was published down to the time of the verdict: *Ib.* See also as to the granting of new trials in actions for libel: *Wilcocks* v. *Howell*, 5 Ont. 360.

As to the application of *Praed* v. *Graham*, *supra*, to cases generally: see *Johnston* v. *G. W. Ry. Co.*, 1904, 2 K. B. 250; where *Philips* v. *L. & S. W. Ry. Co.*, 1879, 4 Q. B. D. 406; 5 Q. B. D. 78, was approved, the effect of which is that a new trial may be ordered if the Court, without imputing perversity to the jury, comes to the conclusion from the amount of the damages and other circumstances, that the jury must have considered matters which they ought not to have considered, or have applied a wrong measure of damages.

Damages assessed on wrong basis.

Where damages are assessed on a wrong basis, *e.g.*, on the ground of neglect of duty, where no such duty existed, a new trial will be ordered: *Dunn* v. *Prescott Elevator Co.*, 26 Ont. App. 389; 30 S. C. R. 620.

Damages too small.

If the damages found by the jury are so small, as to shew that they must have omitted to consider some of the elements of damage, the

Court will grant a new trial: *Philips* v. *London & S. W. Ry. Co.*, 5 Q. B. D. 78; 5 C. P. D. 280; *Church* v. *Ottawa*, 25 Ont. 298; 22 Ont. App. 348. It has been held that a new trial will not be granted merely to enable a plaintiff to recover nominal damages: *Scammell* v. *Clarke*, 23 S. C. R. 307; *Simonds* v. *Chesley*, 20 S. C. R. 174; *Milligan* v. *Jamieson*, 4 O. L. R. 650; but see *Kemp* v. *Christmas*, 105 L. T. Jour. 56. Sec. 28.

Surprise.—In *Riding* v. *Hawkins*, 14 P. D. 58, the plaintiff's case when opened, seemed to proceed on a case of fraud, but undue influence only was alleged. The plaintiff applied for leave to amend, which was granted, and the trial proceeded after the defendant had refused an offer of the Judge to adjourn the trial at the plaintiff's expense: the finding was for the plaintiff on the question of fraud, but for the defendant on the issues on the original pleadings. It was held that defendant was not precluded, by his refusal of the offer of adjournment, from moving for a new trial on the ground of being surprised by the plaintiff's new case. It was also held that the amendment was properly allowed, due care having been taken that the defendant should not be damnified. Surprise.

See *Canada Landed Credit Co.* v. *Thompson*, *supra*, p. 124.

The abstaining by a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andrews* v. *Stuart*, 1 C. L. T. 724.

Where the reason for the application is surprise, the affidavits must state the grounds of surprise: *Dow* v. *Dickenson*, W. N. 1881, 52. Evidence of persons who were called as witnesses to the effect that the evidence they gave was untrue, and that statements made by them to the plaintiff's solicitor before trial were true, is inadmissible on a motion for a new trial: *Rushton* v. *Grand Trunk Ry.*, 6 O. L. R. 425. Grounds of to be shown.

The fact that on cross-examination of an opposite party's witness a damaging statement was elicited is not surprise: *Shipway* v. *Broadwood*, 1899, 1 Q. B. 369; 80 L. T. 11.

Discovery of Fresh Evidence.—As to when a new trial, or supplemental trial may be had on the ground of discovery of new evidence: see note to *Rule* 257; and see *Rule* 523 as to motions to reverse or vary judgments upon the ground of matters arising subsequent thereto, or subsequently discovered; such motions may be made to the Court or Judge who tried the action: *Armour* v. *Merchants Bank*, 17 S. R. 108. Discovery of fresh evidence when ground for new trial.

A new trial will not be granted on the ground of premature admission of evidence which has afterwards become admissible: *Faund* v. *Wallace*, 35 L. T. 361; nor of the discovery of new evidence, unless it is nearly or quite conclusive: *Anderson* v. *Titmas*, 36 L. T. 711; *Young* v. *Kershaw*, 81 L. T. 531; 16 T. L. R. 52; and see *Birch* v. *Birch*, 1902, P. 130.

Where the new evidence is merely corroborative of that given at the trial, a new trial will be refused: *Hownrth* v. *McGugan*, 23 Ont. 96; see *Trumble* v. *Hortin*, 22 Ont. App. 51.

Where the new evidence might have been discovered before trial by examinations for discovery, which were not taken, a new trial was refused: *Turnbull* v. *Duval*, 1902, A. C. 429; *Yackman* v. *Johnson*, 3 O. W. N. 624.

Sec. 30.

Staying new trial pending appeal.

Staying New Trial Pending Appeal.—An application to stay a new trial pending an appeal from the order granting the same was refused: *Hockley* v. *Grand Trunk Ry.*, 7 O. L. R. 186.

Costs.

Costs.—*Primâ facie*, where a new trial is ordered, the party opposing the motion should be ordered to pay the costs of the motion: *Hamilton* v. *Seol*, 1904, 2 K. B. 262; 90 L. T. 592; but these costs, as also those of the former trial, are in the discretion of the Court: *Ib.*, and see s. 74 (1).

New trial may be ordered on any question.

29. A new trial may be ordered upon any question without interfering with the decision upon any other question. 3-4 Geo. V. c. 19, s. 29.

Quære, whether a new trial may not now be ordered as to one defendant, without disturbing the verdict as to another: *Purnell* v. *G. W. Railway Co.*, 1 Q. B. D. 636; and see Jud. Act, s. 28 (2).

A new trial may be ordered as to the assessment of damages, the finding as to the liability of the defendant in respect of the cause of action (for negligence) not being interfered with: *Hesse* v. *St. John Ry. Co.*, 30 S. C. R. 218, 240; *Hockley* v. *G. T. Ry. Co.*, *supra*, p. 154.

Where there are distinct issues, the Judge may, under this *Rule*, accept the verdict of the jury on those issues on which they agree, and discharge them as to others, and a new trial may be ordered on undecided issues: *Morsh* v. *Isaacs*, 45 L. J. C. P. 505; *Coleman* v. *Toronto*, 23 Ont. 345.

Where a new trial is granted, if the order is not appealed from, the question determined by it cannot be re-argued upon an appeal from the judgment pronounced at the new trial: *Journal Printing Co.* v. *Maclean*, 23 Ont. App. 324.

Where the judgment at a trial is set aside it is not in all cases necessary that a new trial should be ordered; there are some cases in which the appellate Court may itself award the judgment which should have been awarded at the trial: see *Jud. Act*, s. 27 (1), (2).

Disagreement of jury.

30. Where the jury disagrees or makes no finding on which judgment can be entered, the Court may, on the application of the defendant, dismiss the action on the ground that there is no evidence to warrant a judgment for the plaintiff, or that for any other reason he is not entitled to judgment. 3-4 Geo. V. c. 19, s. 30.

The *Rule* does not apply to every case of disagreement by a jury, but only to cases which may properly be withdrawn from the jury: *Floer* v. *Michigan Central Ry.*, 30 Ont. 635; 27 A. R. 122.

See *Bank of B. N. A.* v. *Eddy*, in note to *Rule* 264; also *Casey* v. *C. P. Ry. Co.*, 15 Ont. 574, where judgment was given for defendants, the plaintiff's own evidence shewing that the accident, the occasion of the damages claimed by him, was caused by his own negligence; and *Gambell* v. *Heggie*, 5 O. W. R. 746, an action for seduction, where the Judge was of opinion that there was no reasonable evidence upon which seduction only could be found by the jury, and that the evidence

the plaintiff's daughter, if believed, could only lead to the con- Sec. 31.
usion that the defendant had committed the offence of rape; but
is judgment was subsequently reversed: see 41 C. L. J. 839, the Divi-
onal Court holding that the evidence of force might be rejected; but
is for the jury to reject the evidence not the Court: *E. v. F.*, 10 O.
R. 489; 11 O. L. R. 582.

Where after the trial the plaintiff obtains leave to amend his state-
ent of claim, so as to raise new issues, it is not competent for a
visional Court to give judgment on the original pleadings under
s section: *Canadian Pacific Ry. Co. v. Cobban Mfg. Co.*, 22 S. C. R. 132.

The making of a motion under this section was held to stay the
rrying of the case down to a second trial, where the motion was not
ard because the notes of evidence were not ready in time: *Schuhl
Rosenstadt*, 9 C. L. T. 114.

Where a case is properly submitted to the jury, and the Appellate
vision finds that their was some evidence on which they might
ve found in favour of the plaintiff, the Appellate Division will not
able to dismiss the action under this section, because on a new
al the plaintiff might be able to give further evidence to warrant
verdict in his favour: *Skeate v. Slaters*, 1914, 2 K. B. 429; 110
T. 604.

Where the jury disagree, the action may be retried at the same or
y subsequent sittings; *Rule* 500.

Judgment of Appellate Division, When Final.—By the *Do-
nion Courts Act* (R. S. O. c. 55), it is enacted as follows:—

"3. In any action respecting property or civil rights, whether for When appeal lies from Appellate Div.
mages or for specific relief, the judgment of the Appellate Division
all be final except,—

(a) Where the title to real estate or some interest therein is Title to real estate.
in question;

(b) Where the validity of a patent is affected; Patent.

(c) Where the matter in controversy in the appeal exceeds Sum over $1000.
the sum or value of $1,000, exclusive of costs;

(d) Where the matter in question relates to the taking of an Annual rent, etc., etc.
annual or other rent, customary or other duty or fee, or a like
demand of a general or public nature affecting future rights;

(e) Where the special leave of the Appellate Division or the By leave.
Supreme Court of Canada to appeal to such last mentioned Court
is granted. 10 Edw. VII. c. 25, s. 3."

31. In any cause or matter pending before a Divi- Power of Judge of Appellate Division.
onal Court any direction incidental to it not involving
e decision of the appeal, may be given by a Judge of
e Appellate Division; and a Judge of that Division
ay during vacation make any interim order to prevent
rejudice to the claim of any of the parties pending
appeal, as he may think fit; but every such order
ade by the Judge shall be subject to appeal to a Divi-
onal Court. 3-4 Geo. V. c. 19, s. 31.

See Eng. *Jud. Act*, 1873, s. 52.

Sec. 31.

When appeal becomes pending.

A matter becomes pending before the Appellate Division upon the service of notice of intention to appeal: see *Sugden* v. *St. Leonards*, 1 P. D. 209.

A matter is not pending in the Appellate Division after its order has been issued: *Hargrove* v. *Royal Templars*, 2 O. L. R. 126; and a Judge of the Appellate Division has no jurisdiction thereafter to stay proceedings pending a proposed appeal to the Supreme Court. *Ib.*; and see *Hessin* v. *Jones*, *supra*, p. 134.

But he may do so acting as a Judge of the H. C. D.: see sec. 8, *supra*.

Bail.

On an appeal by a party committed for extradition it would seem that a single Judge of the Appellate Division has no jurisdiction under this section to admit the applicant to bail: *Re Watts*, 3 O. L. R. 279, but he may do so acting as a Judge of the H. C. D. under sec. 8.

Injunction.

Where, pending an appeal from an order refusing an injunction to restrain erection of buildings, the buildings were completed before the appeal could be argued, it was said that an interim order should have been applied for under the corresponding section of the Eng. Act: *Johnstone* v. *Royal Courts* W. N. 1883, 5.

It would seem that under this section, a Judge of the Appellate Division may in vacation grant an injunction in a case in which an appeal is pending, and such jurisdiction may also be exercised by the full Court when in session: *Embree* v. *McCurdy*, 14 O. L. R. 325.

In a matter of discretion an order made by a single Judge will not be interfered with by the full Court: *Neill* v. *Travellers' Ins. Co.*, 9 Ont. App. 54; *Platt* v. *G. T. Ry. Co.*, 12 P. R. 380.

Appeals from the Supreme Court of Ontario.

The decision of the Appellate Division on appeals from the High Court Division is not in all cases conclusive; and in certain cases an appeal can be had therefrom either to the Supreme Court of Canada, or to His Majesty in Council.

Decision of Appellate Division final in certain cases.

The decision of the Appellate Division is final in cases which have not come to it from the High Court Division, *e.g.*, such as have come from the Drainage Referee: *Re Raleigh & Harwich*, Cassels' Sup. Court Prac., 2nd ed., 22; or which have originated in a County Court though removed into the Supreme Court: *Young* v. *Tucker*, 18 P. R. 449; *Tucker* v. *Young*, 30 S. C. R. 185; or appeals under the *Dominion Railway Act* (R. S. C. c. 37), s. 209: *James Bay Railway Co.* v. *Armstrong*, 38 S. C. R 511; 1909 A. C. 624.

Appeals to Sup. Ct. of Can.

Appeals to Supreme Court of Canada.—Appeals from the Court of Appeal to the Supreme Court of Canada are regulated by *The Supreme Court Act* (R. S. C. c. 139), and the amendments thereto.

Appeal from final judgments.

Under that Act an appeal lies to the Supreme Court of Canada subject to the limitations hereafter mentioned,—

(1) From all final judgments of the highest Court of final resort, in any Province of Canada, whether such Court is a Court of appeal or of original jurisdiction, in cases in which the Court of original jurisdiction is a Superior Court; except judgments in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition, arising out of a criminal charge, or in any case for or upon a writ of *habeas corpus* arising out of any claim for extradition made

nder any treaty, nnd except in any criminal case except ns provided y the Criminal Code; see R. S. C. c. 139, s. 36. Sec. 31.

(2) Also in nctions commenced in the Supreme Court of Ontario, om a judgment, whether final, or not, of the Appellate Division upon ny motion for a new trial, and from any judgment whether final, or ot, in an action for equitable relief: see R. S. C. c. 139, s. 38 and 3-4 eo. V. c. 51, s. 1 (D),— Where equitable relief granted.

(3) Also from any judgment upon a special case, unless the parties gree to the contrnry, and the Supreme Court of Cannda can in such ppeals draw an inference of fact from the facts stated in the special se which the Court appenled from should have drawn,— Special case.

(4) Also from a judgment on a motion to set aside an award or way of appeal from an award,— Award.

(5) Also from any judgment in any case of proceedings for or pon a *habeas corpus*, *certiorari*, or prohibition, not arising out of a iminal charge,— Habeas corpus, etc.

(6) Also in any case or proceeding for or upon n writ of *mandmus*,— Mandamus.

(7) Also in any case in which a by-law of n municipal corporation s been quashed, or a motion to quash it has been refused after argunent: see R. S. C. c. 139, s. 39. By-laws.

(8) Also from the judgment of the Appellate Division concerning e assessment of property for provincial or municipal purposes, where e assessment is not less than $10,000: see R. S. C. c. 139, s. 41. Assessments.

(9) An appeal may alao, in certain cases, by consent, or leave of e Supreme Court, or a Judge thereof, be taken from a Judge of the gh Court Division *per saltum*: see R. S. C. c. 139, s. 42. Appeal per saltum.

Except as above mentioned an appenl only lies from a final judgnt: see R. S. C. c. 139, s. 44.

But the provisions of the sections above referred to are qualified regards appeals from Ontario, by R. S. C. c. 139, s. 48. Under that ction no appeal lies to the Supreme Court of Canada from the Apllate Division unless:—

(*a*) The title to real estate or some interest therein is in quesn; or,

(*b*) The validity of a patent is affected; or,

(*c*) The matter in controversy in the appeal exceeds the sum or lue of $1,000, exclusive of costs; or,

(*d*) The matter in question relates to the taking of an annual or ier rent, customary or other duty fee, or a like demand of a general public interest affecting future rights; or,

(*e*) Special lenve of the Appellate Division or of the Supreme urt of Canada to appeal to such last mentioned Court is granted.

Whenever the right to appeal is dependent upon the amount in pute, such amount is to be understood to be that demanded, and not t recovered, if they nre different; see R. S. C. c. 139, s. 48. Amount in dispute.

In order, therefore, to appeal as of right, the case must be one thin clauses (5), (6), (7) or (8), *supra*, and also within one or re of the categories (*a*) to (*d*), above-mentioned; and if it cannot brought within any of them, then leave must be obtained.

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Final judgments.

A "final judgment," for the purposes of an appeal to tha Supreme Court, means any judgment, rule, order or decision which determines in whole or in part, any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding: 3-4 Geo. V. c. 51, s. 1 (D).

What judgments are not final.

Prior to that Act it was held that a judgment for an amount to he ascertained hy a Master was not a final judgment: *Union Bank of Halifax* v. *Dickie*, 41 S. C. R. 13; *Wenger* v. *Lamont*, 41 S. C. R. 603; *Dunn* v. *Eaton*, 47 S. C. R. 205; *Clarke* v. *Goodall*, 44 S. C. R. 284; *Crown Life* v. *Skinner*, 44 S. C. R. 616; *Hesseltine* v. *Nelles*, 47 S. C. R. 230, hut since the 3-4 Geo. V. c. 51, s. 1 (D), ahove referred to, wherever the judgment determines a right, and then directs a reference to take an account, and either reserves further directions, or directs judgment for the amount to be found due, the judgment may nevertheless he final for the purpose of an appeal to the Supreme Court of Canada.

By *The Dominion Courts Act* (R. S. O. c. 55), s. 3: *supra*, p. 157, s limitation of the right to appeal to the Supreme Court of Canada is imposed in certain cases, hut this provision was held to he *ultra vires* of the Provincial Legislature: *Clarkson* v. *Ryan*, 17 S. C. R. 251.

Questions not appealable.

Questions not Appealable.—Except aa hereafter mentioned, an appeal cannot be had to the Supreme Court of Canada, from any judgment or order which is not final; therefore, aa a general rule, appeals from interlocutory orders or judgments will not lie: R. S. C. c. 135, s. 44. A judgment directing a reference and reserving further directions and costs, though formerly not appealahle: *Crown Life* v. *Skinner*, 44 S. C. R. 616; *Clarke* v. *Goodall*, *Ib.* 284; *Dunn* v. *Eaton*, 47 S. C. R. 114; *Hesseltine* v. *Nelles*, *Ib.* 230; may now be appealed if any substantial right is determined therehy: see 3-4 Geo. V. c. 51, s. 1 (D). *supra:* or if it he pronounced in respect of some equitahle claim or right: see R. S. C. c. 139, s. 38. Nor can appeals be entertained from discretionary orders except when made in the exercise of equitahle jurisdiction: *Ib.*, *s.* 45; see *Virtue* v. *Hayes*, 16 S. C. R. 721; *Maritime Bank* v. *Stewart*, 20 S. C. R. 105; *Canadian Pacific By* v. *Toronto*, 30 S. C. R. 337; nor appeals invoiving questions of practice and procedure: *Emperor of Russia* v. *Poskouriakoff*, 42 S. C. R. 226.

Thus an order allowing amendment of pleadings is not appealable: *Williams* v. *Leonard*, 26 S. C. R. 406; nor an order as to costs which are in the discretion of the Court: *McGugan* v. *McGugan*, 21 S. C. R. 267; unless there be aome question of principle invoived: *Archbald* v. *De Lisle*, 25 S. C. R. 1; *Smith* v. *St. John City Ry.*, 28 S. C. R. 603; *O'Donohoe* v *Beatty*, 19 S. C. R. 356; *Moir v. Huntingdon*, 19 S. C. R. 363; *Schlomann* v. *Dowker*, 30 S. C. R. 323. So also no appeal will lie from an order granting or refusing an order on an application to set aside a judgment hy default: *O'Donohoe* v. *Bourne*, 27 S. C. R. 654; hut see *Voight* v. *Orth*, 5 O. L. R. 443; nor from an order perpetually staying proceedings: *Maritime Bank* v. *Stewart*, 20 S. C. R. 105; and it has also been held that an order allowing summary judgment to be entered on a specially indorsed writ is discretionary and not appealahle: *Morris* v. *London & Canadian L. & A. Co.*, 19 S. C. R. 434; but see *Voight* v. *Orth*, *supra;* nor does an appeal lie from an order refusing an application to set aside an order discharging bail: *Scammell* v. *James*, 16 S. C. R. 593; nor one which invoives mere questions of practice or procedure: *Irpin* v. *Merchant's Bank*, 24

C. R. 142; *Macdonald* v. *Ferdais*, 22 S. C. R. 260; *Ferrier* v. *Trepan-* Sec. 31.
r, 24 S. C R. 86; *Toronto Railway* v. *Balfour*, 32 S. C. R. 239;
y.-Gen. v. *Scully*, 33 S. C. R. 16; *Gibson* v. *Nelson*, 35 S. C. R. 181;
less some substantial question of right is involved, or grave in-
stice has been done: *Lambe* v. *Armstrong*, 27 S. C. R. 309; *East-*
Townships Bank v. *Swan*, 29 S. C. R. 193; and see *Voight* v.
th, *supra*, p. 160.

Orders granting or refusing a new trial, although discretionary, are Orders granting new trials.
pealable: see R. S. C. c. 139, s. 38 (*b*); but the right of appeal
m an order granting a new trial is not absolute: see *Ib.* s. 48. It is
a final judgment: *Ainslie Mining Co.* v. *McDougall*, 40 S. C. R. 270;
s where on an appeal to the Court of Appeal that Court granted a
w trial, a further appeal by the appellant to the Supreme Court
Canada was not entertained, though the appellant desired to con-
d that the action should have been dismissed: *Canadian Mutual*
serve v. *Dillon*, 34 S. C. R. 141; and see *Confederation Life* v.
rden, 34 S. C. R. 338; *O'Sullivan* v. *Lake*, 15 Ont. App. 711.

Where a new trial was ordered by a Divisional Court to try certain
estions of fact, the Supreme Court on appeal declined to interfere:
ott v. *Bank of New Brunswick*, 21 S. C. R. 30.

An order committing a judgment debtor for making unsatisfactory Order committing judgment debtor.
swers on his examination under *Rule* 580, is a proceeding ancillary
the judgment, and no appeal lies in respect of such an order to the
preme Court of Canada: *Svensson* v. *Bateman*, 42 S. C. R. 146; see
so *Compagnie d'Aqueduc, etc.* v. *Verrett*, 42 S. C. R. 156

Where under the *Canada Railway Act* (R. S. C. c. 39), s. 209, an
peal from an award is taken to the High Court Division *semble* no
rther appeal can be had: see *James Bay Ry.* v. *Armstrong*, 1909.
C. 624.

Questions Appealable.—These are now regulated by *The Supreme* Questions appealable
urt Act (R. S. C. c. 139), s. 48, *supra*, and *The Dominion Courts*
t (R. S. O. c. 55), s. 3, which provide that no appeal shall lie to
e Supreme Court from the Appellate Division except in the following
ses:—

(*a*) Where the title to real estate or some interest therein is Title to land.
in question;

See *Macdonald* v. *Galivan*, 28 S. C. R. 258; *Dreschel* v. *Aucr Light*
Ib., 268; *Jermyn* v. *Tew*, *Ib.*, 497; *Waters* v. *Manigault*, 30 S. C. R.
4; *Aurora* v. *Markham*, 32 S. C. R. 457; *Grimsby Park* v. *Irving*, 41
C. R. 35;

(*b*) Where the validity of a patent is affected: Patent.

See *King* v. *Dupuis*, 28 S. C. R. 388; *Ottawa* v. *Hunter*, 31 S. C. R. 7.

(*c*) Where the matter in controversy in the appeal exceeds Matter involving over $1,000.
the sum or value of $1,000, exclusive of costs;

See *Banque du Peuple* v. *Trottier*, 28 S. C. R. 422; *Bain* v. *Anderson*,
481; *Jermyn* v. *Tew*, *Ib.* 497; *Canadian Accident Co.* v. *McNevin*,
S. C. R. 194; *Frankel* v. *Grand Trunk Ry. Co.*, 3 O. L. R. 703; *Win-*
der v. *Davidson*, 34 S. C. R. 274; *Beauchemin* v. *Armstrong*, 34 S. C. R.
5; *Goold Bicycle Co.* v. *Laishley*, 35 S. C. R. 184; *Robinson* v. *Scott*,
S. C. R. 490; *Labrosse* v. *Langlois*, 41 S. C. R. 43; *Montreal Park &*

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I. Ry. v. *Labrosse*, 40 S. C. R. 96; *Shawinigan H. E. Co.* v. *Shawinigan W. & P. Co.*, 43 S. C. R. 650.

In estimating the amount in controversy, interest cannot be added to the amount of the judgment appealed from: *Toronto Ry.* v. *Milligan*, 42 S. C. R. 238, S. C. 17 O. L. R. 370, 18 O. L. R. 109.

Where it is impossible from the record to say what is the amount in controversy no appeal lies: *Wenger* v. *Lamont*, 41 S. C. R. 603; but see *infra* as to proving amount involved by affidavits.

Where a merely declaratory judgment was asked, an appeal was quashed because there was no pecuniary amount in controversy: *Canada Breweries Co.* v. *Garicpy*, 38 S. C. R. 239; and see also *Hamilton* v. *Hamilton Distillery Co.*, 38 S. C. R. 239.

Annual fee, etc.

(*d*) Where the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights

See *Canadian Mutual Loan Co.* v. *Lee*, 34 S. C. R. 224; *Winteler* v. *Davidson*, 34 S. C. R. 274; *Carrier* v. *Sirois*, 36 S. C. R. 221.

A question whether a fee for entrance to a park owned by the plaintiffs could be exacted, does not come within this clause: *Orimsby Park* v. *Irving*, 41 S. C. R. 35;

By special leave.

(*e*) In other cases where the special leave of the Appellate Division or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

When granted.

Special leave to appeal may be granted in cases involving matters of public interest, important questions of law, the construction of imperial or Dominion Statutes, a conflict between Dominion and Provincial authority on questions of law applicable to the whole Dominion: *Lake Erie, &c., Ry. Co.* v. *Marsh*, 35 S. C. R. 197; and in such cases only: *Whyte Packing Co.* v. *Pringle*, 42 S. C. R. 691; but not even in such cases if there is no doubt about the correctness of the decision: *Lake Erie, &c., Ry. Co.* v. *Marsh*, *supra*.

See *Atty.-Gen.* v. *Scully*, 33 S. C. R. 16; *Rice* v. *The King*, 32 S. C. R. 450; *Fisher* v. *Fisher*, 28 S. C. R. 494; *Hargrove* v. *Royal Templars*, 31 S. C. R. 385; *Tucker* v. *Young*, 30 S. C. R. 185.

When refused.

Leave was refused where the judgment was for $1,000 damages and the grounds upon which leave was asked for were that the costs had accumulated so as to amount to $2,000, and the damages it was alleged had been estimated by a mere guess: *Goold Bicycle Co.* v. *Laishley*, 35 S. C. R. 184.

The mere fact of there being a difference of opinion among the Judges of the Court appealed from is not sufficient ground for treating a case as exceptional: *Toronto Ry.* v. *Milligan*, *supra*.

Amount in dispute, how determined.

(*f*) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

See *Ottawa* v. *Hunter*, 31 S. C. R. 7; *Jermyn* v. *Tew*, 28 S. C. R. 497; *Bain* v. *Anderson*, 28 S. C. R. 481.

The fact that the aggregate amount for which several respondents were sought to be made liable exceeded $1,000 was not sufficient, where the individual liability of each respondent was less than that amount: *Stephens* v. *Gerth*, 24 S. C. R. 716.

The Court cannot refuse to entertain an appeal because the amount volved has not been found or stated by the Court appealed om, but it can ascertain the amount in dispute on affidavits: *In re lkners Gold Mining Co. v. McKinnery*, 1901, A. C. 581; *Auer Light Dreschel*, 18 C. L. T. 209. Sec. 31.

Under these clauses no appeal lies unless the amount in controversy *the appeal* exceeds $1,000, exclusive of costs; the amount demanded the clause *f*), having regard to clause (*c*), means, "demanded in appeal:" *Bain v. Anderson*, 28 S. C. R. 481. See also *Jermyn v. e*, 28 S. C. R. 497; *Ottawa v. Hunter*, and *King v. Dupuis*, *supra*. 61, 62, clauses (b) and (f).

Where the j ' diction of the Supreme Court is doubtful, the Court y assume that it has jurisdiction, when it has been decided that the peal, on the merits, should be dismissed: *Bain v. Anderson*, *supra*.

The Supreme Court Act (R. S. C. c. 139), applies to civil cases only; minal appeals are regulated by the Criminal Code (R. S. C. c. 146): e v. *The King*, 32 S. C. R. 480.

The Supreme Court has entertained an appeal on a question of law pearing on the pleadings, but not raised or adjudicated in the Court ow, where no evidence in rebuttal could have been adduced to affect had it been taken at the trial: *McKelvey v. Le Roi Mining Co.*, S. C. R. 664. Appeal on question of law not raised in Court below.

An appeal may be entertained on a question of fact: *Dempster v.* cis, 33 S. C. R. 292; *Belcher v. McDonald*, 33 S. C. R. 321; but see C., 1904, A. C. 429; *Hood v. Eden*, 36 S. C. R. 476. Ordinarily, bow- r, if there is evidence to support a finding of fact an appellate rt will not interfere with that finding, especially if the case has n tried by a jury: *Grand Trunk Railway v. Roinville*, 25 Ont. App. ; 29 S. C. R. 201; *D'Avignon v. Jones*, 32 S. C. R. 650; *Parodis v.* noilon, 30 S. C. R. 405; *Granby v. Ménard*, 31 S. C. R. 14; even ugh the Judge at the trial was dissatisfied: *Fraser v. Drew*, 30 C. R. 241. So, ordinarily, an appellate Court will not interfere h the assessment of damages unless they are plainly excessive or dequate, or have been arrived at by mere guess-work: *Williams v.* phenson, 33 S. C. R. 323. See also notes to Jud. Act, s. 12. Appeal on questions of fact.

It is only where some fundamental principle of justice has been ored that appeals on a question of costs can be successful; see ith v. *St. John City Ry.*, 28 S. C R. 603; *Schlomann v. Dowker*, 30 C. R. 323. Appeal as to costs.

A Judge of the Appellate Division has no jurisdiction to extend the e for the allowance of the security in a case in which an appeal only be brought by leave, and such leave has not been obtained: bb v. *The Grand Trunk Ry.*, 8 O. L. R. 281; and he has no jurisdic- n to grant such leave to appeal: *Ib.*

Time for Appeal.—An appeal to the Supreme Court in a civil ion must be brought within sixty days from the signing or entry pronouncing of the judgment appealed from: R. S. C. c. 139, s. 69; lligan v. *Grand Trunk Ry.*, 18 O. L. R. 149; *Temiscouata Ry. v. St.* r. 38 S. C. R. 236, 6 Can. Ry. Cas. 367. The signing and entry of gments are, in Ontario, usually contemporaneous acts; but they y take place long after the pronouncing of a judgment. Ordinarily time runs from the pronouncing of the judgment, and it is only ere some substantial matter remains to be determined before judg- Time for appeal to Supreme Court of Canada.

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ment can be entered that the time for appealing runs from the signing or entry: *O'Sullivan* v. *Harty*, 13 S. C. R. 431; *Walmsley* v. *Griffith*, 13 S. C. R. 434; *Martley* v. *Carson*, 13 S. C. R. 439; *Elgin* v. *Robert*, 36 S. C. R. 27. Where the judgment of the Court of Appeal allowed the appeal, and restored the judgment at the trial, but reduced the amount of damages, it was held that nothing substantial remained to be settled, and that the time ran from the pronouncing of the judgment: *News Printing Co.* v. *Macrae*, 26 S. C. R. 695; and see *Martin* v. *Sampson*, 26 S. C. R. 707; as to the time when a judgment not pronounced in open Court is to be deemed to be pronounced for the purposes of appeal; see *Wallace* v. *Bath*, 7 O. L. R. 542. The vacations of the Supreme Court are not to be excluded in reckoning the time for appeal: *News, etc.*, v. *Macrae*, *supra*. The day of pronouncing or entering judgment, whichever of them is the day from which the sixty days is to be reckoned, is excluded. The time for appealing may be extended even after the time prescribed by the statute has expired: *Vaughan* v. *Richardson*, 17 S. C. R. 703: but see *Canadian Mut. Loan & I. Co.* v. *Lee*, 34 S. C. R. 224; *Atty-Gen. for Quebec* v. *Scott*, 34 S. C. R. 282; and *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 4 O. W. R. 299; 5 O. W. R. 162.

Where a party elects to move for an extension of the time for appealing before a Judge of the Appellate Division in Chambers, he cannot afterwards make a substantive application for the same purpose to the Court: *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 5 O. W. R. 162. Whether an appeal lies from the Judge in Chambers to the Court, *quære*: *Ib.*; see *Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188, 201.

Where the 60 days have elapsed the Supreme Court of Ontario cannot extend the time for appealing, where the appeal is not as of right; neither can the Supreme Court of Canada: *Goodison* v. *McNab*, 42 S. C. R. 694; neither can leave to appeal be granted after the 60 days have expired: *Ib.*; except in cases where the appeal is as of right: R. S. C. c. 139, s. 71; *Canadian Mutual Loan & Investment Co.* v. *Lee*, 34 S. C. R. 224.

Leave to appeal, when necessary.

Leave to Appeal, when Necessary.—An appeal can only be brought, without leave or consent, from the decision of the Court of last resort in the Province: R. S. C. c. 139, s. 42: but by consent of parties an appeal may be had direct from a Court of original jurisdiction: R. S. C. c. 139, s. 42 (*a*): and the Supreme Court of Canada or a Judge thereof may also in its discretion allow an appeal from a superior Court of first instance: R. S. C. c. 139, s. 42 (*b*).

Where a case cannot be brought within any of the clauses (*a*) (*b*) (*c*) (*d*) or (*e*) of R. S. C. c. 139, s. 48, then there can be no appeal to the Supreme Court of Canada without leave: see *Aurora* v. *Markham*, 32 S. C. R. 457; *Attorney-General* v. *Scully*, 33 S. C. R. 16; *Beck Mfg. Co.* v. *Valin*, Cam. S. C. Pr. (2nd Ed.) 169-70, and other cases there cited: *Harwich* v. *Raleigh*, *Ib.* 143.

As to appeals in Equity cases: see Cam. S. C. Pr. (2nd ed.) 130.

Where the time for lodging an appeal, or giving notice of an appeal, where notice is necessary, is suffered to elapse without the appeal being lodged or notice given, the Court appealed from, or any Judge thereof, may under special circumstances allow an appeal to be brought: see R. S. C. c. 139, s. 71: *Demers* v. *Bank of Montreal*, 29

C. R. 435; *Bank of B. N. A.* v. *Walker*, Coutlee's Dig. 111; *Hamilton* Sec. 31.
teamboat Co. v. *Mackay*, 15 O. L. R. 184; *Milligan* v. *Grand Trunk Ry.*, 3 O. L. R. 109, Cass. Dig. (2), pp. 670, 671, but only in cases where he appeal is of right: *Canadian Mutual Loan & Investment Co.* v. *ee, supra*; but the Court or Judge is to impose such terms as to ecurity or otherwise as seems proper under the circumstances: R. C. c. 139, s. 71; the applicant should shew that he had a *bona fide* ntention to appeal while the right to appeal without leave existed, nd the suspension of further proceedings by reason of some special ircumstances: *Smith* v. *Hunt*, 5 O. L. R. 97; or that the omission to roceed with the appeal in due course was owing to an unintentional lip: *Ross* v. *Robertson*, 7 O. L. R. 464; *Hamilton* v. *Mutual Reserve ife Ins. Co.*, 4 O. W. R. 299.

Leave to Appeal, When Granted or Refused.—The Supreme Leave to appeal per saltum, when granted.
ourt of Canada has permitted an appeal to be brought from the igh Court without first going to the Court of Appeal, where an nportant constitutional question was involved: *Ontario Mining Co.* *Seybold*, 31 S. C. R. 125; and also where there were only two udges on the Bench of the Provincial Court of Appeal: *Schultz* *Wood*, 6 S. C. R. 585; so also in favour of persons interested who esired to prosecute an appeal in the name of a party who refused allow his name to be used: *Dumoulin* v. *Langtry*, 13 S. C. R. 8; but the fact that the Provincial Court of Appeal has given adverse decision on the question involved is not considered suffi- ent ground for an appeal *per saltum*: *Hislop* v. *McGillivray*, 15 S. C. R. 8; and such leave will not be granted in cases where there would e no appeal to the Appellate Division: *Ottawa Electric Co.* v. *Bren- n*, 31 S. C. R. 311; *Armour* v. *Onondaga*, 42 S. C. R. 218; but see *rquharson* v. *Imperial Oil Co.*, 35 C. L. J. 230; 30 S. C. R. 188. proceedings under *The Dominion Winding Up Act*, (R. S. C. c. Winding-up Act (R. S. C. c. 129.)
9) leave to appeal *per saltum* from a High Court decision cannot granted: *Re Cushing Sulphite Fibre Co.*, 36 S. C. R. 494.

The Supreme Court of Canada will not entertain an application Leave to appeal, when refused.
r leave to appeal after a similar application has been made to the ppellate Division: *Aurora* v. *Markham*, 32 S. C. R. 457, nor will give leave to appeal in a case where the appeal is not of right here the sixty days have elapsed: *Goodison* v. *McNab*, 42 S. C. R. 4, even though the Appellate Division has extended the time: *Ib.* d *semble* in such a case the Appellate Division has no power to ant leave to appeal. Leave was granted under R. S. C. c. 139 s. 71 here the omission to appeal within proper time arose from the mis- ken impression that leave to appeal was necessary and no Court was ting during the sixty days, to which application for leave could be ade: *Hamilton Steamboat Co.* v. *Mackay*, 15 O. L. R. 184. Leave to peal was refused, although the appellant had taken an appeal without ve within the proper time, which, after being argued on the merits d been quashed by the Supreme Court of Canada for want of juris- ction: *Irving* v. *Orimsby Park*, 18 O. L. R. 114; also where only 000 was involved, notwithstanding a difference of opinion among e Judges of the Court of Appeal: *Milligan* v. *Toronto Ry.*, 18 O. L. R. 9. The fact that two Judges out of nine had dissented from the judg- ent arrived at by the Court of Appeal was held not to be sufficient ound for giving leave to appeal to the Supreme Court of Canada: *vell* v. *Lovell*, 13 O. L. R. 587. Leave was also refused, in an action specific performance, where counsel had advised that the judgment s not appealable as not being final, by reason whereof the time

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for appeal had been suffered to elapse, the Court being of the opinion that the judgment was appealable without leave: R. S. C. c. 139 s. 38, and no special circumstances being shewn: *Nelles* v. *Hesselline*, 27 O. L. R. 97; S. C. 47 S. C. R. 230.

As to what are considered special circumstances: see notes to *Rule* 176.

Approving of the security for the appeal is the mode of allowing the appeal under sec. 71: Cass. Pr., 2nd ed., p. 63.

There is no appeal to the Supreme Court of Canada from the order of a Judge of that Court in Chambers granting leave to appeal: *Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188, 201.

Security for costs of appeal.

Security to be Given.—No appeal to the Supreme Court of Canada can be allowed until security has been given by the appellant to the satisfaction of the Court appealed from, or a Judge thereof, or to the satisfaction of the Supreme Court, or a Judge thereof, to the extent of $500, that the appellant will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court: see R. S. C. c. 139, s. 75; except where the appeal is brought by or on behalf of the Crown, or in proceedings for, or upon, a writ of *habeas corpus*: *Ib.*, sub-sec. (2): see *In re Smart*, 16 S. C. R. 396; Cam. Pr. 151. The amount of the security fixed by s. 75 cannot be increased: *Archer* v. *Severn*, 12 P. R. 472.

Form of bond.

For the form of bond for security on appeal to the Supreme Court: see H. & L. Forms, Nos. 1211, 1212; *Davidson* v. *Fraser*, 17 P. R. 246; *Molsons Bank* v. *Cooper*, 17 P. R. 153; *Jamieson* v. *London & Canadian L. & A.*, 18 P. R. 413; *Young* v. *Tucker*, 18 P. R. 449.

It is not necessary that the appellant should be a party to the bond, but if he is made a party and does not execute it, it will be liable to be disallowed: *Robinson* v. *Harris*, 14 P. R. 373.

Payment into Court.

Instead of giving a bond, the $500 may be paid into Court: an order for that purpose must be obtained; for form of such order, see Cameron's Pr., 2nd ed., p. 639. Where the security is to be approved by the Court appealed from the money should be paid into the Supreme Court of Ontario, but where it is to be approved by the Supreme Court of Canada, *semble*, the money should be paid into that Court.

Allowance of security.

The application for the allowance of the security should be made in Chambers, either in the Court appealed from, or in the Supreme Court; the application should be made within the sixty days provided for lodging the appeal, or within the extended time, if any: *McCrae* v. *White*, 9 P. R. 288.

For form of certificate that security has been given, see H. & L. Forms, Nos. 1214, 1215.

The giving of security is a condition precedent to the appeal being entertained: and where security has not been given, the appeal will be quashed: *Scammell* v. *James*, 16 S. C. R. 593; even though there be no one interested in opposing the appeal: *Re Cahan*, 21 S. C. R. 100.

Where an application was made to approve of security for appeal within the time limited for giving security, but the application was not disposed of until after that time had expired, and the Judge then

proved of the security, it was held that, although he had not ex- Sec. 31.
essly extended the time for giving security, he had impliedly done
by allowing the security: *Great Northern Ry.* v. *Furness*, 40 S. C.
455.

Where the Supreme Court of Canada orders a new trial and directs
at the costs of the appeal shall abide the result of the new trial, the
pellant is not entitled to have the bond for security for the costs of
e appeal delivered up to be cancelled, before the result of the new
al is seen: *Dicarllo* v. *McLean*, 6 O. W. N. 290.

Notice of Appeal, when Necessary.—No appeal upon a special Notice of appeal, when necessary.
se, or from a judgment upon a motion to enter a verdict, or non-
it, upon a point reserved at the trial, or from a judgment upon a
tion for a new trial upon the ground that the Judge has not ruled
ording to law shall be allowed, unless notice thereof is given in
iting to the opposite party, or his attorney of record, within twenty
ys after the decision complained of, or within such further time as
e Court appealed from, or a Judge thereof, allows: R. S. C. c. 139,
70. Notice of appeal would seem to be unnecessary in the case
all other appeals to the Supreme Court in civil proceedings: see
f, p. 173.

The giving of notice, when necessary, is a condition precedent to
e right to appeal: *Vaughan* v. *Richardson*, 17 S. C. R. 703.

For form of notice of appeal: see H. & L. Forms, No. 1210.

Case to be Settled.—The appeal is to be on a case stated by the Appeal case, how settled
rties, or, in case of difference, to be settled by the Court appealed
m, or a Judge thereof: sea R. S. C. c. 139, s. 73.

The case is to set forth so much of the pleadings, evidence, affidavits
d documents as is necessary to raise the question for the decision
the Court; it must also include the reasons of the Judge or Judges
the Court or Courts below: see Rule S. C. 6; but see *Mayhew* v.
ne, 26 S. C. R. 58; and also the formal order or judgment of the
urt appealed from: R. S. C. c. 139, s. 73; *Reid* v. *Ramsay*, Cass. Dig.
420; *Kearney* v. *Kean*, and *Wallace* v. *Souther*, *Ib.* 672; Rule S. C. 7,
must also contain the formal judgment or order of the Court of first
tance: *Wright* v. *Huron*, *Ib.* 673; and also a copy of an order which
y have been made by the Court below or a Judge thereof, enlarging
time for appealing: Rule S. C. 7.

It should not contain immaterial documents, or documents, or other
tter, not before the Court of first instance: *Lionais* v. *The Molsons*
nk, 10 S. C. R. 526; *Exchange Bank* v. *Gilman*, 17 S. C. R. 108;
ess the Court appealed from has formally admitted further evidence
e given: see *Rule* 232; in which case such further evidence would,
naterial to the question in appeal, be a necessary part of the case.

The Supreme Court of Canada does not go behind the statement in
order or certificate of the Court appealed from as to the result of
judgment of that Court: *Booth* v. *Ratte*, 21 S. C. R. 637.

By R. S. C. c. 139, s. 68, it is provided that proceedings in appeals Procedure of Privy Council to be followed.
ll, when not otherwise provided for by that Act, or by the Act
viding for the appeal, or by the general rules and orders of the
preme Court, be as nearly as possible in conformity with the present

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practice of the Judicial Committee of the Privy Council; but notwithstanding this provision it is held that the Supreme Court of Canada cannot allow an appeal in *forma pauperis*: *Fraser* v. *Abbott*, Cnss. Dig., 695; although the same may be allowed by the Judicial Committee of the Privy Council: *Quinlan* v. *Quinlan*, 1901, A. C. 612.

Upon the case being agreed to by the parties, or settled by a Judge, the case is to be printed: see Rules S. C. 11, 12; and when printed the Registrar of the Court appealed from is to certify the case and transmit it, with 25 copies, to the Registrar of the Supreme Court of Canada; see R. S. C. c. 139, s. 45; Rule S. C. 11. For form of certificate, see H. & L. Forms, No. 1213; and when the security has been allowed by a Judge of the Court appealed from, the Registrar should also transmit his certificate thereof: see *Ib.*, Nos. 1214, 1215; and see *Macdonald* v. *Abbott*, 3 S. C. R. 278.

Together with the printed case, certified copies of all original documents and exhibits used in evidence in the Court of first instance are to be deposited with the Registrar of the Supreme Court, unless their production is dispensed with by order of a Judge of the Supreme Court; and the Supreme Court, or a Judge thereof, may order that all or any of the original documents be transmitted to the Registrar of the Supreme Court: see Rule S. C. 14.

The case must be filed with the Registrar of the Supreme Court twenty clear days, at least, before the first day of the session of the Supreme Court at which the appeal is to be heard: see Rule S. C. 31.

For form of case: see Rule S. C. 12.

Staying proceedings pending appeal.

Stay of Proceedings, pending Appeal.—Where it is desired to stay execution pending the appeal, further security, in addition to the $500 above mentioned, is required to be given: see R. S. C. c. 139, s. 76; and an order obtained allowing the security: *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499; *Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397; and see *Rombough* v. *Balch*, 19 P. R. 123. After the judgment of the Appellate Division has been entered, that Division has no jurisdiction to stay proceedings in the High Court Division pending an appeal to the Supreme Court: see *Hargrove* v. *Royal Templars*, 2 O. L. R. 126. A stay of a reference to take accounts pending an appeal was refused: *Saskatchewan L. & H. Co.* v. *Moore*, 6 O. W. N. 162.

The Master in Chambers has no jurisdiction in such a case, and, *semble*, a Judge in Chambers, in a case in which an appeal does not lie to the Supreme Court of Canada without leave, cannot stay proceedings until leave to appeal can be obtained: *Tabb* v. *Grand Trunk Railway Co.*, 8 O. L. R. 514.

The former Court of Appeal refused to continue an injunction, which was dissolved by the judgment appealed from, pending an appeal to the Supreme Court of Canada: *Klees* v. *Dominion C. & A. Co.*, 3 O. W. R. 937; or to stay a new trial: *Hockley* v. *Grand Trunk Ry.*, 7 O. L. R. 186.

Factums to be put in.

Factums.—At least fifteen days before the first day of the session at which the appeal is to be heard, the appellant and respondent are, respectively, to deposit with the Registrar of the Supreme Court twenty-five copies of their factums, or points for argument in appeal: see Rule S. C. 29. The factum is to contain a concise statement of the facts and of the points of law intended to be relied on, and of the

uments and authorities to be urged and cited at the hearing, Sec. 31.
nged under appropriate heads; see Rule S. C. 30; and is to
rinted in the same style as the case; see Rule S. C. 31.

No factums are required in *habeas corpus* appeals; see Rule S. C. 61. Hab. corp.

If the appellant does not deposit his factum within the prescribed Default in putting in factum.
, the respondent may move to dismiss the appeal; see Rule S. C.
and if the respondent does not deposit his factum the appellant
set the appeal down to be heard *ex parte*; see Rule S. C. 33;
such setting down may, on application in Chambers, supported by
avits excusing the default, be set aside; see Rule S. C. 34. The
um first deposited is not to be open to inspection by the opposite
y until he has deposited his own factum; see Rule S. C. 35. After
a party has deposited his factum he may, on demand, obtain three
es of his opponent's factum; see Rule S. C. 36.

Points not taken in the Court below will not, as a rule, be enter- Points not taken below.
ed on an appeal to the Privy Council; *White* v. *Victoria Lumber* 1910, A. C. 608; 103 L. T. 323 (in this case an objection to the ge's charge).

Each party states briefly the facts in his factum according to his Contents of factum.
ention as to the result of the evidence. He then states his propo-
on of law applicable to those facts, and gives the proper citation
ases and other authorities intended to be relied on in support.
nsive comments on the conduct of Judges of any of the Courts
w are irrelevant, and may be ordered to be struck out or taken off
files; see *Vernon* v. *Oliver*, 11 S. C. R. 156; *O'Sullivan* v. *Lake*, 16
. R. 636; and the solicitor of the party on whose behalf they are
e may subject himself to the censure of the Supreme Court; and
s may be refused to the party so offending, even though successful
he appeal.

Notice of Hearing.—After the case is filed, the applicant is to Notice of hearing.
15 days' notice of hearing (see H. & L. Forms, No. 1219), for the
following session of the Court as fixed by the Act, or as specially
ened for hearing appeals; or, if there be not sufficient time, then
he next session of the Court; Rules S. C. 15, 18, 19.

For form of notice; see Rule S. C. 17.

As to the procedure in *habeas corpus* proceedings; see Rules S. C. 4-67, 72-79.

Setting Down Appeal for Argument.—The appeal is to be set Setting down appeal.
n for argument at least fourteen days before the first day of the
ion at which it is to be heard; see Rule S. C. 37. A case cannot
set down without the leave of the Supreme Court, or a Judge
eof, which has not been filed with the Registrar of the Supreme
t twenty clear days, at least, before the first day of the session: *Ib.*

Enforcing Judgment of Supreme Court of Canada.—The cer- Enforcing judgment.
ate of the judgment of the Supreme Court of Canada is entered in
office where the original judgment is entered, and it is there
rceable in like manner as a judgment pronounced by the High
t Division; see R. S. C. c. 139, s. 58.

After the judgment has been certified to the High Court Division
all proper entries made thereof, the Supreme Court of Canada is

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functus, and has no power to order a stay of proceedings pending an appeal to the King in Council: *Peters* v. *Perras*, 42 S. C. R. 361.

Amendment.

A judgment of the Supreme Court of Canada is amendable: *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

APPEALS TO HIS MAJESTY IN HIS PRIVY COUNCIL.

Appeals to King in Council.

The prerogative of the Court to allow an appeal to His Majesty in Council cannot be taken away by any Canadian statute: see *Canadian Pacific Ry.* v. *Toronto*, 1911, A. C. 461; 104 L. T. 724; nor by any Court: see 116 L. J. Jour. 28.

Appeals to His Majesty in His Privy Council.—In cases where the matter in controversy exceeds the sum or value of $4,000, or where the matter in question relates to the taking of an annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights of what value or amount soever the same may be, an appeal from the Appellate Division lies to His Majesty in His Privy Council; but except as aforesaid it is declared that no appeal shall lie to His Majesty in His Privy Council: *The Privy Council Appeals Act* (R. S. O. c. 54), s. 2; but as to this latter provision, see *Clarkson* v. *Ryan*, 17 S. C. R. 251; *sed vide Cuvillier* v. *Aylwin*, 2 Knapp., 72.

When appeal may be made.

Appeals as of Right.—*The Privy Council Appeals Act* (R. S. O. c. 54), provides:—

"**2.** Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council; and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council. 10 Edw. VII. c. 24, s. 2.

Security.

3. No such appeal shall be allowed until the appellant has given security in $2,000, to the satisfaction of the Court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed. 10 Edw. VII. c. 24, s. 3."

From Supreme Court.

This appeal may be had from the Appellate Division to the Privy Council without first resorting to the Supreme Court of Canada; but it cannot be had *per saltum* from the High Court Division.

Where an appeal has been had to the Supreme Court of Canada, a further appeal to His Majesty in His Privy Council can only be had by special leave of the Judicial Committee: R. S. C. c. 139, s. 59; *Cuvillier* v. *Aylwin*, 2 Knapp. 72.

Amount in dispute.

Where the question in controversy (the destruction of the defendants' franchise), was not within the last branch of s. 2 *supra*, and there was nothing before the Court to shew that the matter in controversy was of value to the plaintiffs of more than $4,000 or of any sum capable of being valued or ascertained, a motion by the plaintiffs to allow security for an appeal to His Majesty in Council was dismissed: *Toronto* v. *Toronto Electric Light Co.*, 11 O. L. R. 310; followed in *Beardmore* v. *Toronto*, 2 O. W. N. 479. In allowing security

or an appeal, the Appellate Division or a Judge thereof is bound to consider whether the case is properly appealable, and when it appears by its order that it has left this question open, no appeal lies: *Gillett* v. *Lumsden*, 1905, A. C. 601; 93 L. T. 314. Sec. 31.

Where the plaintiff originally claimed $5,000 damages, but agreed to fix the damages at $1,000, for which amount he recovered judgment, and abandoned all claim to $4,000, it was held that the amount in controversy did not exceed $4,000, and no appeal lay by the defendant: *Preston* v. *Toronto Ry.*, 13 O. L. R. 78.

No appeal lies in an action to restrain infringement of a trade mark where no particular sum is in controversy or involved: *Gillett* v. *Lumsden*, 1905, A. C. 601; 93 L. T. 314.

Leave when Necessary.—Except in cases provided for by *The Privy Council Appeals Act*, s. 2, *supra*, no appeal can be had to His Majesty in Council without leave. Leave to appeal to P.C. when necessary

Proceedings in Obtaining Leave to Appeal.—The practice in applying for leave to appeal to His Majesty in Council is comparatively simple. A petition is presented setting out the matter as briefly as possible, and reducing it as far as possible to the condition of a legal problem: shewing that the amount involved is very considerable, or the case otherwise very important, or that it involves matter of public interest; or that an important and far reaching point of law is involved, and that there is *prima facie* ground for contending that the judgment in the Court below is wrong. Any one of these contentions may turn the scale in favour of the applicant. Their absence is generally the ground for refusing leave, and of the three the question of law is more often the decisive one; see *Daily Telegraph* v. *McLaughlin*, 1904, A. C. 776; *Montreal* v. *St. Sulpice*, 14 App. Cas. 660; *Prince* v. *Gagnon*, 8 App. Cas. 103. Application for leave

The petition may be typewritten, but it is better to print it, as in that case all the members of the Judicial Committee who are to sit see it, whereas if it is only typewritten only one as a rule peruses it before going into Court: see *infra*, pp. 178, 185-187.

The petition may be drawn, revised and typewritten here, there is no reason why it should not be printed in Canada provided it be printed in the manner prescribed by the Rules of the Privy Council: see *infra* p. 185, R. 47. As a general rule, however, it is drafted and sent over to the London agents who see to its typing or printing. They then set it down with the Registrar of the Privy Council for hearing.

It is very advisable, but not necessary, to have a certified copy of the case from the Court from which the appeal is proposed to be taken.

Leave, When Granted or Refused.—The Privy Council will not advise His Majesty to admit an appeal from the Supreme Court of Canada, save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very substantial character: *Prince* v. *Gagnon*, 8 App. Cas. 103; *Johnston* v. *St. Andrews*, 3 App. Cas. 159; *Daily Telegraph* v. *McLaughlin*, 1904, A. C. 776; but *semble* the same considerations might not apply to an application for leave to appeal from the Supreme Court of Ontario. Amongst the considerations affecting the granting of the leave are - the general importance of the Leave to appeal to P.C., when granted.

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question, whether it has caused great difference of judicial opinion, and the extent to which the decision has been based upon English authorities: *Robinson* v. *Can. Pac. Ry.*, 1892, A. C. 481; 67 L. T. 505; it is not enough that the questions involved are of great importance to the parties or calculated to attract public attention: *Dumoulin* v. *Langtry*, 57 L. T. 317. Special leave to appeal was refused in a case involving only an issue of fact: *Canada Central Ry. Co.* v. *Murray*, 8 App. Cas. 574.

Leave to appeal from an injunction was granted, where it was shewn that to obey it would put the appellant to expense of £300: *Centre Star* v. *Rossland K. M. Co.*, 11 B. C. R. 509.

When refused.

Leave to appeal was refused though the question sought to be raised was one of public importance, and turned on the construction of a statute, because the Privy Council did not think there was any reasonable doubt as to the correctness of the construction which had been adopted: *Montreal* v. *Seminaire de St. Sulpice*, 14 App. Cas. 660; 16 S. C. R. 407; and see *Toronto* v. *Attorney-General*, 29 C. L. J. 601; and where the appellant had the right to appeal either to the Supreme Court of Canada or to His Majesty in Council, and has elected to appeal to the Supreme Court and has failed, a further appeal to His Majesty in Council will not be allowed unless some important question of law is involved: the question whether a railway company is bound to protect a passenger on its railway from assault was not considered a question of such importance as to warrant the granting of leave: *Canadian Pacific Ry.* v. *Blain*, 1904, A. C. 453, and see *Clergue* v. *Murray*, 1903, A. C. 521; *Victorian Ry. Comrs.* v. *Brown*, 1906, A. C. 381; 95 L. T. 73; *Wilfley Ore Concentrator Syndicate* v. *Guthridge*, 1906, A. C. 548; 95 L. T. 73.

When leave granted on one ground another cannot be taken.

Where an appellant obtained leave to appeal on the ground that he desired to raise a particular question of great and general importance, he was not permitted on the appeal to contend that no such question arose, and that the case turned upon a question of fact on which the Court below was in error: *St. John's* v. *Central Vermont Ry. Co.*, 14 App. Cas. 590.

Where an appellant had omitted to move for a new trial within the time prescribed by a statute, it was held that the Privy Council could not dispense with, or relax the provisions of such statute: *Emery* v. *Wells*, 1906, A. C. 515.

Leave to appeal was refused where the amount involved was inconsiderable, and the question at issue had been settled by subsequent legislation, so that it could not again arise: *Commissioners of Taxation for New South Wales* v. *Baxter*, 1908, A. C. 214; 98 L. T. 221.

Leave will not be given to enable an appellant to raise the question as to the policy or propriety of a colonial statute, the Judicial Committee having no jurisdiction to entertain any such question: *Tilonko* v. *Attorney-General*, 1907, A. C. 461; 97 L. T. 613.

Appeal not allowed on question of procedure nor on points not taken below.

His Majesty in Council will not entertain appeals on mere questions of procedure, where no substantial injustice has been done, and will not suffer points to be raised on such appeals which were not taken, or have been abandoned, in the Court below: *The Palgrave Gold Mg. Co.* v. *McMillan*, 1892, A. C. 460; 67 L. T. 425; *Randwick* v. *Australian C. I. Corp.*, 1893, A. C. 322; *Solling* v. *Broughton*, 1893, A. C. 556; *Ex p. Kennington*, 8 Jur. N. S. 1111; *Grey* v. *Manitoba & N. W. Ry.* 1897, A. C. 254, unless the Judicial Committee of the Privy Council is satisfied that it has before it all the facts bearing on the new contention

s completely as if it had been raised at the trial: *Karunaratne* v. *erdinandus*, 1902, A. C. 405, 86 L. T. 329; *Archambault* v. *Archambault*, 87 L. T. 404; 1902, A. C. 575, and see *The Queen* v. *Poirier*, 30 . C. R. 36; and when the question of the illegality of a contract was aised by the Court of Appeal itself, but had not been raised in argument before them, the Judicial Committee, though considering the circumstances suspicious, declined to give judgment on the question and ent the case for a new trial: *Connolly* v. *Consumers' Cordage Co.*, 9 L. T. 347. Sec. 31.

Where the Supreme Court of Canada has acted under a special eference to it, under an agreement between the parties, and not in its rdinary jurisdiction as a Court of Appeal, no appeal lies to His ajesty in Council: *Atty.-Gen. of Nova Scotia* v. *Gregory*, 55 L. T. 270; 5 L. J. P. C. 40. No appeal from Sup. Ct. when acting under special power.

Where the Court below gives leave to appeal to His Majesty in ouncil, the appeal may nevertheless be quashed, if it appears to the udicial Committee to be improper or futile: see *Grieve* v. *Tasker*, 1906, . C. 132; 94 L. T. 115. Appeal may be quashed though leave given.

For other cases illustrating the principles on which the Judicial ommittee acts in granting special leave to appeal: see 89 L. T. our. 287.

Terms Imposed.—Where leave to appeal is granted in a case where he amount in dispute is below that for which an appeal lies in rict course of law, it may be granted only on the terms of the ppellant submitting to pay the costs of the appeal in any event: *henton* v. *Smith*, 1895, A. C. 229; 72 L. T. 130; *Montreal Gas Co.* v. *adieux*, 1898, A. C. 718. Terms.

Leave to Cross Appeal.—Where the respondents were clearly ntitled to relief, but had not presented a cross petition, leave to file he *nunc pro tunc* was granted at the hearing of the appeal: *Toronto y.* v. *King*, 1908, A. C. 260; 98 L. T. 650. Cross appeal nunc pro tunc.

Appeal in Forma Pauperis.—By leave of the Judicial Committee n appeal may be allowed to be prosecuted in *formâ pauperis* in a roper case; but where it subsequently appeared that such an appeal as frivolous and the leave would not have been granted if all the cts had been disclosed, the order was rescinded: *Quinlan* v. *Quinlan*, 01, A. C. 612. Appeal in forma pauperis.

As to prosecuting or opposing appeals, in *formâ pauperis*: see *infra* 179, R. 8, and p. 184, R. 44.

Security to be Given.—Security is to be given by the appellant case of an appeal to His Majesty in His Privy Council, to the satisction of the Court appealed from, in the sum of $2,000; such security ill be usually given by paying the money into Court to abide the reult of the appeal; or by giving a bond to the respondent in double the mount on condition that the appellant will effectually prosecute his ppeal, and pay such costs and damages as shall be awarded in case e judgment appealed from is confirmed: *The Privy Council Appeals ct* (R. S. O. c. 54), s. 3, *supra*. Security to be given on appeals to Privy Council.

For form of bond in: see H. & L. Forms No. 1224; and *The Privy ouncil Appeals Act*, Form 1.

A bond according to the terms of this Form having the words "or y" in the condition, instead of "and pay," is regular; and "effectlly prosecute" means "successfully prosecute." But to entitle the Bond.

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appellant to a stay of execution, a bond with the condition in the form of H. & L. Forms No. 1206 is necessary: *International Bridge Co.* v *Canada Southern Ry. Co.*, 9 P. R. 250; *McMaster* v. *Radford*, 16 P. R. 20; *The Privy Council Appeals Act* (R. S. O. c. 54), s. 4; and Form 1.

Payment into Court.

In lieu of giving a bond, the appellant may pay into the Supreme Court of Ontario $2,000 by way of security for the costs of the appeal: see *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 19 O. L. R. 342. Where there are several respondents, each of them is not entitled to separate security for $2,000: *Stavert* v. *McMillan*, 3 O. W. N. 165; 20 O. W. R. 242.

Security not allowed till leave given when necessary.

Where there is no appeal as of right from the judgment of the Appellate Division, that Court will not, until leave to appeal has been obtained, allow security for a proposed appeal to the Privy Council: *Can. Pacific Ry.* v. *Toronto*, 19 O. L. R. 663.

The Supreme Court of Canada has no jurisdiction to stay execution pending an appeal from its judgment to the King in Council: *Peters* v. *Perras*, 42 S. C. R. 311, overruling *Union Investment Co.* v. *Wells*, 41 S. C. R. 244: neither will it entertain an application to stay proceedings pending an appeal from that Court to His Majesty in Council: *Adams* v. *Bank of Montreal*, 31 S. C. R. 223.

The respondent is entitled to a security free from objections which might be raised by the sureties if sued: *Jones* v. *Macdonald*, 14 P. R. 535.

Motion for disallowance of bond, when made.

Where the respondent objects to the sufficiency of the bond, he must move to disallow it, or it will, under *The Privy Council Appeals Act*, s. 8, stand allowed after the lapse of fourteen days from service of notice of its filing. The motion should be made in the Court appealed from. The application may be entertained by the Master in Chambers, or, where the bond is filed in an outer office, by a Local Master, or Local Judge, having jurisdiction: see *Rules* 207-209: *Brigham* v. *Smith*, 1 Chy. Ch. 334.

A bond filed before leave to appeal is granted, in a case where leave is necessary, is irregular, and will be disallowed; and a bond which has been disallowed on that ground cannot afterwards be filed, on leave to appeal being granted, without the consent of the sureties: *Jones* v. *Macdonald*, 14 P. R. 435.

Affidavits may be used.

Affidavits may be read in opposition to the affidavits of justification of the sureties: *Campbell* v. *Royal Canadian Bank*, 6 P. R. 45; *Brigham* v. *Smith*, 1 Chy. Ch. 334; and also depositions made by the sureties in another action to which the principal was no party: *Jones* v. *Macdonald*, 14 P. R. 435; but whether the sureties are liable to cross-examination on their affidavits of justification, *quære:* but see *Rule* 227; *Douglas* v. *Blackey*, 14 P. R. 504; and whether they may be compelled to attend to be so examined by being served with an appointment and subpœna though no motion against the bond is pending, *quære*: but see *Rule* 338; *Hughes* v. *Hughes*, 17 C. L. J. 110; 1 C. L. T. 189.

Whether sureties may be examined.

Bond and affidavits to be filed.

The bond, and affidavits of execution, and justification, are separate documents, and each must be stamped with a proper filing stamp: *McBeth* v. *Smart*, 1 Chy. Ch. 269.

The affidavit of justification should be entitled in the cause: see H. & L. Forms, No. 1207. In *Molsons Bank* v. *Cooper*, 17 P. R. 153, it was held that an affidavit of execution not so entitled is

t invalid; hut probahly the better practice ia ta entitle both affi- Sec. 31.
vits in the action: see *Commissioners for Taking Affidavits Act* R. S. O. c. 77), s. 9.

A bond cannot be excepted to on the ground that the sureties are Objections to sureties.
standing sureties" of the appellant, in the ahsence of evidence as to eir insufficiency: *Norval* v. *Canada Southern Ry. Ca.*, 7 P. R. 313. is irregular for the solicitor of the appellant ta become surety in appeal bond: *Beckitt* v. *Wragg*, 1 Chy. Ch. 5; *Grand Trunk Ry. Co. Ontario & Quebec Ry. Ca.*, 3 C. L. T. 173; *Re Gibson*, 13 P. R. 359.

A married woman has heen held to he not a proper surety: *Mullin Pascoe*, 8 P. R. 372; *Raham* v. *The News; Raham* v. *Trout*, Galt. J., 14th March, 1891. And see *The Married Woman's Property Act* R. S. O. c. 149), and *Kerr* v. *Stripp*, 40 U. C. Q. B. at p. 134; *Frazee McFarland*, 43 U. C. Q. B. 281; *Lawson* v. *Laidlaw*, 3 Ont. App. 77; married woman cannot make herself personally liahle ; she can only nd her property, if any: *Hamilton* v. *Perry*, 24 O. L. R. 38.

An officer of the Court is not an Improper surety: *Wilkins* v. *Mc-an*, 7 C. L. T. 5.

Where the title to land, in respect *af* which a surety qualified, was t registered, it was held that he was an insufficient surety ı less gistration of his title was procured: *Adamson* v. *Adamson*, 9 P. R. 96.

Where the bond of a Guarantee Company is given no sureties or idavit of justification are necessary: *The Guarantee Companies curities Act* (R. S. O. c. 190), ss. 4, 5; and see Jud. Act, s. 69, *post*.

As to the damages recoverahle under the hond: aee *Re Alger & rnia Oil Co.*, 23 Ont. 583.

If either surety dies or hecomes insolvent, pending the appeal, an Further security, where it may be ordered.
plication may he made to compel the nppellant to suhstitute an-er: *Saunders* v. *Furnival*, 2 Chy. Ch. 159; *Gage* v. *Canada Publish-Co.*, 10 P. R. 169. The application must be made ta the Court pealed from: *Lumsden* v. *Davis*, 10 P. R. 10.

Where a sum of money is paid into Court hy one of two appellanta, t in the name of both, na security for the costs of an appeal, it will t be ordered ta he paid aut to the appellant who paid it in on his ndoning the appeal, if his co-appellant wishea to proceed with the peal: *Centaur Cycle Co.*, v. *Hill*, 4 O. L. R. 493.

Stay of Execution, or Proceedings Pending Appeal.—*The Privy uncil Appeals Act* (R. S. O. c. 54), provides:—

"4. Suhject to Rules *af* Court, upon the perfecting of auch security, Stay of execution.
ecution shall he stayed in the original cause, except in the follow-cases:—

(*a*) If the judgment appealed from directs the assignment or Exceptions: Where assignment or delivery of documents or personal property directed.
delivery of documents or personnl property, execution shall not he stayed until the things directed to be assigned or delivered have been brought into Court or placed in the custody of such officer or receiver as that Court or a Judge of it appoints, or until security haa been given to the satisfaction of the Supreme Court or a Judge thereof, and in such sum as may be directed, that the appellant will obey the order of the Privy Council; Delivery into custody, or security.

(*b*) If the judgment appealed from directs the execution of a Where execution of instrument directed.
conveyance or any other instrument, execution shall not he stayed until the instrument has been executed and deposited with the proper officer, to abide the judgment of the Privy Council;

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Where sale of real property, etc., directed.

Security, not to commit waste.

(*c*) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been entered into to the satisfaction of the Supreme Court, or a Judge thereof, and in such sum as such Court or Judge directs, that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and if the judgment is confirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession of it, and also in case the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

Where payment of money directed.

Security to pay debt.

(*d*) If the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Supreme Court or a Judge thereof that if the judgment or any part of it is affirmed the appellant will pay the amount thereby directed to be paid or the part of it as to which the judgment may be affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on the appeal. 2 Geo. V. c. 18, s. 1, *part*."

Forms, etc., of security. Rev. Stat. c. 10.

5. Subject to the provisions of *The Guarantee Companies Securities Act*, the security shall be by the bond, Form 1, of two sufficient sureties, each of whom shall make affidavits of justification, Form 2. 2 Geo. V. c. 18, s. 1, *part*.

Where the security is given by bond of a Guarantee Company approved by the Lieutenant-Governor in Council—no sureties or affidavits of justification are necessary. See ss. 4, 5 and sec. 69, *post*. *The Privy Council Appeals Act* also provides as follows:—

Amount of security where judgment directs payment of money.

"**6.** Where security is to be given for payment of money, directed by the judgment or order appealed from to be paid, either as a debt or for damages or costs, the bond shall be in double the amount by the judgment or order directed to be paid; but where security is to be given in a sum in excess of $2,000, the Supreme Court or a Judge thereof may allow it to be given by a larger number of sureties, apportioning the amount among them as may be deemed proper; and where the amount directed to be paid exceeds $10,000 may allow the security to be given for such amount less than double the amount directed to be paid as may be deemed proper. 2 Geo. V. c. 18, s. 1, *part*.

Where judgment directs sale, etc.

7. Where the judgment appealed from directs the sale or delivery of possession of real property or chattels real, the bond shall be in double the yearly value of the property. 2 Geo. V. c. 18, s. 1, *part*.

Filing of bond.

8. The bond, with an affidavit of the due execution of it, and the affidavits of justification, shall be filed in the office in which the action or matter was commenced, and shall be deemed to be perfected and allowed, unless within fourteen days after being served with notice of the filing the respondent moves for its disallowance; but the appellant may, after the filing, make a special application before the expiration of such fourteen days to stay execution. 2 Geo. V. c. 18, s. 1, *part* (see note to s. 5, *supra*).

Payment into court in lieu of bond.

9. Instead of giving a bond the appellant may, without order, pay into Court a sum equal to half the penalty of the bond in cases within

ction 5 or section 7, or equal to the amount by the judgment or order rected to be paid in cases within section 6, and the money when so id is shall stand as security in lieu of a bond, but either party may pply to the Court or a Judge to increase or diminish the amount to paid into Court. 2 Geo. V. c. 18, s. 1, *part*." Sec. 31.

A judgment declaring that the plaintiff is entitled to damages and recting a reference to assess the same, and reserving further direc- ons, is not a judgment for payment of money within section 4 *pra*: see *Sharpe* v. *White*, 20 O. L. R. 475; but the Court in its scretion may stay the reference under such a judgment pending e appeal: *Ib*; but a judgment for the specific performance of a con- act to form a joint stock company and ordering the proposed ap- llant to pay costs, was held by Maclaren, J.A., to be a judgment for e payment of money: *McLeod* v. *Crawford*, 17 Sept., 1908.

Where judgment is given by the Appellate Division in favour of fendant with costs, he is entitled to payment out of Court of money id into Court by the plaintiff as security for the costs of the action, twithstanding an intended appeal by the plaintiff to the Privy uncil, as, otherwise, there would in effect be a stay of proceedings thout any security being given. In such a case the plaintiff should ply to the Appellate Division to stay execution: *Centaur Cycle Co.* *Hill*, 7 O. L. R. 617. Money in Court as security for costs may be paid notwithstanding appeal to P.C.

Approval of Security.—*The Privy Council Appeals Act* (R. S. O. 54) provides:—

"11. A Judge of the Supreme Court shall have authority to ap- ve of and allow the security to be given by a party who intends appeal to His Majesty in His Privy Council, whether the applica- n for such allowance be made during the sittings of the Court, at any other time. 10 Edw. VII c. 24, s. 6." Approval of security.

Stay of Execution on Perfecting Security—*The Privy Council Appeals Act* provides:— Stay of execution.

"10. When the security has been perfected and allowed, a Judge the Supreme Court may issue his fiat to the sheriff to whom any ecution upon the judgment has been issued, to stay the execution, d the execution shall be thereby stayed, whether a levy has been de under it or not; but if the grounds of appeal appear to be rolous, the Supreme Court or a Judge thereof may order execution issue or to be proceeded with. 2 Geo. V. c. 18, s. 1, *part*." Fiat for stay. Unless appeal frivolous.

Provisions as to Security, when not Applicable.—The provi- ns above mentioned as to security do not apply to an appeal to His jesty in His Privy Council from a judgment of any Court on a erence under *The Constitutional Questions Act*. See R. S. O. c. 54, 2. Exception in Appeals under R.S.O. c. 85.

And a person prosecuting an appeal *in formâ pauperis* is not re- red to give security for costs: see *infra* p. 179, R. 9; but he does appear to be able to stay execution without giving security.

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Under the Imperial Statute, 7 & 8 Vict. c. 69, s. 11, the Judicial Committee of the Privy Council is empowered to make Rules, and under the power thus conferred the following Rules relating to appeals have been passed.

THE JUDICIAL COMMITTEE RULES, 1908.

Interpretation.

1.—(1) In these Rules, unless the context otherwise requires:—

"Appeal" means an Appeal to His Majesty in Council;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the records in the Court appealed from;

"Abroad" means the country or place where the Court appealed from is situate;

"Agent" means a person qualified by virtue of Her late Majesty's Order in Council of the 6th March, 1896,* to conduct proceedings before His Majesty in Council on behalf of another;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "Petitioner," "Appellant," "Respondent") mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent;

"Month" means calendar month;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an Appearance, lodging security, or otherwise, such step shall be taken in the Registry of the Privy Council, Downing Street, London.

Leave to appeal.

Leave to appeal generally.

2. All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

Special Leave to appeal.

Form of Petition for special leave to appeal.

3. A Petition for special leave to appeal to His Majesty in Council shall state succinctly and fairly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted. The Petition shall not travel into extraneous matter, and shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

*This order is to be found in Holmested & Langton (3rd ed.) p. 1091.

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4. The Petitioner shall lodge at least three copies of his Petition r special leave to appeal together with the Affidavit in support there- prescribed by Rule 50 hereinafter contained. Three copies of Petition to be lodged together with Affidavit in support.

5. A Petition for special leave to appeal may be lodged at any me after the date of the judgment sought to be appealed from, but e Petitioner shall, in every case, lodge his Petition with the least ssible delay. Time for lodging Petition.

6. Where the Judicial Committee agree to advise His Majesty to ant special leave to appeal, they shall, in their Report, specify the mount of the security for costs (if any) to be lodged by the Petl- oner, and the period (if any) within which such security is to be dged and shall, unless the circumstances of a particular cass render ch s course unnecessary, provide for the transmission of the Record the Registrar of the Court appealed from to the Registrar of the ivy Council and for such further matters as the justice of the case ay require. Security for costs and transmission of Record.

7. Save as by the four last preceding Rules otherwise provided, the ovisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter ntained shall apply *mutatis mutandis* to Petitions for special leave appeal. General provisions.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to titions for leave to appeal *in formâ pauperis*, but in addition to the fidavit referred to in Rule 4 every such Petition shall be accompanied an Affidavit from the Petitioner stating that he is not worth £25 in e world excepting his wearing apparel and his interest in the subject- tter of the intended Appeal, and that he is unable to provide sure- s, and also by a certificate of Counsel that the Petitioner has reason- le ground of appeal. Petitions for special leave to appeal in forma pauperis.

9. Where a Petitioner obtains leave to appeal in *formâ pauperis*, shall not be required to lodge security for the costs of the Respond- t or to pay any Council Office fees. Exemption of pauper Appellant from lodging security and paying Office fees.

10. A Petitioner whose Petition for leave to appeal *in formâ uperis* is dismissed may, notwithstanding such dismissal, be excused om paying the Council Office fees usually chargeable to a Petitioner respect of a Petition for leave to appeal, if His Majesty in Council, the advice of the Judicial Committee, shall think fit so to order. Exemption of unsuccessful Petitioner for leave to appeal in forma pauperis from payment of Office fees.

Record.

11. As soon as an Appeal has been admitted, whether by an Order the Court appealed from or by an Order of His Majesty in Council anting special leave to appeal, the Appellant shall without delay take necessary steps to have the Record transmitted to the Registrar of e Privy Council. Record to be transmitted without delay.

12. The Record shall be printed in accordance with Rules I. to IV. Schedule A. hereto. It may be so printed either abroad or in gland. Printing of Record.

13. Where the Record is printed abroad, the Registrar shall, at the pense of the Appellant, transmit to the Registrar of the Privy Council copies of such Record, one of which copies he shall certify to be rect by signing his name on, or initialling, every eighth page thereof d by affixing thereto the seal, if any, of the Court appealed from. Number of copies to be transmitted, where Record printed abroad

14. Where the Record is to be printed in England, the Registrar all, at the expense of the Appellant, transmit to the Registrar of e Privy Council one certified copy of such Record, together with an dex of all the papers and exhibits in the case. No other certified One certified copy to be transmitted, where Record to be printed in England.

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copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

Record printed partly abroad, partly in England.

13. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

Reasons for judgments to be transmitted.

16. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

Exclusion of unnecessary documents from Record.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a list to be placed after the Index or at the end of the Record.

Documents objected to to be indicated.

18. Where in the course of preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the Index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Registration and numbering of Records.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, the date of the judgment appealed from, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with Rules I. to IV. of Schedule A hereto, shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

Inspection of Record by parties.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

Times within which a copy of a written Record shall be bespoken.

21. Where the Record arrives in England either wholly written, or partly written and party printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a type-written copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—1½*d.* per folio of English matter, 2d. per folio of Indian matter, and 3*d.* per folio of foreign matter.

Notice of Appearance by Appellant.

22. The Appellant shall forthwith, after entering his Appearance, give notice thereof to the Respondent, if the latter has entered an Appearance.

Preparation of copy of Record for Printer.

23. As soon as the Appellant has obtained the type-written copy of ie Record bespoken by him, he shall proceed, with due diligence, to rrange the documents in suitable order, to check the index, to insert ie marginal notes and check the same with the index, and, generally, do whatever may be required for the purpose of preparing the copy r the Printer, and shall, if the Respondent has entered an Appearance, bmit the copy, as prepared for the Printer, to the Respondent for is approval. In the event of the parties being unable to agree as to y matter arising under this Rule, such matter shall be referred to e Registrar of the Privy Council, whose decision thereon shall be al.

Lodging copy of Record for Printing.

24. As soon as the type-written copy of the Record is ready for the rinter, the Appellant shall lodge it, with a request to the Registrar the Privy Council to cause it to be printed by His Majesty's Printer by any other printer on the same terms, and shall engage to pay at e price specified in Rule V. of Schedule A hereto the cost of printing copies thereof, or such other number as in the opinion of the said egistrar the circumstances of the case require.

Special Case.

25. Whenever it shall be found that the decision of a matter on peal is likely to turn exclusively on a question of law, the parties, ith the sanction of the Registrar of the Privy Council, may submit ch question of law to the Judicial Committee in the form of a Special se, and print such parts only of the Record as may be necessary for e discussion of the same. Provided that nothing herein contained all in any way prevent the Judicial Committee from ordering the ll discussion of the whole case, if they shall so think fit, and that, order to promote such arrangements and simplification of the matter dispute, the said Registrar may call the parties before him, and aving heard them, and examined the Record, may report to the Judial Committee as to the nature of the proceedings.

Examination of proof of Record and striking off copies.

26. The Registrar of the Privy Council shall, as soon as the proof ints of the Record are ready, give notice to all parties who have tered an Appearance requesting them to attend at the Registry of the ivy Council at a time to be named in such notice in order to examine e said proof prints and compare the same with the certified Record, d shall, for that purpose, furnish each of the said parties with one oof print. After the examination has been completed, the Appellant all, without delay, lodge his proof print, duly corrected and (so far necessary) approved by the Respondent, and the Registrar of the ivy Council shall thereupon cause the copies of the Record to be uck off from such proof print.

Number of copies of Record for parties.

27. Each party who has entered an Appearance shall be entitled to ceive, for his own use, six copies of the Record.

How costs of printing Record are to be borne.

28. Subject to any special directions from the Judicial Committee the contrary, the costs of and incidental to the printing of the Record all form part of the costs of the Appeal, but the costs of and incident to the printing of any document objected to by one party, in accordnce with Rule 18, shall, if such document is found on the taxation of sts to be unnecessary or irrelevant, be disallowed to, or borne by, the rty insisting on including the same in the Record.

Petition of Appeal.

Times within which Petition shall be lodged.

29. The Appellant shall lodge his Petition of Appeal—

(a) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of

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Appeals from Courts situate in any of the countries or places named in Schedule B. hereto, and within a period of two months from the same date in the case of Appeals from any other Courts;

(b) Where the Record arrives in England written, within a period of one month from the date of the completion of ths printing thereof:

Provided that nothing in this Rule contained shall preclude an Appellant from lodging his Petition of Appeal prior to the arrival of the Record, if there nre special reasons why it should be desirable for him to do so.

Form of Petition.

30. The Petition of Appeal shall he lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possihle, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, hut shell not contain argumentative matter or travel into the merits of the case.

Service of Petition.

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Withdrowol of Appeal.

Withdrawal of Appeal before Petition of Appeal has been lodged.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from thnt the Appeal has heen withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said lettsr without further Order.

Withdrawal of Appeal after Petition of Appeal has been lodged.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement hetween him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, hut where the Respondent has not entered an Appearance, or, having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Non-Prosecution of Appeal.

Dismissal of Appeal where Appellant takes no step in prosecution thereof.

34. Where an Appellent tekes no step in prosecution of his Appeal within a period of four months from the date of the arrivel of the Record in England in the case of an Appeel from a Court situate in any of the countries or places nemed in Schedule B. hereto, or within a period of two months from the same date in the cese of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, hy letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, nnd the Appeal shall thereupon stand dismissed for non-prosecution as from the dete of the said letter without further Order.

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35 Where an Appellant who has entered an Appearance—

Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.

(a) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 21; or

(b) having bespoken such copy within tha periods prescribed by Rule 21, falls thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record; or

(c) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29;

e Registrar of the Privy Council shall call upon the Appellant to plain his default, and, if no explanntion is offered, or if the explan- on offered is, in tha opinion of the said Registrar, insufficient, the d Registrar shall, with all convenient speed, by letter notify the gistrar of the Court appealed from that the Appeal has not been ctually prosecuted, and the Appeal shall thereupon stand dismissed r non-prosecution as from the date of the said letter without further der, and a copy of the said letter shall be sent by the Registrar of the ivy Council to all the parties who have entered an Appearance in e Appeal.

Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, is thereafter to prosecute his Appeal with due diligence, the Regis- r of the Privy Council shall call upon him to explain his default, d, if no explanation is offered, or if the explanntion offered is, in the inion of the said Registrar, insufficient, the said Registrar shall issue Summons to the Appellant calling upon him to show cause before the dicial Committee at a time to be named in the said Summons why the peal should not be dismissed for non-prosecution Provided that no ch summons shall be issued by the said Registrar before the expir- on of one year from the date of the arrival of the Record in England. the Respondent has entered an Appearance in the Appeal, the Regis- r of the Privy Council shall send him a copy of the said Summons, d the Respondent shall be entitled to be heard before the Judicial mmittee in the matter of the said Summons at the time named and ask for his costs and such other relief as he may be advised. The dicial Committee may, after considering the matter of the said mmons, recommend to His Majesty the dismissal of the Appeal for n-prosecution, or give such other directions therein as the justice the case may require.

Restoring an Appeal dismissed for non-prosecution.

37. An Appellant whose Appeal has been dismissed for non-prosecu- n may present a Petition to His Majesty in Council praying that his peal may be restored.

Appearance by Respondent.

Time within which Respondent may appear.

38. The Respondent may enter an Appearance at any time between e arrival of the Record and the hearing of the Appeal, but if he be duly delays entering an Appearance he shall bear, or be disallowed, e costs occasioned by such delay, unless the Judicial Committee herwise direct.

Notice of Appearance by Respondent.

39. The Respondent shall forthwith after entering an Appearance ve notice thereof to the Appellant, if the latter has entered an ppearance.

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Form of Appearance where all the Respondents do not appear.

40. Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

Separate Appearances.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

Non-appearing Respondent not entitled to receive notices or lodge Case.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a Case in the Appeal.

Procedure on non-appearance of Respondent.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply:—

(*a*) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the dispatch of the Record to England, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal;

(*b*) if the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the Record as a Respondent, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent.

Provided that where it is shown to the satisfaction of the Judicial Committee, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clauses (*a*) and (*b*) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

Respondent defending Appeal in forma pauperis.

44. A Respondent who desires to defend an Appeal *in forma pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the

Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal.

Petitions generally.

Mode of addressing Petitions.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other petitions shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

Orders on Petitions which need not be drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

Form of Petition.

47. All Petitions shall consist of paragraphs numbered consecutively and shall be written, type-written, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the short title and Privy Council number of the Appeal to which the Petition relates or the short title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed. Petitions for special leave to appeal may be printed and, shall, in that case, be printed in the form known as Demy Quarto or other convenient form.

Caveat.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

Service of Petition.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

Verifying Petition by Affidavit.

50. A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state

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that, to tha best of the daponent's knowledge, information, and hslief, tha allegations contained in the Petition ara true. Whera tba Petitioner is represented hy an Agent, the said Affidavit shall he sworn by such Agent and shall, hesides stating that, to tbe best of the dsponent's knowledge, information, and belief, the allegations contnined in the Petition are true, show how the deponent ohtained his instructions and the information enahling him to present the Petition.

Petition for Order of Revivor or Suhstitution.

51. A Petition for an Order of Revivor or Suhstitution shall be accompanied hy a certificate or duly authenticnted statement from the Court appealed from showing who, in the opinion of tha said Court, is the proper person to be suhstituted, or entered, on tba Record in place of, or in addition to, n party who has died or undergona a chaage of status.

Petition containing scandalous matter to he refused.

52. The Registrnr of the Privy Council may refuse to receive a Petition on the ground that it contains scandalous matter, but the Patitioner may appeal, hy way of motion, from such refusal to the Judicisl Committee.

Setting down Petition.

53. As soon as a Petition is rendy for hearing, the Petitioner shall forthwith notify the Registrar of tha Privy Council to that effect, sad ths Petition shall thareupon he deemed to ba set down.

Times within which set-down Petitions shall be heard.

54. On each day appointed hy tha Judicial Committee for tha hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwisa direct, put in the paper for hearing all such Petitions as have been set down. Provided that, in tha absence of special circumstances of urgency to be shown to tha satisfaction of the said Registrar, no Petition, if unopposed, shall be ao put in the paper hefore the expiration of three clear days from the lodging thereol. or, if opposed, hafore the expiration of ten clesr days from the lodgiag thereof unless, in the iatter case, tbe Opponent consents to tbe Petition heing put in tha paper on an earlier day not being less than three clear days from the lodging thereof.

Notice to parties of day fixed for hearing Petitions.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a dny for the hearing of a Petition, notify all parties concerned hy Summons of the day so appointed.

Procedure where Petition is consented to or is formal.

56. Wbere the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicisl Committee may, if they think fit, make their Raport to His Majesty on such Petition, or make their Order thereon, as the case may he, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for hy the last-preceding Rule, hut shall with all convenient speed after the Committee have mada their Report or Order notify the partiss that the Report or Order has heen made and of ths dats and nature of such Raport or Order.

Withdrawal of Petition.

57. A Patitioner who desires to witbdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to say agreement hetween the parties to the contrary, be entitled to apply to ths Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, tha parties hsve come to an ngreement as to the costs of the Petition, tbe Petition may.

the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the st-preceding Rule.

Procedure where hearing of Petition unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hear- g, the Registrar of the Privy Council shall call upon him to explain e delay, and, if no explanation is offered, or if the explanation offered , in the opinion of the said Registrar, insufficient, the said Registrar ay treat the said Petition as set down and may, after duly notifying l parties interested by Summons of his intention to do so, put the etition in the paper for hearing on the next following day appointed the Judicial Committee for the hearing of Petitions for such direc- ons as the Committee may think fit to give thereon.

Only one Counsel heard on a side in Petitions.

59. At the hearing of a Petition not more than one Counsel shall admitted to be heard on a side.

Case.

Lodging of Case.

60. No party to an Appeal shall be entitled to be heard by the udicial Committee unless he has previously lodged his Case in the ppeal. Provided that where a Respondent is merely a stakeholder or ustee with no other interest in the Appeal, he may give the Registrar the Privy Council notice in writing of his intention not to lodge any ase, while reserving his right to address the Judicial Committee on e question of costs.

Printing of Case.

61. The Case may be printed either abroad or in England, and all, in either event, be printed in accordance with Rules I. to IV. of heduls A. hereto, every tenth line thereof being numbered in the argin, and shall be signed by at least one of the Counsel who attends the hearing of the Appeal or by the party himself if he conducts his ppeal in person.

Number of prints to be lodged.

62. Each party shall lodge 40 prints of his Case.

Form of Case.

63. The Case shall consist of paragraphs numbered consecutively d shall state, as concisely as possible, the circumstances out of which e Appeal arises, the contentions to be urged by the party lodging the me, and the reasons of appeal. References by page and line to the levant portions of the Record as printed shall, as far as practicable, printed in the margin, and care shall be taken to avoid, as far as ssible, the reprinting in the Case of long extracts from the Record. he taxing officer, in taxing the costs of the Appeal, shall, either of his n motion, or at the instance of the opposite party, inquire into any nnecessary prolixity in the Case, and shall disallow the costs occa- oned thereby.

Separate Cases by two or more Respondents.

64. Two or more Respondents may, at their own risk as to costs, dge separate Cases in the same Appeal.

Notice of lodgment of Case.

65. Each party shall, after lodging his Case, forthwith give notice ereof to the other party.

Case Notice.

66. Subject as hereinafter provided, the party who lodges his Case st may, at any time after the expiration of three clear days from the y on which he has given the other party the notice prescribed by the st-preceding Rule, serve such other party, if the latter has not in the eantime lodged his Case, with a "Case Notice," requiring him to dge his Case within one month from the date of the service of the

P. C. Rules.

said Case Notice and informing him that, in default of his so doing, the Appeal will he set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may, at any time after the expiration of the time limited by the said Case Notice for the lodging of the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, he set down *ex parte* as against the party in default Provided that no Case Notice shall be served until after the completion of the printing of the Record and that it shall he open to the Taxing Officer, in adjusting the costs of the Appeal to inquire, generally, into the circumstances in which the said Case Notice was served and, if satisfied that there was no reasonable necessity for the said Case Notice, to disallow the costs thereof to the party serving the same Provided also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Setting down Appeal and exchanging Cases.

67. Subject to the provisions of Rule 43 and of the last-preceding Rule, an Appeal shall he set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, &c.

Mode of binding Records, &c., for use of Judicial Committee.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to he bound for the use of the Judicial Committee at the hearing. The copies shall he bound in cloth or in half leather with paper sides, and six leaves of blank paper shall he inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall he arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record; (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also he shown on the back.

Time within which bound copies shall be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to he heard.

Hearing.

Notice to parties of date of commencement of Sittings; entering Appeals for hearing.

70. As soon as the Judicial Committee have appointed a day for the commencement of the Sittings for the hearing of Appeals, the Registrar of the Privy Council shall, as far as in him lies, make known the day so appointed to the Agents of all parties concerned, and shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for such Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any direction from the Committee to the contrary, be heard in the order in which they are set down.

Notice to parties of day fixed for hearing Appeal.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Com-

mittee for the hearing of the Appeal, and the parties shall be in readi- ness to be heard on the day so appointed. P. C. Rules.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side. Only two Counsel heard on a side in Appeals.

73. In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors. Nautical Assessors.

Judgment.

74. Where the Judicial Committee, after hearing an Appeal, decide to reserve their Judgment thereon, the Registrar of the Privy Council shall in due course notify the parties who attended the hearing of the Appeal by Summons of the day appointed by the Committee for the delivery of the Judgment. Notice to parties of day fixed for delivery of Judgment.

Costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C. hereto. Taxation of costs.

76. The taxation of costs in England shall be limited to costs in- curred in England. What costs taxed in England.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such Order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bill of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bill of Costs and of the Order to tax and Notice. Order to tax.

78. The Taxing Officer may, if he think fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last- preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation. Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council. Appeal from decision of Taxing Officer.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be in- serted in His Majesty's Order in Council determining the Appeal or Petition. Amount of taxed costs to be inserted in His Ma- jesty's Order in Council.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals. Taxation on the pauper scale.

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Security to be dealt with as His Majesty's Order in Council determining Appeal directs.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

Power of Judicial Committee to excuse from compliance with Rules.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put the application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

Amendment of documents.

84. Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put such application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

Affidavits may be sworn before the Registrar of the Privy Council.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Change of Agent.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council notice in writing of the change.

Scope of application of Rules.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Mode of citation and date of operation.

88. These Rules may be cited as the Judicial Committee Rules, 1908, and they shall come into operation on the 1st day of January, 1909.

Schedule A.

Rules as to Printing.

Rules as to printing.

I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall henceforth be printed in the form known as Demy Quarto (*i.e.*, 54 ems in length and 42 in width).

Size of paper.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

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III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. Type.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin. Lines.

V. The price in England for the printing by His Majesty's Printer of 50 copies in the form prescribed by these Rules shall be 38*s.* per sheet (eight pages) of pica with marginal notes, not including corrections, tabular matter, and other extras. Price for printing.

Schedule B.

Countries and Places referred to in Rules 21, 29, and 34.

Australia (and the constituent States thereof).
Basutoland.
British East Africa.
British Honduras.
British North Borneo.
Brunei.
Ceylon.
China.
Eastern African Protectorates.
Falkland Islands.
Federated Malay States.
Fiji.
Hong Kong.
India.
Mauritius.
New Zealand.
Persia.
Seychelles.
Somaliland Protectorate.
Straits Settlements.
Zanzibar.

Schedule C.

1.

Fees allowed to Agents conducting Appeals or other matters before the Judicial Committee of the Privy Council.

	£	*s.*	*d.*	
Retaining Fee	0	13	4	Tariff of fees in P. C.
Perusing written Record, at the rate of, for every 25 folios	0	6	8	
Perusing printed Record, at the rate of, for every printed sheet of 8 pages	1	1	0	
Attendances at the Council Office, or elsewhere, on ordinary business, such as to enter an Appearance, to make a search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0	
Attending at the Council Office to examine proof print of Record with the certified Record *per diem*	3	3	0	
Attending at the Council Chamber on Summons for the hearing of a Petition	1	6	8	
Attending at the Council Chamber all day on an Appeal not called on	2	6	8	
Attending the Hearing of an Appeal *per diem*	3	6	8	

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Tariff of fees in P. C.

	£	s.	d.
Attending a Judgment	1	6	8
Correcting English proofs, at the rate of, for every printed sheet of 8 pages	0	10	6
Correcting Foreign or Indian proofs, at the rate of, for every printed sheet of 8 pages	1	1	0
Instructions for Petition	0	10	0
Drawing Petition, Case, or Affidavit - - *per folio*	0	2	0
Copying Petition, Case, or Affidavit - - *per folio*	0	0	6
Instructions for Case	1	0	0
Instructions to Counsel to argue an Appeal	1	0	0
Instructions to Counsel to argue a Petition	0	10	0
Attending Consultation	1	0	0
Sessions Fee for each year or part of a year from the date of Appearance	3	3	0
Drawing Bill of Costs - - - - - *per folio*	0	1	0
Copying Bill of Costs - - - - *per folio*	0	0	6
Attending Taxation of Costs of an Appeal	2	2	0
Attending Taxation of Costs of a Petition	1	1	0

II.

Council Office Fees.

Entering Appearance	0	10	0
Lodging Petition of Appeal	2	0	0
Lodging any other Petition	1	0	0
Lodging Case	1	0	0
Setting down Appeal (chargeable to Appellant only)	2	0	0
Setting down Petition (chargeable to Petitioner only)	1	0	0
Summons	0	10	0
Committee Report	1	10	0
Original Order of His Majesty in Council determining an Appeal	4	0	0
Any other Original Order of His Majesty in Council	2	0	0
Plain Copy of an Order of His Majesty in Council	0	5	0
Original Order of the Judicial Committee	1	10	0
Plain copy of Committee Order	0	5	0
Lodging Affidavit	0	10	0
Certificate delivered to Parties	0	10	0
Committee References	2	0	0
Lodging Caveat	1	0	0
Subpœna to Witnesses	0	10	0
Taxing Fee in Appeals	3	0	0
Taxing Fee in Petitions	2	0	0

Enforcing judgment of H. M. in Council.

Enforcing Judgments of His Majesty in Council.—Provision is made by *Rule* 524 for enforcing the judgments of His Majesty in Council by filing the order in the Supreme Court, whereupon it may be entered and acted upon as a judgment of that Court. Where the order reverses a judgment of the Supreme Court of Canada it may be made a rule of that Court: *Lewin* v. *Howe*, 14 S. C. R. 722; and where costs have been paid under the judgment so reversed the Supreme Court will order them to be refunded: *Ib.*, and *semble*, with interest from the date of payment: see *Ashworth* v. *English Card Clothing Co.* (No. 2), 1904, 1 Ch. 704; 90 L. T. 263.

Costs.—*The Privy Council Appeals Act* (R. S. O. c. 54), provides:— Sec. 32.

"13. Costs awarded by His Majesty in His Privy Council upon an appeal shall be recoverable by the same process as costs awarded by the Supreme Court: 10 Edw. VII. c. 24, s. 8." Costs.

Where by the judgment of the Privy Council costs are awarded, in the absence of any express direction to the contrary, they are payable forthwith after taxation, and no inferior Court has jurisdiction to stay execution therefor, with a view to setting off damages or costs: *Metallic Roofing Co.* v. *Jose*, 17 O. L. R. 237.

EFFECT OF JUDICIAL DECISIONS.

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

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

(3) If a Judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a Divisional Court. If decision deemed wrong, reference may be made to a Divisional Court.

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

The Divisional Court referred to in this section is a Divisional Court of the Appellate Division.

This section only affects civil proceedings. As Courts of Appeal for criminal cases were formerly constituted (as to which see note to s. 3), the decision of the Judges of one Court was not binding on the Judges of another Court of co-ordinate jurisdiction: *The Queen* v. *Hammond*, 29 Ont. 211. Whether that case is still an authority remains to be determined.

A decision of the House of Lords upon a question of law is conclusively binding upon the House afterwards: *London Tramways Co.* v. *London County Council*, 1898, A. C. 375.

It would seem to have been decided in *Toronto* v. *Toronto Ry.*, 9 O. W. R. 330, 335, that sub-section (1) interferes with the rule laid down in *Trimble* v. *Hill*, 5 App. Cas. 344, (see also *City Bank* v. *Barrow*, 5 App. Cas. 679), and adopted in *Hollender* v. *Foulkes*, 26 Gr. 61, that in the construction of a Colonial Act similar in its terms Sub-section (1), how it affects decision in Trimble v. Hill.

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to an Imperial Act, the Colonial Courts should adopt as authoritative the construction placed upon the Imperial Act by the Court of Appeal in England in preference to prior decisions of the Colonial Courts of Appeal. The rule was not adopted in *Macdonald* v. *Macdonald*, 11 Ont. 187, and *McDonald* v. *Elliott*, 12 Ont. 98; see also *Woodruff* v. *McLennan*, 14 Ont. App. 256, and in *Toronto* v. *Toronto Ry. Co.*, *supra*, p. 193, it has been held that a decision of the Court of Appeal is to be followed, notwithstanding that it is in conflict with English authorities, except decisions of the Judicial Committee of the Privy Council.

As to the effect of a decision where the Appellate Court is equally divided: see *Clarkson* v. *Atty.-General of Canada*, 16 Ont. App. 202; *Re Stanstead Election*, 20 S. C. R. 12.

Decisions of other Courts not held binding.

Formerly in cases where the High Court of Justice was a final Court of Appeal, in some cases (notwithstanding a similar provision in the Jud. Act. 1897), it followed: *Toronto Auer Light Co.* v. *Colling*, 31 Ont. 18; *Slater* v. *Laboree*, 10 O. L. R. 648; and in some cases refused to follow prior decisions of Courts of co-ordinate jurisdiction: see *Re Stinson and College of Physicians and Surgeons*, 27 O. L. R. 565; *Mercier* v. *Compbell*, 14 O. L. R. 639, or even a decision of the Court of Appeal: *Canadian Bank of Commerce* v. *Perram*, 31 Ont. 116; *Farrell* v. *Gallagher*, 23 O. L. R. 130; and see per Riddell, J., *Crow* v. *Graham*, 22 O. L. R. 145.

Conflict of decisions.

For a conflict existing between decisions of former Divisional Courts of the High Court: see *McKelvey* v. *Chilman*, 5 O. L. R. 263, and cases referred to therein, and in the notes to *Rule* 314.

Before this enactment it was decided in *Pledge* v. *Corr*, 1895, 1 Ch. 51, and other cases that the decision of a Court of co-ordinate jurisdiction is to be followed, though this rule has not been uniformly observed and exceptions to it have been made: see *Heath* v. *Meyers*, 15 P. R. 388, more especially in cases where there is no further appeal, see, *supra*.

When Eng. or Prov. Courts to be followed.

Where after a succession of Ontario decisions the point involved becomes differently decided by Courts of first instance in England, the Ontario cases will, it would seem, be followed in preference to the English cases until a different decision is given by the English or the Provincial Court of Appeal: *Moore* v. *Bank of B. N. A.*, 15 Gr. 308, 319.

Comparative authority of decisions.

As to the comparative authority of decisions of a single Judge sitting as the High Court, and those of a Divisional Court, see *Tancred* v. *Delagoa Bay, etc.*, 23 Q. B. D. 242.

Ground for referring case to higher Court.

The words in sub-sec. 3 "deems the decision previously given to be wrong," were considered by Riddell, J., not to be equivalent to "has a suspicion that the decision may be wrong," but to mean something in the nature of an adjudication; and the fact that there was a conflicting Irish decision, was held not to be sufficient to warrant a reference of the point to a higher Court: *In re Shafer*, 15 O. L. R. 266.

CONSTITUTIONAL QUESTIONS.

Notice to be given to Attorneys-General of Canada and of Ontario before Act declared invalid.

33.—(1) Where in any action or other proceeding, the constitutional validity of any Act or enactment of the Parliament of Canada or of this Legislature is brought in question, the same shall not be adjudged to be invalid until after notice has been given to the Attor-

ney-General for Canada, and the Attorney-General of Ontario. Sec. 34.

(2) The notice shall state what Act or part of an Act is in question, and the day on which the question is to be argued, and shall give such other particulars as are necessary to show the constitutional point proposed to be argued. Form of notice.

(3) Subject to the Rules, the notice shall be served six days before the day named for the argument. Six days' notice necessary.

(4) The Attorney-General for Canada and the Attorney-General of Ontario shall be entitled, as of right, to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding. 3-4 Geo. V. c. 19, s. 33. Right of Attorneys-General to be heard.

By this section provision is made for the determination of the validity of Acts of either the Dominion or the Province when called in question incidentally in actions. By sec. 20 *supra*, provision is also made for the determination of the validity of any Provincial Act, either on the application of the Dominion, or Provincial Attorney-General.

INTEREST

34. Interest shall be payable in all cases in which it is now payable by law, [or in which it has been usual for a jury to allow it.] 3-4 Geo. V. c. 19, s. 34. Interest may be allowed as heretofore.

The words in brackets are not in the Imp. Act, 3 & 4 Vict. c. 42, s. 28, from which this section was taken. As to the words in brackets: see *McCullough* v. *Clemow*, 26 Ont. pp. 472, 475.

Interest is in practice more frequently allowed by our juries than English authority would seem to warrant: *Spence* v. *Hector*, 24 U. C. R. 277; see also *Mennie* v. *Leitch*, 8 Ont. 397; *Snarr* v. *Badenach*, 9 Ont. 131; *Re Kirkpatrick*, 10 P. R. 4; *Michie* v. *Reynolds*, 24 U. C. R. 303; *Montgomery* v. *Boucher*, 14 U. C. C. P. 45; *McCullough* v. *Clemow*, *supra*; *McCullough* v. *Newlove*, 27 Ont. 627. Where in the opinion of the Court payment of a just debt has been improperly withheld, and it seems fair and equitable that the party in default should make compensation by payment of interest, it is incumbent on the Court to allow interest for such time, and at such rate, as the Court may think right. Where no rate is fixed by the parties the Court has a jurisdiction to fix it. This need not necessarily be the legal rate: *City of Toronto* v. *Toronto Ry.*, 7 O. L. R. 78; 1906 A. C. 117; 93 L. T. 646.

As to the allowance of interest on a claim in the Master's office: *Re Ross*, 29 Gr. 385; *Rule* 410 and notes. Master's office.

A referee on taking accounts has power to allow interest whenever a jury would be entitled to allow it: *Attorney-General* v. *Etna*

Sec. 35.

Insurance Co., 13 P. R. 459; and on amounts claimed for work and services agreed to be paid at a fixed rate, from the times when they became payable: *McCullough* v. *Newlove*, 27 Ont. 627.

Mortgages.

As to interest on mortgages: see *Rule* 474, and notes.

Interest Act.

The Interest Act (R. S. C. c. 120), being an Act passed on grounds of public policy for the benefit of borrowers, its application cannot be waived: *Dunn* v. *Malone*, 6 O. L. R. 484.

Foreign judgment.

Interest is not recoverable on the amount of a foreign judgment except as unliquidated damages: *Solmes* v. *Stratford*, 16 P. R. 78, 264; nor on an award; and such interest does not begin to run until notice of the award has been given to the person liable to pay: *Hayes* v. *Wilson*, 18 P. R. 44.

Fraud.

Interest is payable on money obtained, and retained, in fraud of the plaintiff, but not on money paid by mistake: *Johnson* v. *The King*, 1904, A. C. 817; 91 L. T. 234.

When allowable on debts certain and overdue.

35.—(1) On the trial of any issue, or on any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a time certain, interest may be allowed from the time when the debt or sum became payable.

See *Towsley* v. *Wythes*, 16 U. C. Q. B. 139; *McCullough* v. *Clemow*, *supra*, p. 195.

Debt or sum certain.

"**Debt or Sum Certain, etc.**"—"The Act requires that the contract shall ascertain the sum and the time; the certainty of both must appear from the contract. But still, if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient:" *Per* Lindley, L.J., in *London C. & D. etc.* v. *S. E. Ry. Co.*, 1892, 1 Ch. 144; see also 1893, A. C. 429; and *McCullough* v. *Clemow*, 26 Ont. p. 473. But it is not sufficient that the debt or the time may be made certain by some process of calculation, or some act to be performed in the future: *Sinclair* v. *Preston*, 31 S. C. R. 408.

Bond.

Where the amount recovered on a bond is damages not ascertainable until judgment, interest will not be allowed: see *Sinclair* v. *Preston*, 31 S. C. R. 408; *Beam* v. *Beatty*, 3 O. L. R. 345, (but this case was reversed on another point, 4 O. L. R. 554); but interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same on payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond: *Re Dixon*, *Heynes* v. *Dixon*, 1899, 2 Ch. 561; 1900, 2 Ch. 561.

Where a money bond fixed no time for payment, interest was allowed under this section, from the date of filing the claim thereon against the debtor's estate, there having been no previous demand of payment: *Re Dale*, 3 O. W. N. 329, 332.

Agreement for sale.

Where lessees went into possession under an agreement for a lease, and there was delay by the lessors in making title, and the rent was in the meantime neither paid nor tendered, it was held that interest on rent in arrear did not begin to run until the lessors had made

title; *Re Canadian Pacific R. W. v. Toronto*, 5 O. L. R. 717, in appeal, 1905, A. C. 33; *Toronto v. Toronto Ry. Co.*, 7 O. L. R. 78; 1906 A. C. 117; 93 L. T. 646. Sec. 35.

Where the sale of a chattel was set aside for fraud and the price was ordered to be refunded, the use of the chattel by plaintiff was set off against the interest on the purchase money: *Addison v. Auto and Tari Co.*, 30 O. L. R. 51.

(2) If such debt or sum is payable otherwise than by virtue of a written instrument at a time certain, interest may be allowed from the time when a demand of payment was made in writing, informing the debtor that interest would be claimed from the date of the demand. When allowable after demand of payment.

These provisions are founded upon *Imp. Act*, 3 & 4 Wm. 4, c. 42, s. 28.

Interest cannot be allowed on merchants' accounts unless a demand of interest under this section is proved: *Inglis v. Wellington Hotel Co.*, 29 C. P. 387. But in *Michie v. Reynolds*, 24 U. C. Q. B. 303, 310, Draper, C.J. said: "It has been the practice for a very long time to leave to the discretion of the jury to give interest where the payment of a just debt has been withheld, and we can find no good reason to depart from that practice;" and in *Spence v. Hector*, *Ib.* 277, 281, the same learned Judge remarked that "interest is in practice much more frequently allowed by our juries than English authorities would seem to warrant." Interest on claims, when allowed.

When the debt or sum is payable by virtue of a written instrument at a certain time, no demand is necessary in order to entitle the payee to interest. A covenant to pay six months after the death of the covenantor is a covenant to pay at "a certain time:" *Re Horner*, 1896, 2 Ch. 188; 74 L. T. 688; and interest is usually allowed, without demand made, on sums awarded to be paid at a particular time: *Townsley v. Wythes*, 16 U. C. Q. B. 139. Demand of interest.

Where the indorsement on the writ claimed interest, Boyd, C., was of opinion that that was a good demand of interest under the statute: *Irwin v. Victoria Harbour*, Jan. 22nd, 1894 (not reported); but the mere bringing of the action appears not to be sufficient demand where there has been no specific demand of interest: *London, Chatham & Dover Ry. v. South Eastern Ry.*, 1893, A. C. 429; 69 L. T. 637.

It has been held in England that a printed notice at the head of an account that interest will be charged is not a sufficient demand within the statute: *Re Edwards*, 65 L. T. 453; but where interest had been regularly charged on sums overdue for three years and upwards, the fact that no objection was made by the debtor was held to be evidence of a promise to pay interest: *Re Anglesey*, 1901, 2 Ch. 548; 85 L. T. 179, overruling *Re Edwards*, *supra*, on this point.

Interest may be allowed upon a solicitor's bill, if a demand in writing is made for it: *Re McClive*, 9 P. R. 213; and *see The Solicitors Act* (R. S. O. c. 159), s. 63.

Although interest cannot, in the cases provided for in this section, be allowed without a prior demand, it is still in the discretion of the Discretion of Court or jury.

Sec. 35. Judge or jury to disallow interest in such cases, even though a demand be proved.

Where money has been paid by mistake, interest on it will not be allowed in favour of the payer: *Barber* v. *Clark*, 20 Ont. 522; 18 Ont. App. 435; *Johnson* v. *The King*, 1904, A. C. 817; 91 L. T. 234, but where moneys of an estate were distributed under a judgment subsequently reversed for irregularity, the payees were ordered to refund with interest from the commencement of the proceedings to set aside the judgment: *Ufner* v. *Lewis*, *Boys' Home* v. *Lewis*, 5 O. L. R. 684.

Where an action was brought upon a written agreement, silent as to interest, to recover the amount of net profits of a business for a period ending 1st May, 1895, as ascertained in the manner provided for in the agreement, but not so ascertained till after the time fixed thereby, and it was adjudged at the trial that the ascertainment was void, and a reference was directed to a Master to take an account, it was held that interest was not recoverable, (1) under s. 34, as in a case in which it had been usual for a jury to allow it, because no debt existed which was payable till ascertained, either in the manner provided in the agreement, or by the account taken in the action; nor (2) under s. 35 (1), because, the mode of computation provided by the contract being departed from, there was no certainty as to the amount payable, nor time of payment: *McCullough* v. *Clemow*, 26 Ont. 467.

Rule in Equity. As regards the rule followed by Courts of Equity in the allowance of interest, Bacon, V.C., said, in *Spatali* v. *Constantinidi*, 20 W. R. 823, "I take the law of this Court to be perfectly clear and distinct, and to have prevailed for centuries, that upon the wrongful withholding of a debt, the party who wrongfully withholds it is liable to pay interest upon that debt. A jury might always have given it, I do not say it did, but it might always have given it at law. But without reference to what a jury might do, this Court has given it in numberless instances:" see *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 3 P. C. 465; but it is said that as regards legal claims the Courts of Equity always followed the law: see *per* Lindley, L.J., *London, Chatham & Dover Ry.* v. *South Eastern Ry.*, 1892, 1 Ch. at p. 142; *Booth* v. *Leycester*, 3 My. & Cr. 459; 1 Keen. 247.

Rate. Usually interest at the rate fixed by the parties is recoverable; but not if it contravenes the provisions of *The Interest Act*: see *Dunn* v. *Malone*, *supra*, p. 196; but where no rate is fixed by the parties the Court has a discretion as to the rate to be allowed; usually the legal rate will be allowed, but a lesser rate may in certain cases be deemed proper: see *Toronto* v. *Toronto Ry.*, *supra*, p. 197, where only 4 per cent. was allowed.

After judgment. After judgment has been recovered for a sum of money, payable "with interest until paid," it is doubtful whether the rate reserved by the contract can be recovered after judgment: see *Hutton* v. *Federal Bank*, 9 P. R. 568. In *Rykert* v. *St. John*, 4 Ont. App. 213; 10 S. C. R. 278, it was held that the contract became merged in the judgment, and only the interest payable under the judgment could be recovered. But in *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. 329, it was held that the difference between the rate payable by the contract, and the rate recovered on the judgment, for the period between the recovering of judgment and payment, might be recovered in a subsequent action; and see 19 C. L. J. 21; *Acc. Economic Life Assce. Co.*

Osborne, 85 L. T. 587; but see *Ex p. Fewings*, 25 Ch. D. 338;; 50 L. T. 109. Sec. 35.

(3) In actions for the conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, and in actions on policies of insurance may give interest over and above the money recoverable thereon. Interest by way of damages in certain actions

After goods are placed in the custody of the law — for instance, in the hands of a sheriff or receiver, the liability of the defendant for interest on the value of such goods ceases: *Peruvian Guano Co. v. Dreyfus*, 1892, A. C. 166.

(4) Unless otherwise ordered by the Court, a verdict [illegible] or judgment shall bear interest from the time of the rendering of the verdict, or of giving the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceeding in the action including an appeal. 3-4 Geo. V. c. 19, s. 35. [illegible] payments.

Interest does not run from the date of the verdict, where the judgment is expressly directed to be entered at a future day: *McLaren v. Canada Central Ry. Co.*, 10 P. R. 328; and where a verdict is entered, subject to an award, the amount of the award does not bear interest from the date of the verdict: *Hope v. Brotty*, 7 P. R. 39; and see *Woodruff v. Canada Guarantee Co.*, 8 P. R. 532.

Where the entry of judgment is stayed, the interest nevertheless runs from the date of the judgment: *Talbot v. Canadian C. C. Co.*, 33 C. L. J. 735; 17 C. L. T. 336; and see *Rule* 512.

Where the judgment declares a charge of money upon land without imposing any personal liability, it bears interest unless otherwise ordered: *Re Drax*, 1903, 1 Ch. 781; 88 L. T. 510; although the contrary was held in *Lynch v. Skerritt*, 5 Ir. Eq. 494.

An interlocutory order for payment of costs was held to be a judgment within Imp. Act, 1 & 2 Vict. c. 110, s. 28, and to carry interest on the costs from the date of the order: *Taylor v. Roe*, 1894, 1 Ch. 413; 70 L. T. 232; see also R. S. O. c. 83, s. 5. Orders.

The interest included in a judgment is a part of the claim for the purpose of determining the scale of costs applicable: *Malcolm v. Leys*, 5 P. R. 75; but not the interest which accrues on the verdict or judgment under this section: *Sproule v. Wilson*, 15 P. R. 349.

Where the Judge at the trial of an action for unliquidated damages dismisses it, and the judgment is subsequently reversed, and damages are awarded, interest will, unless otherwise expressly ordered, only run on such damages from the date of the judgment awarding them: *Northwick v. Elderslie*, 1905, 2 K. B. 516; and see *Burland v. Earle*, 1905, A. C. 590; 93 L. T. 313; *Shea v. Inglis* referred to by MacMahon, J., in *Morton v. Ontario Accident Co.*, 28 Mar., 1908—and where there is a reference to ascertain damages, interest on the damages will Unliquidated damages.

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run from the date of the report, and not from the date of the judgment or order of reference; *Ashover Fluor Spar Mines* v. *Jackson*, 1911, 2 Ch. 355; 105 L. T. 334.

CERTIFICATE OF LIS PENDENS.

Action, etc., not notice unless caution or certificate registered

36.—(1) The institution of an action or the taking of a proceeding, in which any title to or interest in land is brought in question, shall not be deemed notice of the action or proceeding to any person not a party to it, until, where the land is registered under *The Land Titles Act*, a caution is registered under that Act, nor in other cases until a certificate, signed by the proper officer of the Court, has been registered in the Registry Office of the registry division in which the land is situate.

Rev. Stat. c. 126.

Form.

(2) The certificate may be in the following form:—

"I certify that in an action or proceeding in the Supreme Court of Ontario, between *A. B.*, of and *C. D.*, of some title or interest is called in question in the following land (*describing it.*)"

Dated at (*stating date and place*).

Exception.

(3) Subsection 1 shall not apply to an action or proceeding for foreclosure or sale upon a registered mortgage. 3-4 Geo. V. c. 19, s. 36.

Lis pendens.

The registration of a *lis pendens* is notice to persons subsequently dealing with the lands which are the subject of the *lis*, and they take subject to the rights of the parties as ultimately declared in the action. It cannot avail to give a plaintiff priority over any prior unregistered instrument: *Clergue* v. *McKay*, 6 O. L. R. 51; 8 O. L. R. 84.

As to the doctrine of *lis pendens:* see notes to *Rule* 404.

As to the effect of a *lis pendens:* see *Price* v. *Price*, 35 Ch. D. 297.

Mode of registering.

Where the plaintiff desires to register a certificate of *lis pendens*, the indorsement on the writ of summons should contain a short description of the property, sufficient to identify it for the purpose of registration: see note to Form No. 4; H. & L. Forms No. 64. The officer who issues the writ will issue the certificate of *lis pendens* in the manner provided in this section; *Rule* 752. Where a *lis pendens* is required the plaintiff should be more precise than in ordinary cases, and should by the indorsement define generally the grounds of his claim to an interest in the land: *Sheppard* v. *Kennedy*, 10 P. R. 242. A solicitor suing for his bill of costs of foreclosure proceedings and claiming a lien or charge on the property in question under *Rule* 689, was held entitled to register a *lis pendens:* *O'Flynn* v. *Middleton*, 5 O. L. R. 321.

When not to be issued or registered.

Where the title to land is not in question in the action, *e.g.*, in an alimony suit: *White* v. *White*, 6 P. R. 208; *Crandell* v. *Crandell*, 20 C. L. J. 329; 4 C. L. T. 500. It is improper to issue a *lis pendens:* and if this appears from the indorsement on the writ, the registration may

vacated on motion before a Judge in Chambers: sec. 37 (1) *infra*. the suit ostensibly brings the title to land in question, but is an usory suit brought in order to register a *lis pendens*, the action may dismissed on an admission by the plaintiff, as to the real nature the suit; but otherwise it must be disposed of in the regular way. there is not such an admission, but the affidavits clearly shew the ture of the suit, an order may be made by a Judge directing a eedy trial: see *Jameson* v. *Laing*, 7 P. R. 404; *Sheppard* v. *Kennedy*, *pra*. Sec. 37.

A plaintiff may not register a *lis pendens* merely to prevent a fendant from alienating land which would be liable to satisfy the dgment if the plaintiff should succeed in the action. An action for at purpose will not lie, and the registration of a certificate of *lis ndens* may be vacated on motion: *Westloh* v. *Brown*, Referee in mbers, 5th June, 1878; see *Newton* v. *Newton*, and *National Pro- ncial Bank* v. *Thomas*, *supra*, p. 55; also *White* v. *White*, *supra*, p. 200; pburn v. *Patton*, 26 Gr. 597; *Robinson* v. *Pickering*, 50 L. J. Chy. 7; *Green* v. *Temple*, 6 O. W. R. 15. A certificate of *lis pendens* ued before the action was actually begun was set aside: *St. Louis O'Callaghan*, 13 P. R. 322. Vacating lis pendens.

Where a certificate of *lis pendens* is registered, a defendant is en- led to appear *gratis* and anticipate the service upon him of actually ued process, so as to compel the plaintiff to proceed promptly: *Taggart* v. *Toothe*, 20 C. L. J. 175; *Poulton* v. *Lee*, 7 P. R. 415. here an appearance is so entered *gratis*, the defendant should serve tice thereof on the plaintiff's solicitor: *Vigeon* v. *Northcote*, 12 L. T. 101.

Semble, an action will not lie for maliciously registering or main- ning the registration of a *lis pendens*: see *Cowan* v. *Macaulay*, 5 C. R. 495.

Provision has now been made by sec. 37 *post*, for the discharge a certificate of *lis pendens* where the plaintiff does not promptly ceed with his action. Before this enactment, where a *lis pendens* d been properly issued and registered, it could not be vacated ding the action: *Foster* v. *Moore*, 11 P. R. 447, a case of fraudu- t conveyance.

The registration of a certificate of an order dismissing the action is sufficient discharge of a *lis pendens*: *Tedford* v. *Tedford*, 7 C. L. T. ; *Graham* v. *Chalmers*, 2 Chy. Ch. 53.

It may be observed that the concluding words of the section dis- sing with the registration of a certificate of *lis pendens* in actions foreclosure of sale, do not expressly provide that the institution of h actions shall be deemed notice thereof to any person not a party; does the clause extend to actions for redemption. Mortgage actions.

37.—(1) Where a caution or certificate is registered, d the plaintiff, or other party at whose instance it s issued, does not in good faith prosecute the action proceeding, a Judge of the High Court Division may any time make an order vacating the caution or rtificate. Order vacating caution or certificate on failure to prosecute action.

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Where land, etc., not claimed.

(2) Where a caution or certificate is registered, and the plaintiff's claim is not solely to recover land, or an estate or interest in land, but to recover money or money's worth, chargeable on or payable out of land, or some estate or interest in it, or for the payment of which he claims that the land or such estate or interest ought to be subjected, or where the plaintiff claims land or some estate or interest in land, and, in the alternative, damages or compensation in money or money's worth, a Judge of the High Court Division may at any time make an order vacating the caution or certificate upon such terms as to giving security or otherwise as may be deemed just.

The 'caution' referred to in the above sub-section is the equivalent under *The Land Titles Act* (R. S. O. c. 126) for a certificate of *lis pendens*.

Upon other grounds.

(3) A Judge of the High Court Division may at any time vacate the registration upon any other ground which may be deemed just.

Costs.

(4) On an application under this section, the Judge may order any of the parties to the application to pay the costs of any of the other parties to it, or may make any other order with respect to costs, which under all the circumstances may be deemed just.

Appeal from order.

(5) The order vacating a caution or certificate shall be subject to appeal according to the practice in like cases, and may be registered in the same manner as a judgment affecting land on or after the fourteenth day from the date of the order, unless the order is meanwhile reversed or its registration is postponed or forbidden by an order of a Judge of the High Court Division.

Registration of order.

Effect of vacating caution or certificate.

(6) Where a caution or certificate is vacated, any person may deal in respect to the land as fully as if the caution or certificate had not been registered, and it shall not be incumbent on any purchaser or mortgagee to enquire as to the allegations in the action or proceeding, and his rights shall not be affected by his being aware of such allegations. 3-4 Geo. V. c. 19, s. 37.

Sub-sections 3-6 apply only where the *lis pendens* has been registered by an opposite party: *McGillivray* v. *Williams*, 4 O. L. R. 454. A party by whom, or for whose benefit, a *lis pendens* has been registered,

nay obtain *ex parte* an order vacating it and may register the order t any time: *Ib.* Secs. 38, 39.

The object of delaying the registration of orders vacating a *lis endens*, is obviously to prevent a plaintiff from being prejudiced in ase the order should be reversed. It is questionable whether any rder vacating a certificate of *lis pendens* obtained by a defendant can e legally registered until after the fourteen days, even though the rder be made by consent; at the same time, it is to be observed that ub-section (6) seems to enable persons to deal with the land as oon as the certificate is vacated, even before registration of the order. The proper way to construe these sub-sections, 5 and 6, however, is robably to treat a certificate as not "vacated" until the order vacating it is actually registered.

The Master in Chambers or other officer having like jurisdiction ight formerly entertain the motion: but see now *Rule* 208 (13).

An order refusing to vacate a certificate is not in terms appealable nder this section, and has been held to be not appealable under *Rules* 05 or 507; *Hodge* v. *Hollamore*, 18 P. R. 447.

SITTINGS AND DISTRIBUTION OF BUSINESS.

38.—(1) There shall be as many Divisional Courts of he Appellate Division as are necessary for the proper despatch of the business of the Division. Divisional Courts of Appellate Division.

(2) There shall at all times be at least two of such Divisional Courts. To be two Divisional Courts.

(3) A Divisional Court shall consist of five Judges. How constituted.

See *post* sec. 41 (1).

(4) The Divisional Courts shall be numbered consecu- ively. 3-4 Geo. V. c. 19, s. 38. To be numbered.

39.—(1) The first Divisional Court shall consist of he Chief Justice of Ontario and the four Justices of ppeal. First Divisional Court.

(2) The Judges of the Supreme Court shall at a neeting to be held in the month of December in each ear and not later than the second Monday in the month, elect from among the Judges of the High Court Division, the judges to constitute the second Divisional Court or the next ensuing calendar year, and when such election has been made, the judges so selected shall be he judges to constitute that Divisional Court for that ear. Annual selection of Judges for second Divisional Court.

(3) Whenever the volume of business in the Appel- ate Division requires that an additional Divisional Court Additional Divisional Courts.

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or additional Divisional Courts be constituted, the Judges of the Supreme Court shall select the judges to constitute such Court or Courts.

Permanent and temporary Divisional Courts.

(4) The first and second Divisional Courts shall be permnnent Divisional Courts, and those constituted under the provisions of subsection 3 shall be temporary Divisional Courts.

Failure of Judges to make selection.

(5) In the event of the Judges of the Supreme Court failing at the prescribed time to select the judges who are to constitute the Divisional Courts or any of them, the selection may be made at a later date.

Judges of one Divisional Court may sit in another.

(6) Whenever occasion requires, a judge of any Divisional Court may sit in the place of a judge of any other Divisional Court.

Ad hoc Judges of Divisional Courts.

(7) Whenever occasion requires, a judge who is not a member of a Divisional Court may sit in the place of a judge of any Divisional Court.

Application of sub-secs. 6, 7 in case of vacancy.

(8) Subsections 6 and 7 shall apply where a vacancy occurs in a Divisional Court by the death or resignation of a judge or otherwise, until, in the case of the first Divisional Court, his successor is appointed, and in the case of any other Divisional Court until his successor is selected, as provided by subsection 9.

Filling vacancy in Divisional Courts other than the first.

(9) Where a vacancy occurs in a Divisional Court, except the first, by the death or resignation of a judge or otherwise, the Judges of the Supreme Court at a meeting called for that purpose shall select a judge to fill the vacancy for the remainder of the year for which the judge whose place he is selected to fill, was selected.

Right of Judge who sits in place of another not to be questioned.

(10) A Judge who sits in the place of a judge of a Divisional Court shall be conclusively deemed to have been entitled and qualified to so sit, within the meaning of the next preceding four subsections.

Judge may give judgment after ceasing to be Judge of Divisional Court.

(11) A judge who has sat in a Divisional Court on the hearing of any appeal, matter or proceeding therein may give judgment notwithstanding that he has ceased to be a judge of that Court.

Judge not to hear appeal from his own judgment.

(12) A judge shall not sit on the hearing of an appeal from a judgment or order made by himself. 3-4 Geo. V. c. 19, s. 39.

Chief Justice of Ontario and Justices of Appeal not to be assigned to other work without consent.

40. Neither the Chief Justice of Ontario nor any of the Justices of Appeal shall without his consent be assigned to, or required to perform any duty, except such as appertains to him as a member of the Appellate Division. 3-4 Geo. V. c. 19, s. 40.

Four judges may hear appeals.

41.—(1) Appeals to a Divisional Court may be heard and disposed of by a court of four judges.

Exception as to Election trials and Criminal matters. Rev. Stat. c. 10. R.S.C. c. 146

(2) Subsection 1 shall not apply to appeals under *The Ontario Controverted Elections Act* or to cases and matters which come before the Court under the provisions of the Criminal Code, all of which shall be heard and disposed of by a full court of five judges. 3-4 Geo. V. c. 19, s. 41.

Monthly sittings of Divisional Courts.

42.—(1) There shall be at least monthly sittings of a Divisional Court, except during vacations, and, subject to subsection 2 and to the Rules and to any other arrangement between the judges constituting the Divisional Courts, such courts shall sit in alternate weeks, but nothing in this section shall prevent a sittings from being held during the long vacation.

Sittings may be held concurrently.

(2) The Divisional Courts may sit concurrently and shall do so whenever necessary for the proper despatch of business.

Presiding Judge in absence of Chief Justice.

(3) In the absence of the Chief Justice of Ontario, or if he is not a member of the Court, the judge entitled to precedence over the other judges present shall preside. 3-4 Geo. V. c. 19, s. 42

BUSINESS IN HIGH COURT DIVISION TO BE DISPOSED OF BY A JUDGE.

Business to be disposed of by one Judge.

Judge to constitute the Court.

43.—(1) Every action and proceeding in the High Court Division, and all business arising out of it, except as herein otherwise expressly provided, shall be heard, determined and disposed of before a Judge, and where he sits in Court he shall constitute the Court. (*a*)

(*a*) This is the same in effect as the enactment in the Eng. J. A. 1876, s. 17; and is an extension of the authority previously to Ont. J. A. 1881, possessed in Ontario by a Judge of the Common Law Courts under the Administration of Justice Act, 1874 (R. S. O. 1877, c. 50, s. 281); see *Cooper* v. *Central Ont. Ry.*, 4 Ont. 280.

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Judge not to reserve questions.

(2) Subject to section 32, a Judge of the High Court Division shall decide all questions coming properly before him, and shall not reserve any case, or any point in a case, for the consideration of a Divisional Court.

See Eng. J. A. 1873, s. 46; J. A. 1875, s. 22; and J. A. 1876, s. 17.

In *Benschor* v. *Coley*, 52 L. J. Q. B. 398; 48 L. T. 533, it was held that notwithstanding the first clause of this section a Judge at *Nisi Prius* may leave any party to move a Divisional Court for judgment, and that the words "so far as is practicable and convenient" above, should be interpreted to authorize that course. This decision would not seem to be applicable in Ontario as the Imp. Act contains no clause similar to sub-sec. (2) above.

Where "a special case on the pleadings" had been referred to a Divisional Court in forgetfulness of the above sections, the application was turned into a motion and heard under *Rule* 220; *Till* v. *Till*, 15 Ont. 133.

In re Vivian, Rose, J., directed an issue to be heard before a Divisional Court, and it was heard and disposed of by C. P. Divisional Court, 9th January, 1896; but see *Rood-Barrs* v. *Cathcart*, 72 L. T. 184; W. N. 1895, 34.

Hearing in camera, when permissible.

Ordinarily all causes ought to be heard in open Court: *Scott* v. *Scott*, 1913, A. C. 417; 109 L. T. 1; *Reid* v. *Aull* (1914), 5 O. W. N. 964 (an action to annul a marriage); but a hearing *in camerâ* may be allowed in a proper case: see *Cleland* v. *Cleland*, 109 L. T. 744; *Mellor* v. *Thompson*, 31 Ch. D. 55, (an application to restrain a solicitor from disclosing communications made to him confidentially as such solicitor), and see 82 L. T. Jour. 297, and observations of Lord Fitzgerald in *Macdougall* v. *Knight*, 14 App. Cas. 206-7; also articles in 25 C. L. J. 597, and 88 L. T. Jour. 40, 123. Where a cause is heard *in camerâ* it is a contempt of Court to publish a report of the hearing: *Re Martindale*, 1894, 3 Ch. 193; unless it is done *bonâ fide* and without malice: *Scott* v. *Scott*, *supra*.

As to the comparative authority of decisions of a single Judge sitting as the Supreme Court and those of a Divisional Court: see *Tancred* v. *Delagoa Bay, etc., Co.*, 23 Q. B. D. 242.

Arrangements for holding Courts, etc.

(3) All such arrangements as may be necessary or proper for the holding of any of the courts, or the transaction of business in the High Court Division or the assignment from time to time of judges to hold such courts, or to transact such business, shall be made by the Judges of that Division. 3-4 Geo. V. c. 19, s. 43.

SITTINGS FOR TRIALS.

Sittings for trials.

44.—(1) There shall be as many sittings of the High Court Division in and for every county as are required for the trial of civil causes, matters and issues and for the trial of criminal matters and proceedings.

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Separate sittings may be held.

(2) Separate sittings may be held for the trial of civil causes, matters and issues which are to be tried without a jury and separate sittings for those which are to be tried with a jury, and separate sittings may also be held for the trial of criminal matters and proceedings.

Sittings may be held concurrently.

(3) Sittings may be held concurrently or separately as may be directed by the judges appointing the days therefor or by the judges presiding at such sittings.

Jury cases to be first tried.

(4) Subject to the Rules, where a sittings is held for the trial of civil causes, matters and issues which are to be tried with and for those which are to be tried without a jury, separate lists shall be made and the jury cases shall be first disposed of unless the presiding judge otherwise directs.

Sittings to be held in county town.

(5) The sittings shall be held in the court house of the county town or at such other place in the county town as the presiding judge directs.

Two sittings yearly in each county.

Additional sittings in certain counties.

(6) Subject to the Rules, at least two sittings shall be held in each year in and for every county, and at least one additional sittings in and for the County of York, the County of Carleton, the County of Wentworth, the County of Middlesex, and the United Counties of Dundas, Stormont and Glengarry. 3-4 Geo. V, c. 19, s. 44.

Section 109 provides that the Judges of the Supreme Court, seven of whom shall form a quorum: sec. 113, shall have power to appoint the days upon which the Assizes and Sittings for trial shall be held.

Under this section the High Court Division holds Circuit Sittings similar to the former Sittings of Courts of Assize and Nisi Prius.

Commissions for holding Courts of Assize, or any other commissions general or special, for trials of causes, may still be issued: see *post*, secs. 49, 120.

Who may preside.

45.—(1) Every such sittings shall be presided over by one of the Judges of the Supreme Court, or, on the request in writing of a Judge of the Supreme Court, by a retired judge of that Court, or by a judge of a county court, or by one of His Majesty's Counsel learned in the law appointed for Upper Canada, or for Ontario.

Powers of presiding Judge.

(2) Such judge or counsel while holding the sittings shall possess and enjoy and may exercise all the powers and authorities of a Judge of the High Court Division.

Secs. 46-49.

and in civil proceedings may reserve the giving of his decision on questions raised at the trial and afterwards give the same, and such decision shall have the like force and effect as the decision of a Judge of the High Court Division. 3-4 Geo. V. c. 19, s. 45.

In so far as this section purports to authorise the appointment of a retired Judge, or a Judge of a County Court, or one of His Majesty's Counsel, to act as a Judge of the Supreme Court, its validity has been doubted, as being a contravention of the B. N. A. Act, s. 96, which reserves to His Excellency the Governor-General the right to appoint Judges of Provincial Superior Courts: see 49 C. L. J. 313; see also sec. 120, *post*.

Course to be pursued by the sheriff if the judge does not arrive on the day appointed for opening Court.

46. Where the judge whose duty it is to hold any sitting does not arrive in time, or is not able to open court on the day appointed for that purpose, the sheriff, or, in his absence, his deputy, may, after six o'clock in the afternoon of that day, by proclamation, adjourn the sittings to an hour on the following day to be named by him, and so from day to day until the judge arrives or until other directions from the judge are received. 3-4 Geo. V. c. 19, s. 46.

When sittings to commence.

47.—(1) No such sittings shall begin on the first day earlier than one o'clock in the afternoon or on any other day before nine o'clock in the forenoon, nor, except for special reasons, shall it extend beyond seven o'clock in the afternoon, and there shall be an intermission of at least half an hour at or near noon.

Hours of sittings.

Non-observance of hours not to effect proceeding.

(2) Failure to observe any of the provisions of sub-section 1 shall not render the trial or other proceeding void. 3-4 Geo. V. c. 19, s. 47.

Entering non-jury actions for trial.

48. Non-jury actions to be tried in any county except the County of York, may be entered for trial at any sittings of the High Court Division in such county. 3-4 Geo. V. c. 19, s. 48.

Commissions of assize and other commissions.

49.—(1) Commissions of assize or any other commissions, either general or special, may be issued, by the Lieutenant-Governor in Council, assigning to the person therein named, the duty of trying and determining within any place or district named for that purpose by the commission, any cause or matter, or any question or issue of fact or of law or partly of fact and partly of law, in

ny cause or matter, depending in the Supreme Court; Sec. 49.
r for the exercise of any civil or criminal jurisdiction
apable of being exercised by the Court.

(2) A commissioner, when exercising any jurisdiction Commissioner to be a Court.
o assigned to him, shall be deemed to constitute the
ourt. 3-4 Geo. V. c. 19, s. 49.

The English J. A. 1873, s. 37, gave this authority expressly to His Whether section intra vires?
ajesty. In Canada it has been questioned whether the authority
longs under the B. N. A. Act to the Governor-General or the
euteasnt-Governor. A commission in its ordinary form both con-
itutes the Court and names the Judges, while under the B. N. A. Act
e creation of Courts belongs to the Province, and the appointment
Superior Court Judges belongs to the Dominion: see *Regina* v.
ner, 42 U. C. Q. B. 391.

The English section l...ited the appointment to "any Judge or
dges of the High Court, or other persons usually named in commis-
ns of assize." The Dominion Government is understood to maintain
at a Provincial Legislature has no authority to limit the class of
rsons from which Judges are to be selected.

The Commissions issued under this section would ordinarily assign
a Judge or Judges of the Supreme Court the duty of holding the As-
es; and it is douhted whether, in view of the B. N. A. Act, s 96, His
nour the Lieutenant-Governor could appoint any other person to try
ses in the Supreme Court, or exercise the criminal jurisdiction of
e Supreme Court: see 49 C. L. J. 313.

Pleadings in Actions on Foreign Judgments.

Foreign judgments are those given by Courts whose jurisdiction Actions on foreign judgments
es not extend to Ontario: *Macfarlane* v. *Derbishire*, 8 U. C. Q. B. 12;
oreign judgment, if not impeached or denied, is *prima facie* evidence
ainst the defendant: *Monning* v. *Thompson*, 17 C. P. 606; hut it
st be a judgment which finally and conclusively (subject only to
peal) settles the existence of the debt, so as to become *res judicoto*
ween the parties: *Nouvion* v. *Freemon*, 15 App. Cas. 1.

A foreign judgment constitutes a simple contract debt, so that the A simple contract debt.
iod of limitation in such case (6 years), for bringing an action
n it, applies: *North* v. *Fisher*, 6 Ont. 206; and is a liquidated de-
nd which may be specially indorsed under *Rule* 33: *Solmes* v. *Staf-*
d. 16 P. R. 78.

The principle upon which a foreign judgment is enforced is that the Principle on which they are enforced.
gment of a Court of competent jurisdiction over the defendant
poses an obligation upon the defendant to pay which the domestic
urt is bound to enforce: *Fowler* v. *Vail*, 4 Ont. App. 270; *Cas-*
ue v. *Imrie*, L. R. 4 E. & I. App. 414; *Godard* v. *Gray*, L. R. 6 Q.
139; *Re Trufort, Trafford* v. *Blone*, 57 L. T. 674; *Ritter* v. *Fairfield*,
Ont. 350; *Fuyerick* v. *Hubbord*, 86 L. T. 829; *Swaizie* v *Swaizie*, 31
324; *Robertson* v *Robertson*, 16 O. L. R. 170.

No legislature, having merely territorial jurisdiction, can confer Jurisdiction of foreign Courts over foreigners
Courts under its control, jurisdiction which any foreign Court

Actions on foreign judgments.

ought to recognize, against absent foreigners who owe no allegiance or obedience to the power which so legislates. In all personal actions the Courts of the country where the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to: *Sirdar Gurdyol Singh* v. *Rajah of Faridkote*, 1894, A. C. 670; see also note prefixed to *Rule* 25; *Brennan* v. *Cameron*, 46 C. L. J. 136; but *semble* where the foreign Court is by agreement of the parties to have jurisdiction over the matter in question its judgment is binding on the parties and enforceable in Ontario, if not contrary to natural practice: see *Jeannot* v. *Fuerst*, 100 L. T. 816.

Final judgments not enforced.

A judgment for a penalty payable to a foreign state, under a statute of such foreign state, does not create a debt enforceable in this Province; but where the penalty is payable by way of indemnity to a private citizen a foreign judgment for such penalty may be enforced in Ontario: *Huntington* v. *Attrill*, 20 Ont. App. 703; 1893, A. C. 150; neither can a judgment recovered for a sum payable under a local improvement Act of a foreign country create a debt enforceable in Ontario: *Sydney* v. *Cook* (1908), 99 L. T. 805; and where the foreign judgment is both for a penalty and also for a civil claim for damages it is severable and the latter claim may be enforced in Ontario: *Raulin* v. *Fischer*, 1911, 2 K. B. 93; 104 L. T. 849.

Foreign judgment is not merger of original cause of action.

A foreign judgment is not a merger of the original cause of action, which may, notwithstanding such judgment, be sued on in Ontario *Trevelyan* v. *Myers*, 26 Ont. 430; *Bugbee* v. *Clergue*, 27 Ont. 96, affirmed in S. C., *sub nom. Clergue* v. *Humphrey*, 31 S. C. R. 66; the foreign judgment creditor may sue either upon the judgment or upon the original cause of action: *Ib.*; and where he sues upon both the judgment and original claim, and, at the trial, establishes both causes of action, and elects to take judgment on his claim on the foreign judgment, he is not thereby precluded, in case he is found on appeal not to be entitled to recover on the judgment, from obtaining judgment on the original claim: *Moritz* v. *Canada Wood Specialty Co.*, 17 O. L. R. 53; 42 S. C. R. 237.

Limits of Provincial jurisdictions.

The tribunals constituted by Provincial authority cannot extend their powers so as to bind by their decisions persons, or their property, in other Provinces, unless such persons choose to attorn to their jurisdiction; but judgments of Provincial Courts are binding on persons resident in other Provinces when pronounced in actions or proceedings which they have themselves instituted: *Deacon* v. *Chadwick*, 1 O. L. R. 346.

Defendant, when bound.

Mr. Justice Fry in *Rousillon* v. *Rousillon*, 14 Ch. D. 351; 42 L. T. 679, enumerates five cases in which the Court considers a defendant bound by a foreign judgment:

(1) Where he is a subject of the country in which the judgment is recovered;

(2) Where he was resident in such country when action was begun.

(3) Where defendant in character of a plaintiff selected the venue in which he is afterwards sued.

(4) Where he has voluntarily appeared in the action.

(5) Where he has voluntarily contracted to submit himself to the jurisdiction of the foreign Court.

He also enumerated as a 6th case where defendant has real estate in the foreign jurisdiction, but this ground has been denied: see *per* Lord

eiborne in *Sirdar Gurdyal Singh* v. *Faridkote*, 1894, A. C. 670; but a h case was held to exist where the judgment is a judgment *in rem* affecting status, or ancillary thereto: *Phillips* v. *Batho*, 1913, 3 K. B. ; 109 L. T. 345, and see 135 L. T. Jour., 500. Actions on foreign judgments.

A judgment of a Colonial Court against a defendant resident in ngland who did not appear, was held to be not binding on him, though e defendant was born in the colony in which the judgment was re- vered: *Gavin* v. *Gibson*, 1913, 3 K. B. 379; 109 L. T. 445. Judgment of foreign Court against absentee.

A foreign judgment is *prima facie* evidence only that the foreign urt had jurisdiction over the subject matter, or the person of the fendant, and that the judgment was regularly obtained. It may be ewn by way of defence that the judgment was not binding in the reign country, for want of jurisdiction. The Court has jurisdiction er the person of the defendant when he is a subject of the country, en though not resident nor domiciled in it, and he is therefore und by a judgment, though obtained in his absence, where recovered der the process of the country to which he owes allegiance as a bject, or temporary allegiance, by being when the suit was com- enced resident in the country, so as to have the benefit and protec- n of its laws. The absence of these circumstances will constitute defence: see *Fowler* v. *Vail*; *Godard* v. *Gray*, *supra*, p. 209; *Schibsby* *Westenholz*, L. R. 6 Q. B. 155; *Maubourquet* v. *Wyse*, 1 Ir. C. L. 471; *Lean* v. *Shields*, 9 Ont. 699; *Solmes* v. *Stafford*, 16 P. R. 78; *Beatty* *Cromwell*, 9 P. R. 547; *Turnbull* v. *Walker*, 67 L. T. 767; 2 Smith L. 10th ed., 766. Effect of foreign judgment as evidence.

If the foreign Court had jurisdiction as above, or if defendant sub- tted to its jurisdiction by appearing: *Voinet* v. *Barrett*, 34 W. R. 1; 1 Cab. & E. 554, the judgment is conclusive so as to prevent him om pleading any defence which might have been pleaded in the for- n country: *Fowler* v. *Vail*, and other cases, *supra*; *Paisley* v. *Broddy*, P. R. 202; *Solmes* v. *Stafford*, 16 P. R. 78. When conclusive.

A judgment or decree pronounced by a foreign Court will be treated d acted on as final, notwithstanding any irregularity of procedure der the local law; provided the foreign Court had jurisdiction over e subject matter, and over the persons brought before it, and the oceedings do not offend against English views of substantial jus- e: *Pemberton* v. *Hughes*, 1899, 1 Ch 781; but an action on a for- n judgment must fail if it be proved that the judgment was obtained thout notice to the defendant, actual or constructive: *Bugbee* v. *rgue*, 27 Ont. 96; 31 S. C. R. 66; but if a defendant in the foreign ion does not prove that he had no notice of the proceedings and no portunity of appearing in the foreign Court, the judgment, if *in rem*, y be conclusive on him; see *Fracis* v. *Corr*, 81 L. T. 50; 1902, A. C. ; 85 L. T. 144. Irregularity in foreign judgment. Judgment obtained without notice.

By invoking or submitting to the jurisdiction of a foreign Court, a rty may, in an action in Ontario on the judgment of the foreign urt, be precluded from setting up want of jurisdiction to it: *Swaizie* *Swaizie*, 31 Ont. 324. Conclusive against party who invoked jurisdiction.

Fraud in obtaining a foreign judgment is in some cases a defence: *binson* v. *Fenner*, 106 L. T. 722; *Jacobs* v. *Beaver*, 17 O. L. R. 496; *ouloff* v. *Oppenheimer*, 10 Q. B. D. 295; *e.g.*, by means of false evidence duced in the foreign Court; *Hollender* v. *Fjoulkes*, 23 Ont. 61; *Ander-* v. *Nesbitt*, 1 O. W. R. 818; 2 O. W. R. 430; though the fraud is h that it cannot be proved without re-trying the questions adjudi- ed upon by the foreign Court: *Ib.* and *Vadala* v. *Lowes*, 25 Q. B. D. Effect of fraud.

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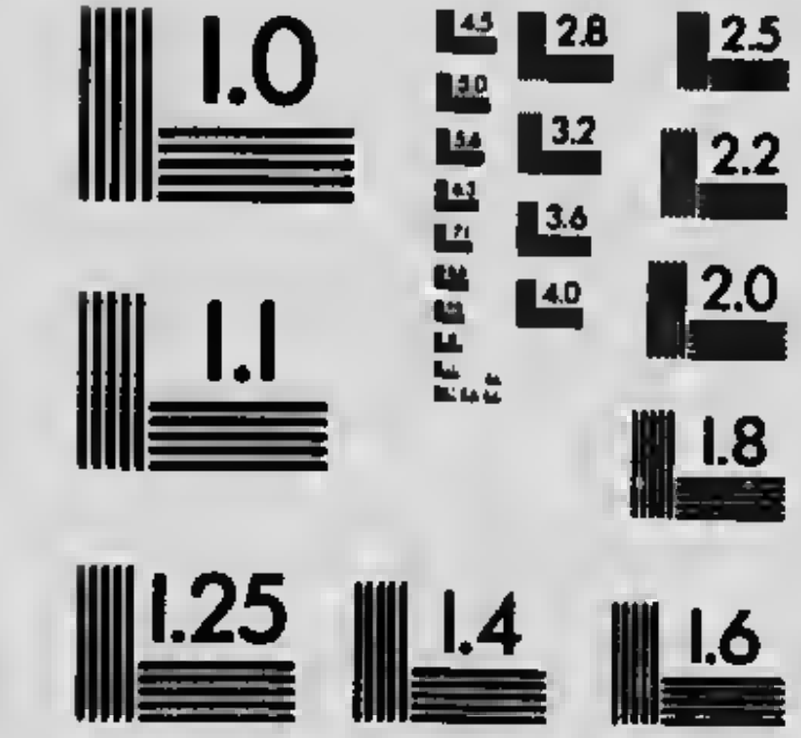

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Secs. 50, 51.

310; 62 L. T. 701; 63 L. T. 128; *Johnson* v. *Barkley*, 10 O. L. R. 724; but where the judgment is in *rem*: *Castrique* v. *Behrens*, 1861, 30 L. J. Q. B. 163; or affects the *status* of parties, *e.g.*, a decree of divorce: *Bates* v. *Bates*, 1906, P. 209, it may be binding so long as it is unimpeached in the foreign Court, notwithstanding it was obtained even by fraud or suppression of material facts. It is also a defence that the judgment is contrary to natural justice, as in *Buchanan* v. *Rucker*, 1 Camp. 63; 9 East., 192; or the fact that it was obtained against defendant without notice (he being an alien), notwithstanding the judgment is valid in the foreign country: *Rousillon* v. *Rousillon*, 14 Ch. D. 351.

ACTIONS ON QUEBEC JUDGMENTS.

Action on Quebec judgment where service personal.

50. Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service on the defendant or party sued was personal, no defence which might have set up to the original action may be made to the action on the judgment. 3-4 Geo. V. c. 19, s. 50.

Judgments of the Courts of Quebec are now subject to the ordinary rules of international law, and are not conclusive evidence of liability unless there has been personal service of process in Quebec, or the defendant has attorned to the jurisdiction of the Quebec Court, though served out of Quebec: *Vézina* v. *Newsome*, 14 O. L. R. 658; *Court* v. *Scott*, 32 C. P. 148, at p. 22 Vict. c. 5, s. 58, on which it was based, are no longer law; and see *Jacobs* v. *Beaver*, 17 O. L. R. 496.

Where the defendant did not appear or submit to the jurisdiction of the foreign Court, and was not a resident within the territorial jurisdiction when the foreign judgment was obtained, an action on such judgment (except when recovered in the Provinc of Quebec, as mentioned in s. 50, *supra*), cannot be maintained in Ontario: see *Turnbull* v. *Walker*, 67 L. T. 767; and see *Schibsby* v. *Westenholz*: *Sirdar Gurdyal Singh* v. *Faridkote*, and other cases, *supra*, pp. 209, 210. Where a party enters into a partnership in a foreign country he does not thereby impliedly submit himself to the jurisdiction of the Courts of that country so far as the affairs of the partnership are concerned, and proceedings in the Court of such country of which he is notified, are not binding on him if he does not appear and is at the time resident without the jurisdiction of such Court: *Emanuel* v. *Symon*, 1907, 1 K. B. 335; 1908, 1 K. B. 302; 96 L. T. 231; 98 L. T. 304.

Action on Quebec judgment where service not personal.

51. Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service was not personal and in which no defence was made, any defence which might have been set up to the original action may be made to the action on the judgment. 3-4 Geo. V. c. 19, s. 51.

As to the mode of proof of a Quebec judgment: see *Tilton* v. *McKay*, 24 U. C. C. P. 94.

See notes to sec. 50, *supra*.

Costs.

52.—(1) Where an action is brought on a judgment obtained in the Province of Quebec the costs incurred in obtaining the judgment in that Province shall not be recoverable without the order of a judge directing their allowance.

Conditions under which order may be made.

(2) Such order shall not be made, unless, in the opinion of the judge, the costs were properly incurred nor if it would have been a saving of expense and costs to have first instituted proceedings in Ontario on the original claim. 3-4 Geo. V. c. 19, s. 52.

TRIAL, AND PLACE OF TRIAL.

Practice as to trials with, or without, jury.

In Ontario the practice as to having, or dispensing with, a jury is different from that which prevails in England, as to which see H. & A. Jud. Act, 2nd ed., p. 139.

(1) All actions which, under the practice existing at the time of the passing of the A. J. Act, 1873, could have been brought in the Court of Chancery only, must be tried by a Judge without a jury: see ss. 55, 56 (4), and a notice of jury given in such a case is irregular and will be struck out on motion: see *Gowanlock* v. *Mann*, 9 P. R. 279 (an action for rectification of a lease): *Thurlow* v. *Beck*, 9 P. R. 268 (an action to set aside a conveyance): see also *Usil* v. *Whelpton*, 45 L. T. 39; 29 W. R. 799.

(2) Certain actions against municipal corporations are to be tried without a jury: sec. 54.

(3) In all other actions (except those mentioned in sec. 53), the provisions of secs. 55 and 56 will apply; and either party, upon giving notice, has a *prima facie* right to a trial by jury, subject to the discretion vested in a Judge in Chambers, or the Judge at the trial, to direct otherwise: see notes to sec. 56, *infra*.

Certain actions to be tried by a jury.

53. Actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury unless the parties in person or by their solicitors or counsel waive such trial. 3-4 Geo. V. c. 19, s. 53.

In the cases mentioned in this section it is not necessary to file and serve a jury notice: *Puterbaugh* v. *Gold Medal Mfg. Co.*, 3 O. L. R. 259, and the Court has no power to dispense with the jury, except by consent of both parties: see *Adair* v. *Wade*, 9 Ont. 15, but it is for the Judge to say if an alleged libel is reasonably capable of being interpreted as libellous, and, if it is not, there is no question for the jury, and the Judge may give judgment for the defendant: *McQuire* v. *Western Morning News*, 1903, 2 K. B. 100; *Macdonald* v. *The Mail*, 2 O. L. R. 278.

Secs. 54, 55.

An action for trads libel does not come within this section so as to be triable only hy s jury, unless by consent: *Dickerson* v. *Radcliffe*, 17 P. R. 418.

Certain actions against municipalities, etc., to be tried without a jury and venue to be local.

54. Actions against a municipal eorporation or board of poliee trustees for damages in respect of injuries sustained by reason of the default of the eorporation in keeping in repair a highway or bridge shall be tried by a judge without the intervention of a jury, and the trial shall take place in the county whieh eonstitutes the municipality or in which the municipality or police village is situate. 3-4 Geo. V. e. 19, s. 54.

Actions against municipalities for non-repair of roads.

As to actions of the kind mentioned in this section, see *The Municipal Act* (R. S. O. c. 192) s. 463.

In *Vennard* v. *Township of Bruce*, 19 C. L. T. 87, it was held that a bridge, part of the highway, was within ths words "etreets, rosds or sidewalks," in this eection.

An action against a municipal corporation for negligently leaving a stone roller on the highway whereby plaintiff's horses wsre frightened and thereby csused damags to ths plsintiff is not in respect of non-repair of streets, snd therefore is not within this section: *Clemens* v. *Berlin*, 7 O. L. R. 33; nor is an action in respect of injuries occasioned by the negligent use of a steam roller of the municipality, operated hy a contracting company: *Kirk* v. *Toronto*, 7 O. L. R. 36.

An action hssed both on non-repair and obstruction is within the section, and on a motion to striks out a jury notice leave to amend by striking out the allegations as to non-repair was refused: *Read* v. *City of Toronto*, 4 O. W. R. 310.

Where an action was hrought against a railway company snd a city corporation to recover damages for injuries eustained by the plaintiffs by being upset upon a street in the city, owing to ths heaping up of snow upon the side of ths roadway, and the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel, it was held that the action must be treated as one for non-repair of a street within the meaning of this section, and a jury notice was therefore irregular and was struck out: *Barber* v. *Toronto Ry. Co.*, 17 P. R. 293.

An action based on negligent construction of a pavement, rendering it slippery and dangerous, is within the section: *Armour* v. *Peterborough*, 10 O. L. R. 306.

The omission to guard an excavation on a public street is held to be non-repair within this section: *Burns* v. *Toronto*, 13 O. L. R. 109; and it appears to be immaterial for the purpose of this section whether the non-repair arise from nonfessance or misfeasance: *Brown* v. *Toronto*, 21 O. L. R. 230.

Issues of fact with certain exceptions to be tried without jury.

55.—(1) Subjeet to the Rules, except where otherwise expressly provided by this Act, all issues of fact shall be tried and all damages shall be assessed by the judge without the intervention of a jury.

Sec. 56.

(2) The judge may nevertheless direct that the issues or any of them be tried and the damages assessed by a jury. 3-4 Geo. V. c. 19, s. 55.

Judge may direct trial by jury.

One of the *Rules* to which this provision is subject is *Rule* 258, by which equitable issues are to be tried without a jury. See also *Rule* 259, providing for the case where there are both legal and equitable issues.

56.—(1) Subject to the Rules, if a party desires that the issues of fact shall be tried or the damages assessed by a jury he may, at any stage of the proceedings, but not later than the fourth day after the close of the pleadings or if notice of trial or assessment is served before that time, within two days after service of such notice or within such other time as may be allowed by a judge, file and serve on the opposite party a notice in writing requiring that the issues be tried or the damages assessed by a jury, and if such notice is given, subject to subsection 3, they shall be tried or assessed accordingly.

Where jury required notice to be given.

(2) A copy of the notice shall be attached to the certified copy of the pleadings prepared for use at the trial.

Copy of notice to be annexed to record.

(3) Notwithstanding the giving of the notice the issues of fact may be tried or the damages assessed wi' it the intervention of a jury if the judge presiding a ne sittings so directs or if it is so ordered by a judge.

Jury may be dispensed with.

(4) Subsection 1 shall not apply to causes, matters or issues over the subject of which before *The Administration of Justice Act, 1873*, the Court of Chancery had exclusive jurisdiction. 3-4 Geo. V., c. 19, s. 56.

Sub-section not to apply to certain causes, etc. 36 V. c. 8.

For the form of jury notice: see Form 33; H. & L. Forms, No. 824.

Where a jury notice was serv but by inadvertence not filed within the proper time, it was that there was power to correct the slip by ordering the notic stand good, and that such an order should be made where the case is a proper one to be tried by a jury: *Macrae* v. *News Printing Co.*, 16 P. R. 364.

No jury notice is necessary in actions of the class provided for by sec. 53: *Puterbaugh* v. *Gold Medal Co.*, 3 O. L. R. 259.

Striking Out Jury Notice.—It has been said that as a rule the question whether a jury notice ought to be struck out can be better disposed of by the Judge at the trial, when the real questions to be tried have been ascertained, than by a Judge in Chambers on the pleadings and affidavits (*per* Osler, J.A., in *Conmee* v. *Can. Pac. Ry.*, 12 Ont. App. 769), and the Judge at the trial is considered to have absolute control over the manner in which the case shall be tried, and his discretion will not be interfered with by a Divisional Court: *Brown* v. *Wood*, 12

Striking out jury notices.

Sec. 56.

P. R. 198. See, however, *per* Osler, J.A., in *Reg.* v. *Grant*, 17 P. R. at p. 171.

Dispensing with jury at trial.

In *Conmee* v *C. P. R.* (*sup.*), though the Court of Appeal held that the plaintiff was entitled to a jury, at the trial a jury was dispensed with and the case referred to arbitrators. It has, therefore, sometimes been considered inexpedient to deal with the matter on motion before trial in view of the power of the Judge at the trial: see *Temperance Colonization Co.* v. *Evans*, 12 P. R. 48, 380; *McMahon* v. *Lavery*, *ib.* 62. Cases, however, have arisen in which the Court has acted on motion: see *Montgomery* v. *Ryan*, 13 O. L. R. 297; *Bryans* v. *Moffatt*, 15 O. L. R. 220; *Clisdell* v. *Lovell*, 15 O. L. R. 379; and in *Bissett* v. *Knights of Maccabees*, 3 O. W. N. 1280; and *Gerbracht* v. *Bingham*, 4 O. W. N. 117. it is said to be the duty of a Judge in Chambers to exercise his discretion as whether or not a case is to be tried with a jury.

The jurisdiction of Judge in Chambers to strike out a jury notice has never been judicially doubted: *Peoples' Loan, etc., Co.* v. *Stanley*, 4 O. L. R. 90, 377; *Shantz* v. *Berlin*, 4 O. L. R. 730.

Jurisdiction of Judge in Chambers as to jury notices.

A Judge in Chambers, on motion before trial, has full discretion to direct as to the mode of trial: *Lauder* v. *Didmon*, 16 P. R. 74; and *semble*, where, before trial, the Court or a Judge has ordered that the action be tried without a jury, the Judge at the trial has no power (while the order stands unreversed) to say that the issues shall be tried by a jury: *Reg.* v. *Grant*, 17 P. R. at p. 171, *per* Osler, J.A. It had previously been said that the exercise by a Judge in Chambers of his power before trial may hamper the discretion of the trial Judge: *per* Street, J., in *Bristol, etc.*, v. *Taylor*, 15 P. R. 310; and see *Bank of Toronto* v. *Keystone F. Ins. Co.*, 18 P. R. 113. While, therefore, there is no doubt as to the discretionary power of a Judge in Chambers before trial to strike out a jury notice, the practice is not to strike it out where the ground is merely that the action can be more conveniently dealt with without a jury, that being a matter which can better be left for the consideration of the Judge at the trial: *Hawke* v. *O'Neill*, 18 P. R. 164; *Shantz* v. *Berlin*, *supra*; and it was held by a Divisional Court that where the action is of a purely common law character that a Judge in Chambers should not strike out the notice but leave it to the Judge at the trial to determine whether or not the case should be tried by a jury: *Stavert* v. *McNaught*, 18 O. L. R. 370. It is by no means, however, a rule that all common law actions should be tried with a jury: see *infra*. On the other hand it is said that it is desirable to have the question whether an action is to be tried with or without a jury determined at as early a stage as possible: *Lauder* v. *Didmon*, 16 P. R. 74; and the discretion of a Judge on this point will not be lightly interfered with: *Ib.*; and see *Toogood* v. *Hindmarsh*, 17 P. R. 446; and *Mangan* v. *Metropolitan Electric Supply Co.*, 1891, 2 Ch. 551.

Local Judges.

A local Judge acting under *Rule* 210 has the same power as a Judge of the High Court in Chambers: *Fox* v. *Fox*, 17 P. R. 161; and in a case where it was almost certain that the Judge at the trial would dispense with the jury it was held that the discretion of the local Judge ought to have been exercised by striking out the jury notice.

Discretion of Judge.

It has been held that this section places the matter in the discretion of the Judge in much the same way as under the English Order 36, rr. 3-7, that it, the Judge must be satisfied that sufficient reasons exist to deprive the party claiming a jury of his *primâ facie* right.

he onus of establishing this is on the other side, if an application is ade before trial, and if the case can be equally well tried by either ode, then, if either party desires it, the case should go to a jury: ank of B. N. A. v. Eddy, 9 P. R. 470; see also ' ark v. Skipper, 21 h. D. 134; Moses v. Simpson, 20 C. L. J. 230. Sec. 56.

Where a trial is commenced with a jury, the Judge may, even fter the evidence is taken, or during its progress, dispense with, and ischarge the jury, and try the case himself: Marks v. Windsor, 17 nt. 719; see also Denmark v. McConaghy, 26 C. P. 563; Adair v. ode, 9 Ont. 15; but semble, where he refuses to try a case with a ury he should proceed to try it himself, and semble, he has no juris- iction to strike out the jury notice and transfer the case to a non- ury sittings for trial: Bank of Toronto v. Keystone Fire Insurance o., 18 P. R. 113. Judge at trial.

The Master in Chambers and officers having like jurisdiction can nly strike out a jury notice for irregularity, e.g., where not proper nder sec. 55, or where delivered after the time allowed by section 56 or doing so; see Rule 208, clause 12. Before that Rule the Master in hambers had the same jurisdiction as a Judge: see Baldwin v. Mc- uire, 15 P. R. 305; Bristol, etc. v. Taylor, 15 P. R. 310; Lauder v. idmon, 16 P. R. 74. Jurisdiction of Judge and judicial officers.

In cases in County Courts an order made by the Judge before trial, s to trial of the action with, or without a jury, is not appealable nder sec. 40 of The County Courts Act (R. S. O. c. 59): McPherson v. ilson, 13 P. R. 339. County Court cases.

In Pickup v. Kincaid, 11 P. R. 445, an action to recover fees for edical attendance, where nothing was in dispute but the amount, t was held to be a proper case to strike out a jury notice with a view o having an account directed at once. Examples.

Semble, mere complexity of facts would not, alone, be sufficient eason for dispensing with a jury, in a Common Law action: Bank of B. N. A. v. Eddy, 9 P. R. 468.

Under ordinary circumstances an action for infringement of a atent should not be tried by a jury: Vermilyea v. Guthrie, 9 P. R. 67; and here there is an issue involving a scientific investigation, hat may be a good reason for dispensing with a jury: Swyny v. North Eastern Ry. Co., 100 L. T. Jour. 390. Patent cases.

It has been said that actions against physicians and surgeons for malpractice, should now, as a general rule, be tried without a jury: Town v. Archer, 4 O. L. R. 383; Hodgins v. Banting, 12 O. L. R. 117; Gerbracht v. Bingham, 4 O. W. N. 117; and an action on a fire policy in which the defendants set up fraud was tried without a jury: Whyte v. British America Assurance Co., 38 C. L. J. 165. Actions for malpractice.

Cases of action may in a proper case be severed, that some proper for a trial by jury may be so tried: see Temperance Colonization Co. v. Evans, 12 P. R. 48, and McMahon v. Lavery, 12 P. R. 62; but such separate trial by jury should not be ordered where there is but one cause of action: Farran v. Hunter, 12 P. R. 324. Separate trials.

Rules 258 and 259, provide the mode of trial where equitable issues, or both legal and equitable issues, are raised: see notes to those Rules. Legal and equitable issues.

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Where a case had been tried and the jury disagreed, a motion was made to dispense with a jury, as a jury would be likely to disagree again, but is was held that the case having been considered proper for a trial by jury, it should be so tried, subject to the directions of the Judge at the trial: *Bank of B. N. A. v. Eddy*, 3 C. L. T. 499; see 19 C. L. J. 158; but in *Adomson v. Adamson*, 12 P. R. 469, a second trial was directed to be without a jury, the case being one where there was no *primâ facie* right to a jury; but in *Reifenstein v. Day*, 28 O. L. R. 491, that course was considered improper in a case properly triable by a jury.

In *McGunighal v. Grand Trunk Ry.*, 6 P. R. 209, after the jury disagreed, and a second trial had been had, but the verdict had been set aside as against evidence, an order was made for trial by a Judge.

Where at the trial both parties treated an issue as one which should be tried by the Judge, and not by the jury, and the plaintiffs obtained a rule *nisi* for a new trial on the ground that the Judge had decided the issue wrongly, they were not allowed to amend the rule so as to state that the Judge should have left the issue to the jury: *Australian, etc., Co. v. Smith*, 14 App. Cas. 318.

As to the effect of withdrawing a juror: see *Thomas v. Exeter, Flying Post*, 18 Q. B. D. 882.

Equity cases. What actions prima facie to be tried without a jury.

Equity Cases.—A change in the practice was made by sub-sec. (4) in 1887. The words "prior to The Administration of Justice Act of 1873," were in the Revision of the Statutes, 1887, substituted for the words "at the time of the passing of this (the J. A. 1881) Act," in sec. 45, of 44 Vict. c. 5. The effect of this alteration was to add to the cases which must be tried without a jury those actions which by the A. J. Act, 1873, were made cognizable by a Court of Law as well as by the Court of Chancery, *e.g.*, actions for purely money demands, though the right to recover was an equitable one (see R. S. O. 1877, c. 49, s. 4), and actions where an injunction, or similar equitable relief is required, though otherwise cognizable by a Court of Law: see *Toronto & Hamilton Navigation Co. v. Silcox*, 12 P. R. 622, and R. S. O. 1877, c. 49, s. 8.

In determining whether an action is one over the subject of which the Court of Chancery had exclusive jurisdiction, the test is not whether the plaintiff's end might have been substantially obtained by some proceeding cognizable in a Court of Law, but whether or not the specific relief asked for in the statement of claim is of a kind which on the 29th March, 1873, could only have been obtained in the Court of Chancery: see *Powson v. Merchants' Bank*, 11 P. R. 72; *Mosse v. Mosse*, 11 P. R. 81, reversing *S. C.*, 10 P. R. 574; *Herring v. Brooks*, 11 P. R. 15. If the cause of action is an equitable one, the circumstances that the issues or questions of fact to be tried are matters which juries are accustomed to consider, in actions differently framed, will not entitle a party to a trial by jury: *Feran v. Hunter*, 12 P. R. 324.

An action to enforce a charge, and also for a personal judgment for the recovery of the sum charged, was held to be not an action for relief, which prior to 29th March, 1873, could only have been obtained in the Court of Chancery: *Sawyer v. Robertson*, 19 P. R. 172; so also an action to restrain a nuisance, and for damages: *Shontz v. Berlin*, 4 O. L. R. 730; *sed vide, St. Margaret's v. Stephens, infra*, p. 219.

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The following have been held to be cases which could have been only brought in Chancery: an action for the rectification of a lease: *Gowanlock* v. *Mann*, 9 P. R. 270; to set aside a conveyance: *Thurlow* v. *Beck*, 9 P. R. 268; *Hall* v. *McPherson*, 45 C. L. J. 357; to declare void the delivery of certain notes: *Pawson* v. *Merchants' Bank*, *supra*, p. 218; to establish a will: *Re Lewis*, 11 P. R. 107; *Jarrett* v. *Campbell*, 26 O. L. R. 83; to obtain a declaration of trust: *Roscoe* v. *McConnell*, 4 O. W. N. 126. Examples.

An action by ratepayers against members of a municipal council for misconduct causing loss to the municipality is an action against trustees, and formerly within the exclusive jurisdiction of Chancery: *Morrow* v. *Connor*, 11 P. R. 423; so also an action for an injunction, and to establish a will, and for an account: *McGill* v. *McDonell*, 14 P. R. 483; and an action for an injunction to abate a nuisance and for damages: *Lauder* v. *Didmon*, 16 P. R. 74; *St. Margaret's* v. *Stephens*, 33 C. L. J. 464; see 29 Ont. 195; *sed vide*, *Shantz* v. *Berlin*, *supra*, p. 218. Action by ratepayers against municipality.

An action for specific performance of a covenant to repair, or for damages, was held to be a Common Law action, as specific performance of such a covenant could not be decreed in Chancery: *Bingham* v. *Warner*, 10 P. R. 621; but generally where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, move to strike out the pleading (see *Rule* 124), instead of attacking it indirectly by asking to have a jury: *Fraser* v. *Johnston*, 12 P. R. 113. Where equitable relief not grantable.

Formerly in cases within the former exclusive jurisdiction of the Court of Chancery, a trial by jury might be had. *Primâ facie* the trial is to be without a jury. It might, however, be "otherwise ordered" on special application. The power to order a jury existed under the Chancery Act (R. S. O. 1877, c. 40, s. 99). Applications under that section could only be made to the Court; the Master in Chambers had no jurisdiction: *Thurlow* v. *Beck*, 9 P. R. 268. Under the present section it seems doubtful whether the power to order a jury in such cases any longer exists except in the Judge at the trial under sec. 55 (2). If there be any jurisdiction in the Court or a Judge to make such an order: *semble*, the application should be made in the same way as an application under sub-sec. 1, that is, to the Court or a Judge thereof, and should not be made to the Master in Chambers or a local Judge, as the discretion to be exercised on the motion is similar to that vested in the Judge at the trial under section 55 (2); see, however, *Bennett* v. *Trepent*, 25 C. P. 443. When jury can be obtained on special motion?

A jury was refused in *Re Lewis*, 11 P. R. 107, a suit to establish a will; and see *McGill* v. *McDonell*, 14 P. R. 483.

It was granted in an action by a mine owner against another mine owner for an account and for an injunction, in which a view was said to be necessary: *Jenkins* v. *Bushby*, 1891, 1 Ch. 484; 64 L. T. 213; and also in a partnership action in which allegations of fraud and misconduct were made against the defendant as grounds for a dissolution: *Ehrmann* v. *Ehrmann*, 72 L. T. 352, 548. Case where view necessary.

The fact that a counterclaim is filed in respect of a claim properly triable by a jury, does not entitle the defendant to have the action so tried, if otherwise triable without a jury: *Kinnaird* v. *Field*, 1905, 2 Ch. 361. Defendant filing counterclaim.

As to where there are both legal and equitable issues: see *Rule* 259 and notes.

Secs. 57-60.

Effect of agreement, etc., as to place of trial.

57.—(1) Subject to subsection 2, no proviso, condition, stipulation, agreement or statement which provides for the place of trial of any action, matter or other proceeding shall be of any force or effect.

Motion by defendants to change venue.

(2) Subsection 1 shall not apply or be available unless and until the defendant moves to change the place of trial. 3-4 Geo. V. c. 19, s. 57.

This section applies to cases where, by contract, the parties have agreed that actions in respect of the contract may be brought in some specified county. The effect of it appears to be that if the plaintiff lay the venue at the place agreed on, the defendant may, nevertheless, move to change it, notwithstanding the contract; and the venue will not be changed to the place agreed on if the preponderance of convenience is in favour of the place at which it is laid: see *Bell* v. *Goodison Thresher Co.*, 12 O. L. R. 611.

JURY TRIALS.

Agreement of ten jurors in verdict or answers to be sufficient.

58.—(1) It shall be sufficient if ten of the jurors agree, and a verdict rendered or question answered by ten jurors shall have the same effect as a verdict or answer given by twelve jurors.

Special juries.

(2) This section shall apply to special juries.

Not necessary for same ten jurors to agree to all answers.

(3) Where more questions than one are submitted, it shall not be necessary that the same ten jurors shall agree to every answer. 3-4 Geo. V. c. 19, s. 58.

This sub-section is passed to meet the question raised, but not decided, in *Zuvelt* v. *Can. Pac. Ry.*, 23 O. L. R. 602.

Death or illness of juror or discovery interest during trial.

59. If at the trial of an action or issue or assessment of damages, a juror dies or becomes incapacitated from any cause from continuing to sit or act on the jury, or if it is discovered that a juror has an interest in the result of the proceeding, or is a relative within the degree of first cousin of any of the parties the judge may discharge such juror, and may direct that the trial or assessment shall proceed on such terms as he deems just with eleven jurors, and in such case ten jurors may give the verdict or answer the questions submitted to the jury. 3-4 Geo. V. c. 19, s. 59.

General or special verdict may be given unless Judge otherwise directs.

60.—(1) In the absence of a direction to the contrary of the judge, a jury may give a general or special verdict, but shall give a special verdict if he so directs and

hall not give a general verdict if directed by him not to Sec. 61.
o so.

(2) This section shall not apply to actions of libel. Not to apply to actions of libel.
-4 Geo. V. c. 19, s. 60.

A "general verdict" is one whereby the jur" ad the issue in vour of one party or the other, generally, i.e., t plaintiff or de- ndant, as the case may be; and where there are veral issues, if me be found in favour of one side and some in favour of the other, is would still be a "general verdict": Co. Lit. 226: *Davies* v. ounder, 1 Sc. N. R. 328; Chitty's Arch. Pr. (14th ed.) 655. A "special rdict," on the other hand, is one whereby the jury simply find the cts, leaving it to the Court on applying the law to the facts so und, to determine for which of the parties a judgment should be ven: Co. Lit. 227 b., 228; Chitty's Arch. Pr. (14th ed.) 655.

Formerly a jury might in all cases give a general verdict: *Mayor f Devizes* v. *Clark*, 3 A. & E. 506; but this and the following sec- on have restricted this right, and the jury may in certain cases be equired to answer specific questions: sec. 61.

Where a jury is entitled to return, and do return, a general verdict, is not competent for the Judge to put a special question to them nd to give judgment in accordance with their answer to it, contrary o their general verdict: *Arnold* v. *Jeffreys*, 110 L. T. 25o.

61.—(1) Upon a trial by jury, except in an action for Except in actions of libel, the jury may be directed to answer questions.
ibel, the judge, instead of directing the jury to give ither a general or a special verdict, may direct the jury o answer any questions of fact stated to them by him; nd the jury shall answer such questions, and shall not ive any verdict.

(2) Judgment may be directed to be entered on the Judgment may be entered on answers.
nswers to such questions. 3-4 Geo. V. c. 19, s. 61.

This section has made an important change. Formerly not only ctions for libel, but actions for slander, criminal conversation, seduc- ion, malicious arrest, malicious prosecution or false imprisonment, ere excepted from the cases in which the jury could be directed to nswer questions: see Jud. Act (1897) c. 51, s. 112. Now in all actions xcept for libel, the jury may be required to answer questions.

It was considered by Anglin, J., that in the excepted class of ctions it was not competent for a Judge to require a jury to answer pecific questions at all: *Still* v. *Hastings*, 13 O. L. R. 322; 14 O. L. R. 38; but see *per* Middleton, J., *Harris* v. *Bickerton*, 24 O. L. R. 41, and s to whether by consent of parties questions may be put: see *Go cer* . *Lusse*, 16 Ont. 88.

For cases where the section has been applied and as to the duty of he Judge upon the questions being answered: see *Canada Central* v. *cLaren*, 8 Ont. App. 564; *St. Denis* v. *Baxter*, 13 Ont. 41; 15 Ont pp. 387.

It is imperative upon the jury to answer the questions submitted o them, and they may not give a general verdict instead, unless the

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Judge in his discretion receives it: *Furlong* v. *Carroll*, 7 Ont. App. 145, but to enable the jury to give such general verdict instead of answering the questions, the Judge's charge must give them such instructions as to the law, that they can properly give a general verdict instead of merely answering the questions: *Reid* v. *Barnes*, 25 Ont. 223, and see *Gowganda-Queen Mines* v. *Borckh*, 24 O. L. R. 293; 46 S. C. R. 645. Leave to appeal to P. C. refused: 27 O. L. R. 643.

In libel cases, this section prevents a judgment from being entered upon answers to questions submitted to the jury; a general verdict must be given by the jury in such cases, and a finding, in answer to a question, of a certain amount of damages is not equivalent to a general verdict: *Gordon* v. *Denison*, 22 Ont. App. 315 (an action for false imprisonment).

A Judge is not bound to submit questions in writing to the jury: *Lett* v. *St. Lawrence*, 1 Ont. 545. See also *Bolfour* v. *Toronto Railway Co.*, 5 O. L. R. 735; 32 S. C. R. 239; where Armour, C.J.O. said that questions should be in writing; but Osler, J.A., said that while it is convenient and no doubt the usual course that questions submitted to the jury should be in writing, the law does not so require; and a judge's refusal to submit any particular question is not ground for a new trial: *Turner* v. *Burns*, 24 Ont. 28.

Failure of jury to answer questions.

When the jury fail to answer questions, or their answers are conflicting, so that no judgment can be awarded for either party on their finding, or in case the Judge at the trial refuses to give judgment for either party, the action may, unless his decision is appealed from, be carried down for trial again, as upon a disagreement of the jury: see Jud. Act, s. 30 and *Rule* 501. In *Nettleton* v. *Prescott*, 16 O. L. R. 538, a Divisional Court rejected an answer of a jury to a question as being insensible and at unreasonable variance with their answers to other questions.

In *Spencer* v. *Alaska, etc.*, 35 S. C. R. 362, it was said by Nesbitt, J., that in an action founded upon negligence it is advisable that specific questions be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence. The jury should be asked to find specifically what was the negligence which caused the injury: *Mader* v. *Hotifax Electric Tramway Co.*, 37 S. C. R. 94.

ACTIONS FOR MALICIOUS PROSECUTION.

Question of reasonable and probable cause to be decided by judge.

62. In actions for malicious prosecution, the judge shall decide all questions both of law and fact necessary for determining whether or not there was reasonable and probable cause for the prosecution. 3-4 Geo. V. c. 19, s. 62.

This section appears to work a legislative reversal of *Harris* v. *Bickerton*, 24 O. L. R. 41, where it was held that any disputed fact on which reasonable and probable cause was based, must be found by the jury. This section now leaves both the law and fact on such questions to the decision of the Court.

In such an action the plaintiff must establish not only malice, but the absence of reasonable and probable cause. Notwithstanding this section, the question of malice would appear to be distinct from that

"reasonable and probable cause," and, therefore, still a question to be submitted to the jury: *Harris* v. *Bickerton*, *supra*, p. 222. Sec. 63.

Proof that the charge was made and failed is not *per se* proof of malice, or want of reasonable and probable cause: *Corea* v. *Peiris*, 1909, A. C. 549; 100 L. T. 790; *Walters* v. *Smith*, 136 L. T. J. 169.

Where the defendant acts on the advice of counsel after a full disclosure of the facts so far as known to the defendant, that of itself is "reasonable and probable cause": *Longdon* v. *Bilsky*, 22 O. L. R. 4; and see *Ford* v. *Canadian Express Co.*, 21 O. L. R. 585; *Pitchet* v. *Fulton*, 22 O. L. R. 40; 23 O. L. R. 260.

The section does not apply to actions for false imprisonment, as to which: see *Walters* v. *Smith*, *supra*.

QUASHING CONVICTIONS, ETC.

Procedure substituted for certiorari, etc.

63.—(1) Where it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by motion in the first instance instead of by *certiorari*, rule or order *nisi*.

Service of notice of motion.

(2) Notice of the motion shall be served at least six days before the return day thereof upon the magistrate making the conviction or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant, if any, and upon the clerk of the peace if the proceedings have been returned to his office, and the notice shall specify the objections intended to be raised.

Indorsement on notice of motion.

(3) Upon the notice of motion shall be indorsed a copy of subsection 4 and a notice in the following form, addressed to the magistrate, coroner or clerk of the peace, as the case may be:

Form.

"You are hereby required forthwith after service hereof to return to the Central Office at Osgoode Hall, Toronto, the conviction (*or as the case may be*) herein referred to, together with the information and evidence, if any, and all things touching the matter, as fully and entirely as they remain in your custody, together with this notice.

"Dated

"To *A. B.*

"Magistrate (*or as the case may be*).

"*C. D.*,

"Solicitor for the Applicant."

The notice does not indicate that it is to be entitled in any cause or matter, but it would seem advisable that it should be entitled in the proceeding in which the conviction, warrant, or inquisition which is sought to be quashed was made. The same remark applies to the

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notice of motion, which should also be entitled "In the Supreme Court."

Return by Magistrate, etc.

(4) Upon receiving the notice so indorsed, the magistrate, coroner or clerk of the peace shall forthwith return to the Central Office, the conviction, order, warrant or inquisition, and the information and evidence, if any, and all things touching the matter, and the notice served upon him with a certificate indorsed upon it in the following form:

Form.

Pursuant to the within notice I herewith return to this Honourable Court the following papers and documents:—

"1. The conviction (*or as the case may be*);

"2. The information and the warrant issued thereon;

"3. The evidence taken at the hearing;

"4. (*Any other papers or documents touching the matter*).

"And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in this notice of motion."

Effect of certificate.

(5) The certificate shall have the same effect as a return to a writ of *certiorari* or to an order under the Rules.

Notice returnable before Judge in Chambers.

(6) The notice shall be returnable before a Judge of the High Court Division sitting in Chambers.

(7) The motion shall not be entertained—

Limitation of time for proceedings.

(*a*) unless the return day thereof is within six months after the conviction, order, warrant or inquisition; and

Security to be given.

(*b*) the applicant is shown to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a Magistrate of the county within which the conviction, order or inquisition was made or the warrant was issued, or before a judge of the county court of that county or before a Judge of the High Court Division, conditioned that the applicant will prosecute the application at his own costs and charges without any wilful or affected delay and that he will pay to the person in whose favour the conviction, order or other proceeding is affirmed his full costs and

charges to be taxed according to the course of the Court in case the conviction, order or other proceeding is affirmed, or has paid into Court the like sum as security that he will do so. Sec. 64.

The Crown is not bound by this section, and therefore on an application by the Crown to quash a conviction, no deposit or security is required: *Re Martin & Garlow*, 20 O. L. R. 295.

(8) The recognizance with an affidavit of its due execution shall be filed with the Clerk in Chambers. Recognizance to be filed.

Where money is paid into Court as security, *semble*, the certificate of the Accountant should be filed with the Clerk in Chambers.

(9) The Judge shall have all the powers of the Court in the like matters and may order the production of papers and documents as he may deem necessary. Powers of Judge. Appeal.

(10) No appeal from the order of the Judge shall lie unless leave is granted by a Judge of the High Court Division. 3-4 Geo. V. c. 19, s. 63. No appeal without leave.

The motion must be returnable before a Judge of the High Court Division, the jurisdiction of the Master in Chambers and officers having the like jurisdiction is therefore excluded: *Rule* 208 (13).

The effect of this section is to abolish the writ of *certiorari* for the purpose of removing a conviction for breach of Provincial laws. This change was originally effected by the former C. RR. 1289-1298, subsequently superseded by 8 Edw. VII., c. 34, on which this section is based.

Similar provisions are made by C. RR. 1279-1288 in respect of convictions under *The Criminal Code* which are still in force: see *supra*, p. 140.

This section is only applicable in cases where *certiorari* formerly lay: *Rex* v. *Cook*, 18 O. L. R. 415; 14 C. C. C. 495; *Rex* v. *Nelson*, 18 O. L. R. 484; *Rex* v. *Renaud*, 18 O. L. R. 420; 15 C. C. C. 246.

An acquittal will not as a rule be quashed: *Rex* v. *Simpson*, 1914, K. B. 66. The quashing of a conviction is not pleadable as a bar to fresh proceedings in reference to the same alleged offence: see *Ib.*

REFERENCES TO OFFICIALS AND SPECIAL REFEREES.

64.—(1) Subject to the Rules and to any right to have particular cases tried by a jury, a Judge of the High Court Division may refer any question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties. Reference for inquiry and report.

(2) Subsection 1 shall not, unless with the consent of His Majesty, authorize the reference to an official referee Where Crown interested.

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of an action to which His Majesty is a party or of any question or issue therein. 3-4 Geo. V. c. 19, s. 64.

"**A Judge of the High Court Division.**"—The Master in Chambers, Local Judges, and Local Masters, have no jurisdiction to make an order under this section: *Union Loan Co. v. Boomer*, 10 P. R. 630; *Bank of Commerce v. Jennings*, 7 C. L. T. 170: see *Rule* 208 (13), except, as to a Local Judge, where he has jurisdiction under *Rule* 210.

As to who are Official Referees: see ss. 76 (1) (o), *infra*, p. 265; and s. 86 (1), *infra*, p. 274.

See also *Rule* 65, which provides further for references to take accounts or make inquiries at any stage of proceedings.

As to the employment of experts: see *Rule* 268.

Except by consent, the Court has no power to order a reference under the above section to any person other than an Official Referee, or the Judge of a County Court: *Fewster v. Raleigh*, 14 P. R. 429.

Scope of section.

"**Inquiry and Report.**"—In view of other provisions of the Act, these words probably have a slightly different signification in this section from that given to them in the English Act. The inquiry intended is just such a judicial inquiry as a Master would make in the case, to ascertain, as the delegate of the Court, the rights of the parties in regard to the questions referred: see *Rule* 400; and the report is to be similar to that of a Master and is to have the same effect given to it when filed: see sec. 67, *infra*, and notes.

Under Ont. Act.

What may be referred.

"**Any Question Arising.**"—Under this section all that can be referred is a question or questions in the action, and must be a question or questions which must necessarily be decided in the action, not such as it may prove unnecessary to decide: *Weed v. Ward*, 40 Ch. D. 555. The whole action, facts and law, cannot be referred: *Longman v. East*, 3 C. P. D. 142; *Braginton v. Yates*, W. N. 1880, 150; *Luney v. Essery*, 10 P. R. 285; *Re Queen City Refining Co.*, 10 P. R. 415; nor the whole of the issues in an action: *Clarry v. B. A. Ass. Co.*, 12 P. R. 357; but the whole action may be referred for trial by an official referee under sec. 65 *infra*.

A question of liability, upon which the right to an account depends, should be tried in the usual way: *Ward v. Hall*, W. N. 1880, 69, *per* Cotton, L.J., *Clow v. Harper*, 3 Ex. D. 198; *Fewster v. Raleigh*, 14 P. R. 429; more especially if it be a proper question for a jury: *Young v. Prittie*, Globe, 19th April, 1882. Where a question is directly raised by the pleadings, and is distinctly presented to the Court for its decision, and evidence has been taken upon it, it should not be referred, but should be disposed of by the Court: *International Bridge Co. v. Canada Southern Ry. Co.*, 7 Ont. App. 266; *Smith v. Armitage*, 24 Ch. D. 727.

Amount of damages.

The question of the amount of damages, as a question in the action, may be referred, in the discretion of the trial Judge, but the exercise of his discretion is subject to review: *Ratté v. Booth*, 16 P. R. 185. The onus of shewing that the discretion was wrongly exercised is on the party objecting: *Ib.*; and generally speaking a reference as to damages ought only to be ordered in cases where the inquiry involves questions of detail which it would be wasting the time of the Court to investigate: *Wallis v. Sayers*, 34 Sol. Jour. 545, *per* Bowen, L.J.

For form of order of reference under this section: see No. 74 H. & L. Forms, No. 943. it should express on its face whether it is an order under this section for inquiry and report, or under sec. 65 for trial: *Cumming* v. *Low*, 2 Ont. 505; and see *White* v. *Peto*, W. N. 1886, 165; *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155. Sec. 84. Form of order.

Further directions need not be expressly reserved, but a motion for judgment upon the report may be made after it has become confirmed, which is in effect the former motion for decree on further directions.

Procedure before Referee.—This section contemplates an inquiry by examination of witnesses and not by the Referee's personal observation only: *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155. Procedure on reference.

The practice and procedure generally before a Referee is the same as before a Master: see *Rule* 400, also *Rules* 277, 402-459.

Eng. Rule 474 confers power on the Referee to direct judgment to be entered, and gives authority with respect to discovery and production: see *Serle* v. *Fardell*, 44 Ch. D. 299; *Clark* v. *Sonnenschein*, 25 Q. B. D. 226; *Hayward* v. *Mut. Reserve*, 1891, 2 Q. B. 236. The *Ont. Jud. Act* denies the power to direct judgment to be entered, and no express provision is made in regard to discovery.

Ther was formerly doubt as to whether a Referee had power to issue a direction for production like a Master, or whether an order in *præcipe* might be obtained: see *Hilderbroom* v. *McDonald*, 8 P. R. 89. Discovery.

Now, however, it is made clear by *Rule* 400 that the practice before a Referee is to be as nearly as possible the same as before a Master. If the order of reference is made after discovery and production has been obtained in the action in the ordinary way under *Rule* 327, that may suffice; but if further discovery or production is required for the purpose of the reference, it is obtainable by the order or direction of the Referee: see *Rules* 349, 411, and *Brooks* v. *Georgian Bay, &c.*, 16 P. R. 511; *Garland* v. *Clarkson*, 9 O. L. R. 281. Where the parties directed to make discovery are present or represented by their solicitor, no formal order is necessary, and the direction entered in the Master's book is sufficient: *Rule* 421.

Where a reference is made for trial, the Referee has power to direct such discovery as might be obtained in an action before trial, including discovery, under *Rule* 334, from a person for whose immediate benefit the action is brought or defended: *Garland* v. *Clarkson*, 9 O. L. R. 281.

The Referee, whether the reference is for report (*Jud. Act*, s. 64); or trial (*Ib.*, s. 65), has power, subject to the control of the Court, to fix a peremptory appointment for the hearing, and, on default of either party, to proceed in his absence: *Wenlock* v. *River Dee Co.*, 32 W. R. 220; 49 L. T. 617. Hearing.

Report.—The report is subject to the same rules, and should be drawn in the same form, as the report of a Master, as to which: see notes to *Rule* 424. Report of Referee.

The Master, if he sufficiently follows the directions of the judgment, is not obliged to give his reasons for, or to enter into detailed explanations of his report: *Booth* v. *Ratté*, 21 S. C. R. 637; and see

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Dunkirk, etc. v. *Lever*, 9 Ch. D. 20, under the English practice. Evidence should not he steted: *Longman* v. *East*, 3 C. P. D. 149; *Sovereign* v. *Sovereign*, 15 Gr. 559.

A Referee may, like a Master, report specielly any circumstances which he deems necessary for the informetion of the Court, end he should do so as to any metter affecting costs: eee *Hayes* v. *Hayes*, 29 Gr. 90.

When the conduct of en erhitrator would invelidate his report the like conduct on the part of e Referee would be fatal to his report: see *Conmee* v. *Canadian Pacific Ry. Co.*, 16 Ont. 639.

The Referee should himeelf draw his report and eettle it in th presence of both parties: *Knarr* v. *Bricker*, 16 P. R. 363, where it wee held to he improper for the Referee to delegate the drewing of the report to the eolicitor for the successful perty.

As to 'ling the report, see sec. 67, *infra*, and *Rules* 429, 502.

Costs.

Where en ection is referred to a Referee for trial under *The Jud. Act*, s. 65, he would seem to have power to determine hy whom the costs of the action end reference should he paid: eee *Patten* v. *West of England, etc.*, 1894, 2 Q. B. 159, and note *infra*, p. 232; hut peyment thereof cen only he enforced under a judgment or order directing payment which is made hy e Judge.

As to the costs of references and appeels: see *McCullough* v. *Clemow*, 26 Ont. 467.

Judgment on Referee's report.

Judgment on Report.—A report under this section, under *Rule* 502, hecomee absolute at the expiration of 14 deye from the filing unlese duly appealed from, or erroneors on its fece. Judgment cannot he signed upon it, however, without a motion for judgment, which is simliar to the former motion for decree on further directione, end the Referee cannot direct judgment to be entered upon his report: see sec. 67. The Eng. practice is different: see Eng. (1883), R. 474; *Clark* v. *Sonnenschein*, 25 Q. B. D. 226, 464.

Two clear days' notice of e motion for judgment is sufficient: *Re Brook*, 45 L. T. 172; 29 W. R. 891; 17 C. L. J. 391, and *Rule* 215.

Appeal from Report.—See sec. 67, *infra*, and *Rules* 502-504 and notes.

The appeal from a report lies to a Judge in the Weekly Court, upon eeven deys' notice: *Rule* 503, and see notes to s. 65 *infra*.

65. In an action,

Power to refer in certain cases.

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

(*b*) where a prolonged examination of documents or a scientific or local investigation is required which cannot in the opinion of the

Court or a Judge conveniently be made before a jury or conducted by the Court directly; or, Sec. 65.

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

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

"A Judge of the High Court Division."—The Master in Chambers, Local Judges, and Local Masters, have no jurisdiction to order a reference under this section: *White* v. *Beemer*, 10 P. R. 531; *Union Loan* v. *Boomer*, 10 P. R. 630; *Bank of Commerce* v. *Jennings*, 7 C. L. T. 170; see *Rule* 208 (13); except as to a Local Judge where he has jurisdiction under *Rule* 210.

But where the Master in Chambers made an order of reference to a Judge of a District Court, and a report was made and judgment subsequently pronounced thereon by a Judge of the High Court, a Divisional Court refused to entertain the question whether the Master in Chambers had jurisdiction to make the order, there being no appeal therefrom: *Fraser* v. *Buchanan*, 25 Ont. 1

Special Referee.—A reference to a special Referee under secs. 64 or 65 can only be ordered on consent: see *London & Lancashire F. Ins. Co.* v. *British American Ass. Co.*, 52 L. T. 385; 54 L. J. Q. B. 302, where the extra costs of a trial before an Official Referee instead of a special Referee, to whose appointment defendants refused to consent, were reserved.

As to Official Referees: see ss. 76 (1), 86.

Under above sec. 65, the Court, or a Judge at *nisi prius*, or at a Circuit sitting of the High Court: *Hoch* v. *Boor*, W. N. 1880, 93; 43 L. T. 425; 49 L. J. Q. B. 665, may send, where the parties have consented, the whole action (though this was not formerly authorized: see *Longman* v. *East*, 3 C. P. D. 142; *Braginton* v. *Yates*, W. N. 1880, 150; *Clarry* v. *B. A. Ass. Co.*, 12 P. R. 357), or any question or issue of fact, or question of account, to an Official Referee for trial. When an order is made without consent, the Court can only send such questions as are brought within the terms of clauses (*b*) and (*c*), that is, any issue requiring prolonged examination of documents or accounts, etc., which in the opinion of the Judge cannot conveniently be made before a jury or conducted by the Court itself: *Longman* v. *East*; *Hoch* v. *Boor*, *supra*, or where the question in dispute consists wholly, or in part, of matters of account. But if a case is once brought within clauses (*b*) and (*c*), or either of them, the Court may refer not only the questions of account, but the whole cause or matter (see last clause of sec. 65); or all issues of fact in the cause: *Ward* v. *Pilley*, 5 Q. B. D. 427, 431; *Miller* v. *Tilling*, 9 Q. B. D. 738; *Knight* v. *Coales*, 19 Q. B. D. 296; though the question in dispute does not consist entirely of matters of account: *Martin* v. *Fife*, 31 W. R. 840; 49 L. T. 107; *Goodwin* v. *Budden*, 42 L. T. What may be referred.

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536; as where issues of fact were so mixed up with matters of account, that they could not practically be dissevered: *Longman* v. *East*, 3 C. P. D. 150; *Ward* v. *Hall*, W. N. 1880, 69. It is probable, however, that where there is a substantial question of liability, upon which the taking of accounts depends, to be determined, it will first be determined in the ordinary way: *Clow* v. *Horper*, 3 Ex. D. 198; *Word* v. *Holl*, W. N. 1880, 69; *Weed* v. *Word*, 40 Ch. D. 665; and other cases under s. 54, *supra*, p. 226.

"Prolonged" means prolonged if had before a jury, not if had before a skilled accountant: *Word* v. *Pilley*, 5 Q. B. D. 428; and the documents are such as it would be necessary to inquire into, in order to leave the question properly to the jury, not such as require examination to determine a question of legal right: *Ormerod* v. *Todmorden*, 8 Q. B. D. 664, 677. Reading a lot of letters is not a prolonged examination of documents: *Green's Trustee* v. *Borrett*, W. N. 1875, 204.

The expression "question of account," will receive a large construction: *Re Leigh*, 3 Ch. D. 292; and any question of account which might have been compulsorily referred under the C. L. P. Act (see R. S. O. 1877, c. 60, ss. 189 and 195), may be compulsorily referred under this section: *Word* v. *Pilley*, 6 Q. B. D. 427.

In a case involving a critical knowledge of pictures, the Court of Appeal refused to send the case for trial before a Referee against defendant's will, as the fortune and character of the defendant were involved, and he was entitled to have the matters of fraud charged tried in a public Court: *Leigh* v. *Brooks*, 5 Ch. D. 592. But even where there are questions of fraud there is no inherent right to a trial by jury, and in such a case if the issues involve a prolonged examination of documents or accounts they may be compulsorily referred: *Hoch v. Boor*, W. N. 1880, 93; 43 L. T. 425; *Socker* v. *Rogozine & Co.*, 44 L. T. 308; but see *Russell* v. *Horris*, 65 L. T. 752.

A question of damages consisting of various items in an action for injuries caused to a vessel by defendant's negligence: *Liverpool, etc., Co.* v. *London Novigotion*, W. N. 1875, 203; damages from obstructing a river by casting in sawdust and rubbish: *Rotté* v. *Booth*, 16 P. R. 185; issues of fact in a patent case requiring "scientific investigation"; *Saxby* v. *Gloucester Wagon Co.*, W. N. 1880, 28; and damages in an action for specific performance: *Stofford* v. *Coxon*, W. N. 1877, 138, were ordered to be assessed by a Referee.

An order made under this section by a Judge in his discretion is appealable: *Ormerod* v. *Todmorden, etc.*, 8 Q. B. D. 664; *Hoch* v. *Boor*, W. N. 1880, 93; 43 L. T. 425; *Ratté* v. *Booth*, 16 P. R. 185. But as a rule a Court of Appeal is disinclined to interfere with the exercise of a discretion: *Saxby* v. *Gloucester Wagon Co.*, W. N. 1880, 28.

Order.

For form of order: see No. 75; H. & L. Forms, No. 944. It should, as intimated in *Longman* v. *East*, 3 C. P. D. 163, point out that it is an order under this section for issues to be tried, and should state whether all the issues are to be tried, or, if only certain issues, it should state by some sufficient description what those issues are: *Cumming* v. *Low*, 2 Ont. 505.

Special referee to be an officer of the Court.

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

(2) The remuneration to be paid to a special referee may be determined by a Judge of the High Court Division. Sec. 67. Remuneration of special referee.

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

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

Where the Referee apportions the fees payable to him between the plaintiff and defendant according to the time occupied by each in the reference, and the plaintiff pays his proportion, the Referee cannot refuse to issue to the plaintiff the report until the fees payable by defendant are paid: *Brooks* v. *Georgian Bay, etc., Co.*, 17 P. R. 34.

Procedure before Referee.—For the procedure before the Referee: see *Rules* 400, *et seq.*

Where a Referee refused to postpone the trial of a matter referred to him, it was held that an appeal from that decision might be made to a Judge in Chambers: see *Richard* v. *Talbot*, 38 W. R. 478. In Ontario, the course would seem to be to take out a certificate of the Referee of his decision, and appeal from it to the Court, as in the case of a Master.

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

A Referee has the same power to allow interest as a jury has: *Attorney-General* v. *Ætna Insurance Co.*, 13 P. R. 459; and see secs. 34, 35, *supra*, and notes.

Report.—The report of a Referee under this section should state his conclusions upon the issues referred, and he is not bound to give reasons for his findings: *Miller* v. *Pilling*, 9 Q. B. D. 736; see also *Longman* v. *East*, 3 C. P. D. 155; *Fawcett* v. *Winters*, 12 P. R. 232. Under *Rule* 401 the Court has power to obtain any explanation or reason as to the principles upon which the Referee has rested his conclusions: *Ib.* Report.

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For an example of scientific or local investigation by a Referee: see *Broder* v. *Saillord*, 2 Ch. D. 692.

The Referee should himself draw his report and settle it in the presence of both parties: *Knarr* v. *Bricker*, 16 P. R. 363; he should not delegate the drawing of the report to the solicitor for the successful party: *Ib.*

See also notes to *Rule* 424.

Effect of report of referee after filing.

Effect of Report of Referee.—The report of an Official or special Referee under either s. 64 or s. 66 should be filed, and notice of the filing thereof given to the other parties, and from the time of service of such notice it is subject to all the incidents of a report of a Master as regards confirmation, appealing therefrom, motions thereupon, and otherwise: see *Rule* 400. See also *Rules* 428, 502.

The report should be filed in the office in which the proceedings were commenced: see *Rules* 428, 761, 762.

Appeals from report.

Appeals from Reports.—The appeal from the report is heard and decided by a Judge sitting in the Weekly Court, and the practice to be observed upon such appeal and any further appeal to the Appellate Division is the practice observed on an appeal from the report of a Master: see *Rule* 503.

As to appeals from the Judge in Weekly Court: see sec. 26, *supra*.

Where a Referee held that there was a want of reasonable and probable cause for the defendant's proceeding criminally against the plaintiff, and it was objected that this was a finding of law and not of fact, it was held to be equivalent to a verdict for plaintiff rendered by a jury under instructions from the Judge as to what would be reasonable and probable cause: *Fowcett* v. *Winters*, 12 P. R. 232.

Time for appealing.

An appeal from a report must be brought before the expiration of 14 days from the filing thereof, and the giving notice of such filing to the opposite party, unless special leave to allow an appeal after the 14 days is obtained. See notes to *Rule* 503.

As to appeals in respect to costs: see sec. 74 (4), and notes.

Costs.—As to the costs of references and appeals: see *McCullough* v. *Clemow*, 26 Ont. 467.

Where an action was referred to a Referee for trial, and he gave the defendant the costs of the action and award, this was held to include the costs of the reference: *Potten* v. *West of England*, etc., 1894, 2 Q. B. 159.

Where an action is referred under s. 65, the Referee may find by whom the costs should be paid, but payment of them can only be enforced under a judgment or order of the Court directing payment of them. The judgment or order of reference may contain such a direction: see Form 75; H. & L. Forms, No. 944.

Judgment.—An Official Referee has no power to order judgment to be entered: *Longman* v. *East*, 3 C. P. D. 142. The report must be brought before the Court on motion for judgment, when the Court will give judgment as formerly in Chancery upon the report of a

Master: *Murphy* v. *Corry*, 12 O. L. R. 120; *Longman* v. *East*, *supra*; Secs. 68, 69.
Deacon v. *Dolby*, W. N. 1883, 25; *Miller* v. *Pilling*, 9 Q. B. D. 736;
Monro v. *Rendall*, W. N. 1878, 41; *Walker* v. *Bunkell*, 22 Ch. D. 722.
The motion is made to a Judge sitting in the Weekly Court: see *Cum-*
ming v. *Low*, *supra*, p. 230. See also s. 64, *supra*, p. 225.

Defects appearing on the face of the report such as that the report is imperfect, or in excess of jurisdiction, may be urged in opposing a motion for judgment: *Cooke* v. *Newcastle*, 10 Q. B. D. 336.

Where the judgment of reference also orders payment of what shall be found due, no motion for judgment on the report is necessary, but execution may issue on the confirmation of the report.

Transmission of evidence and exhibits.

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

The proper officer will be the officer in whose office the proceedings were commenced: see *Rules* 761 and 762.

SURETY COMPANIES.

"Surety Company."

69.—(1) In this section "Surety Company" shall mean an incorporated company empowered to give bonds by way of indemnity.

Bonds of company may be taken as security.

(2) The Lieutenant-Governor in Council may direct that the bond of any surety company named in the order in council may be given as security in all cases where security is ordered to be given by any court or by any judge or officer of any court, and in all cases where security for the costs of an appeal, or for the prosecution of the appeal, is required by any law, rule or practice.

Order in council approving of company to be published in Gazette.

(3) Every order in council made under subsection 2 shall forthwith be published in the *Ontario Gazette* and shall be laid before the Assembly within 15 days after the making thereof if the Assembly is then in session, and if it is not in session within 15 days after the opening of the next session.

Other surety or affidavit of justification not required.

(4) The bond of any surety company named in the order in council shall be sufficient without any other surety joining in the bond, and an affidavit of justification shall not be necessary.

Disallowance of bond on motion.

(5) Notwithstanding anything in this section, any judge or any officer having jurisdiction in the matter, may in his discretion disallow any such bond on a motion

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to disallow it, and upon any evidence which may be deemed sufficient. 3-4 Geo. V. c. 19, s. 69.

Sub-section 2, originally applied merely to security for costs, as now amended it applies to security for any purpose.

See *The Guarantee Companies Securities Act* (R. S. O. c. 190).

PHYSICAL EXAMINATION OF PARTIES.

Physical examination of party by medical practitioner.

70.—(1) In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the court which, or the judge, or the person who by consent of parties, or otherwise, has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury damages or compensation are sought shall submit himself to a physical examination by a duly qualified medical practitioner who is not a witness on either side and may make such order respecting the examination and the costs of it as may be deemed proper.

Medical practitioner to be selected by judge and may be a witness.

(2) The medical practitioner shall be selected by the court, judge, or person making the order, and may afterwards be a witness on the trial unless the court, judge or person before whom the action or proceeding is tried otherwise directs. 3-4 Geo. V. c. 19, s. 70.

Former C. R. 462 made a similar provision.

This section applies to all actions in which the plaintiff seeks to recover damages for personal physical injuries caused by the alleged negligence of the defendant, *e.g.*, to actions under *The Fatal Accidents Act;* and to actions against municipal bodies, or railways, or others for bodily injuries occasioned through the alleged default of their servants.

Formerly, the examination of the person of a litigant could not be ordered for the purpose of discovery: *Reily* v. *City of London*, 14 P. R. 171.

This section does not authorize the putting of questions by the medical practitioner to the person examined, who may therefore refuse to answer questions, but must allow himself to be physically examined: *Clouse* v. *Coleman*, 16 P. R. 496, 541; and he cannot be compelled to submit himself to any operation: *Rothwell* v. *Davies*, 19 T. L. R. 423; *Warnecken* v. *Moreland*, 1909, 1 K. B. 184; *Tutton* v. *Majestic*, 1909, 2 K. B. 54.

An examination under C. R. 462, after trial and verdict for plaintiff, for the purpose of shewing that the plaintiff had recovered his health, and that the verdict was excessive, was refused, it being held that an examination under that Rule was only intended for discovery before trial: *Fraser* v. *London Street Ry. Co.*, 18 P. R. 370; and see *Burns* v. *Toronto Ry.*, 13 O. L. R. 404.

Where the issues are defined by pleadings, an examination may be ordered under this section on any point pertinent to the issues: *Kippen* v. *Baldwin*, 3 O. W. N. 121; 20 O. W. R. 203. Secs. 71, 72.

TENDER OF AMENDS IN CASE OF TORTS.

71. A person who has committed a wrong giving a cause of action for the recovery of damages to the person wronged may at any time before action tender amends, and the tender shall have the same effect as a tender in an action for the recovery of a debt. 3-4 Geo. V. c. 19, s. 71. Tender of amends in case of torts.

This section is a departure from the Common Law and extends to all actions of tort, a right which was first given by statute in actions of libel, to tender amends for the alleged wrong. In libel actions the tender could only be effectively made after action brought, and in respect of libels in newspapers: see *The Libel and Slander Act* (R. S. O. c. 71), s. 9; in actions for either libel or slander a written or printed apology might be given in evidence, but only in mitigation of damages, *ib.* s. 4; but now, under the present section, a tender of amends for any wrong is to have the same effect as a tender in an action on contract, and if the jury find the tender to have been sufficient, it will not be merely evidence in mitigation of damages, but a bar to the action. Tender of amends for tort.

VESTING ORDERS.

72. Where the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may by order vest such real or personal property in such person, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and the order shall have the same effect as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in case of a chose in action, as if it had been actually assigned to such last mentioned person. 3-4 Geo. V. c. 19, s. 72. Vesting order, effect of.

The power of the Court to grant a vesting order extends to every case where it has power to order the execution of a conveyance, transfer, or assignment, of any property, real or personal; but the Court cannot order the execution of any conveyance by any person who is not before the Court and amenable to its jurisdiction, and it can therefore only vest the interests of those who are before the Court and subject to its jurisdiction: *Re Hewish*, 17 Ont. 454, as to the report of which see *Ayerst* v. *McClean*, 10 C. L. T. 341. Only interests of parties before the Court can be vested.

Where lands are sold under the judgment or order of the Court, a conveyance by the person having the legal estate is all that is

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necessary to vest the title in the purchaser. It is not necessary that parties to the suit having purely equitable interests should also join in the conveyance: *Ross* v. *Steele*, 1 Chy. Ch. 94; *Moore* v. *Shinners*, 1 Chy. Ch. 59; but persons having equitable interests who were not parties to the action would not formerly (unless represented sufficiently by persons who were parties) be bound by the judgment, and it was necessary for a purchaser, before taking either a conveyance or vesting order, to see that all persons having any interest, had been made parties, or were properly represented by persons who were parties, and were bound by the judgment; but see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 56.

Effect of vesting order.

By a vesting order, all the interest, legal and equitable, of the parties to the action, or any of them, may be vested in the person named in the order: *Re Robertson*, 22 Gr. 449; even though some of them be infants: *Donaldson* v. *Berry*, 2 Chy. Ch. 16. But where the legal estate was in the plaintiff, who became the purchaser himself at a sale under a decree, the Court refused to make a vesting order because it had no power to order him to convey to himself: *Bowen* v. *Fox*, 1 Chy. Ch. 387. In such cases the purchaser's title would be made out by the production of the judgment and the Master's report on sale duly confirmed (see *per* Maclennan, Q.C., *arguendo*, 22 Gr. 452); but this has been thought an unsatisfactory mode of proving that the equitable rights have been extinguished, and in some cases under similar circumstances vesting orders have been made, no objection thereto being raised by the parties.

Vesting order when refused.

Purchase money.

A vesting order will not be granted to a purchaser except on proof of payment of his purchase money, or on evidence entitling him to an order dispensing with its payment.

Purchaser entitled to deed.

The purchaser is entitled to a conveyance with ordinary covenants for title, and he cannot be compelled to accept a vesting order: see *Slater* v. *Fisken*, 1 Chy. Ch. 1; but he may, if he chooses, take a vesting order instead.

Evidence.

In *Slater* v. *Fisken*, *supra*, it was held that a purchaser, before taking a vesting order, was entitled to proof that the persons whose estates were sold were alive at the time of the sale; but in deducing title under a vesting order it has been held unnecessary to give this evidence because the order will be presumed to be rightly made until the contrary is shewn: *Re Morse*, 8 P. R. 475; and see *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Gnt. App. 371; *McLean* v. *Grant*, 20 Gr. 76.

Notice of motion for vesting order, to whom to be given.

Upon a sale of lands by the Court, notice to the vendor's solicitor of the application for a vesting order by the purchaser is sufficient, and notice to infants interested was held to be unnecessary: *Boulton* v. *Stegman*, 1 Chy. Ch. 199; but see *Thorne* v. *Chute*, 2 Chy. Ch. 221. So also a vesting order has been granted *ex parte* where a party to the action was ordered to convey, but could not be found after due diligence: *McNair* v. *Simpson*, 1 Chy. Ch. 299; and see *Lawrason* v. *Buckley*, 3 Chy. Ch. 270, where the costs of the motion were ordered to be paid out of the purchase money. But where one of the plaintiffs had become the purchaser in a mortgage action, notice of a motion to dispense with payment into Court and for a vesting order was required to be given to the mortgagor who had appeared in the suit: *McMaster* v. *Kempshall*, 1 Chy. Ch. 329.

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Where a purchaser takes a vesting order he usually waives all objection to the title, and if possession has not previously been delivered to him, he assumes the responsibility of obtaining possession: *Bell* v. *Harper*, 6 P. R. 36; and where a purchaser after the lapse of a year from obtaining a vesting order, applied to be allowed compensation in respect of certain taxes which the vendor should have paid, the application was refused: *Kincaid* v. *Kincaid*, 6 P. R. 93. But so long as the purchase money remains in Court, an application by a purchaser who has inadvertently taken a vesting order without first requiring incumbrances to be paid off, to have the incumbrances discharged out of the purchase money, will be granted: *Fleming* v. *McDougall*, 8 P. R. 200; *Turrill* v. *Turrill*, 7 P. R. 142.

Purchaser taking v. o. waives objections to title, etc.

As regards infants, whose estates have been sold under the direction of the Court, the Court may order some person to execute the conveyance in the place of the infants: *The Infants Act* (R. S. O. c. 153), s. 14; and the Master in Ordinary or a Local Master may, in like manner, be ordered to execute a deed for adult parties who have been committed to gaol for contempt in refusing to execute the same, after the expiration of two calendar months from their being committed or detained under such process; see *post*, section 137; *Ledyard* v. *Campbell*, O. B. 26, fo. 719.

Infants.

Under *The Trustee Act* (R. S. O. c. 121), ss. 6-11, the Court has also power to make vesting orders of real or personal property: and under secs. 14, and 15 (4), wherever the Court can under that Act make a vesting order, it may also appoint some person to execute a conveyance.

Trustee Act.

JUDGMENTS FOR ALIMONY.

Judgment for alimony may be registered.

73.—(1) An order or judgment for alimony may be registered in any registry office in Ontario, and the registration shall, so long as the order or judgment remains in force, bind the estate and interest which the defendant has in any land in the registry division in which the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his land.

Registration of order.

Rev. Stat. c. 126.

(2) The order or judgment may also, on the application of the plaintiff, be registered as a charge against any lands of the defendant registered under *The Land Titles Act*. 3-4 Geo. V. c. 19, s. 73.

How registered.

A judgment for alimony is registered by means of a certificate: see *The Registry Act* (R. S. O. c. 124), s. 43; and an order for payment of interim alimony may in like manner be registered.

The charge created by the registration of a judgment or order for alimony, binds all the lands of the defendant in the registration division in which the registration is made. The judgment itself does not contain any clause creating a lien, nor does it specify any lands to be

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bound; the judgmsnt or order creates the charge, hut under the *Registry Act*, s. 34, it would now appear to be necessary, before the certificate of the judgment or order can be registered, that a statutory declaration should be delivsred to the Registrar specifying by local description the lands of ths defendant affected or hound by the judgment or order.

Statutory declaration required.

Enforcing charge.

The charge created hy the judgment or order may be enforced by a motion in the alimony action, where the defendant has made default in paying the alimony ordered to be paid: *Abbott* v. *Abbott*, 3 O. W. N. 683. Upon such a motion the Court may order the land bound by the judgment, or such part thereof as may be deemed necessary, to be sold and the purchase money to he applied in payment of the arrears of alimony, and ths alimony as it accrues. The order should provide for a sale free from ths wife's inchoate right of dower, and for an allowance to her of a sum in lieu thereof: *Abbott* v. *Abbott*, 3 O. W. N. 683. For form of order in such a case: see *Forrester* v. *Forrester*, D. B. 37, fo. 232; H. & L. Forms, No. 882.

Charge not affected by assignment.

The charge created hy a registered judgment under this section is not affected hy an assignment for the benefit of creditors subsequently made by the defendant, and the plaintiff is not obliged to rank *pari passu* with other creditors of the defendant under *The Assignments and Preferences Act* (R. S. O. c. 134), s. 14: *Abraham* v. *Abraham*, 19 Ont. 256; 18 Ont. App. 436; nor is the charge affected by the plaintiff recovering judgment in another Court for instalments of alimony in arrear: *Lee* v. *Lee*, 27 Ont. 193; and see *Abbott* v. *Abbott*, *supra*.

COSTS.

Costs.

74.—(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid.

Right of trustee or mortgagee preserved.

(2) Nothing herein shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund.

When costs to follow the event.

(3) Where an action or issue is tried by a jury, the costs shall follow the event, unless the Judge before whom the action or issue is tried in his discretion otherwise orders.

In proceedings before judicial officers.

(4) Costs of proceedings before judicial officers, unless otherwise disposed of, shall be in their discretion subject to appeal. 3-4 Geo. V. c. 19, s. 74.

Hab. corp. proceedings.

Habeas corpus proceedings are within this section: *Re Weatherall*, 1 O. L. R. 542; so also motions to quash convictions under Ontario statutes: *Rex* v. *Mancion*, 8 O. L. R. 24.

Absence of express authority as to costs.

The mere absence of any clause conferring jurisdiction on the Court to award costs under a particular statute is not an "express provision of any statute" so as to amount to an express prohibition by the

Legislature, and to deprive the Court of its discretion as to costs conferred by this section: *Re Schmarr*, 1902, 1 Ch. 326. Sec. 74.

The ancient doctrine that in matters of Common Law the Crown neither pays nor receives costs, has not been altered in England: *Rex.* v. *Archbishop of Canterbury*, 1902, 2 K. B. 503; 86 L. T. 450; but various statutory provisions have in Ontario made a change in this respect, so that it has been said that the rule is practically superseded: see *Attorney-General* v. *Toronto General Trusts Corporation*, 5 O. L. R. 607, and *Rule* 5 (2); but see *Johnson* v. *The King*, 1904, A. C. 817. Crown.

This section applies both to costs in the High Court Division and in the Appellate Division: *Peoples' Loan, etc.* v. *Stanley*, 4 O. L. R. 247. By C. RR. 1238, 1241, the jurisdiction to award costs given by the Jud. Act and Rules of 1897 was made to apply to proceedings in relation to the quashing of convictions or orders, but C. RR. 1238, 1241 have not been continued. Whether their omission has altered the law remains to be determined.

The section does not apply to costs incurred in a matter before the proceedings have actually come into Court: *Re Brandreth's Trade-mark*, 9 Ch. D. 618. Costs out of Court.

But, where upon a reference by consent, though not in a cause, the costs of the reference are left in the discretion of the arbitrator, the costs of negotiating and settling terms of the submission may be taxed as "costs of the reference:" *Re Autothreptic, etc. Co. & Townsend & Co.*, 21 Q. B. D. 182.

"**Any Statute.**"—Sect. 74 has the effect of preserving in force any special statutory provisions in force at the date of *The Judicature Act*, 1914, and probably also includes any statute which may thereafter be passed, relating to costs in particular cases. All such provisions in Ontario Acts have now been inserted in *The Revised Statutes*. Certain statutory provisions regarding costs formerly found in the Imperial Statutes, revised and consolidated in R. S. O. 1897, vol. 3, *e.g.*, as to costs of contempt: see now ss. 137-139 *post;* of charging orders: see now s. 141 (4) *post;* of *quo warranto* proceedings: see now s. 149 *post:* of proceedings under *The Trustee Relief Act* (R. S. O. c. 121), s. 70; of applications to apply dividends on stock for maintenance of infants: *The Infants Act* (R. S. O. c. 153) s. 21 (3); of proceedings as to lunatics and their estates: see *The Lunacy Act* (R. S. O. c. 68), s. 35; of applications for renewals of leases in case of absentee lessors: see *The Landlord and Tenant Act* (R. S. O. c. 155), s. 63 (6). It may here be noted that sec. 13 of R. S. O. (1897), c. 340, which gave the Court power to make orders as to costs in all applications under that Act, has in the present Revised Statutes (R. S. O. c. 153), s. 21 (3), been restricted to applications under sec. 21 of that Act. Statutes affecting costs.

The discretionary power is not taken away by an Act providing that a judgment in an action contemplated by the Act "shall carry costs to be taxed as between solicitor and client": *Bostock* v. *Ramsay Urban, etc.*, 1900, 1 Q. B. 357, 2 Q. B. 616, but it is otherwise when the language is "shall be entitled to his full costs . . to be taxed as between solicitor and client:" *Ing Kon* v. *Archibald*, 17 O. L. R. 484; *Webb* v. *Box*, 19 O. L. R. 40.

By various *Rules* special provision is made as to costs in particular cases—where a County Court has no jurisdiction: see *Rule* 766; and *Great Northern, etc.*, v. *Inett*, 2 Q. B. D. 284; *Crowther* v. *Boult*, 33 Costs under special Rules.

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W. R. 150; on confession of defence: *Rule* 164: on discontinuance: *Rule* 321; on accepting money paid into Court in satisfaction: *Rule* 314; preliminary examinations of parties: *Rule* 654; by reason of a party not making admissions: *Rule* 671.

Generally.

Costs Generally of Proceedings in the Supreme Court.—The costs of proceedings in the respective branches of the Supreme Court are in the discretion of the Court or Judge before whom such proceedings come for hearing or determination: *Holmes* v. *Bready*, 18 P. R. 79; *In re Schnarr*, 1902, 1 Ch. 326.

Effect of sec. 74.

Where before the Act the Court had no power, original or statutory, to award costs, it has now power to do so: see *Re Gonty & Manchester & S. Ry. Co.*, 1896, 2 Q. B. 439; *Ex p. Hospital of St. Katherines*, 17 Ch. D. 378; *Re Lee* v. *Hemingway*, 24 Ch. D. 669; see also *Arscott* v. *Lilley*, 14 Ont. App. 295; *Re Knight's Trusts*, 26 Ch. D. 82; *Re Wood*, 31 Ch. D. 607; *Kingston* v. *Murphy*, 11 P. R. 304; *London County Council* v. *Churchwardens of West Ham.*, 1892, 2 Q. B. 173; *Re Fisher*, 1894, 1 Ch. 450. As to costs, in *certiorari* and prohibition proceedings: see *Rex* v. *Woodhouse*, 1906, 2 K. B. 501; 95 L. T. 399. Prior to the *Jud. Act* it would seem that the Court had not. (see *The Queen* v. *Jones*, 1894, 2 Q. B. 382); but it has now, power to award costs against a defendant in *habeas corpus* proceedings; *Re Weatherall*, 1 O. L. R. 542; and it has been held that, in a civil proceeding, where an Act gives jurisdiction to determine questions, but is silent as to costs, the Court has inherent jurisdiction to order a person wrongly putting it in motion to pay costs: *Re Bombay Civil Fund Act*, 40 Ch. D. 288. Even though not named as a party where it is shewn that he is the instigator and supporter of the action or proceeding: *Re Sturmer & Beaverton*, 25 O. L. R. 190, 566. So where costs were not asked for by a rule *nisi*, but were asked for at the bar, they were in the discretion of the Court, and might, nevertheless, be awarded, where the opposite party appears: *Re Peck & Galt*, 46 U. C. Q. B. 211; but where the opposite party does not appear the Court will not usually give costs if they have not been asked by the notice of motion. In England neither an order for an interpleader issue: *Wicks* v. *Wood*, 26 W. R. 680; *Harmont* v. *Foster*, 8 Q. B. D. 82, nor sending a case for trial to a County Court: *Farmers* v. *May*, 44 L. T. 148, removes the case from the jurisdiction of the High Court as to costs; but see *Rules* 645, 646.

Section 74 also repeals all former practice which laid down any special rule as to costs: *The Friedberg*, 10 P. D. 112.

Applies to all proceedings.

Section 74 applies not merely to costs at the trial, but also on motions: *Young* v. *Thomas*, 1892, 2 Ch. 134; and where the Court is exercising statutory jurisdiction, as *e.g.*, under an expropriation Act: *Re Schnarr*, 1902, 1 Ch. 326; but it only applies to proceedings in the Supreme Court of Ontario, and does not give a Judge jurisdiction over costs in matters where he acts under a statute merely as *persona designata*, and not by virtue of his office as Judge: *Re Young*, 14 P. R. 303; *Re Pacquette*, 11 P. R. 463; but the costs of such proceedings are now in the discretion of the Judge by virtue of *The Judges Orders Enforcement Act* (R. S. O. c. 79) s. 2. Section 74 applies to civil proceedings, but whether it applies also to proceedings in relation to the quashing of convictions or orders, whether they be affirmed or quashed in whole or in part, and whether it enables the Court or a Judge to award costs in other Crown cases where they are not otherwise by statute or *Rule* authorized so to do may perhaps be open to doubt as C. RR. 1238 and 1241 have not been continued: see *London County Council* v. *West*

Ham, 1892, 2 Q. B. 173; but this case was not followed: *Rex* v. *Woodhouse*, 1906, 2 K. B. 501; 95 L. T. 399; and see *The Queen* v. *Jones*, *supra*; or in cases where the Court has only a consultative jurisdiction, as upon a special case stated by an arbitrator: *In re Knight & The Tabernacle Building Socy.*, 1892, 2 Q. B. 613. Sec. 74.

"Full Costs" referred to in the Imp. Copyright Act, 5 & 6 Vict. c. 45, s. 26, is held to mean no more than the usual costs taxable between party and party: *Avery* v. *Wood*, 1891, 3 Ch. 115; and that expression in an order or judgment is in England held to mean merely the ordinary party and party costs taxable according to the scale properly applicable: see *Irwine* v. *Reddish*, 5 B. & Ald. 796; *Jamieson* v. *Trevelyan*, 10 Ex. 748; but the words "full costs and expenses" are held to cover costs as between solicitor and client: *Doe d. Hyde* v. *Manchester*, 12 C. B. 474. The expression "full costs" was held in Ontario to mean costs according to the High Court scale: *per* Falconbridge, J., *Marsh* v. *Burns*, March, 1897, but see *Ireland* v. *Pitcher*, 11 P. R. 403. "Full costs."

Proceedings before Judicial Officers.—It has been held by Street, J., that it is not intended by s. 74 (4), that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from: *Campbell* v. *Wheler*, 17 P. R. 289; and that the Court will not interfere with the discretion exercised as to costs, unless the officer whose order is appealed from has proceeded upon some erroneous principle of law, or upon some misapprehension of the facts of the case: *Ib.*; see also *Knickerbocker* v. *Katz*, 16 P. R. 191. Jurisdiction of judicial officers as to costs.

The costs of proceedings before an Official Referee would seem to be within the provisions of s. 74 (4); but see *Minister* v. *Apperley*, 1902, 1 K. B. 643.

Notwithstanding sub-sec. (4), *ex parte* orders made by judicial officers are to be silent as to costs: *Rule* 658.

Costs where Court has no Jurisdiction.—Though the Court may have no jurisdiction to entertain the action or proceeding, it has been held that it may, nevertheless, make an order as to the costs thereof: *Re Erb*, 16 O. L. R. 594; *Reg.* v. *Eli*, 13 Ont. App. 526; see *Sherk* v. *Evans*, 22 Ont. App. 242, *per* Osler, J.A., at p. 245; *Plant* v. *Gillies*, 3 L. W. N. 921; *Cote* v. *Halliday*, 33 C. L. J. 159; 17 C. L. T. 53; *Great Northern, etc.* v. *Inett*, 2 Q. B. D. 284; *Crowther* v. *Boult*, 33 W. R. 150. In cases in the County Court or Division Court, those Courts have express jurisdiction to give costs in such circumstances: see *The County Court Act* (R. S. O. c. 59), s. 33, and *Rule* 766. Where Court has no jurisdiction over matter in litigation.

Costs at the Trial.—In actions tried without a jury the costs are subject to certain special exceptions and restrictions) in the discretion of the trial Judge, and without an order made in the exercise of such discretion, no costs will be taxable to any party: s. 74. Non-jury cases.

Where, in an action tried by a Judge without a jury, no order is made as to costs, none are recoverable by either party: *Re Great Western Advertising Co.* v. *Rainer*, 9 P. R. 494; *Lewin* v. *Trimming*, 1 Q. B. D. 230. An order for payment of costs *simpliciter* does not preclude an inquiry under *Rule* 649, as to the scale properly applicable: *Re Forster*, 18 P. R. 65; and it would seem that in such case where the Judge gives no directions disallowing a set-off of costs by

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defendant (such as is contemplated by *Rule* 649), the Taxing Officer has now power to allow such set-off: *Rule* 649; see formerly *Truax v. Dixon*, 13 P. R. 279.

In an action tried without a jury, judgment being given for plaintiff, on the claim and counter-claim, but for defendant against third parties with "such costs as defendant would be entitled to by law," it was held that the costs being in the discretion of the Judge, and no discretion being exercised in favour of defendant against the third parties, the defendant was not "entitled by law" to costs: *Lewin v. Trimming*, 21 Q. B. D. 230.

Jury cases.

In actions tried by a jury, the costs of the trial *primâ facie* must follow the event, but the Judge has a discretion subject to certain special exceptions and restrictions, to make a different order: s. 74 (3).

Where an action is tried before a Referee, he would appear to have no jurisdiction as to the costs of the action or reference, unless specially authorised to deal with them; even then he can give no judgment therefor, he can only report who should bear them: see s. 67 *supra*.

Where interlocutory costs have been ordered to be paid by either party, a subsequent dismissal of the action without costs, does not affect the order as to such interlocutory costs: *Walter v. Bewicke*, 90 L. T. 409.

Motions.

Costs on Motions.—The power as to costs is exercisable not merely at the trial but also on motions for judgment: *Young v. Thomas*, 1892, 2 Ch. 134; 66 L. T. 575; and extends to costs to be dealt with on interlocutory proceedings before the trial, so that they may be directed to be borne by one party in any event: *Vicary v. Great Northern Ry. Co.*, 9 Q. B. D. 168. See *infra*, pp. 251 *et seq.*

The dismissal of an action for want of prosecution without costs is within the discretion of the Judge, and there is no appeal without leave: *Snelling v. Pulling*, 29 Ch. D. 85; and see *supra* p. 129.

The Court has jurisdiction to grant prohibition with costs: *Reg. v. JJ. of London, etc.*, 1894, 1 Q. B. 453; and also a *certiorari*: see *Rex v. Woodhouse*, 1906, 2 K. B. 501; 95 L. T. 399; but see *Rules* 622, 623.

Orders made *ex parte* are not to contain any direction as to costs: *Rule* 658.

Costs of examining judgment debtor, attaching debts, etc.

Costs of Proceedings after Judgment.—By C. R. 1139, the costs of the examination of a judgment debtor or other person liable to examination, and of any application for the attachment of debts, and of any proceedings arising from, or incidental to, such application, were expressly made in the discretion of the Court or a Judge.

That Rule has not been continued but probably no change has been made in the practice.

Prior to that Rule it was held in *Ginty v. Rich*, 7 P. R. 319, that an order for the payment of the costs of the debtor's examination could not be made on an application for that purpose, though it might perhaps be made by way of punishment, on an application to commit.

The costs of proceedings to examine the debtor may be allowed, though the examination does not actually take place: *Popham v. Flynn*, 15 P. R. 286.

Semble, the costs of the examination of the judgment debtor, and also of garnishee proceedings in which the execution creditor succeeds, where the creditor has not proceeded unreasonably, should be allowed him as against the debtor: see *Arlington* v. *Conyngham*, 1898, 2 Q. B. 492; 79 L. T. 238. Sec. 74.

Costs of Appeals.—Usually the costs of appeals follow the result of the appeal, but the Court has full discretion, and may make such order respecting them as it sees fit. Appeals.

In *McNair* v. *Boyd*, 14 P. R. 132, the C. A. allowed an appeal without costs, where the case was the first which had come before the Court as to the meaning of a new *Rule* about which there had been much difference of opinion.

Costs of Summary Proceedings.—Costs of *habeas corpus* proceedings in civil cases are in the discretion of the Court, and where a return has been made to the writ and the body produced, the Court may order the applicant to pay the expenses of complying with the writ: *Re Weatherall*, 1 O. L. R. 542. Summary proceedings.

Where the Court makes "no order as to costs," that is a refusal of costs to either party: *McCune* v. *Botsford*, 38 C. L. J. 606; *In re Hodgkinson*, 1895, 2 Ch. 190.

Costs where Judgment entered without Trial, or Motion.—Where judgment is entered without a trial, or motion for judgment, and therefore without any express directions as to costs, the scale of costs is determined by the Taxing Officer, under *Rules* 650, 651. Where judgment without a trial.

Scale of Costs.—In the case of actions brought in the Supreme Court, which might have been brought in an inferior Court, if no order is made by the Judge, *Rule* 649 applies and prescribes the scale upon which the costs are to be taxed; but whether the action is tried with, or without, a jury the Judge may give special directions as to the scale. It was said in *Bennett* v. *White*, 13 P. R. 152, that in exercising the Judge's discretion there was no better guide than the rule laid down by *Rule* 649, in the absence of special circumstances; but the Judge is not fettered in his discretion except by s. 74 (2). Scale of costs.

Where a plaintiff takes money out of Court under *Rule* 314, even though the amount be within the jurisdiction of an inferior Court, he is under that *Rule*, entitled to his full costs without any set off by the defendant; and a Judge has no jurisdiction under this Section to make any other order as to the costs: *Babcock* v. *Standish*, 19 P. R. 5.

"Full costs," even where given by statute, do not include any more than the usual costs taxable between party and party: see *Avery* v. *Wood*, 1891, 3 Ch. 115; 65 L. T. 122; *sed vide*, *Marsh* v. *Burns*, *supra*, 241.

Disposal of Costs of Action on Motion in Chambers.—Though the discretion of the Court as to the costs of a contested action is usually exercised at the trial, or on motion for judgment, yet where the object of the action is obtained without a trial or motion for judgment, it is improper to bring the action to trial, or bring on motion for judgment, merely for the purpose of obtaining adjudication as to the costs, without first offering to have the question disposed of in Chambers: see *Sivell* v. *Abraham*, 8 Beav. Summary motion to dispose of costs.

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598; *Morgan* v. *Great Eastern Ry. Co.*, 1 H. & M. 78; *O'Sullivan* v. *Cluxton*, 26 Gr. 612; *Webb* v. *McArthur*, 3 Cby. Ch. 364; but if the opposite party refuses to consent to the disposition of the costs in that way, the action must be tried, or heard on motion for judgment. *Hunter* v. *Strathroy*, 18 P. R. 127; see also *Sonnenschein* v. *Barnard*, 57 L. T. 712; *Blakley* v. *Ingram*, 9 C. L. T. 143; *Storr* v. *Maidstone*, W. N. 1878, 219; *Dicks* v. *Yates*, 18 Ch. D. 77; *Landed Estates Company* v. *Weeding*, W. N. 1871, 148; *Wilde* v. *Wilde*, 4 De G. F. & J. 348; *McLean* v. *Cross*, 3 Chy. Ch. 432; *sed vide Knickerbocker* v. *Ratz*, 16 P. R. 193, where a contrary view is expressed; and the extra expense so occasioned will be considered in disposing of the costs, and in any event may be ordered to be borne by the party who has occasioned them: see *Eastwood* v. *Henderson*, 17 P. R. 578; *East* v. *O'Connor*, 2 O. L. R. 355.

At all events the plaintiff cannot compel the defendant to submit to a disposition of the question of costs in Chambers where the act alleged by the plaintiff to be a satisfaction of his claim is equivocal, and the defendant denies that the plaintiff had any cause of action: *Hunter* v. *Strathroy*, *supra*.

Where both plaintiff and defendant had sold their properties which were in question in the litigation, (an action to restrain interference with the flow of water) the Court, on a motion to dispose of the costs, refused to go into the pleadings and documentary evidence in order to form an opinion as to the merits; the Judge saying, "Where the merits, for any reason, cannot be determined, there ought not to be a pretended investigation of the merits for the purpose of awarding costs": *McClellan* v. *Powassan Lumber Co.*, 6 O. W. N. 302.

Jurisdiction of Master in Chambers.

It was apparently doubted by Spragge, C.: *McLean* v. *Cross*, 3 Chy. Ch. at p. 433, whether the former Referee in Chambers had jurisdiction to entertain such applications; and as to whether the Master in Chambers has such jurisdiction has been doubted: see *per* Meredith, J., *Knickerbocker* v. *Ratz*, 16 P. R. at p. 39, and see *Jones* v. *Miller*, 16 P. R. 92; *King* v. *Federal Bank*, 17 P. R. 65; *Davis* v. *Winn*, 22 O. L. R. 111.

He certainly cannot entertain jurisdiction on such a question without the consent of the parties, and, if he does, his order is appealable notwithstanding *Jud. Act*, s. 24; *Davis* v. *Winn*, *supra*.

Disposal of costs of action on interlocutory motion.

Sometimes in such cases where parties consent, an interlocutory motion in Court is treated as a trial of the action, and the costs are then disposed of: *Barber* v. *Penley*, 68 L. T. 662; and where the parties agree to an order being made in Chambers to carry out a settlement, the plaintiff cannot recover the costs of moving in Court: *Allen* v. *Gakey*, 62 L. T. 724. *Sed quære*, see *Craig* v. *Craig*, 1 Ch. Ch. 41.

Where there is no object in proceeding with the action except to determine the question of the costs of it, owing to the loss or destruction of the subject matter, or other circumstances occurring after the commencement of the action, the plaintiff must nevertheless proceed either by trial, or motion for judgment, or, by consent, by motion in Chambers, to have the question of costs disposed of, otherwise the defendant may apply to dismiss for want of prosecution: *Elliott* v. *Gardner*, 8 P. R. 409; see also *Hogaboom* v. *Gillies*, 16 P. R. 402.

The Crown.

The Crown.—Formerly the rule was that the Crown, when a party to civil proceedings, was neither ordered to pay nor receive

costs: see *Reg.* v. *Mainwaring*, 5 O. S. 670; *Gibson* v. *Church*, 1 Cby. Ch. 69; *United States* v. *Denison*, 2 Cby. Ch. 263; *Johnson* v. *The King*, 1904, A. C. 817; 91 L. T. 234; but now in proceedings by petition of right the costs are in the discretion of the Court: *Rule* 748; as also in proceedings on a special case: see *Attorney-General* v. *Toronto General Trusts Corpn.*, 5 O. L. R. 607; but in proceedings of a strictly common law character it would seem that the old rule still prevails: *Rex* v. *Archbishop of Canterbury*, 1902, 2 K. B. 503; 86 L. T. 450, unless the case is governed by some statute, or there are exceptional circumstances justifying a departure from the rule: *Johnson* v. *The King*, 1904, A. C. 817; 91 L. T. 234. Sec. 74.

Suitors in Person.—As a rule a suitor, not being a solicitor, suing or defending in person, is not entitled to solicitor's costs, but, at most, to his actual disbursements, and a reasonable allowance for loss of time; see Dax's M. O. 31; where a suitor in person successfully opposed an appeal to the Divisional Court he was allowed his disbursements, and "a moderate amount for his time and trouble on the argument" to be set off against the debt due by him to the plaintiff in the action: *Miller* v. *Macdonald*, 14 P. R. 499; but where a duly qualified solicitor sues or defends in person, and he is awarded costs, he is, unless acting in a fiduciary character, entitled to make and recover the same charges as when acting for another: Lush Pr., 775, 896; except for taking instructions: Dax's M. O. 31; and see *Gupy* v. *Brown*, L. R. 1 P. C. 411; and if he is also a barrister, and also acts as counsel he cannot recover his counsel fee: *Clarke* v. *Creighton*, 15 P. R. 105; but if his partner acts as counsel he may tax his counsel fee, or such part thereof as the suitor has no interest in: *Henderson* v. *Comer*, 3 U. C. L. J. 29; *Johnston* v. *Ryckman*, 7 O. L. R. 511; and even when, being a co-trustee with others, he acts for himself and co-trustees as solicitor and counsel, he may, if awarded costs, tax against the opposite party full costs, including instructions and counsel fees; *Strachan* v. *Ruttan*, 15 P. R. 109; ordinarily, a solicitor, trustee, or mortgagee, when acting in person for himself alone is only entitled to costs out of pocket, either as against the trust or mortgaged estate, or his *cestui que trust*, or mortgagor, as the case may be, unless expressly empowered to charge for his professional services as against the trust estate, or mortgagor: see note to *Rule* 410, *infra*. Costs of suitors in person.

Suitors in a Fiduciary Capacity.—A trustee, or liquidator, or other person in a fiduciary capacity, suing, or defending, in his own name, ordinarily becomes liable, if he fails, to be ordered personally to pay costs to the opposite party: *Macdonald* v. *Balfour*, 20 Ont. App. 404; *Ex p. Brown*, 17 Q. B. D. 488; *Smith* v. *Williamson*, 13 P. R. 126; *G. W. Ry. Co.* v. *Jones*, 13 Gr. 355; and where a liquidator of a company intervened, and obtained leave to defend an action brought against the company, he was held to be personally liable to the plaintiff for costs: *Boyd* v. *Dominion Cold Storage Co.*, 17 P. R. 468. But where an action is brought by a liquidator of a company in the name of the company, and the liquidator is not personally a party, he cannot be ordered to pay the costs of the action: *Ontario Forge & B. Co.* v. *The Tomel Cycle Co.*, 17 P. R. 156; and a liquidator who *bonâ fide* contested a claim was held to be not personally liable for costs, though he failed in the litigation: *Re Bollon*, 1895, 1 Ch. 333, overruling *Re Staffordshire Gas Co.*, 1893, 3 Ch. 523. Trustees, &c.

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Executors were given costs of opposing an unsuccessful appeal, out of the estate, in the event of their not being able to make them out of the appellant: *Re Cassie*, 17 P. R. 402.

Executors who, in a probate action, had, without justification, contested the validity of a codicil, were ordered to pay the costs so occasioned personally: *Re Speke, Speke* v. *Deakin*, 109 L. T. 719.

An administrator is entitled to his costs of an administration action (which may, however, be given in the form of a commission under *Rule* 653), even though the action has been caused by a claim by him for the allowance of payments which are disallowed in the action, provided the claim is made under an honest mistake, and is neither fraudulent nor monstrous: *Re Jones*, 1892, 2 Ch. 190; but see *Re Skinner, Cooper* v. *Skinner*, 1904, 1 Ch. 289.

Where in an action between a trustee and his *cestui que trust* the Court makes "no order as to the costs," such adjudication is final, and the trustee cannot afterwards retain his costs of the proceedings out of the trust estate: *Re Hodgkinson*, 1895, 2 Ch. 190; 72 L. T. 617. And when on an appeal on the merits the appellate Court has refused to make an order for the payment of the costs of a trustee or executor out of the estate or fund in litigation, it is not competent for the Court of first instance thereafter to make any such order: *Purcell* v. *Bernin*, 16 P. R. 301.

Indemnity out of trust estate.

A person properly suing or defending in a fiduciary capacity, is usually entitled to indemnity for his costs out of the trust estate. But a person occupying a fiduciary position, who is improperly put to costs, has no right to indemnity out of the trust estate unless the proceeding was for the benefit or protection of the estate, *e.g.*, a receiver sued for misfeasance and succeeding in the action, which is dismissed with costs, is not, in the event of being unable to recover the costs from the plaintiff, entitled to payment thereof out of the estate of which he is receiver: *Re Dunn*, 116 L. T. Jour. 366; neither can he recover such costs from his *cestuis que trustent*, unless they have expressly agreed to indemnify him: *Johnston* v. *Dulmage*, 30 Ont. 233; and an executor bringing an unsuccessful action to recover a sum of money alleged to be due to the testator's estate, is not entitled to resort to the specifically devised realty for payment of his costs, even though the personal estate is exhausted: *In re Champagne*, 7 O. L. R. 537. And where a defendant is sued in a fiduciary character, and judgment is given against him with costs, the plaintiff cannot deduct such costs from moneys in his hands to which the defendant is entitled in his fiduciary character, even though the defendant may have a beneficial interest in a share of the fund: *Phillips* v. *Howell*, 1901, 2 Ch. 773; 85 L. T. 777.

A trustee of a settlement which was set aside at the instance of creditors of the settlor was, nevertheless, held entitled to his costs out of the settled estate, though he had appeared and endeavoured to defend the settlement and had failed: *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; 96 L. T. 774; *sed vide, Dutton* v. *Thompson*, 23 Ch. D. 278.

Receivers, and liquidators.

Liquidators and Receivers.—A receiver is usually ordered to be indemnified against costs out of the assets which come to his hands. As a rule he will not be ordered to pay costs personally unless he has taken an active part as a litigant, in the proceedings, in which case he may be ordered personally to pay the costs of the adverse party: see *Re Tweddle*, 1910, 2 K. B. 67, 697; 103 L. T. 257; *Re Williams*, 1913, 2 K. B. 88. Where proceedings are taken by, or against, a receiver in

his own name whether as plaintiff, or defendant, he should take the precaution to obtain indemnity from those beneficially interested before embarking in the litigation. Where an action is brought against a liquidator or receiver personally, for alleged misconduct, it may be impossible to obtain indemnity, and though the action fail, he may have to bear his own costs if he cannot recover them from the opposite party: see *Re Dunn*, *supra*, p. 246. Sec. 74.

Where a liquidator of a company brought an unsuccessful suit and was ordered to pay the defendant's costs, it was held that the defendant was entitled to priority over the liquidator's own solicitors for payment of such costs out of the assets in the liquidators' hands: *In re Pacific Coast Syndicate*, 1913, 2 Ch. 26.

Administration Actions.—Where the costs of a trustee, or personal representative, in an administration action are ordered to be paid out of the estate in question, which proves deficient, the trustee, or personal representative is entitled to be paid his costs in priority to those of the other parties, even though the order be silent on that point: *Re Griffith*, 1904, 1 Ch. 807; 90 L. T. 639. Costs of administration actions.

Where a person suing or sued in a fiduciary character is ordered to pay costs, such order is appealable; but where he is refused costs, it was held by Wright, J., that the order is discretionary, and not appealable: *In re Roynes Park Golf Club*, 1899, 1 Q. B. 961; unless, perhaps, where the Judge had proceeded on some wrong principle. Order when appealable.

Pecuniary legatees, defendants in an action in which the validity of a will was in question, who put in formal defences submitting their rights to the protection of the Court, were held to be not entitled to costs out of the estate, nor from the plaintiff who had failed in having the will declared invalid: *Logon* v. *Herring*, 19 P. R. 168.

A creditor, or legatee, bringing an action for administration, though not standing in a fiduciary position, is, in case of a deficiency of assets, entitled to costs as between solicitor and client out of the estate: *Re New Zealand M. Ry. Co.*, 1901, 2 Ch. 357; 84 L. T. 852.

The rule that a trustee's costs are payable as between solicitor and client is not confined to cases where he is brought into Court against his will: *Blakeley* v. *Ingram*, 9 C. L. T. 143. Solicitor and client costs.

Trustees and executors are, in litigating with third persons, in the same position in regard to their right to, and liability for, costs, as parties litigating in their own right: *Smith* v. *Williamson*, 13 P. R. 126; *G. W. Ry.* v. *Jones*, 15 Gr. 335; *Macdonald* v. *Balfour*, 20 Ont. App. 404. They are not as against the defendant entitled to costs as between solicitor and client, where the action is not brought in respect of the trust estate: *Holman* v. *Knox*, 25 O. L. R. 588; 29 O. L. R. 648. As to the right of the trustees, etc., to be recouped out of the trust estate: see *supra*, pp. 245, 246.

Where trustees unreasonably delay making a division of the trust estate in accordance with the trust, they may be ordered to pay the costs of an application to compel them to distribute it: *Re Ruddock*, *Newberry* v. *Monsfield*, 102 L. T. 89. Trustees guilty of default.

Although the costs of an administration action properly instituted are usually ordered to be paid out of the estate generally, it may sometimes happen that the parties interested in the realty and personalty may be different persons, and in such a case the costs of administration accounts and inquiries exclusively relating to the realty When costs ordered out of particular fund.

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may be ordered to be paid out of the renity: see *Re Betts, Doughty* v. *Walker*, 1907, 2 Ch. 149; 96 L. T. 875.

As to costs in administration actions: see notes to *Rules* 608 and 633.

Mortgagees.

Mortgagees.—A mortgagee is entitled, as by contract, to all costs properly incurred in enforcing his security, and such costs are not in the discretion of the Court: *Re Rio Grande, etc., S. S. Co.*, 5 Ch. D. 282; and see note to *Rule* 474. See also notes to *Jud. Act*, s. 24, and see 29 Sol. Jour. 178, 199; but where he is a solicitor he cannot recover profit costs against the mortgagor or those claiming under him: *Eyre* v. *Wynn-Mackenzie*, 69 L. T. 822; and see notes to *Rule* 410, *infra*.

A mortgagee making a wrongful claim and refusing to be redeemed, and thus occasioning the litigation, may be ordered to pay costs: *Squire* v. *Pordoe*, 66 L. T. 243. See also *Queen's College* v. *Claxton*, 25 Ont. 282; and, so also, if he is sued for a surplus in his hands after exercising a power of sale in his mortgage, if a balance is found against him he is liable to pay the costs of the action: *Boulton* v. *Rowland*, 4 Ont. 720; *sed vide Heath* v. *Chinn*, *infra*.

A mortgagee is not disentitled to costs merely because he has *bona fide* claimed more than is actually found due to him: *Cotterell* v. *Stratton*, L. R. 8 Chy. 295; *Doigneau* v. *Dogenois*, 5 O. L. R. 265; nor because he has set up a right to consolidate securities which is disallowed: *Stork* v. *Reid*, 26 Ont. 257, though he may be disallowed costs occasioned by claims on which he failed: *Block* v. *Hiebert*, 38 S. C. R. 457, or may be ordered to pay costs occasioned by his unfounded claims; though allowed the costs of an ordinary redemption action: *Heath* v. *Chinn*, 98 L. T. 855; and see *supra*.

Debenture holder.

An action by a debenture holder to enforce payment of his debentures stands on the same footing as a mortgage action, and the plaintiff is not, even as against his co-debenture holders, who get the benefit of the action, entitled to costs as between solicitor and client: *In re Queen's Hotel*, 1900, 1 Ch. 792; except, perhaps, in the case of a deficient fund: see *Re New Zealand M. Ry.*, 1901, 2 Ch. 357, and *Mortgage Insurance Co.* v. *Canadian A. C. & C. Co.*, 1901, 2 Ch. 377.

General discretion where equitable relief granted.

Equitable Relief.—In cases unaffected by s. 74 (2) where equitable relief is sought, the costs are in the discretion of the Judge, without any restriction. It would be impossible to indicate how that discretion is exercised in all cases, but although there are some cases in which a party, though successful, may be ordered to pay costs, the general rule is that, in the absence of any misconduct on the part of the successful party, he is usually awarded his costs as against the opposite unsuccessful party: see *Downey* v. *Roof*, 6 P. R. 89.

In *Fritz* v. *Hobson*, 14 Ch. D. 542, where costs of an injunction had been reserved till the trial, but counsel had then omitted to ask for them, the omission was supplied on subsequent motion under *Rule* 521; but such a motion must be made in Court to the Judge who tried the action, the Master in Chambers has no jurisdiction: *Jones* v. *Miller*, 16 P. R. 42.

Discretion limited in certain cases.

Where the action is for relief of an equitable nature, s. 74 limits the discretion of the Judge in his disposition of the costs of the action in certain cases, so that he cannot deprive a trustee, or mortgagee, or other person, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon before the Ont. Jud. Act, 1881, in Courts of Equity. Where, therefore,

the disposition of costs made by a Judge is not in accordance with those rules, the order as to costs is appealable. Those rules affect not only the right to payment out of a particular fund, but also the quantum of costs to be allowed, *e.g.*, ordinary suitors are only entitled to costs as between party and party, but according to the rules in question, a suitor made a party in a fiduciary capacity and awarded costs, is in some cases entitled to them "as between solicitor and client," and this exception as to the quantum of costs in some cases, applies to creditors or legatees and others who have not any fiduciary character, but who are acting not only for themselves but on behalf of others. Sec. 74.

A trustee, or other person in a fiduciary position, guilty of no misconduct, who is a party to an action, either as plaintiff or defendant, in his fiduciary character, is usually entitled to his costs either against the opposite party, or out of the trust estate, if it is before the Court in the litigation: *Crawford* v. *Broddy*, 18 P. R. 233. Where a settlement is set aside, see as to the trustees' costs, *Dutton* v. *Thompson*, 23 Ch. D. 278, in note to *Jud. Act*, s. 24, *supra*, p. 113. Trustees who have been guilty of impropriety of conduct may be deprived of costs in the discretion of the Court: *Re Hoskin's Trusts*, 6 Ch. D. 281; *Turner* v. *Hancock*, 20 Ch. D. 303; *Re Cabburn, Goge* v. *Rutlond*, 46 L. T. 848; W. N. 1882, 92; *Re Radcliffe, Pearce* v. *Radcliffe*, 44 L. T. 96; *Re Hawkins*, 16 P. R. 136; or may be ordered to pay costs: *Re Chapman*, 72 L. T. 66; *Re Skinner, Cooper* v. *Skinner*, 1904, 1 Ch. 289; but such an order is appealable, as the costs are not in the discretion of the Court if there was no misconduct: *Re Pugh, Lewis* v. *Pritchard*, 57 L. T. 858; *In re Raynes Park Golf Club*, 1899, 1 Q. B. 961. Where *cestuis que trustent* were allowed their costs as against a co-defendant, it was held on appeal that as they were improperly made parties, their costs were not in the discretion of the Court, and were disallowed: *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611; 47 L. T. 89. Costs out of estate.

The exception in section 74 (2) applies not only to persons in a fiduciary position, but to "other persons" who, according to the rules of Courts of Equity above referred to, were entitled to be paid their costs out of any estate or fund in question; but this does not apply in favour of persons named as executors in a will unsuccessfully attempted to be established: see *Purcell* v. *Bergin*, 16 P. R. 301; nor to persons unsuccessfully claiming as next of kin against a deceased person's estate: *Lomb* v. *Cleveland*, 19 S. C. R. 78. Persons suing for benefit of others. Unsuccessful trustees.

Where a creditor, legatee, or personal representative, takes proceedings for the administration of a deceased person's estate, he is entitled to costs out of the estate, unless there are special grounds for depriving him of them, and this rule is preserved by section 74, and as to such costs, controls the discretion of the Court; *Farrow* v. *Austin*, 18 Ch. D. 58; followed as to the costs of residuary legatees in *Re Woodhall*, *Urbutt* v. *Hewson*, 2 Ont. 456; see also *Croggan* v. *Allen*, 22 Ch. D. 651; *Johnstone* v. *Cox*, 19 Ch. D. 17; *Turner* v. *Hancock*, 20 Ch. D. 303; *Chennell*, 8 Ch. D. 492; *Re McClellon*, 29 Ch. D. 495; *Sandford* v. *Irter*, 16 Oat. App. 565; and *Bew* v. *Bew*, 1899, 2 Ch. 467; 81 L. T. 464; *Re New Zealand M. Ry. Co.*, 1901, 2 Ch. 357; 84 L. T. 852.

Where in an action against a trustee the Judge declared that "he did not see fit to make any order as to the costs of the action," this was held to be a declaration that the trustee was not entitled to his costs, and had no right to retain them out of the estates *Re Hodgson*, 1895, 2 Ch. 190. Effect of "no order as to costs."

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Costs of a hostile action against a trustee seeking to charge him with costs on account of misconduct were not within the old rule of Chancery, that the plaintiff in an administration suit is entitled *primâ facie* to costs out of the fund. Such costs are in the discretion of the Court and therefore an order as to them is not appealable without leave: *Williams* v. *Jones*, 3 Ch. D. 120.

An order allowing a trustee costs of some other proceedings as against his trust estate is appealable without leave: *In re Beddoe*, 1893, 1 Ch. 547; 88 L. T. 595.

Where an action to set aside an alleged fraudulent conveyance by a judgment debtor failed, and the grantee and debtor appeared by the same solicitor, and the action was dismissed with costs those of the debtor to be set off *pro tanto* against the judgment of the plaintiff against him, it was held that one-third of the total costs taxed should be so set off: *Zaratz* v. *Dodge*, 17 P. R. 295, following *In re Colquhoun*, 5 D. M. & G. 35, and *Clark* v. *Virgo*, 17 P. R. 280; *Beaumont* v. *Senior*, 1903, 1 K. B. 282, *infra*, p. 259.

Married women.

Married Woman.—A married woman bringing an unsuccessful action, on a motion, may be ordered to pay the costs personally: *Morris* v. *Freeman*, 3 P. D. 351, followed by Boyd, C., *Barker* v. *Westover*, 31 May, 1882, and see *Olway* v. *Olway*, 13 P. D. 142; *Cox* v. *Bennett*, 1891, 1 Ch. 617; 64 L. T. 380; or they may be ordered to be paid out of her separate property notwithstanding a restraint against anticipation: *Pawley* v. *Pawley*, 1905, 1 Ch. 593; 92 L. T. 457; *Re Godfrey*, 72 L. T. 8.

It may be noted, that, notwithstanding *The Married Women's Property Act*, a married woman is still a person who is not *sui juris*, and is incapable of consenting to a judgment *in personam*: *Re Hamilton* v. *Parry*, 24 O. L. R. 38.

Next friend.

Next Friend.—In general the next friend of an infant is in the same position as any other litigant and receives and pays costs personally, as between himself and the opposite party. Where an infant by his next friend brings an unsuccessful action, the latter may be personally ordered to pay the opposite party's costs, but such order may be made without prejudice to any claim he may have to be indemnified out of the infant's estate: *Smith* v. *Mason*, 17 P. R. 444.

And the next friend has a right to an indemnity for costs he incurs or is ordered to pay out of the infant's estate where there has been a reasonable ground for bringing the action or taking the proceedings, even though they have proved unsuccessful: *Steeden* v. *Walden*, 1910, 2 Ch. 393; 103 L. T. 135.

Nominal plaintiff.

Nominal Plaintiff.—Where an action or other proceeding was brought or promoted by any person in the name of some other person who was not the real litigant, the Court, on a summary application, may order the real litigant to pay the costs of the opposite party: *Re Sturmer & Beaverton*, 25 O. L. R. 190, 566, and the real instigator of the proceedings may be also liable to an action: *Bradlaugh* v. *Newdigate*, 11 Q. B. D. 31. Persons having a common interest with the plaintiff, may assist him to maintain his action, but a trade union has been held to have no common interest entitling it to maintain a suit brought by one of its officers for libel of him in his official capacity: *Orom* v. *Hutt*, 1913, 1 Ch. 259.

The Official Guardian ad litem.—The costs of the Official Guardian *ad litem* are usually ordered to be paid, no matter what may be the result of the litigation, either out of the estate or fund, if any, in question, or by the plaintiff personally, with power to add them to his own costs. Where the action has been occasioned by the personal misconduct of an infant, for whom the Official Guardian *ad litem* appears, the infant may be ordered to pay personally the plaintiff's costs, including those paid by him to the Official Guardian *ad litem*: *Lipsett* v. *Perdue*, 18 Ont. 575; *Woolf* v. *Woolf*, 1899, 1 Ch. 343; 79 L. T. 725; *Westgate* v. *Westgate*, 11 P. R. 62. Sec. 76. Official Guardian.

In England the costs of the official solicitor, when appointed guardian *ad litem*, if no special directions are given, are taxable as between party and party, but the Court may allow them as between solicitor and client, and *semble*, the Official Guardian *ad litem*, may obtain a special direction for taxation of his costs as between solicitor and client, even where he appears for an infant defendant sued for tort, and such costs may be ordered to be paid by the plaintiff and added to his own: see *Eady* v. *Elsdon*, 1901, 2 K. B. 460; 84 L. T. 615, and *Rule* 655.

Discretion of Court or Judge. Extent of.—Where the right to exercise a discretion as to the costs of an action or proceeding exists, no hard and fast rules can be laid down as to the manner of exercising it: *The Friedberg*, 10 P. D. 112; *Badische Anilin, etc.* v. *Levinstein*, 29 Ch. D. 366. The discretion extends to persons who are not parties, but who have actively promoted or supported the litigation: see *Re Sturmer & Beaverton*, *supra*, p. 250. Discretion of Court.

The Judge at a trial has the same discretion as to the costs in actions tried by a jury as in those tried without a jury.

The recommendation of the jury that each party should pay his own costs was not considered; and affidavits by some of the jurymen that they would not have acquiesced in a verdict for defendant if they had supposed the result would be to throw all the costs on the plaintiff, were held inadmissible: *Forquhar* v. *Robertson*, 13 P. R. 156; *Weaver* v. *Sawyer*, 16 Ont. App. 422. Recommendation of jury.

Some of the cases decided under the former Rules (repealed in 1893) may still be usefully consulted as shewing circumstances which were formerly considered "good cause" for making the costs not follow the event, and may now furnish the Judge who tries the case with reasons for similarly disposing of the costs in the exercise of his discretion. See H. & L. Jud. Act, 1st ed., pp. 897, 898; 2nd ed., pp. 1259, 1260.

As to the power of the Judge at the trial to direct a set-off without regard to any claim of lien on the part of the solicitors: see *Blumenthiel* v. *Edwards*, 11 O. L. R. 30, in notes to *Rule* 116, *post*, and in notes to *Rule* 666.

The discretion is a judicial one, and it has been said that a plaintiff who successfully enforces a substantial legal right, and in no way misconducts himself, may not be deprived of costs, but is entitled to them as of right: *Cooper* v. *Whittingham*, 15 Ch. D. 501; and see *Bell* v. *Wilson*, 19 P. R. 167; but see the remarks of Bowen, L.J., in *Young* v. *Thomas*, 40 W. R. 468, referring to *N. London Ry. Co.* v. *G. N. Ry. Co.*, 1 Q. B. D. 30; and see also *Hayward* v. *E. London W. Works*, 28 Ch. D. 46; *The Condor*, 4 P. D. 120; *The Monkseaton*, 14 P. D. 51; *Upmann* v. *Forester*, 24 Ch. D. 231; *Goodhart* v. *Hyett*, 25 Ch. D. 182; *Wittmann* v. *Oppenheim*, 27 Ch. D. 260; 54 L. J. Chy. 56; *Re Patullo* v. *Orongo-* Discretion is judicial. How exercised.

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ville, 31 Ont. 192; *Anglo-Canadian M. P. Assn.* v. *Somerville*, 19 P. R. 113; but where the plaintiff is found to have acted in a tricky and unfair manner towards the defendant: *Lever* v. *Masbro' Equitable Society*, 105 L. T. 948; 106 L. T. 472; or recovers only nominal damages, or a very trifling part of his claim, he is not entitled to costs as of right: *Florence* v. *Mallinson*, 65 L. T. 354; and see *American Tobacco Co.* v. *Guest*, 1892, 1 Ch. 630; and he may be ordered to pay the defendant's costs (even where the case is tried by a jury); *Harris* v. *Petherick*, 4 Q. B. D. 611; and *Forget* v. *Ostigny*, 1895, A. C. 318; *Fielden* v. *Cox*, 120 L. T. Jour. 521; and *Nicolos* v. *Atkinson*, 25 T. L. R. 568; but if the defendant after notice has resisted the plaintiff's claim, even although only nominal damages are recovered against him he may be ordered to pay costs: *Overend* v. *Burrow*, 19 O. L. R. 642.

Where a plaintiff is only partially successful he may be given only an aliquot part of his costs proportioned to his success: see *Coats* v. *Herefordshire*, 1909, 2 Ch. 579.

Costs in partnership action.

In particular classes of cases, where by the practice before the *Jud. Act* certain rules have been developed as the just mode of disposing of costs, in such cases the discretion of the Court will probably be exercised in accordance with such rules, for example, as to the costs in partnership cases: *Chapman* v. *Newell*, 14 P. R. 208; *Ross* v. *White*, 71 L. T. 277; 1894, 3 Ch. 326; but see *Downey* v. *Roof*, 6 P. R. 89.

Joint tort feasors.

As to the severability of costs in actions against joint tort feasors: see *Birmingham & M. Motor Omnibus Co.* v. *London & N. W. Ry.*, 1913, 3 K. B. 850; 110 L. T. 64; *Adam S. S. Co.* v. *London Ass'ce Co.*, 137 L. T. Jour. 342.

Third parties.

As to the case of "third parties": see *Blore* v. *Ashby*, 42 Ch. D. 682; 38 W. R. 141, and notes to *Rule* 169.

Delegation of discretion.

A Judge has no power to delegate his discretion to the Taxing Officer: *Lombton* v. *Parkinson*, 35 W. R. 545.

Action brought without notice.

The fact that the action was brought without first making an application to the defendant for the relief sought, was not considered sufficient to deprive plaintiff of costs: *Goodhart* v. *Hyett*, 25 Ch. D. 182; *Wittmon* v. *Oppenheim*, 27 Ch. D. 260; *Ruskin* v. *Robinson*, 2 T. L. R. 18; but see *Holt* v. *Smith*, 3 T. L. R. 329.

For the effect on costs of a refusal of a reasonable sum tendered before suit: see *The William Symington*, 10 P. D. 1.

Trade mark.

In an action for infringement of trademark, an offer of full compliance with the plaintiff's demands was made after action commenced, but, notwithstanding this, a motion for injunction was brought on. The motion was held not unnecessary, the compromise being insufficient, and the plaintiff was held entitled to costs: *Fenessy* v. *Day & Martin*, 55 L. T. 161; see also *Knickerbocker* v. *Ratz*, 16 P. R. 30, 191; *Trotter* v. *Macleon*, 13 Ch. D. 574; *Anglo-Canadian M. P. Assocn.* v. *Winnifrith*, 15 Ont. 164; but where an action for infringement of trademark was brought against an innocent retail dealer without any previous notice, the Court, though granting an injunction, refused to order the defendant to pay costs: *American Tobacco Co.* v. *Guest*, 1892, 1 Ch. 630; 66 L. T. 257; and an action for infringement was dismissed, but without costs, because it appeared that the defendants had adopted their design with the view of acquiring the benefit of the market which the plaintiffs had developed: *Kerstein* v. *Cohen*, 11 O. L. R. 450; 13 O. L. R. 144; 39 S. C. R. 286.

Nominal damages.

A Judge before whom a second trial is held, has power (subject to any restriction contained in the order granting the new trial) to order

a plaintiff who recovers a nominal sum to pay the costs of both trials, even where the action is tried with a jury: *Harris* v. *Petherick*, 4 Q. B. D. 611; see *Fane* v. *Fane*, 13 Ch. D. 228; *Florence* v. *Mallinson*, 65 L. T. 354; and where the costs of the former trial were "ordered to abide the result" of a new trial, and at the new trial the jury only gave the plaintiff nominal damages, and no order was made as to costs, it was held that he was not entitled to the costs of the former trial; the result in such a case means the result as to costs: *Brotherton* v. *Metropolitan Dist. Ry.*, 1894, 1 Q. B. 666; *sed vide Koosen* v. *Rose*, *infra*, p. 258. Sec. 74. "Costs to abide result."

In an action of slander, where the plaintiff only recovered $1 damages the Court refused to interfere so as to deprive the plaintiff of costs, his conduct not having been reprehensible, and the smallness of the damages being due to the defendant's condition at the time the defamatory words were spoken: *Bell* v. *Wilson*, 19 P. R. 167. Slander.

Successful Defendant.—Where a defendant succeeds generally he may have the costs of some of his defences on which he has not succeeded; but where he has raised a distinct issue and failed he ought not to have the costs of that issue, but should be ordered to pay them: *Blank* v. *Footman*, 39 Ch. D. 678; *Reinhart* v. *Mentasti*, 42 Ch. D. 690. Successful defendant.

Where plaintiff recovered no more than a sum paid into Court, with defence denying the negligence on which the action was based, it was held that, though the defendant was entitled to the general costs of the action, there was power in the discretion of the Court to give the plaintiff costs of the issue of negligence on which he had succeeded: *Dunn* v. *S. E. & Chatham Ry. Co.*, 1903, 1 K. B. 358; *Hubback* v. *British North Borneo Co.*, 91 L. T. 672.

Where a plaintiff wholly fails there is no power to order the defendant to pay the costs: *Vipond* v. *Sisco*, 29 O. L. R. 200; but he may be refused his costs, even though the action be tried with a jury: *Rogers* v. *Kidd*, 13 O. L. R. 396 (an action for slander); but such discretion should not be exercised arbitrarily: *Ib.* Where the conduct of a defendant who had partly succeeded had been harsh and unreasonable: *Hessey* v. *Quinn*, 20 O. L. R. 442; or unmeritorious: *McMurray* v. *E. Missouri*, 21 O. L. R. 46, that was considered a sufficient reason for refusing the defendant costs; and see *Kerstein* v. *Cohen*, *supra*, p. 252.

As to the costs of a guilty wife in an action for alimony: see *Townson* v. *Townson*, 78 L. T. 54.

A successful defendant is *primâ facie* entitled to costs, and it is not a proper exercise of discretion as to costs to deprive him of costs because he has done some act which, although a fraud on the public, is not in any way connected with the issue between himself and the plaintiffs: *King* v. *Gillard*, 1905, 2 Ch. D. 7; 92 L. T. 605; and see *Civil Service Co-operative Soc.* v. *Gen. Steam Navigation Co.*, 1903, 2 K. B. 756; 89 L. T. 429; or because he has succeeded on the defence of the Statute of Limitations: *Elms* v. *Hedges*, 95 L. T. 145. If a successful defendant is deprived of costs, where no material exists for the exercise of the Judge's discretion, the order as to costs is appealable: *Civil Service Co-operative Soc.* v. *Gen. Steam Navigation Co.*, *supra*; but it is to be noted that in *Re Rotch*, 127 L. T. Jour. 617, it was said that the statements in *King* v. *Gillard*, *supra*, that there is no judicial discretion to deprive a successful defendant of his costs are *obiter* and contrary to the prior decision of the Court of Appeal in *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Chy. App. 276; 32 L. T. 80. Successful defendant.

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It was for some time doubtful whether, where the plaintiff fails, the defendant could be ordered to pay the whole costs: see *Dicks* v. *Yates*, 18 Ch. D. 76; *Foster* v. *G. W. Ry.*, 8 Q. B. D. 25, 515; *Butcher* v. *Pooler*, 24 Ch. D. 273; *Lambton* v. *Parkinson*, 35 W. R. 545; *Mitchell* v. *Vandusen*, 14 Ont. App. 517; *Forget* v. *Ostigny*, 1895, A. C. 318; 72 L. T. 399; but it would now seem to be settled that he cannot be so ordered, unless the plaintiff was entitled to bring the action, and it has failed merely by reason of circumstances subsequently occurring: *Fleming* v. *Toronto*, 19 Ont. App. 318; *Andrew* v. *Grove*, 1902, 1 K. B. 625.

Thus a defendant as to whom the action is dismissed cannot (except as above mentioned), properly be ordered to pay the plaintiff's costs: *Wills* v. *Carman*, 14 Ont. App. 656, confirming *Mitchell* v. *Vandusen*, 14 Ont. App. 517, where the question of the power to make a successful party pay costs was also raised, but was not necessary to the decision: see also *McDermid* v. *McDermid*, 15 Ont. App. 287; but he has been ordered to pay the costs of a co-defendant, though there was no issue between them: *Church* v. *Fuller*, 3 Ont. 417.

Partial success.

When a defendant is only partially successful, and is deprived of costs, the order as to costs is not appealable: *Leckhampton Quarries Co.* v. *Ballinger*, 93 L. T. 93: Where a defendant is wrongly made a party, but nevertheless chooses to take an active part in the proceedings when he might have stood aside, he was held not entitled to costs: *Butler* v. *Rice*, 1910, 2 Ch. 277; 103 L. T. 94; and see *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611; 47 L. T. 89, and note to *Rule* 134.

Improper parties.

Costs may be ordered to be paid by one defendant to another.

By C. R. 1140, it was expressly provided that where the costs of one defendant ought to be paid by another defendant, the Court might order payment to be made by the one to the other directly.

That Rule has not been continued, but under section 74 the like order may probably be made.

Costs between co-defendants.

A defendant is usually liable to pay costs to his co-defendant, when the latter is an innocent party, and is necessarily brought into the litigation in order to enable the plaintiff to obtain complete relief in the action: see *McLean* v. *Grant*, 20 Gr. 76. Formerly at law there was no practice authorizing a judgment to be given against a defendant for the payment of the costs of a co-defendant either directly or indirectly; and even in Equity, prior to Chy. O. 319, from which C. R. 1140 was taken, the Court of Chancery was accustomed only to order such costs to be paid by the circuitous process of directing the plaintiff to pay them, and add them to his own costs. In interpleader proceedings by Sheriffs, the costs of the Sheriff are to be included in the costs of the successful party under *Rule* 641 (2).

The Court has ordered a defendant to pay a co-defendant's costs, even though the action was dismissed: *Church* v *Fuller*, 3 Ont. 417, but a successful defendant cannot be ordered to pay the plaintiff's costs: *Mitchell* v. *Vandusen*, 14 Ont. App. 517; *Wills* v. *Carman*, *Ib.*, 656; unless the plaintiff was entitled to bring the action, and it has failed by reason of circumstances subsequently occurring: see *supra*.

Several defendants, as to some of whom action fails.

When a plaintiff succeeds against one defendant and fails against another, he is not entitled, without an order to that effect, to add in his costs, payable by the unsuccessful defendant, the costs payable by him to the successful defendant: *Child* v. *Stenning*, 7 Ch. D. 413; 11 Ch. D. 82; *Bergmann* v. *McMillan*, 17 Ch. D. 423, 428; and see *Beaumont* v. *Senior*, 1903, 1 K. B. 282; but where the unsuccessful

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defendant has occasioned the litigation as against the other defendants, or the circumstances justified the plaintiff in making them parties, he may be ordered to recoup the plaintiff the costs he is ordered to pay the successful defendants: *Child* v. *Stenning*, *supra*; *Bostermann* v. *British Motor C. Co.*, 1914, 3 K. B. 181; 110 L. T. 754.

Where there are several defendants, some of whom do not defend and some of whom do; the non-defending defendants may in some cases be relieved from paying costs occasioned by the defence of their co-defendants: see *Dansk Rekylriffel, etc.*, v. *Snell*, 1908, 2 Ch. 127; 98 L. T. 830. And where a defendant is improperly made a party, but actively takes part in the litigation in support of another party, he may disentitle himself to costs: *Butler* v. *Rice*, 103 L. T. 94; 1910, 2 Ch. 277; *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611; 47 L. T. 89.

No power to award anything by way of penalty in addition to costs.

The Court cannot, except under some special statute, impose costs beyond the costs of suit, by way of penalty. The discretion as to costs, however, extends to ordering a defendant to pay half the costs, or a fixed sum in lieu of costs: *Rule* 652 (1); *Wilmott* v. *Barber*, 17 Ch. D. 772; *Ryan* v. *Fish*, 4 Ont. 335, 344; see *Cockburn* v. *Edwards*, 18 Ch. D. 449, 459; *Harrison* v. *McSheehan*, W. N. 1885, 207; or no more costs than the verdict: *Hancock* v. *Hale*, 28 Sol. Jour. 230, where only £1 was recovered on a much larger claim; or costs as between solicitor and client (in matters of equitable jurisdiction at any rate): *Andrews* v. *Barnes*, 39 Ch. D. 133; *Sandford* v. *Porter*, 16 Ont. App. 565, 577; or giving no costs where the action was within the jurisdiction of an inferior Court: *Vandewaters* v. *Horton*, 9 Ont. 548; *Kay* v. *Tighe*, 18 L. R. Ir. 40; or where the defendant, who was nearly of age, had avoided the contract sued on, on the ground of infancy: *Edison Co.* v. *Smith*, 119 L. T. Jour. 106; or only such costs as would have been incurred had a less costly mode of proceeding been adopted: *Wallis* v. *Cain*, 21 Ont. 532; *McPherson* v. *Irwin*, 26 Ont. 440; *Re Brown*, 32 Ch. D. 323; or to directing a solicitor to pay costs personally: *Barnard* v. *Holes*, 37 W. R. 668; or to directing costs to be borne by an infant: *Bassett* v. *Perdue*, 18 Ont. 575; *Woolf* v. *Woolf*, 1899, 1 Ch. 343; 79 L. T. 725; or to refusing costs to a party, though successful, whose conduct has been discreditable in respect to some matter connected with the litigation in question: *Darby* v. *City of Toronto*, 17 Ont. 554; *Robinson* v. *Bogle*, 18 Ont. 387; *Green* v. *Stevenson*, 9 O. L. R. 671; and *Re King* v. *Gillard*, *supra*, p. 253; or harsh and unreasonable: *American Tobacco Co.* v. *Guest*, 1892, 1 Ch. 630; or whose claim is trivial: *Mendudno* v. *Woods*, 1899, 2 Ch. 705; *Fielden* v. *Cox*, 120 L. T. Jour. 7; or has been submitted to by the defendant: see *Slazenger* v. *Spalding*, 1910, 1 Ch. 257; 102 L. T. 390; or who has made improper charges of fraud, etc., which are not sustained: *Fry* v. *Lane*, 40 Ch. D. 312; *Minute* v. *Walsh*, 34 Ont. 309; *In re Stanton*, 3 Ont. 86; *Stretton* v. *Grimes*, 19 Ont. 286; *Beatty* v. *O'Connor*, 5 Ont. 747; or to directing payment of the opposite party's costs of such charges: see *Neale* v. *Winter*, 9 Gr. 261; *Hodgins* v. *McNeil*, *Ib.*, 305; *Watson* v. *Watson*, 9 Gr. 70; *Teacher* v. *Calder*, 1899, A. C. 451; *McKenzie* v. *Yielding*, 11 Gr. 496; so also costs may be refused where a party otherwise misconducts himself, as by making an untruthful defence: *Finlayson* v. *Willard*, 10 Gr. 130; or unnecessarily bringing a suit: *Darling* v. *Wilson*, 9 Gr. 255; *Springer* v. *Clarke*, 15 Gr. 664; even in the case of a mortgagee: *McLean* v. *Cross*, 3 Chy. Ch. 432; *Ashworth* v. *Lord*, 36 Ch. D. 545; *Graham* v. *Ross*, 6 Ont. 154; *Smallpiece* v. *Lee*, 20 Sol. Jour. 61; *Beatty* v. *O'Connor*, 5 Ont. 747; or trustee: *Easton* v. *Landor*, 67 L. T. 1; or he may be ordered to pay costs: *Faire* v. *Fane*, 13 Ch. D. 228; *Tabburn*, *Gage* v. *Rutland*, 46 L. T. 848; W. N. 1882, 92.

Costs as between solicitor and client may be given.

Or costs of less expensive mode of proceeding.

Examples of discretion as to costs.

Unfounded charges of fraud.

Improper action, or defence.

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There is jurisdiction in an action of tort, as well as of contract, to order a defendant against whom relief is obtained to pay, not only the plaintiff's own costs, but also the costs the plaintiff is ordered to pay to a defendant as to whom the action has failed: *Bullock* v. *London General Omnibus Co.*, 1907, 1 K. B. 264; 95 L. T. 105; *Bestermann* v. *British Moto Cab Co.*, *supra*, p. 255.

Awarding costs out of an estate.

Costs out of Estate.—In testamentary cases, where a will set up is obtained under suspicious circumstances, a defendant setting up fraud and undue influence, may, though unsuccessful, nevertheless be entitled to costs out of the estate: see *Gilbert* v. *Ireland*, 9 O. L. R. 124; *Wilson* v. *Bassill*, 1903, p. 239; 89 L. T. 586, but subsequent to the payment of the plaintiff's costs as between solicitor and client: *Ib.*, or though the plaintiff be unsuccessful the action may be dismissed without costs: *Logan* v. *Herring*, 19 P. R. 168; or the party whose conduct excited the litigation may have to bear them: see *Re Osment*, *Child* v. *Osment*, 110 L. T. 990.

Actions to establish or impugn wills.

Costs out of the estate have, under special circumstances, been allowed to all parties, in an action to establish a will, even where undue influence was established: *R. C. Episcopal Corp.* v. *O'Connor*, 14 O. L. R. 670.

But where, after probate, a party sued to set aside the will on the ground of alleged undue influence and testamentary capacity on insufficient evidence and without having made proper inquiry, he was ordered to pay the costs of the defendants who actively defended the action: *McAllister* v. *McMillan*, 25 O. L. R. 1. In that case the rules for ordering costs to be paid out of an estate were stated to be (1) where the litigation is due to the act or conduct of the testator or principal beneficiaries; and (2) if there is a reasonable ground for investigation due to surrounding circumstances, an unsuccessful litigant may be relieved from paying costs, and the plaintiff's costs may be ordered to be paid out of the estate: see *Re Osment*, *Child* v. *Osment*, *supra*.

Costs in action for construction of will.

In an action for the construction of a will, the costs of all parties, in the absence of misconduct, are usually ordered to be paid out of the estate of the testator under whose will the difficulty arose: *Shortman* v. *Shortman*, 67 L. T. 717; and see *Ib.* as to the principles upon which costs will be allowed out of an estate where a will, disputed on the ground of undue influence, is established; but costs of an action in which an estate is interested cannot properly be ordered to be paid out of such estate unless the estate is before the Court in the litigation: *Crawford* v. *Broddy*, 18 P. R. 233.

But on a summary application for the construction of a will, an unsuccessful defendant was ordered to pay costs: *Re Halston*, *Elcen* v. *Halston*, 1912, 1 Ch. 435; 106 L. T. 182 (a case of the misnomer of a devisee).

Where the question arising on the construction of a will had given rise to great divergence of judicial opinion, the Privy Council, while dismissing an appeal directed the costs of both parties as between solicitor and client to be paid out of the estate: *Dunne* v. *Byrne*, 1912, A. C. 407; 106 L. T. 394, whether this order merely applied to the costs of the appeal or the whole costs of the litigation is not stated.

The Court may order costs to be paid out of real or personal estate, but where it makes no specific direction of that kind, but simply orders them to be paid out of an estate, the costs are payable out of the entirety in due course of administration: *Re Vickerstaff*, 1906, 1 Ch. 762.

Where Money Paid into Court.—Where in an action on a covenant the defendant paid money into Court and denied the breach, and a referee, to whom the issues were referred, reported that the money paid in was sufficient to satisfy the claim, it was held that the costs were in the discretion of the Court, and that the proper method of exercising it was by allowing plaintiff his costs up to the time of payment into Court, and defendant the costs of the action after that time: *Buckton* v. *Higgs*, 4 Ex. D. 174. Sec. 74. Costs where money paid into Court.

Where money is paid in with a defence denying liability, and the plaintiff fails to recover as much as is paid in, but succeeds on the issue as to liability, the plaintiff is entitled to the costs of the action up to the time of payment in, and of the issues as to liability raised by the defendant, and the defendant is entitled to his costs of action after payment in, other than the costs of the issues on which he fails: see *Wagstaffe* v. *Bently*, 1902, 1 K. B. 124; *Ridout* v. *Green*, 87 L. T. 679; *Hubback* v. *British North Borneo Co.* 1904, 2 K. B. 473; *Fitzgerald* v. *Tilling*, 96 L. T. 718; *Powell* v. *Vickers*, 1907, 1 K. B. 71, 95 L. T. 774.

Where money is paid into Court in satisfaction of a claim for damages which the plaintiff accepts in full of that claim, but proceeds to trial claiming an injunction, or other relief, which is refused with costs, and the money paid into Court is ordered to be paid to the plaintiff with costs of that claim; under such an order the general costs of the action are apportionable: *Todd* v. *N. E. Ry. Co.*, 87 L. T. 710; 88 L. T. 112; 1903, W. N. 30.

But where a cause was referred by consent at a trial to the Master under the C. L. P. Act, as a matter of account, formal judgment being entered for the plaintiff, and the order of reference was silent as to costs, after an award that nothing was due to plaintiffs beyond money paid into Court, it was held that the proceedings were not "proceedings in the High Court" within this section, but withdrawn from it by an agreement of the parties, and, the parties having agreed to its terms, the Court could not add to it, and had no power to give costs: *Wimshurst* v. *Barrow Shipbuilding Co.*, 2 Q. B. D. 335.

Tender After Writ.—A defendant cannot escape the costs of a writ of summons by tendering the amount sued for before service, but after the issue of the writ: *O'Malley* v. *Killmallock*, 22 L. R. Ir. 326, and see *Hughes* v. *Justin*, 1894, 1 Q. B. 667; *Du Pasquier* v. *Cadbury, Jones & Co.*, 1903, 1 K. B. 104; but where no writ has been issued, it would seem that no costs of proceedings taken with a view to bringing an action are recoverable from a defendant: *Holman* v. *Stephens*, 6 Ir. N. S. 124. Effect of the issue of a writ on right to costs.

Reservation of Question of Costs to a Future Time.—Sometimes the question of the costs of the action is not disposed of at the trial, but is reserved to the future hearing of the cause on further directions, or the costs may be awarded up to the judgment at the trial, and the question of subsequent costs only may be so reserved.

Costs of Interlocutory Applications Adjourned to the Trial — Frequently costs of interlocutory applications are reserved to be disposed of at the trial, and care should be taken to bring the question of such costs to the attention of the Judge at the trial, so that he may make order concerning the same. Costs of motions adjourned to the trial.

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The Judges in England have laid down the following rules, viz.: that where applications are adjourned to the trial, and are not then mentioned to the Judge, the costs of such applications are to be costs in the cause, and taxed accordingly, and need not be mentioned in the judgment; where, however, an interlocutory application has been disposed of, but the costs of it have been reserved, such costs are not to be mentioned in the judgment or order pronounced at the trial, or allowed on taxation without the special direction of the Judge: see *British Natural Premium, etc., Assocn.* v. *Bywater*, 1897, 2 Ch. 531; 77 L. T. 22. Thus, where a motion by plaintiff is adjourned till the trial, and no mention is made of the costs of it then, or at the trial, a judgment dismissing the action with costs carries with it the costs of the motion: *Gosnell* v. *Bishop*, 38 Ch. D. 385. See also as to costs reserved to be disposed of at the trial: *Hodges* v. *Hodges*, 25 W. R. 162; *Fritz* v. *Hobson*, 14 Ch. D. 542. In Ontario no general rule such as that referred to above has been laid down, and it would seem to be necessary that the costs of all interlocutory motions adjourned, and all interlocutory costs reserved, till the trial, should be mentioned to, and disposed of by, the Judge at the trial.

Omission to dispose of costs reserved.

Where the judgment at the trial omits to dispose of such costs, and the judgment is appealed from and affirmed, it may be found thereafter impossible to get such costs disposed of: see *Tucker* v. *Tecumseh*, 10 Can. Ex. 153, but an omission of that kind may be remedied at any time before the judgment is entered, or affirmed on appeal. After entry, or on appeal, it does not seem possible for the Judge of first instance to vary the judgment. If, however, the costs were awarded at the trial, but by mistake such award is omitted in the formal judgment, then it is amendable under *Rule* 521.

Where costs of a motion for an interim injunction were reserved to the trial, and it appeared that although the plaintiff had made a *prima facie* case for an interim injunction, yet the action failed, no order was made as to the costs of the motion, but the action was dismissed with costs: *Coombe* v. *Mendit*, 136 L. T. Jour. 86.

Whether orders as to interlocutory costs may be affected by judgment at trial.

Orders disposing of interlocutory costs are not interfered with by a general award of costs at the trial: *Beynon* v. *Godden*, 4 Ex. D. 246; *Walter* v. *Bewicke*, 90 L. T. 409; and cannot be reviewed at the trial. Thus where such costs are ordered to be "costs in the cause," the Judge at the trial cannot deprive the successful party of them: *Koosen* v. *Rose*, 76 L. T. 145; 45 W. R. 337; this was a decision of the English Court of Appeal; but see *contra*, *per* Meredith, J., in Chambers, *Dickerson* v. *Ratcliffe*, 19 P. R. 223, and *per* Rose, J., *Muir* v. *Squire*, *Ib.* 237, where it was held that the making of costs of an interlocutory motion "costs in the action" or "costs in the cause to the successful party in the action," is not a final disposition of the costs, but leaves such costs in the discretion of the Judge at the trial: and see *Brotherton* v. *Metropolitan Dist. Ry.*, *supra*, p. 253, where costs were ordered to abide the result, and it was held that the result referred to was the result as to costs.

Mode of taxation where two defendants appear by same solicitor.

For the mode of taxation of costs, where an action against two defendants appearing by the same solicitor was dismissed as to one with costs, and judgment was given for the plaintiff against the other with costs: see *Clark* v. *Virgo*, 17 P. R. 260; and see *Beaumont* v. *Senior*, *infra*, p. 259.

As to costs of witnesses where plaintiff was ordered to pay defendants so much of the costs as were occasioned by a particular contention: see *Lockard* v. *Waugh*, 17 P. R. 269.

Costs where Success Divided on Several Issues.—In jury cases the observations following are in regard to the cases where the costs follow the "event," under sub-section (3), *i.e.*, where the Judge has not otherwise ordered. Sec. 74. Costs where success divided.

Where the "event" is the result of a single issue, no difficulty occurs in the application of the sub-section. It is where there are several issues, or there is a counter-claim, that difficulty arises. Jury cases.

Where there are several issues, and neither plaintiff nor defendant is wholly successful, the question arises, what the "event" is which the costs are to follow. It has been held that the word "event" in sub-sec. (3) is complex, and must be read distributively as regards distinct causes of action. The general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them: *Myers* v. *Defries*, 4 *Ex. D.* at p. 180; *Stooke* v. *Taylor*, 5 Q. B. D. 569; in which the previous case of *Staples* v. *Young*, 2 Ex. D. 324, was not approved of: see also *Ellis* v. *Desilva*, 6 Q. B. D. 521; *Waring* v. *Pearman*, 32 W. R. 429; *Lund* v. *Campbell*, 14 Q. B. D. 821; *Hawke* v. *Brear*, *Ib.*, 841; *Goutard* v. *Carr*, 13 Q. B. D. 598 *n*; *Ahrbecker* v. *Frost*, 17 Q. B. D. 606; *Bertram* v. *Massey Mfg. Co.*, 13 P. R. 184; *Crepeau* v. *Pacaud*, 35 C. L. J. 114; *Lockhampton Quarries Co.* v. *Ballinger*, 93 L. T. 93; and the judgment should be drawn up so as to give effect to sub-sec. (3): *Hoyes* v. *Tate*, 1907, 1 K. B. 656. Where several issues.

In each issue the "event" is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation; and therefore where a new trial was had and the plaintiff on the second trial recovered a verdict, he was held entitled to the costs of the first trial as part of the costs of the action: *Field* v. *Great Northern Ry.*, 3 Ex. D. 261; *Green* v. *Wright*, 2 C. P. D. 354; *Waring* v. *Pearman*, 32 W R. 429; *Wright* v. *Shaw*, 19 Q. B. D. 396; and so also, where at the first trial the jury disagreed: *Copeland* v. *Blenheim*, 11 P. R. 54. "Event," meaning of.

Where there are issues on which the plaintiff succeeds and others on which he fails, and by reason of his failure he recovers nothing in the action, where costs follow the "event" he is entitled to the costs of the issues on which he succeeded: *Slatford* v. *Erlebach*, 106 L. T. 61.

Where a plaintiff recovered a less sum than an amount paid into court by the defendants for the sake of peace, the defendants, though held entitled to the general costs of the action, were nevertheless ordered to pay the costs of an issue as to which they had failed: *Ashback* v. *British North Borneo Co.*, 91 L. T. 672.

In *Abbott* v. *Andrews*, 8 Q. B. D. 648, where the plaintiff succeeded on some issues but was non-suited on others, no order being made as to costs, the defendant was held entitled to costs of issues on which the plaintiff was non-suited, and the plaintiff to the other costs, including the general costs of the cause.

Where two defendants are jointly represented by the same solicitor, and costs are awarded in favour of one defendant, and against the other, the successful defendant, in the absence of any agreement between him and his co-defendant, as to how their costs are to be borne *inter se*, is entitled to recover from the plaintiff half the costs of the defence: *Beaumont* v. *Senior*, 1903, 1 K. B. 282; and see *Zavitz* v. *Judge*, and other cases, *supra*, p. 250.

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Claims against defendants in the alternative.

Where the plaintiff's claim is against two defendants in the alternative he may be ordered to add the costs of the defendant as to whom he fails to bis own, and get them over against the defendant as to whom he succeeds: see *Sanderson* v. *Blyth Theatre Co.*, 1903, 2 K. B. 533; 89 L. T. 159; in an action of tort as well as an action of contract, or for equitable relief: *Bullock* v. *London General Omnibus Co.*, 1907, 1 K. B. 264; 95 L. T. 105; *Medley* v. *United Tramways*, 26 T. L. R. 315; *Bestermann* v. *British Motor Cab Co.*, 1914, 3 K. B. 181; 110 L. T. 754; but this cannot be done without the special order of the Court: *Child* v. *Stanning*, 7 Ch. D. 413; 11 Ch. D. 82.

Ambiguous order as to costs.

Where a judgment is ambiguous as to costs, application should be made to the Judge who pronounced it, to correct the ambiguity. It is not proper to bring the matter up on an appeal from the taxing officer: *Abbott* v. *Andrews*, 8 Q. B. D. 648; *Sparrow* v. *Hill*, 8 Q. B. D. 479, may also be referred to, though in that case the Judge made an order as to costs, and the question was the right interpretation of it. There the plaintiff succeeded on three heads of his claim, and was awarded costs in respect of the amounts recovered, and the defendant was given costs in respect of the rest. Therefore the plaintiff was held entitled to the general costs of the cause, excepting those which related to the issues on which he had failed, and the defendant was given his costs of the latter issues; and see: *Davis* v. *Hurd*, 4 O. L. R. 466.

Where one of several plaintiffs fails.

Where several plaintiffs are joined, and some or one of them only are or is found entitled to relief, the defendant, though unsuccessful, would appear to be entitled to his costs occasioned by so joining any person who has not been found entitled to relief, unless the Court in disposing of the costs of the action otherwise orders.

Where an action was brought by two plaintiffs on separate causes of action, one of whom failed and the other succeeded, and the costs were ordered to abide the event of the action; it was held that the defendants were entitled to the costs occasioned by joining the unsuccessful plaintiff, and that the successful plaintiff was entitled to the general costs of the action: *Gort* v. *Rowney*, 17 Q. B. D. 625.

Cases of counter-claims.

Counter-claims.—In cases where there are counter-claims, most difficulty has occurred in jury cases where costs follow the event under section 74 (3), or in any case where an order is made which has the same practical effect as to costs, *e.g.*, giving costs simply to the party successful on the counter-claim.

Strictly speaking a counter-claim is a claim which a defendant prior to the Judicature Act could only have set up by cross-action, or by a claim for cross-relief: see *Girardot* v. *Welton*, 19 P. R. 162, 201.

There is a distinction between cases where a defendant sets up a counter-claim in the nature of a set-off of a debt or liquidated claim, and a counter-claim for unliquidated damages.

Set-off.

Under the present *Rule* 115 both kinds of claims may be presented by the defendant in the pleading called a counter-claim: see *Bennett* v. *White*, 13 P. R. 151; but a true set-off does not lose its real character by being pleaded as a counter-claim: *Ryan* v. *Fraser*, 16 L. R. Ir. 253; *Cutler* v. *Morse*, 12 P. R. 594; *Bennett* v. *White*, 13 P. R. 149; *Sanderson* v. *Ashfield*, 13 P. R. 230; and the costs are taxable on the same principles as they would have been taxed in like case before

the Jud. Act; *Cutler* v. *Morse*, *supra*; see also *Wight* v. *Shaw*, 19 B. D. 396; *Girardot* v. *Welton*, 19 P. R. 162, 201. Sec. 74.

Therefore, where the plaintiff establishes his claim and the defendant a set-off of an equal or greater amount, the defendant has succeeded and the plaintiff failed, and the defendant is therefore entitled to the costs of the action: *Stooke* v. *Taylor*, 5 Q. B. D. 576; *Baines* v. *Bromley*, 6 Q. B. D. 794; *Heritage* v. *Ford*, *supra*; *Gates* v. *Seagram*, 19 O. L. R. 216. Plaintiff's claim reduced by set-off.

On the other hand, where the plaintiff establishes a claim, and the defendant establishes a counter-claim, in the nature of a cross-action, *i.e.*, both claim and counter-claim are successful, the plaintiff is entitled to the costs of the action (without any apportionment of charges common to both claim and counter-claim), and the defendant to such costs only as are properly attributable to the counter-claim: *Re Brown*, *Ward* v. *Morse*, 23 Ch. D. 377; *Stooke* v. *Taylor*, *supra*; *Gray* v. *Davidson*, 5 Ex. D. 189; *Ellis* v. *Desilva*, 6 Q. B. D. 521; *Ontario Forge*, *etc.* v. *Comet Cycle Co.*, 17 P. R. 156; *Sharpe* v. *Haggith*, 106 L. T. 13. This gives the general costs of the action not to the party recovering the most, nor to the party to whom the litigation is on the whole favourable, but to the plaintiff: *Baines* v. *Bromley*, *supra*; *Pearson* v. *Ripley*, 32 W. R. 463; 50 L. T. 629 (because his costs are those of the action), whether the balance is in favour of the plaintiff: *Hallinan* v. *Price*, 41 L. T. 627; 27 W. R. 490; or of the defendant: *Re Brown*, *Ward* v. *Morse*, *supra*. See also *Waring* v. *Penrman*, 32 W. R. 429; 50 L. T. 633; and *Coughlin* v. *Hollingsworth*, 5 Ont. 207, where costs were directed to be taxed upon this principle and judgment was directed to be entered for the party in whose favour the balance should be found. Recovery on claim and counter-claim.

Where the plaintiffs claimed £304 17s. 9d., and the defendants set up a counter-claim for £480, and the arbitrator to whom the matter was referred found in favour of the plaintiffs for £371, and in favour of the defendants for £375, the Court, on appeal from the District Registrar, who had given the costs of the cause to the defendants, ordered "the costs of, and relating to the plaintiff's claim, and the proof thereof to be paid by the defendants, and the costs of, and relating to the defendants' counter-claim, and the proof thereof, to be paid by the plaintiffs": *Cole, Merchant & Co.* v. *Firth*, 4 Ex. D. 201; 40 L. T. 851.

For the purposes of taxation a counter-claim properly so called is now to be treated as a cross action, and the costs thereof may be taxed separately from those of the action: *Emerson* v. *Gearin*, 12 P. R. 399; *Shrapnel* v. *Laing*, 20 Q. B. D. 334; *Amon* v. *Bobbett*, 22 Q. B. D. 543; *Ontario Forge & Bolt Co.* v. *Comet Cycle Co.*, 17 P. R. 476; *Haggart* v. *Brampton*, 17 P. R. 477; but a defence which is not strictly speaking a counter-claim cannot acquire that character merely because the plaintiff or defendant so calls it: *Girardot* v. *Welton*, 19 P. R. 162, 201; *Gates* v. *Seagram*, 19 O. L. R. 216. Counter-claim to be treated as cross-action on taxation of costs.

In *Bowker* v. *Kesteven*, 47 L. T. 515, the plaintiff claimed £49 17s., the defendant admitted the claim, and counter-claimed for £75; judgment was for the plaintiff on the claim admitted and costs, and for the defendant for £40 and costs. It was held that the plaintiff was entitled to costs up to and including the statement of defence, and the defendant to costs after that time: see also *O'Riordan* v. *Kelly*, 16 L. R. Ir. 263.

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Recovery on counter-claim exceeding claim of plaintiff.

Where there is a counter-claim in respect of matters which could not be pleaded as a set-off, and the defendant recovers on his counter-claim a sum exceeding that which the plaintiff recovers on his claim, the claim and counter-claim having, for purposes of taxation, to be treated as independent actions, the costs in each should be taxed in favour of the successful party, as if he had wholly succeeded in the action, subject to a deduction in respect of the costs of any issues on which he has not succeeded: *Shrapnel* v. *Laing*, 20 Q. B. D. 334; *Summerfeldt* v. *Johnston*, 17 P. R. 6; but "common items," that is items common to the defence and the counter-claim, should not be allowed to the defendant: *Haggart* v. *Brampton*, 17 P. R. 477. It is immaterial, for purposes of taxation, whether the form of the judgment be for recovery by each party of the amount found due to him, or by plaintiff or defendant for the balance in his favour: *Ib.*

Reduction by set-off.

In the case of a true counter-claim, the plaintiff cannot foresee that the defendant will set up the counter-claim, but may prefer to bring a cross-action, while in the case of a set-off, he must know of the existence of the claim, and should give credit for it, if good: see *Heritage* v. *Ford*, 71 L. T. Jour. 313; *Stooke* v. *Taylor*, *infra*.

Claim and counter-claim dismissed.

Where therefore the claim and counter-claim are both dismissed, the plaintiff is to pay the defendant the general costs of the action, as if no counter-claim had been put in, and the defendant has only to pay the sum by which the costs have been increased by the counter-claim: *Soner* v. *Milton*, 11 Ch. D. 416; *Mason* v. *Brentini*, 15 Ch. D. 287. No part of the general costs of the action are chargeable against the defendant: *Ib.*, and *Atlas, etc., Co.* v. *Miller*, 1898, 2 Q. B. 500; 79 L. T. 5. As to the form of judgment in such cases: see *James* v. *Jackson*, 1910, 2 Ch. 92; 102 L. T. 804.

Claim dismissed without, and counter-claim dismissed with, costs.

Where the claim was dismissed without costs, and the counter-claim with costs, the Judge ordered defendant to pay half plaintiff's costs, as a convenient mode of settling the matter: *Wilmott* v. *Barber*, 15 Ch. D. 96; 17 Ch. D. 774.

Where the Judge gave the plaintiff the costs of the action, and the defendant the costs of his counter-claim, it was held that the taxing officer could not tax costs to the plaintiff only up to the defence which admitted his claim: *Finsko* v. *Brown*, W. N. 1891, 87.

Set-off and counter-claim pleaded.

"Event."

In *Chatfield* v. *Sedgwick*, 4 C. P. D. 459, the plaintiff claimed a sum exceeding £50. The defendant pleaded a set-off, and also made a counter-claim for goods to the amount of about £24. The action was referred to a Master, costs to abide the event. The Master certified that there was due to the plaintiff on the claim £16, and to the defendant on the counter-claim £23, and that the balance due to the defendant was £7. It was held that defendant was entitled to his costs, as the question was, taking claim and counter-claim together, which was creditor and which was debtor, and, the finding being in favour of the defendant, that was the event which the costs were to follow. The reasons for this decision are dissented from by Cockburn, C.J., in *Stooke* v. *Taylor*, 5 Q. B. D. 582, though the decision itself is approved of, as being in accordance with the principles previously above mentioned, not because the defendant succeeded, but because the plaintiff failed as to costs, not having recovered £20, so as to be entitled to costs under the County Court Act. See also *Lowe* v. *Holme*, 10 Q. B. D. 286; *Ryon* v. *Fraser*, 16 L. R. Ir. 253.

Where, in an arbitration, costs were to follow the "event," and the defendant recovered more on his counter-claim than the plaintiff,

it was held that the defendant was entitled to the general costs and the plaintiff to costs of the issue on which he succeeded: *Lund* v. *Campbell*, 14 Q. B. D. 821, where *Baines* v. *Bromley*, is explained: *Hawke* v. *Brear*, *Ib.*, 841: see also *Ahrbecker* v. *Frost*, 17 Q. B. D. 606. Sec. 74.

The costs of an action in which judgment is signed in default of defence, and the damages are assessed by a jury, do not follow the event, but are in the discretion of the Judge, there having been no trial with a jury: *Guth* v. *Howarth*, 28 Sol. Jour. 427; W. N. 1884, 99; see Section 74 (3), and *Rules* 650, 651. Costs on assessment of damages.

Appeals Respecting Costs.—Sections 74 (1), and 24, have the effect, that except in the case of trustees, mortgagees, etc.: see *Farrow* v. *Austin*, and other cases cited, *supra*, p. 249; and where the Judge has proceeded on a wrong principle: *Young* v. *Thomas*, 1892, 2 Ch. per Lindley, L.J., at p. 137; *McCausland* v. *Quebec F. Ins. Co.*, 25 Ont. 330, or misapprehension of the facts: *Gates* v. *Seagram*, 19 O. L. R. 216, no appeal in respect of costs will be allowed, without leave, since section 24 prohibits appeals, except by leave of the Court or Judge appealed from, in respect of costs, which are by law left to the discretion of the Court: *Mitchell* v. *Vandusen*, 14 Ont. App. 517 (where, on an appeal by leave, the decision was reversed). Appeals as to costs.

An appeal lies to a Divisional Court respecting the award of costs at the trial, where the Judge at the trial proceeded on an erroneous principle: *McCausland* v. *Quebec Fire Ins. Co.*, 25 Ont. 330; and see *Re Brodford*, 15 Q. B. D. 635; or where the costs are in fact in his discretion, but he acts on the assumption that his discretion is excluded: *Bew* v. *Bew*, 1899, 2 Ch. 467; 81 L. T. 284; also see *King* v. *Gillard*, and *Civil Service Co-operative Socy.* v. *General Steam Navigation Co.*, *supra*, p. 253.

Where the costs of an action referred to a Referee for trial are in his discretion, it is held in England that there is no appeal from his disposition thereof: *Minister* v. *Apperly*, 1902, 1 K. B. 643; but in Ontario on a motion for judgment in accordance with the Referee's report, it would appear to be open to the Judge to adopt, or reject, or vary, the Referee's decision as to costs; and the Referee's decision as to costs, as well as to any other matter involved in the reference, would appear to be subject to appeal: see *Rules* 400, 502, 503, 504.

Even, though leave to appeal has been given, the appellate Court will not review the exercise of his discretion by the Judge; per Lindley, L.J., *Young* v. *Thomas*, 1892, 2 Ch. p. 136; and the Court will not on appeal interfere with the discretion exercised by a judicial officer as to costs of proceedings before him, unless there is error of law or fact: *Campbell* v. *Wheler*, 17 P. R. 289.

Orders have therefore been held unappealable in respect of costs of inspection of a mine allowed under *Rule* 370: *Mitchell* v. *Darley Main Colliery Co.*, 10 Q. B. D. 457; costs directed to be paid to a defendant by a co-defendant though there was no issue between them: *Church* v. *Fuller*, 3 Ont. 417: see also *Rudow* v. *Great Britain Insurance Co.*, 17 Ch. D. 600; *Leckhampton Quarries Co.* v. *Ballinger*, *supra*, p. 254: but see *Re Cooper*, *Cooper* v. *Vesey*, *Ib.*: costs directed to be paid by defendant, and given over against a third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; and costs dealt with before the trial and directed to be borne by one party "in any event": *Vicary* v. *Great* Orders not appealable.

Sec. 75. *Northern Ry. Co.*, 9 Q. B. D. 168. See other cases in notes to section 24 of the Jud. Act, *supra*, pp. 112 *et seq.*

Costs are not in the discretion of the Court, and are therefore the proper subject of an appeal where they came within the exceptional cases in section 74 (2).

See also notes to section 24, and *Bozett* v. *Morgan*, 24 Q. B. D. 28; *Horphom* v. *Shocklock*, 19 Ch. D. 207.

PRACTICE AND PROCEDURE.

Practice and procedure.

75.—(1) Subject as to appeals under *The Ontario Controverted Elections Act* to the provisions of that Act, and as to appeals and applications for a new trial to the Court under *The Criminal Code* to the provisions of that Act, and subject also to the Rules, the practice and procedure upon and as to appeals to a Divisional Court shall be that which on the 31st day of December, 1912, was applicable to appeals to a Divisional Court of the High Court.

Rights of appeal preserved.

(2) Nothing in subsection 1 shall take away or affect any right of appeal to the Court of Appeal from a judgment, order or decision pronounced, made or given by a Divisional Court of the High Court which on the 31st day of December, 1912, any party had or was entitled to, whether by or without leave, but the appeal shall be to a Divisional Court of the Appellate Division.

Judgment in matters heard before 31st December, 1912.

(3) In all matters and proceedings which on the 31st day of December, 1912, had been fully heard by a Divisional Court of the High Court, and in which judgment had not been given, or having been given had not been signed, drawn up, passed, entered or otherwise perfected, judgment may be given, signed, drawn up, passed, entered or otherwise perfected in the name of the same court, and by the same judges and officers, and generally in the same manner as if such court had not been abolished, and for those purposes the court shall be deemed to continue to exist.

Matters pending in Divisional Courts on 31st December, 1912.

(4) All matters and proceedings in a Divisional Court of the High Court pending on the 31st day of December, 1912, to which subsection 3 does not apply, shall be deemed to be matters and proceedings in the Appellate Division and shall be dealt with in the manner, and the practice and procedure shall be as provided by subsection 1. 3-4 Geo. V. c. 19, s. 75.

OFFICES AND OFFICERS. Sec. 76.

76.—(1) There shall be the following officers of the Supreme Court:— Officers.

In Toronto:

(*a*) An Official Guardian;

(*b*) A Master in Chambers;

(*c*) A Master in Ordinary;

(*d*) A Registrar of the Appellate Division;

(*e*) Two or more Registrars of the High Court Division, the senior of whom shall be called the Senior Registrar;

(*f*) A Clerk of the Crown and Pleas;

(*g*) An Accountant;

(*h*) Two or more Taxing Officers;

(*i*) An Assistant Registrar of the Appellate Division;

(*j*) A Clerk of Records and Writs;

(*k*) A Clerk in Chambers;

(*l*) A Marshal and Clerk of Assize for the County of York;

(*m*) A Clerk of the Process;

(*n*) As many stenographic reporters as the Lieutenant-Governor in Council may deem necessary;

(*o*) As many official referees as the Lieutenant-Governor in Council may deem necessary;

(*p*) In addition to those who are *ex officio* special examiners, as many special examiners as the Judges of the Supreme Court may deem necessary and appoint;

Out of Toronto: Out of Toronto.

(*q*) A deputy clerk of the Crown and Pleas, and a deputy registrar, if those offices are not consolidated, and a local registrar if they are

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consolidated, for every county except the County of York;

(*r*) One or more local masters for every county except the County of York, who shall also be *ex officio* referees of titles in their respective counties;

and the officers mentioned in this subsection, except the special examiners, shall be appointed by the Lieutenant-Governor in Council.

In addition to the officers in Toronto specified in this sub-section, there are also two other officers of the Supreme Court for the administration of *The Quieting Titles Act* (R. S. O. c. 123), viz.:

(1) The Inspector of Titles, and

(2) The Referee of Titles in Toronto: see *Ib.* ss. 42, 43.

Other officers may be appointed.

(2) The Lieutenant-Governor in Council may appoint such other officers and clerks as he may deem necessary for the proper despatch of business in the Supreme Court.

Existing officers to continue.

Tenure of office.

(3) Every person now holding any of the offices mentioned in subsection 1, and every officer and clerk employed in the office of any such officer shall continue to hold office during pleasure, and every officer and clerk hereafter appointed shall also hold office during pleasure.

Officers may be dispensed with.

(4) If the Lieutenant-Governor in Council deems it advisable so to do, he may dispense with any of the officers mentioned in subsection 1, or may amalgamate his office with any other office.

Existing officers to retain rank, etc.

(5) Existing officers shall retain their present rank and seniority, and subject to subsection 6, their offices shall retain the names they now bear.

Official names may be changed.

(6) The official names of any of the offices and officers may be changed, and the duties assigned to any officer may be regulated and changed by the Lieutenant-Governor in Council and, subject to any order in council, by the Rules.

Duties of officers may be prescribed by the Rules.

(7) Subject to any order made by the Lieutenant-Governor in Council, the duties to be performed in the Supreme Court or in either Division of it or in a Divisional Court or in Chambers, in connection with the business therein, other than those to be performed by the judges,

shall be assigned to such officer as may be directed by the Rules and shall be performed by him. Sec. 76.

(8) Duties may be assigned to an officer in respect of business in either of the Divisions or in both of them, and every officer shall perform the duties assigned to him by the Rules, whether or not they appertain to the office which he holds. 3-4 Geo. V. c. 19, s. 76. Duties in either Division may be assigned to officers.

The Official Guardian.—This officer acts as the *ex officio* guardian *ad litem* of all infant defendants, *Rule* 18, unless some other guardian is especially appointed, and he also intervenes whenever required so to do by the Court for the protection of the rights of infant suitors even though they are plaintiffs: see *Rules* 609, 615. He also has certain duties under *The Devolution of Estates Act*, where infants are concerned: see *Rules* 690, 691. He has also to see that mortgages in Court in which infants are interested are promptly paid and that the insurance and taxes on the mortgaged property are duly paid: *Rule* 719; and also in regard to the payment of maintenance money for infants: *Rule* 737: and in regard to money paid into County Courts or Surrogate Courts in which infants are interested: *Rule* 770. Official Guardian.

The Official Guardian also acts, on request, as the Solicitor of the Court. See further as to the duties of this office: sec. 106 *post*.

The Master in Chambers.—This officer discharges the business in Chambers as provided by *Rule* 208. Master in Chambers.

The Master in Ordinary.—This officer is charged with the duty of conducting inquiries and taking accounts, etc., in such matters as may be referred to him by any order or judgment of the Court: see *Rules* 402-459. Master in Ordinary.

The Registrar of the Appellate Division.—With this officer is set down all appeals to the Appellate Division, and to him is transmitted from the Central Office all papers required for the purposes of such appeals, and in his office the cause lists for that Division are made up. He, or the assistant Registrar, attends the sittings of the first Divisional Court. It is the duty of the Registrar to sign all judgments and orders made by the Appellate Division: *Judge's Regulations*, 28th Jan., 1913. Registrar Appellate Division.

Registrars of the High Court Division.—The following business is transacted in the office of the Registrars of the High Court Division: Registrar's office, H.C.D. business in.

(a) The business of the Crown Office, which comprises all criminal business, and *quasi* criminal business, and proceedings carried on in the offices of the Registrars of any Division of the High Court prior to the 1st day of January, 1896, and all business and proceedings on the Crown, and Revenue side of the Queen's Bench, and Common Pleas, Divisions, carried on in the offices of the Registrars of those Divisions prior to said date. Crown business.

(b) The preparation of Cause Lists in the High Court Division comprising the following business, viz.:— Civil business.

(1) The setting down of actions for trial at sittings of the High Court Division in the County of York.

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(2) The setting down of all motions, special cases and other matters required by the *Rules* to be set down for sittings of the Weekly Court at Toronto.

(3) The attendance with records, exhibits and papers on the Court or Judges thereof, and the furnishing to the proper officer on his requisition, of all papers and exhibits necessary for the purposes of all motions, appeals, special cases and other matters in the High Court Division.

(4) The custody of the records, exhibits, affidavits and papers relating to the matters aforesaid until the conclusion of the same when the same are to be transmitted to the Central Office.

(c) The custody of the roll of barristers, and solicitors, and all former rolls of barristers, attorneys and solicitors, and the producing thereof when necessary and the issuing of certificates in respect thereof.

(d) The settling of all judgments and orders made at any sittings of the High Court Division in the County of York, for the trial of causes, matters and issues, or at the sittings of the Appellate Division: see C. R. 26, *Rules* 526, 527, and Judges' regulations of 28th Jan., 1913.

Distribution of business.

(*f*) The Senior Registrar of the High Court Division is also Inspector of Titles, and Referee of Titles in Toronto, under the *Quieting Titles Act*: see *Rule* 695.

Duties of Registrars.

Subject to any Orders in Council and to the provisions of the *Rules* the duty of settling the judgments and orders referred to in clause (*d*), is assigned to the Senior Registrar of the High Court Division; and the control and superintendence of the business referred to in clauses (*a*), (*b*) and (c), is assigned to one of the Junior Registrars: see C. R. 28.

(*g*) One of the Junior Registrars also acts as the clerk of the Weekly Court.

Settlement of judgments and orders by Registrar.

The Registrar attending the Weekly Sittings of the High Court Division at Toronto, settles all judgments pronounced at any such Sittings so attended by him, or they may at the desire of any party be settled by the Senior Registrar: see C. R. 30.

Cause lists to be transmitted to proper officers.

The proper officer in the Registrar's Department makes out and transmits to the proper Registrar, Clerk of Assize, Clerk of the Weekly Court or other proper officer, a list of all actions and matters set down for trial at the Sittings of the High Court Division for trial of actions, causes and matters in the County of York, and of all motions, appeals, special cases and matters set down for argument in the Weekly Court: see C. R. 31.

The Clerk of the Crown and Pleas.—This officer is the head of the Central Office and has the general supervision thereof.

20. The business of the Central Office includes:

(1) The issuing of writs for the commencement of actions in the County of York: see C. R. 21.

(2) The receiving, filing and custody of all appearances, pleadings, petitions, reports, depositions, affidavits, bonds, and other papers and proceedings, and making entries thereof in the proper books.

(3) Amending pleadings.

(4) Entering notes of default in pleading and giving certificates thereof. Sec. 76.

Central Office.

(5) The care and custody of all papers and proceedings in actions commenced in the Central Office, and of all documents required or ordered to be deposited for safe keeping or produced under any order of Court.

(6) Preparing and issuing all writs (other than writs of summons), commissions, and orders, obtainable on *præcipe*.

Præcipe orders are all the orders which, according to the practice of the Court of Chancery, could be obtained on *præcipe* without an actual motion therefor, or which, at Common Law, were called "side bar rules," and were issued on the filing of a motion paper signed by Counsel. The most common orders of this kind were:—

(*a*) Orders for security for costs, where the writ or other proceeding by which an action is commenced discloses on its face, that the plaintiff or person asking relief is resident out of the jurisdiction: *Rule* 375.

(*b*) Orders to continue proceedings where the death or marriage of parties, or the transmission of interest *pendente lite*, renders it necessary for other persons to be made parties to the action: *Rule* 301.

(*c*) Orders for sheriffs to return writs, or to bring in the body: *Rule* 574; *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 23.

(*d*) Orders for delivery and taxation of solicitors' bills of costs, on the application of a client: or for the taxation alone of such bills on the application of the client within a month from the delivery thereof, or on the application of the solicitor at any time after such month: see *The Solicitors' Act* (R. S. O. c. 159), s. 35.

For other orders issuable as of course: see Daniel's Pr., 5th ed., 2002-2012.

(7) Certifying proceedings and making exemplifications of proceedings and of judgments or orders.

Certificates of officers as to proceedings in their offices are conclusive; and affidavits cannot be read to contradict them: *Beaven* v. *Burgess*, 10 Jur. 63; *Foley* v. *Griffith*, 2 Moll. 318.

(8) Examining and authenticating office copies of pleadings and other proceedings.

(9) Issuing certificates of *lis pendens*.

(10) Preparing and issuing certificates for registration.

(11) Receiving the return of commissions and attending on the opening of the same.

(12) The issuing of writs of execution or other process under judgments and orders.

(13) Receiving and filing articles of clerkship.

(14) Preparing precepts for summoning juries, and transmitting them to the proper officers.

(15) The care and custody of all books kept under the Act for Quieting Titles and making the necessary entries therein.

(16) Transmitting petitions to the proper Referee.

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(17) Entering and issuing certificates of title and conveyances granted under the said Act.

The petition, affidavits, and other evidence used upon Quieting Titles proceedings (except the original title deeds), remain in the custody of the Senior Registrar, but are not open to public inspection, except by consent of the petitioner or his solicitor, or leave of the Court.

(18) The signing of all judgments in actions commenced in the Central Office.

(19) The issuing of all such judgments, and all orders pronounced in Toronto (other than orders in Chambers), and the entering of such thereof as by the *Rules* or practice are required to be entered.

(20) The custody of all judgment and order books of the former Courts of Queen's Bench and Common Pleas and the Court of Chancery, and all judgments and order books (other than Chambers order books in actual use) containing judgments and orders entered since the Judicature Act of 1881 came into force: see C. R. 23.

(21) And generally all other business transacted in the office of the Clerk of Records and Writs, prior to the 1st day of January, 1896, not otherwise expressly provided for by the form Con. RR., and all similar business transacted, prior to said date, in the offices of the Registrars of the Queen's Bench and Common Pleas Divisions: see C. R. 22.

This Department also has charge of records, exhibits, and other documents received by the Central Office from outer offices, and attends to their transmission to the proper local office.

Seal.

In this office the seal of the Court is kept, and all documents requiring the seal of the Court issue therefrom.

The Clerk of Records and Writs.—This officer is the head of the Records and Writs Branch of the Central Office, and is practically the deputy head of the Central Office. This officer has the custody of the seal of the Court: see sec. 11, *supra*, p. 33.

Deputy Registrars, Deputy Clerks of the Crown, and Local Registrars.—When The Judicature Act, 1881, was passed there were in existence as local officers of the Common Law Courts in each county "Deputy Clerks of the Crown," whose duties were confined to proceedings in those Courts; and in each county there was also a "Deputy Registrar," who was a local officer of the Court of Chancery, and whose duties were confined to proceedings in that Court. When the Judicature Act took effect these officers were in many counties continued, the Deputy Clerks of the Crown's duties being limited to actions in the Queen's Bench and Common Pleas Divisions of the High Court, and the Deputy Registrar's duties being limited to actions in the Chancery Division. In some counties both of these offices were combined in one officer, who was thenceforth styled "The Local Registrar": see *post*, sec. 91. In course of time the plan of commencing actions in particular Divisions of the High Court was abolished, and actions were thereafter instituted in the High Court of Justice, whereupon in counties where there are a Deputy Clerk of the Crown, and a Deputy Registrar, both officers had co-ordinate jurisdiction, and proceedings might, at the election of the suitor, be instituted in either office, all subsequent proceedings being carried on in the office in which the proceedings were instituted.

These officers, in their respective counties, perform the like duties as are performed in Toronto in the Central Office: see further as to their duties: *Rules* 752-755 and 757; and ss. 82-86, 90-95, 98, 99, 100, *post;* and also the like duties for the Courts held in their respective counties as are performed by the Registrars of the High Court Division in Toronto.

Local Masters.—**These officers in their respective counties discharge the like duties as are performed in Toronto by the Master in Ordinary: see *supra*, and see *post*, ss. 81, 83, 87, 88, 89.**

The Accountant.—**As to this officer: see *post*, ss. 105, 107, and *Rules* 715-737.**

Oath of officers.

77.—(1) Every officer hereafter appointed shall, before entering upon the duties of his office, take and subscribe the following oath:—

Form.

"I, *A. B.*, of solemnly swear that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of without favour or affection, prejudice or partiality, to any person. So help me God."

Oath to be administered by a Judge in Court.

(2) The oath shall be administered by a Judge in Court.

Exception where inconvenient for officer to attend at Toronto.

(3) Where it is not convenient for a person appointed to an office to attend at Toronto to take the oath, it may be taken before the judge of the county court of the county in which the officer resides, or before a commissioner authorized to take affidavits in that county.

Oath to be transmitted to, and filed in Central Office.

(4) Where the oath is taken in accordance with subsection 3, the judge or commissioner before whom it is taken shall forthwith transmit the oath to and it shall be filed in the Central Office. 3-4 Geo. V. c. 19, s. 77.

Appointment of deputies by Local Registrars.

77.—(*a*) With the approval of the Lieutenant-Governor in Council every Local Registrar, Deputy Registrar, Deputy Clerk of the Crown and County Court Clerk may, by writing under his hand and seal of office, appoint a deputy who may perform all the duties required to be performed by the officer making the appointment: 4 Geo. V. c. 21, s. 15 (1).

Section 77 (*a*) is to be deemed to have been in force on and from the 16th day of April, 1912: see 4 Geo. V. c. 21, s. 15 (2).

OFFICERS PAID BY SALARY NOT TO TAKE FEES.

Officers paid by salary not to take fees.

78.—(1) Except where in this Act it is otherwise expressly provided, an officer who is paid by salary shall

Secs. 79-81.

not take for his own benefit, directly or indirectly, any fee or emolument except the salary to which he is entitled, and the fees payable in respect of proceedings in his office shall be payable to the Crown.

(2) Subsection 1 shall not apply to the fees of—

Exceptions.

(*a*) A deputy clerk of the Crown and Pleas on an examination had before him as a special examiner or on a reference made to him as an official referee.

(*b*) A stenographic reporter for copies of short-hand notes of evidence. 3-4 Geo. V. c. 19, s. 78.

This section does not preclude a salaried officer from claiming compensation from the Crown for any special and extraordinary service he may be called on by the government to perform, which could not have been legitimately expected or intended when he accepted office: see *The Queen* v. *Bradley*, 27 S. C. R. 657.

RETURN OF FEES.

Return of fees.

79.—(1) Every officer paid wholly or partly by fees, whether commuted or not, shall on or before the 15th day of January in every year, transmit to the Inspector of Legal Offices a just, true and faithful account, verified by his oath, of the amount of fees paid or payable to him in cash or in law stamps, in respect of his office during the next preceding calendar year, and such other particulars with reference to the business of his office as the Inspector may require.

Form of return may be prescribed.

(2) The Lieutenant-Governor in Council or the Minister having charge of the matter, may require the return to state any particulars, or to be made in any form which may be deemed proper, and the return shall be made accordingly. 3-4 Geo. V. c. 19, s. 79.

WHERE OFFICES TO BE KEPT.

Certain officers in Toronto to keep their offices at Osgoode Hall.

80. The officers in Toronto mentioned in section 76, except those mentioned in clauses (*a*), (*n*), (*o*) and (*p*), shall keep their offices at Osgoode Hall, in the City of Toronto. 3-4 Geo. V. c. 19, s. 80.

Local Master to keep office in county town.

81. Every local master shall keep his office in the county town of the county for which he is appointed. 3-4 Geo. V. c. 19, s. 81.

Secs. 82, 83.

Certain offices to be kept at court house.

82.—(1) Subject to subsection 2, every local registrar, every deputy clerk of the Crown and Pleas, and every deputy registrar shall, if proper accommodation is afforded to him there, keep his office in the court house of the county for which he is appointed, and until he can obtain such accommodation he shall keep his office in some convenient place in the county town.

Exception. (Essex).

(2) The local registrar at Sandwich may keep an office in some convenient place in the city of Windsor, subject to such arrangements as the council of the county of Essex may assent to, and the Lieutenant-Governor in Council may approve. 3-4 Geo. V. c. 19, s. 82.

OFFICE HOURS.

Office hours.

83. Except on holidays, and subject to the Rules as to office hours during vacations, the offices of the local registrars, deputy clerks of the Crown and Pleas and deputy registrars and those of the Snpreme Court and of both divisions of it at Osgoode Hall, shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except on Saturdays, when the offices shall be kept open until 1 o'clock in the afternoon. 3-4 Geo. V. c. 19, s. 83.

[*As to Clerks of County Courts see The County Courts Act, s. 9, and as to registrars of Surrogate Courts see Sur. Court Rule 30.*]

See *Rule* 177.

This *Rule* is merely directory, and for the guidance of the officials only. It does not forbid them to keep their offices open to a later hour than those mentioned if they think fit, or the business of the office requires it: *Muir* v. *McNeil, Re N. Bruce Election*, 27 C. L. J. 338; 11 C. L. T. 265. The hours will be according to standard time: *The Definition of Time Act* (R. S. O. c. 132), s. 2; see also *Lloyd* v. *Ford*, 13 P. R. 238.

A special examiner, though an official of the Court, has no office in connection with the Court which is required to be kept open or closed under this or any other *Rule*: *Hogaboom* v. *Cox*, 15 P. R. 23, 127.

As to the office of the Taxing Officers: see *Cousineau* v. *City of London F. I. Co.*, 13 P. R. 36; and as to the office of Official Referees: see *Marples* v. *Rosebrugh*, 17 P. R. 104.

Office hours during vacation.

During vacation the Registrars' offices are open only for the transaction of matters of an urgent nature, such as issuing injunction orders, but not as a general rule for the transaction of business requiring the

Secs. 84-86. attendance of the opposite party, such as the settlement of the minutes of orders or judgments not of an urgent nature: *Miller* v. *Spencer*, 13 P. R. 478; and see former Chy. O. 425.

SECURITY FROM OFFICERS.

Officers to give security, if required.

84.—(1) Every officer of the Supreme Court, if and when so required by the Lieutenant-Governor in Council, shall give security to His Majesty for the due performance of the duties of his office in such sum as the Lieutenant-Governor in Council may direct.

Consequences of neglecting to do so.

(2) The neglect to give such security shall render the appointment of the officer void, but the forfeiture of office shall not affect any act done by him while he continues to act. 3-4 Geo. V. c. 19, s. 84.

SEALS OF OFFICERS OUT OF TORONTO.

Seals of Local Registrars, Deputy Registrars, and Deputy Clerks of the Crown and Pleas.

85.—(1) In the offices of the local registrars, deputy registrars and deputy clerks of the Crown and Pleas, such seals shall be used as the Lieutenant-Governor in Council shall from time to time direct, and the same shall be impressed on every writ and other document issued out of such office; and every such writ and document, and every exemplification and copy thereof purporting to be sealed with such seal shall be received in evidence in all Courts without further proof thereof.

Seals of Accountant, and Master in Ordinary, and local officers.

(2) Until other seals are authorized by the Lieutenant-Governor in Council, the seals now in use in the office of the Accountant and in the office of the Master in Ordinary or of any local officer of either of the Divisions shall be the proper seals of those officers respectively. 3-4 Geo. V. c. 19, s. 85.

As to the seal of the Supreme Court: see sec. 11, *supra*.

OFFICIAL REFEREES.

Official referees.

86.—(1) Subject to the Rules, judges of county courts, the Master in Ordinary, the Master in Chambers, the Clerk of the Crown and Pleas, Registrars, local masters, local registrars, deputy clerks of the Crown and Pleas, and deputy registrars shall be official referees for the trial of such questions as may be directed to be tried by an official referee.

Additional referees.

(2) Where the business requires additional official referees, the Lieutenant-Governer in Council may appoint them.

(3) Subject to subsection 4 of section 66 in the case of officers who are paid by salary, the fees on a reference or trial shall be paid in law stamps; other referees shall be paid in money. 3-4 Geo. V. c. 19, s. 86. Fees of referees.

The Drainage Referee is not an Official Referee under this section unless specially so appointed, which has not been done: *McClure* v. *Brooke*, 5 O. L. R. 59.

CERTAIN LOCAL MASTERS NOT TO PRACTICE.

87.—(1) A local master whose gross income from his office of local master or of deputy registrar and local master is $2,000 or upwards, and ony other local master as to whom the Lieutenant-Governor in Council shall so direct, shall not, directly or indirectly, practise the profession of the law as counsel, or solicitor, or act as a notary public, or conveyancer, or do any manner of conveyancing, or prepare any paper or document to be used in any court. Certain Local Masters not to practise.

(2) Every person who contravenes the provisions of subsection 1 shall incur a penalty of $400. Penalty.

(3) This section shall not apply to a local master whom the Lieutenant-Governor in Council has relieved or may hereafter relieve from its prohibition, which the Lieutenant-Governor in Council shall have authority to do. 3-4 Geo. V. c. 19, s. 87. Lieutenant-Governor in Council may relieve from prohibition of sub-section 1.

VACANCY IN OFFICE OF LOCAL MASTER.

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

More than one Master may now be appointed for a county or union of counties: see s. 76 (1) *r*.

Prior to the Act from which section 76 is derived, the contingency provided for in this sub-section was held to be the only case in which there could be two Local Masters in a county: see *Re Glen, Fleming* v. *Perry*, 27 Ont. App. 144.

Where a Master writes a letter to the government resigning his office, the appointment of some other person to the office is equivalent to an acceptance of the resignation: *Ib.*

APPOINTMENT OF LOCAL MASTER PRO TEMPORE.

When Judge of County Court may act for Local Master.

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

DEPUTY REGISTRARS, EX OFFICIO.

Deputy Registrars.

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

This section would have no application in a county where there is a Local Registrar: see notes to s. 76, and ss. 91 93.

CONSOLIDATION OF OFFICES OF DEPUTY CLERK OF CROWN AND PLEAS AND DEPUTY REGISTRAR.

Local Registrars.

91. The offices of the deputy clerk of the Crown and Pleas, and deputy registrar (not local master) may be consolidated as vacancies occur in either of them, and when they are held by the same person, he shall be styled local registrar. 3-4 Geo. V. c. 19, s. 91.

LOCAL REGISTRARS, EX OFFICIO.

Clerks of District Courts to be Local Registrars.

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

CLERKS OF COUNTY COURTS TO BE DEPUTY CLERKS OF CROWN AND PLEAS.

Deputy Clerks of the Crown and Pleas.

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

SALARIES OF DEPUTY CLERKS OF THE CROWN AND PLEAS.

Salaries of Deputy Clerks of the Crown and Pleas.

94.—(1) Every deputy clerk of the Crown and Pleas shall be paid out of any money appropriated for that purpose by the Legislature a yearly salary of such amount not exceeding $600 or less than $100, as the Lieutenant-Governor in Council shall direct.

When maximum not to apply.

(2) The maximum of $600 shall not apply where the deputy clerk does not hold the office of registrar of the surrogate court. 3-4 Geo. V. c. 19, s. 94.

FEES OF OFFICERS ATTENDING SITTINGS.

Fees for attending sittings for trial.

95.—(1) Every local registrar, deputy clerk of the Crown and Pleas, and deputy registrar, and every officer authorized to act as local registrar, deputy clerk of the Crown and Pleas, or deputy registrar, shall be entitled to be paid out of the Consolidated Revenue Fund $4 for each day's attendance at non-jury as well as at jury sittings. 3-4 Geo. V. c. 19, s. 95.

STENOGRAPHIC REPORTERS.

Stenographic reporters.

96.—(1) The stenographic reporters shall be officers of the court to which they are appointed, and shall perform such other duties as may be assigned to them by the Lieutenant-Governor in Council or by the Rules.

Reporter's oath.

(2) Every such reporter shall take and subscribe the following oath before a judge of the court to which he is appointed, and the oath shall be filed with the proper officer of that Court:—

Form.

"I (*A. B.*), solemnly and sincerely promise and swear that I will faithfully report the evidence and proceedings in each case in which I act as stenographic reporter. So help me God."

3-4 Geo. V. c. 19, s. 96.

Reporters for County and Surrogate Courts.

97. The Lieutenant-Governor in Council may appoint a stenographic reporter for any county court or surrogate court and the provisions of the next preceding section shall apply to a stenographic reporter so appointed. 3-4 Geo. V. c. 19, s. 97.

Sec. 98.

SPECIAL EXAMINERS.

Ex officio, special examiners.

98.—(1) Every local registrar, deputy clerk of the Crown and Pleas, deputy registrar, and clerk of the county court shall *ex officio* be a special examiner for the county for which he is appointed.

Appointment of special examiners.

(2) The Judges of the Supreme Court may appoint special examiners for the purpose of taking evidence of parties and witnesses, and a commission under the seal of the Court shall be issued to a special examiner so appointed.

Number limited.

(3) There shall be but four special examiners in Toronto, in addition to the officer or clerk at Osgoode Hall mentioned in subsection 4.

Salaried officers at Osgoode Hall not to take fees as special examiner for own use.

(4) No officer or clerk at Osgoode Hall who is in receipt of a salary as such officer or clerk from the Province shall act as a special examiner for fee or reward; but the fees payable in respect of any examination before him or for copies or certificates thereof or connected therewith shall be payable to the Crown, and not otherwise, and no such officer or clerk whose salary is so paid shall be eligible for appointment as a special examiner.

Number of special examiners.

(5) Where a vacancy occurs in the office of special examiner there shall thereafter be but three special examiners in Toronto, in addition to such officer or clerk.

Examination to be taken in presence of special examiner.

(6) Where an examination is taken by a stenographer or other person who is not a special examiner, it shall be taken in the presence of the special examiner.

Examinations not to be solicited.

(7) A special examiner shall not solicit or make request from any suitor, solicitor, or other person, or offer any inducement to have a special examination taken before him, nor shall any one do so on his behalf with his knowledge or assent, on pain of forfeiture of office.

Appointment of special examiners, pro tem.

(8) Where it appears to the Lieutenant-Governor in Council that a local registrar, a deputy clerk of the Crown and Pleas, a deputy registrar, or a clerk of a county court elsewhere than in Toronto, is infirm or ill, or is otherwise unable or unfit to act personally as special examiner, or if he is absent on leave, the Lieutenant-Governor in Council may appoint the stenographic reporter for the County Court, or some other person, to act

temporarily or otherwise as such special examiner in his stead. 3-4 Geo. V. c. 19, s. 98. Secs. 99-100.

An examiner appointed under this section becomes an officer of the Court, and before entering on his duties should take the oath of office as required by s. 77.

Where a stenographic reporter for the County Court is appointed a special examiner under this section he becomes an officer of the Supreme Court, and before entering on his duties as such, should take the oath of office as required by s. 77.

COMMUTATION OF FEES OF CERTAIN OFFICERS.

Commutation of fees of certain officers.

99.—(1) The Lieutenant-Governor in Council may commute the fees payable to a—

(*a*) local master, or local registrar, or deputy registrar, including his fees as an official referee;

(*b*) deputy clerk of the Crown and Pleas on references and examinations and other matters;

for a fixed annual sum, not exceeding the average income derived from such fees during the next preceding five years.

Amount of commutation may be changed.

(2) An annual sum so fixed, and any order in council for payment of any such annual sum may be rescinded, and the amount may be increased or diminished, but in no case shall it exceed the average income or fees, as the case may be, during the next preceding five years. 3-4 Geo. V. c. 19, s. 99.

Order in Council as to commutations to be laid before Assembly.

100.—(1) Every order in council determining any commutation allowance under the authority of this Act, shall be laid before the Assembly forthwith, if the Assembly is then in session, and if the Assembly is not then in session, within the first fifteen days after the opening of the next session.

Disapproval by Assembly.

(2) If the Assembly at such session, or if the session does not continue for three weeks after the order in council is laid before the Assembly, then at the next ensuing session, disapproves by resolution of such order in council, either wholly, or so far as relates to any person named in it, the Order in Council, so far as so disapproved, shall have no effect from the time of the passing of the resolution. 3-4 Geo. V. c. 19, s. 100.

Secs. 101-103.

RETURNS BY CLERK OF PROCESS.

Clerk of Process to make quarterly returns.

101. The Clerk of the Process shall make to the Treasurer of Ontario quarterly returns verified by his affidavit, of all writs and process supplied by him to the local registrars, deputy clerks of the Crown and Pleas and deputy registrars to be issued by them. 3-4 Geo. V. c. 19, s. 101.

INSPECTOR OF LEGAL OFFICES.

Inspector of Legal Offices.

102. The Lieutenant-Governor in Council may appoint an officer to be called "The Inspector of Legal Offices," to inspect the offices of the Master-in-Ordinary and of the other officers of the Supreme Court and of both Divisions of it at Toronto, and the offices of the sheriffs, local masters, local registrars, deputy clerks of the Crown and Pleas, deputy registrars, Surrogate Clerk, registrars of the surrogate courts, clerks of the peace, crown attorneys and clerks of the county courts, and such other offices connected with the administration of justice as the Lieutenant-Governor in Council may direct. 3-4 Geo. V. c. 19, s. 104.

Duties of Inspector.

103.—(1) In addition to any other duties assigned to him by any Act of this Legislature or which may be assigned to him by the Lieutenant-Governor in Council, the Inspector shall—

(*a*) make a personal inspection of the offices mentioned in section 102 and of the books and court papers belonging to them;

(*b*) see that proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times and in proper form and order, and that the court papers and documents are properly classified and preserved;

(*c*) ascertain that the duties of the officers are duly and efficiently performed.

(*d*) see that proper costs and charges only are allowed or exacted;

(*e*) ascertain whether uniformity of practice prevails in the offices; and Sec. 104.

(*f*) report upon all such matters to the Lieutenant-Governor.

(2) Where the Inspector has occasion to inquire into the conduct of any officer in relation to his official duties or acts, he may require such officer, or any other person, to give evidence before him on oath; and for that purpose he shall have the same power to summon such officer or other person to attend as a witness, to enforce his attendance and to compel him to produce books and documents and to give evidence, as any court has in civil cases. Inquiries by Inspector.

(3) The officers shall, when and as often as required by the Inspector, produce for examination and inspection all books and documents which are required to be kept by them, and shall report to the Inspector all such matters relating to any cause or proceeding as the Inspector shall require. 3-4 Geo. V. c. 19, s. 105. Books, etc., to be produced for inspection.

[*As to authority of Inspector to direct law stamps to be affixed to proceedings not properly stamped, see The Law Stamps Act, s. 12.*]

OFFICIAL GUARDIAN.

104.—(1) No person shall be appointed Official Guardian unless he is a barrister at law and solicitor of Ontario of not less than 10 years standing. Qualification of Official Guardian.

(2) The Official Guardian shall be the guardian *ad litem* of infants and shall perform such other duties as may be assigned to him by the Rules. Duties.

(3) The same costs as are payable to counsel and solicitors shall be payable to the Official Guardian, but all costs paid to him by any party shall forthwith be paid into Court by the Official Guardian and shall be placed to the credit of an account to be entitled "Account of Official Guardian," and all costs payable to the Official Guardian out of any fund in Court shall be transferred to the credit of the same account. Costs payable to Official Guardian to be paid into Court.

(4) Where an estate is small, and in view of the amount at the credit of the Account of Official Guardian the amount or part of the amount payable out of the Dispensing with payment of costs out of small estates.

Sec. 104.

estate for the costs of the Official Guardian does not appear to be required to pay his salary and the disbursements of his office, the Court may direct that payment out of the estate of the whole or any part of such costs be dispensed with.

Remuneration of Official Guardian.

(5) There shall be paid to the Official Guardian for all business done and all costs in respect of it over and above all disbursements, a fixed annual salary of such sum as, in view of the amount of the business done or to be done by him and the sum at the credit of the account, the Judges of the Supreme Court deem reasonable and the Lieutenant-Governor in Council approves.

Salary and disbursements to be paid monthly.

(6) The salary and disbursements shall be paid monthly out of the money at the credit of the account, and the surplus at the credit of the account shall be transferred to the Suitors Fee Fund Account.

Deficiency to be paid out of Suitors Fee Fund Account.

(7) If in any year the amount at the credit of the account is insufficient to pay the salary and disbursements the deficiency shall be paid out of the Suitors Fee Fund Account.

Deputy Official Guardian.

(8) Subject to the approval of the Lieutenant-Governor in Council, the Official Guardian may appoint a deputy to act for him when he may be absent from Toronto, or ill, and such deputy shall have all the powers and shall perform all the duties of the Official Guardian during any such absence or illness.

Qualification of Deputy.

(9) No person shall be appointed as such deputy unless he is a barrister at law and solicitor of Ontario of not less than 10 years standing.

Employment of solicitor out of Toronto.

(10) The Official Guardian may employ as agents, solicitors out of Toronto for the purpose of any proceeding being carried on out of Toronto, and a solicitor so appointed shall be entitled to the same costs for the work actually done by him as the Official Guardian would have been entitled to if the work had been done by him, and such costs shall be paid to the solicitor and shall be deemed to be a disbursement of the Official Guardian.

Half-yearly statement of costs received to be made and filed.

(11) The Official Guardian shall once in every six months file in the office of the Accountant a statement verified by his affidavit showing in detail all costs received by him as Official Guardian during the next

preceding six months and the names of the actions and matters in which the same were received, together with the date of receipt. Sec. 104.

(12) If the Lieutenant-Governor in Council so directs, the Official Guardian shall not directly or indirectly practise the profession of the law as counsel or solicitor or act as a notary public or conveyancer or do any matter of conveyancing or prepare any paper or document to be used in any court of Ontario except in the discharge of his duties as Official Guardian or of a duty which may be assigned to him under the authority of this Act. Official Guardian not to practise if Lieutenant-Governor in Council so directs.

(13) For every contravention of the next preceding subsection the Official Guardian shall incur a penalty of $400. Penalty.

(14) Unless otherwise ordered by the Court or a Judge the Official Guardian shall not be required to give security for the costs of any proceeding. Official Guardian not to give security for costs.

(15) The Accountant shall on or before the 15th day of January in every year transmit to the Provincial Secretary a statement certified by him to be a true statement, showing the state of the Account of Official Guardian on the 31st day of the next preceding December. Return by Accountant as to state of account of Official Guardian.

(16) When a new Official Guardian is appointed he shall *ipso facto* become and be by virtue of his appointment guardian *ad litem* of all infants in the place and stead of his predecessor with the same rights, duties and powers, and the latter or his executors or administrators shall forthwith deliver to the new Official Guardian all letters, papers, documents and books in his or their possession or power relating to matters in which such predecessor acted as official or other guardian *ad litem* of infants, and the new Official Guardian shall forthwith notify all persons concerned of his appointment. 3-4 Geo. V. c. 19, s. 106. New Official Guardian.

By section 76, provision is made for the appointment of "an Official Guardian" by the Lieutenant-Governor in Council. Under the Judicature Act, 1897, s. 157, provision was made for the appointment of the Official Guardian *ad litem* of infants," by the Lieutenant-Governor. Under section 76 and this section the official title of the officer in question is "The Official Guardian," and he is appointable by the Lieutenant-Governor in Council. It is to be presumed that "the Official Guardian *ad litem* of infants," appointed under the former Act,

Secs. 105, 106.

is now "the Official Guardian," though the statute does not say so in terms.

The Suitors Fee Fund Account referred to in sub-sec. 6, is that provided for by sec. 108 *post*.

ACCOUNTANT.

Accountant to be a corporation sole.

105.—(1) The Accountant of the Supreme Court shall be a corporation sole by the name of "The Accountant of the Supreme Court of Ontario," and as such corporation sole shall have perpetual succession and may sue and be sued and may plead and be impleaded in any of His Majesty's Courts.

Money, mortgages, etc., to be vested in Accountant.

(2) All money, mortgages, stocks, securities and property now vested in the Accountant, as such corporation sole, shall continue to be so vested in him, and all money in Court and all securities in which money paid into Court is invested shall be vested in him as such corporation sole, subject to the provisions of this Act.

Where there is no Accountant, officer designated by the Rules shall be the Accountant.

(3) Where there is a vacancy in the office of Accountant, such officer or person as may be directed by the Rules to perform the duties of the office shall be deemed to be and shall have all the powers of the Accountant.

Expenses of Accountant's office.

Surplus to be paid to suitors fee fund.

(4) The expenses of the Accountant's office including all salaries shall be the first charge on the income from the funds in Court, and the surplus income after payment of such interest on the money of suitors as by the Rules or otherwise is directed to be paid shall be transferred to the Suitors Fee Fund Account. 3-4 Geo. V. c. 19, s. 107.

Moneys in Court are not liable to assessment for municipal taxation: *Re Accountant*, 35 C. L. J. 75.

See *Rules* 715-737.

INVESTMENT OF COURT FUNDS.

Finance Committee of Judges.

106.—(1) The Judges of the Supreme Court may delegate to a committee of themselves appointed for that purpose, to be called The Finance Committee, the control and management of the money in Court and the securities in which it is invested and the investment of such money.

Investment of Court funds.

(2) Money paid into Court shall be invested in the name of the Accountant, or if there is no Accountant, in the name of such officer as may be directed by the Rules, and may be invested in such of the securities in which a

trustee may uader *The Trustee Act* iuvest, as may from time to time be directed by the Judges of the Supreme Court or by the Finance Committee. Secs. 107, 108. Rev. Stat. c. 121.

(3) The Lieutenant-Governor in Council may direct that aay part of such money which is available for investment shall be invested in securities issued by the Province of Ontario or in securities the paymeat of which is guaranteed by it. Investment in Provincial Securities, etc.

(4) Where an investment in debentures of a municipal corporatiou is made, the validity of the debentures shall not thereafter be open to questiou but they shall be deemed to be valid. Debentnres invested in not to be open to question.

(5) The Judges of the Supreme Court or the Finance Committee may employ a trust company to make tbe iuvestments of money paid into Court on such terms and conditions as may be agreed on. 3-4 Geo. V. c. 19, s. 108. Trust corporation may be employed.

For the purpose of investing the moneys in Court, arrangements have been made by the Court with the Toronto General Trusts Corporation. These arrangements were embodied in the former J. A. Rule 521. Con. Rule 191, and Rule of 23rd March, 1895. Subject to this section, moneys in Court can only he invested in the manner provided for in those *Rules*, and the Conrt will not on the application of suitors authorize the investment of moneys in Court in any other way: see *Re Smith's Trusts*, 18 Ont. 327; *Re Harrison*, 18 P. R. 303.

107. All money, securities, effects and real or personal property vested in or held by the Accountant or by the Official Guardian or by any one appointed to discharge the duties of either of them shall be deemed to be vested in them in trust for His Majesty, but may, nevertheless, be paid out, sold, disposed of, assigned, conveyed or dealt with in accordance with any statute or the Rules, or with any judgment, or order of Court, or Order of the Lieutenant-Governor in Council or otherwise as heretofore or as may be provided or directed by any snch statute, rules, judgmeat, order, or Order-in-Council. 3-4 Geo. V. c. 19, s. 109. Money, etc., vested in Accountant, Guardian, etc., to be deemed to be held in trust for Crown.

SUITORS FEE FUND ACCOUNT.

108. The Suitors Fee Fund Account shall be kept and managed as may from time to time be directed by the Judges of the Snpreme Conrt or the Finance Committee, and any Divisional Court or any Judge of the Supreme Court may apply so much of the money at the credit of Suitors' fee fund.

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the account as may be necessary for the protection of any infant or other person not *sui juris* or *non compos mentis*, on whose behalf proceedings may be had in the Court, or may be ordered to be had in another court, and may also, from time to time, order to be paid, out of the money at the credit of the account, any sum required to make good a default in respect to any suitor's money or securities from any mistake, act or omission of any officer of the Court, but such payment shall not prejudice the right to require the officer or his sureties to make good the loss occasioned by the mistake, act or omission. 3-4 Geo. V. c. 19, s. 110.

Certain losses may be charged on suitors' fee fund.

The "Suitors' Fee Fund Account," which is an account formerly kept by the Court of Chancery, was first created by 20 Vict. c. 56, s. 20 (Con. Stat. U. C. c. 12, s. 73; R. S. O. 1877, c. 40, s. 104). It was constituted by a fee of ten cents on every bill, answer, and demurrer filed; and it was provided that the account should "be kept and managed as may from time to time be directed by the Court; and the sums at the credit of such account shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris*, on whose behalf proceedings may be had in the Court, or may by the Court be ordered to be had in other Courts." This section of the Revised Statute was repealed by 41 Vict. c. 8, s. 5, "so far as it directed payment of any fee to the accou[illegible]" There was then, and is still, a considerable sum at the credit [illegible] the account; and this sum, with the additions that may be made to it under sections 104 (6) and 105 (4), will continue to be applicable to the same purposes and the others mentioned in this section.

The Suitors' Fee Fund is to be resorted to if necessary for the protection of infants, but not for the purpose of relieving adult plaintiffs from their liability to pay the costs incurred on behalf of infant defendants: *Re Farrell*, 5 O. W. N. 455.

RULES OF COURT.

The result of sections 109 and 110 in the present Act is, that since the Act went into operation, the power of making *Rules* is as follows:

(1) *Rules* may be made by the Judges of the Supreme Court for Ontario for the several purposes mentioned in section 109.

(2) The Lieutenant-Governor may authorize the three Chief Justices and the Chancellor, and any one or more of the other Judges and the Treasurer of the Law Society and any two barristers-at-law to make *Rules* for any purpose under the Act, and *Rules* made by such persons, or any three of them, are to have the same effect as if made by all the Judges of the Supreme Court: sec. 110.

As to the power to make *Rules* respecting criminal procedure: see *The Criminal Code* (R. S. C. c. 146), s. 576. For certain Rules made under this power: see notes to sec. 26, *supra*, p. 140.

As to the virtue and effect of Rules of Court; and as to Rules which may not be considered *intra vires*: see *Williams* v. *Goose*, 1897, 1 Q. B. 471.

Rules of the Court are not to be construed as having a retroactive effect, so as to deprive any suitor of any vested right or interest he may have acquired at the time of their being passed: *Island* v. *Ingersoll*, 18 P. R. 3; but where they merely affect procedure, they will be held to apply to all pending actions: *Ib.*; *Spence* v. *G. T. Ry.*, 1; P. R. 172; but see *McGillivray* v. *Lindsay*, 16 P. R. 11; *Doran* v. *Jewell*, 49 S. C. R. 88. Sec. 109.

By the Judicature Act, 1913 (3-4 Geo. V., c. 19) s. 103, it appears that the Hon. Mr. Justice Middleton was empowered to frame *Rules*, and tariffs of fees and disbursements, which, when approved by the Lieutenant-Governor in Council, were to take effect as if embodied in that Act from the day named by the Lieutenant-Governor by proclamation. The *Rules* referred to in that section were approved and came into force on the first day of September, 1913: see *Ontario Gazette*, 1913, p. 981. For these *Rules*, and Tariffs: see *post*, p. 311, *et seq.*

RULES OF COURT.

109.—(1) The Judges of the Supreme Court may at any time amend or repeal any of the Rules and may make any further or additional Rules for carrying this Act into effect, and in particular for— Judges of Supreme Court may make rules.

(*a*) regulating the sittings of the Divisional Courts and of the Judges of the High Court Division sitting in Court or in Chambers; Sittings.

(*b*) regulating the pleading, practice, and procedure in the Supreme Court and the Divisions thereof and in the Divisional Courts, and in the county and surrogate Courts; Pleading, practice and procedure.

District Courts are included in this sub-section: see sec. 2. The Divisional Courts referred to are the Divisional Courts of the Appellate Division.

(*c*) allowing service out of Ontario; Service out of Ontario.

See *Rules* 25 *et seq.*

(*d*) prescribing the fees and charges of special examiners and stenographic reporters; Fees of special examiners and stenographic reporters.

See Tariff B, as to fees of special examiners.

(*e*) fixing the vacations; Vacations.

See *Rule* 177.

(*f*) empowering the Master in Chambers, or any officer sitting for him or in his stead or the judges of the county courts, other than a judge of the County Court of the County of York, or the local masters in respect of actions Empowering Master in Chambers, etc., to transact business.

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brought in their counties, to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the Rules, are or may be done, transacted or exercised by a Judge of the High Court Division sitting in Chambers, as shall be specified in any such rule, except in respect of matters relating to—

Exceptions.

(i) the liberty of the subject;

(ii) appeals and applications in the nature of appeals;

Rev. Stat. c. 68.

(iii) proceedings under *The Lunacy Act;*

Rev. Stat. c. 121.

(iv) applications for advice under *The Trustee Act;*

(v) matters affecting the custody of children;

(vi) proceedings enabling infants to make binding settlements of their real and personal property on marriage;

Regulating practice and procedure, duties of officers, costs, etc.

(*g*) generally, for regulating any matters relating to the practice and procedure of the courts mentioned in clause (*b*), or to the duties of the officers thereof, or to the costs of proceedings therein; and every other matter deemed expedient for the better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts respecting such courts;

Fees payable to the Crown.

(*h*) subject to the approval of the Lieutenant-Governor in Council for making rules from time to time regulating all fees payable to the Crown in respect of proceedings in any Court.

Provisions of statutes as to practice or procedure may be modified.

(2) Where any provisions in respect of the practice or procedure of any court, the jurisdiction of which is vested in the Supreme Court, are contained in any statute, Rules may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to such court unless, in the case of an Act hereafter passed, that power is expressly excluded.

Exception.

Secs. 110, 111.

(3) Any provisions relating to the payment, transfer or deposit into, or in, or out of any court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure. 3-4 Geo. V. c. 19, s. 111.

Provisions as to payment into or out of Court of money, etc.

Clause (*f*) See *Rules* 207-210.

The Judicature Act, 1897, s. 122. included among the excepted matters, "questions submitted for the opinion of the Court in the form of special cases on the part of such persons as may by themselves, their committees or guardians or otherwise concur therein;" but the *Rules* made under this sub-section do not appear to authorize the County Court Judges or officers named, to entertain such matters: as to County and District Court Judges, however, see *post*, s. 114.

Clause (*g*) See *Rules post, passim.*

Clause (*h*) See the Tariff B., *infra;* and as to power to impose fees, see *Institute of Patent Agents* v. *Lockwood*, 1894, A. C. 347; but see Cotton v. *The King*, 1914, A. C. 176.

Sub-section (2). To the same effect as Eng. J. A., 1875, s. 24.

See *Williams* v. *Goose*, 1897, 1 Q. B. 471.

The operation of this section is probably now very limited, as nearly all the statutory enactments regulating practice and procedure in any of the Courts existing prior to Ont. J. A., 1881, whose jurisdiction is now vested in the Supreme Court were, at the time of the Revisions of the Statutes in 1887 and 1897, intended to be embodied in the Consolidated *Rules*. For an instance in which the *Rules* varied a statute, see Jud. Act, 1897, s. 128 and former C. R. 8.

Sub-section (3). See Eng. Jud. Act, 1875, s. 24.

Lieutenant-Governor in Council may authorize certain Judges and others to make rules.

110.—(1) The Lieutenant-Governor in Council may from time to time authorize the Chief Justices, including the Chancellor, if any, and any one or more of the other Judges of the Supreme Court and the Treasurer of the Law Society of Upper Canada and any two barristers-at-law of Ontario to make Rules under this Act; and every appointment so made shall continue for the time specified in the order in council.

Effect of rules so made.

(2) The persons so appointed, or any three of them, may make such rules, and they shall have the same effect as if made under section 109. 3-4 Geo. V. c. 19, s. 112.

COUNCIL OF JUDGES.

Council of Judges.

111.—(1) A Council of the Judges of the Supreme Court, of which due notice shall be given to all of them,

Secs. 112, 113.

shall assemble once at least in every year, on such day as shall be fixed by the Lieutenant-Governor in Council, for the purpose of considering the operation of this Act and of the Rules, and the working of the offices and the arrangements relative to the duties of the officers of the Court, and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of justice in the Supreme Court or in any other court, or by any other authority.

Purposes for which Council to be held.

Council to report to Lieutenant-Governor.

(2) The Council shall report to the Lieutenant-Governor what amendments or alterations, if any, it would be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provision, if any, which cannot be carried into effect without legislative authority it would be expedient to make for the better administration of justice.

Extraordinary Councils.

(3) An extraordinary council for the purposes mentioned in subsection (1) may also at any time be convened by the Lieutenant-Governor in Council. 3-4 Geo. V. c. 19, s. 113.

DELEGATION OF POWERS OF JUDGES.

Delegation of powers of Judges.

112.—(1) Where by this or any other Act any power or authority is conferred upon the Judges of the Supreme Court or upon the Judges of the High Court Division as a body, they may respectively delegate such power or authority to a committee of themselves, and when it is exercised by the committee the acts done by the committee shall have the same effect as if they had been done by the body by which the committee was appointed.

Majority to be a quorum.

(2) The presence of a majority of the members of the committee shall be necessary to constitute a quorum for the transaction of business.

Application of subs. (1).

(3) Subsection (1) shall not apply to the making of Rules under the powers conferred by section 109 or to a Council of the Judges provided for by section 111. 3-4 Geo. V. c. 19, s. 114.

QUORUM OF MEETINGS OF JUDGES.

Quorum of meetings of Judges.

113. Where by this Act any power is conferred on the judges of the Supreme Court or of the High Court Division the power may be exercised at a meeting duly called

at which in the case of the Supreme Court at least seven of the judges are present, and in the case of the High Court Division at least five of the judges are present. 3-4 Geo. V. c. 19, s. 115. Secs. 114-117.

LOCAL JUDGES OF THE HIGH COURT DIVISION.

114. Except in the County of York, every judge of a county court shall be a Judge of the High Court Division for the purposes of his jurisdiction in actions in the Supreme Court; and in the exercise of such jurisdiction may be styled a Local Judge of the Supreme Court, and shall, in all causes and actions in the Supreme Court, have, subject to the Rules, power and authority to do and perform all such acts and transact all such business in respect to matters and causes in or before the High Court Division as he is or may be by statute or the Rules empowered to do and perform. 3-4 Geo. V. c. 19, s. 116. County Court Judges to be local Judges of H.C.D.

Judges of District Courts are included: see *supra*, s. 2.

See notes to *Rules* 209, 210.

Under the Rules of 1897, it was held that notwithstanding anything in this section, Judges of County, and District, Courts who were Local Judges of the High Court had no jurisdiction to deal with applications under *The Vendors and Purchasers Act* (R. S. O. c. 122), or under *The Land Titles Act* (R. S. O. c. 126); *Re Mitchell & The Pioneer Steam Navigation Co.*, 31 Ont. 542; but under the *Rules* as now framed, it would seem that a Judge of a County, or District, Court, would have such jurisdiction in such matters, where all parties reside in his county, or agree that the same may be heard before him: see *Rule* 210 (1).

SHERIFFS, ETC.

115. Sheriffs, deputy sheriffs, gaolers, constables and other peace officers, shall aid, assist and obey the Court and the Judges thereof in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by the Rules or by the order of the Court or of a Judge required so to do. 3-4 Geo. V. c. 19, s. 117. Sheriffs, Gaolers, etc., to obey orders of the Court.

GAOLS.

116. All gaols in Ontario shall be prisons of the Court. 3-4 Geo. V. c. 19, s. 118. Gaols to be prisons of the Court.

OATHS AND AFFIDAVITS.

117. Every officer of the Supreme Court shall, for the purposes of any proceeding directed by a Judge of the Administration of oaths.

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Court or by a Divisional Court to be taken before him, have power to administer oaths, to take affidavits, and to examine parties and witnesses as the Court or Judge may direct. 3-4 Geo. V. c. 19, s. 119.

WITNESS FEES.

Fees of certain officers producing documents.

118. A public official or other witness subpœnaed or called upon to produce before any court or other tribunal any public or other document shall not be entitled to more than ordinary witness fees, unless the court or other tribunal otherwise orders. 3-4 Geo. V. c. 19, s. 120.

PROVISIONS APPLICABLE TO COUNTY COURTS.

Certain sections to apply to County Courts.

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

COMMISSIONS FOR HOLDING SITTINGS, ETC.

Power to issue Commissions not to be affected.

120. This Act shall not affect the power to issue commissions for the discharge of civil or criminal business on circuit or otherwise; or the authority of a judge or a retired judge of any of the superior courts, or a judge of a county court, or one of His Majesty's Counsel learned in the law, to preside without any commission at any sittings for the trial of civil causes, matters and issues or for the trial of criminal matters and proceedings; and any such judge or counsel shall have the same authority to preside at and to hold any such sittings as a Judge of the High Court Division; and when so presiding with or without a commission, or when holding any such sittings, shall be deemed to constitute the court. 3-4 Geo. V. c. 19, s. 122.

See notes to ss. 45, 49, *supra*.

ACCESS TO CERTAIN BOOKS.

All books in which writs, judgments, etc., are entered to be open to inspection.

121.—(1) Every person shall have access to and be entitled to inspect the books of the Supreme Court and of the county courts, containing records or entries of the writs issued, judgments entered, and chattel mortgages

and bills of sale filed; and no person desiring such access or inspection shall be required, as a condition of his right thereto, to furnish the names of the parties or the style of the causes or matters in respect of which such access or inspection is sought. Secs. 122-124.

(2) Every officer having the charge or custody of any such book shall upon request produce for inspection any writ of summons or copy thereof so issued, and any judgment roll, or chattel mortgage, or bill of sale so filed in his office, or of which records or entries are, by law, required to be kept in such book. Production of writs of summons, etc.

(3) The fees payable in respect of such inspection shall be 25 cents for a general search, and 10 cents for each writ of summons, judgment roll, chattel mortgage or bill of sale inspected, and 10 cents per folio shall also be payable for all extracts, whether made by the person making the search or by the officer. 3-4 Geo. V. c. 19, s. 123. Fees for inspection.

See also sec. 132, *post*.

PLEADINGS TO BE IN ENGLISH.

122. Writs, pleadings and proceedings in all courts shall be in the English language only, but the proper or known names of writs or other process, or technical words, may be in the same language as has been commonly used. R. S. O. 1897, c. 324, s. 1. Writs, pleadings and proceedings to be in English.

This section is based on Imp. Statutes, 4 Geo. II. c. 26, s. 1, and 6 Geo. II. c. 14, s. 5.

DEMISE OF CROWN.

123. No action or other proceeding in any court shall be discontinued or determined by reason of the demise of the Crown, but the same shall be proceeded with as if such demise had not happened. R. S. O. 1897, c. 324, s. 2. Demise of Crown not to affect pending proceedings.

This section is based on 1 Edw. VI. c. 7, s. 1, and 1 Anne, c. 2, s. 4. But for this provision the proceedings in an action would, on the demise of the Crown, come to an end, and have to be commenced *de novo*: see also R. S. C. c. 101, s. 5.

SERVICE OF PROCESS ON THE LORD'S DAY.

124. No person upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order or judgment, except in cases of Service of process on the Lord's day (exception) void.

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treason, felony, or breach of the peace, and the service of every such writ, process, warrant, order or judgment on the Lord's Day shall be void, and the person so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he had done the same without any writ, process, warrant, order or judgment. R. S. O. 1897, c. 324, s. 3.

Persons serving same liable to action.

This section is based on 29 Car. II, c. 7, s. 6.

Before this Act ministerial acts done in civil actions on Sunday were valid: *Pit* v. *Welby*, 2 Bulst. 72; but since the Act service of any civil process on Sunday is absolutely void: *Wilson* v. *Tucker*, 1696, 1 Salk. 78; and cannot be validated by waiver: *Taylor* v. *Phillips*, 1802, 3 East. 155; 6 R. R. 575; but not if the service is effected through the Post: *Reg.* v. *Leominster*, *infra*.

A writ tested on Sunday is null and void: but if the writ is correctly tested, and the copy served is erroneously tested on Sunday, that is a mere irregularity: *Corrall* v. *Foulkes*, 1848, 5 D. & L. 590.

A pleading: *Worren* v. *Roe*, 1826, 8 D. & R. 342; *Good title d. Mortimer* v. *No title*, 1822, 2 D. & R. 232; and notice of filing a pleading: *Roberts* v. *Monkhouse*, 1807, 8 East. 547; 9 R. R. 497; a notice to produce: *Hughes* v. *Budd*, 8 Dowl. 315; and a notice of appeal: *Milch* v. *Frankau*, 1909, 2 K. B. 100; 100 L. T. 1002; *Reg.* v. *Leominster*, 1862, 2 B. & S. 391, come within the meaning of "process."

A debtor cannot be arrested on Sunday, but if he escape he may be retaken on Sunday: *Anon*, 1704, 6 Mod. 231, *Parker* v. *Moore*, 1705, 2 Salk. 626; but not if he has been voluntarily liberated: *Featherstonehough* v. *Atkinson*, 1735, Barnes 373, even though there be a detainer at the suit of another person in the Sheriff's hands: *Atkinson* v. *Jameson*, 1792, 5 T. R. 25. But a debtor unlawfully arrested on Sunday may on a subsequent day be validly detained under process issued by another creditor, without collusion: *In re Romsden*, 1846, 15 L. J. M. C. 113; *Hooper* v. *Lane*, 1857, 6 H. L. Cas. 443.

An arrest made, or process served, on Sunday, may be set aside on motion, and the prisoner discharged: *Atkinson* v. *Jameson*, *supra*; and an action will lie against the Sheriff for trespass: *Wilson* v. *Gutsery*, 1695, 5 Mod. 95; 1 Salk. 78.

An arrest for contempt of Court may be validly made on Sunday: *Ex* p. *Whitchurch*, 1792, 1 Atk. 55.

A distress made on Sunday is within the Act: *per* Mathew, J., in *Werth* v. *London & Westminster Loan Co.*, 5 T. L. R. 521, 522; and see *Child* v. *Edwards*, 1909, 2 K. B. 753.

A notice to quit is not "process," and may be validly served on Sunday: *Songster* v. *Noy*, 16 L. T. 157.

ACTIONS ON BONDS.

In actions on bonds, etc., plaintiff may assign as many breaches as he pleases.

125.—(1) In an action commenced or prosecuted in any court upon a bond for non-performance of any covenant or agreement in any indenture, deed or writing, the plaintiff may assign as many breaches as he thinks fit.

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and, upon trial of such action, not only such damages and costs as have heretofore been usually assessed shall be assessed, but also damages for such of the breaches so assigned as the plaintiff upon the trial of the issues shall prove, and the like judgment shall be entered as heretofore in such action.

Damages may be assessed.

In what case if judgment for plaintiff, he may suggest as many breaches as he pleases.

(2) If judgment is given for the plaintiff by confession or default he may suggest as many breaches of the covenants and agreements as he thinks fit, and the damages that he shall have sustained thereby shall be assessed; and if the defendant after such judgment entered, and before any execution executed, pays into the court in which the action is brought to the use of the plaintiff such damages so to be assessed by reason of all or any of the breaches of such covenants or agreements, together with the costs of suit, a stay of execution on the judgment shall be entered upon record.

Defendant paying damages and costs, execution may be stayed.

Judgment to remain to answer any further breach.

(3) If, by reason of any execution executed the plaintiff or his executors or administrators are fully paid or satisfied, all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the execution, the body, land or goods of the defendant shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon record; but such judgment shall, nevertheless, remain, continue, and be as a further security to answer to the plaintiff and his executors or administrators such damages as shall or may be sustained for further breach of any covenant or agreement in the same indenture, deed or writing contained upon which the plaintiff may apply to the court in which judgment is entered for leave to issue execution upon the judgment against the defendant, or his executors or administrators, suggesting other breaches of the covenants or agreements, and to call upon him or them to show cause why execution shall not be awarded upon the judgment, upon which the court shall make such order as may be deemed just.

And plaintiff may apply to issue execution against defendant.

And so toties quoties.

(4) Upon payment or satisfaction of such future damages, costs and charges all further proceedings on the judgment are again to be stayed, and so *toties quoties*.

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and the defendant, his body, land or goods shall be discharged out of execution. R. S. O. 1897, c. 324, s. 4.

Common Law rule as to bonds.

Originally the penal sum mentioned in a bond was recoverable on default at Common Law; but Courts of Equity established a practice of relieving the obligor in certain cases from payment of the penalty, on his paying the amount intended to be secured. In order to save obligors the necessity of going into Equity for relief, two statutes were passed, viz.: 8-9 W. 3, c. 11, s. 8, from which this section is derived; and 4 & 5 Anne c. 3 (c. 16, according to Ruffhead), ss. 12, 13 (from which s. 129 *post* is derived), so that thereafter an obligor might obtain the same relief at law as he could in equity. This section applies to all bonds given to secure the performance of divers acts or obligations. It does not apply to bonds given for the performance of a single act, for in such cases, only one breach can be assigned: see *per* Bramwell, B., *Preston* v. *Dania*, L. R. 8 Ex. at p. 21; and see 1 Saund. Plg. (5th Am. ed.), 651.

Bonds not within sec. 125.

A bond conditioned for payment of a sum certain is not within this section: *Murray* v. *Lord Stair*, 2 B. & C. 90; nor is a bail bond: *Moody* v. *Pheasant*, 2 B. & P. 446; *McNamee* v. *Reilly*, 13 U. C. Q. B. 197; nor a bond conditioned not to trespass: *Strickland* v. *Williams*, 1899, 1 Q. B. 382; 80 L. T. 4, the penalty in such a case being liquidated damages; neither is a replevin bond: *Bletcher* v. *Burn*, 24 U. C. Q. B. 259, under C. R. 1073, such a bond was within the statute, but that *Rule* has not been continued. An appeal bond is within this section: *Appleby* v. *Turner*, 19 P. R. 145, 175.

A bond for the payment of a sum of money by instalments is within this section: *Star Life* v. *Southgate*, 18 P. R. 151; but a bond for payment of a sum of money subject to a condition that a smaller sum, if punctually paid by instalments, would be accepted in satisfaction, is not: see *Bonafous* v. *Rybot*, 3 Burr. 1370; because that is not a condition against which a Court of Equity would relieve.

Procedure in actions on bonds within sec. 125.

In all respects, other than the matters mentioned in this section, the practice and proceedings in an action on a bond are the same as in an ordinary action: *Star Life, etc.* v. *Southgate*, 18 P. R. 151; *Appleby* v. *Turner*, 19 P. R. 145, 175. Where the action is brought on a bond, which is within this section, the indorsement of the writ should claim the full amount of the penalty, and allege the breach or breaches and claim execution for the amount due in respect thereof. In the event of default of appearance, a statement of claim appears to be necessary, which should set out the condition and specify the breaches, and in default of defence, judgment, it would seem, must be obtained, by motion for judgment under *Rule* 356, not under *Rule* 355: *Star Life* v. *Southgate, supra*, and will be for the full amount of the penalty, but should conclude with an allegation of the condition, and of the alleged breach, and a direction to assess the damages in respect thereof in such way as may be thought proper under *Rule* 39: *Ib.* When the action comes on for assessment of damages, the damages in respect of the breaches for which execution is to be issued will be assessed:

Ib. Upon the damages being assessed, the judgment should be entered reciting the assessment and directing execution to issue for the amount thereof and costs.

For forms of judgment, see H. & L. Forms, Nos. 884-887.

SET OFF.

Mutual debts to be set one against the other.

126. Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party one debt may be set against the other. R. S. O. 1897, c. 324, s. 5.

This section is founded on 2 Geo. II. c 22, s. 13.

Set-off and counter-claim.

Set-off and counterclaim in our practice remain in their nature different, a set-off may be a defence, but a counterclaim cannot. The latter is in effect a cross action for relief, which cannot be obtained in the plaintiff's action; and the costs of an action and counterclaim are usually dealt with as if they were separate actions—whereas, a set-off where proved is not only a defence to the plaintiff's action, but if it exceed the plaintiff's claim the defendant is entitled under sec. 128 *infra*, to judgment for the excess against the plaintiff: see *Gates* v. *Seagram*, 19 O. L. R. 216.

Mutual debts may be set off although one accrues by reason of penalty.

127.—(1) Mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature, except where either of the debts shall accrue by reason of a penalty contained in any bond or specialty.

Judgment only for balance due after set off.

(2) Where either the debt for which the action is brought, or the debt intended to be set against the same, has accrued by reason of any such penalty the debt intended to be set off shall be pleaded, and it shall be shown by the pleading how much is truly and justly due on either side; and if the plaintiff recovers in any such action judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other. R.S.O. 1897, c. 324, s. 6.

This section is based on 8 Geo. II. c. 24, s. 5.

See note to preceding section. The proper judgment, where the defendant proves a set-off equalling the plaintiff's claim, is one dismissing the action; and, if the set-off exceeds the plaintiff's claim, there should also be judgment for the defendant for the excess. Where a set-off is pleaded by way of counter-claim it should be treated as a defence: *Gates* v. *Seagram*, *supra*.

Defendant to be entitled to judgment for balance due after set off.

128. If, upon a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff the

Secs. 129, 130.

defendant shall be entitled to judgment for the balance remaining due to him. R.S.O. 1897, c. 324, s. 7.

No similar provision to this is found in the English statutes of set-off. Its origin in this province is to be found in 11 Geo. IV. c. 5, whence it passed into the *Common Law Procedure Act*, 1856. For the subsequent history of this section: see *Gates* v. *Seagram*, 22 O. L. R. 216, *per* Osler, J.A., at p. 222.

PAYMENT POST DIEM.

Plea of payment in bar in action of debt, etc.

129. Where an action is brought upon any bill, or where action is brought upon any judgment, if the defendant has paid the money due upon such bill or judgment such payment may be pleaded in the action, and where an action is brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executors or administrators the principal and interest due by the condition or defeasance of such bond, though such payment was not made strictly according to the condition or defeasance, yet it may nevertheless be pleaded in such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance and had been so pleaded. R.S.O. 1897, c. 324, s. 8.

This and section 130 are based on 4-5 Anne c. 3 (c. 16 in Ruffhead), ss. 12, 13, and are in *pari materia* with s. 125, *supra*.

See note to that section; and for some observations on this section see *Bonafous Rybot*, 3 Burr. 1370; *Preston* v. *Denia*, L. R. 8 Ex., at p. 21; and *Re Dixon, Heynes* v. *Dixon*, 1900, 2 Ch. 561; 83 L. T. 129.

Where the bond is conditioned for the payment of a sum of money on a specified day, and is subject to a condition that if a lesser sum is punctually paid in instalments, it will be accepted in satisfaction, payment *post diem* will be a defence: see *Bonafous* v. *Rybot*, *supra*.

Principal, interest, and costs brought into court pending action upon bond.

130. If, at any time pending an action upon any bond with a penalty, the defendant brings into the court all the principal money and interest due on such bond, and also all such costs as have been expended in any suit upon such bond, the money so brought in shall be deemed and taken to be in full satisfaction and discharge of the bond, and the court may give judgment to discharge every such defendant of and from the same accordingly. R.S.O. 1897, c. 324, s. 9.

This section is based on 4-5 Anne c. 3 (c. 16 in Ruffhead), s. 13. See note to s. 129, *supra*.

Secs. 131-133.

ACCOUNT BY JOINT-TENANTS.

Proviso for actions of account by and between joint tenants as bailiffs, etc.

131. Actions of account shall and may be brought and maintained against the executors and administrators of a guardian, bailiff and receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joiut-tenant or tenant in common. R.S.O. 1897, c. 324, s. 10.

This section is based on 4-5 Anne c. 3 (c. 16, according to Ruffhead), s. 27. At Common Law the action of account authorized by this section would not lie for want of privity between the parties, nor is there any trust or agency: see *Woodfall's Landlord and Tenant* (19th ed.), p. 15.

RECORDS OF COURT.

Persons entitled to search and to copies of records of courts.

132. A person affected by any record in any court, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification or a certified copy thereof made, and delivered to him by the proper officer. R.S.O. 1897, c. 324, s. 11.

This section is based on 46 Edw. III.; see the petition of Algernon Sidney, State Tracts 266. It was at one time doubted whether a person accused and acquitted of a criminal charge, was entitled, as of right, to an exemplification or certified copy of the proceedings shewing his acquittal, or whether it might be lawfully refused, unless the fiat of the Attorney-General was first obtained: see *Reg.* v. *Ivy*, 24 C. P. 78; *Hewitt* v. *Cane*, 26 Ont. 133; but see contra: *O'Hara* v. *Dougherty*, 25 Ont. 347; *Rex* v. *Scully*, 2 O. L. R. 315; 4 O. L. R. 394. In none of these cases except the last, do the provisions of this statute appear to have been noticed by the counsel, or the Court. The last case seems to settle that under this section the right of a person affected by the proceedings of a Court or Justice to a copy of the record thereof is *ex debito justitiæ*, and is not subject to the discretion of the Attorney-General, or any other functionary.

See *supra*, sec. 121.

PERPETUATING TESTIMONY.

Actions to perpetuate testimony may be brought by persons claiming offices, titles, etc., contingent on future events.

133. Any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any office or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled to maintain an action in the Supreme Court to perpetuate any

Secs. 134, 135.

testimony which may be material for establishing such claim or right; and all laws, rules and regulations, not contrary to the provisions of this section, in force or in use in suits to perpetuate testimony, or respecting depositions taken in such actions in making such depositions, shall be in force and used and applied in all suits instituted under the authority of this section and in respect to depositions taken in such action. R.S.O. 1897, c. 324, s. 14.

This section is based on the Imp. Stat. 5-6 Vict. c. 69, s. 1:

The Act as it appeared in R. S. O. 1897, c. 324, s. 14, had, prior to the word "office" in the third line, the words "any honour, title, dignity or." The omission of these words from this section would probably prevent an action to perpetuate testimony in reference to "any honour, title, or dignity," unless the honour, title or dignity can be associated with the ownership of land in Ontario which, in view of the fact that many younger sons of the nobility come to Canada, may possibly at some time prove inconvenient. It may be noticed that the side note does not agree with the text.

Attorney-General to be party defendant in all such actions in which the King may have any estate or interest.

134. In all actions which may be so instituted under the authority of section 133 touching any office, or any other matter or thing in which His Majesty may have any estate or interest, it shall be lawful to make the Attorney-General a party defendant thereto; and in all proceedings in which the depositions taken in any such action in which the Attorney-General was so made a defendant may be offered in evidence, such depositions may be admissible notwithstanding any objection to such depositions upon the ground that His Majesty was not a party to the action in which such depositions were taken. R.S.O. 1897, c. 324, s. 15.

See note to sec. 133.

SPECIAL CASE—INDEMNITY TO PESONS ACTING UNDER JUDGMENT ON.

Protection to be afforded to trustees by declaration.

135. Any executor, administrator, trustee or other person making any payment or doing any act in conformity with the declaration contained in any judgment made upon a special case shall in all respects be as fully and effectually protected and indemnified by such declaration as if such payment had been made or act done under or in pursuance of the express order of the court made in a suit between the same parties instituted by writ of summons, save only as to any right or claim of

any person in respect of matters not determined by such declaration. R.S.O. 1897, c. 324, s. 16. Secs. 136, 137.

See *Rule* 126 and notes.

136. The filing of a special case shall be taken to be a *lis pendens*. R.S.O. 1897, c. 324, s. 17. Special case to be a lis pendens.

Although this section constitutes a special case a *lis pendens*, it does not in any way obviate the necessity of registering a certificate of it under *The Registry Act* (R. S. O. c. 124), in order to constitute notice of it to other persons dealing with any land affected thereby.

CONTEMPT.

137.—(1) When any person has been directed by any judgment or order to execute any deed or other instrument, or make a surrender or transfer, and has refused or neglected to execute such deed, or instrument, or make, such surrender or transfer, and has been committed to prison under process for such contempt, or, being confined in prison for any other cause, has been charged with or detained under process for such contempt, and remains in such prison, the court may, upon affidavit that such person has, after the expiration of fourteen days from the time of his being committed under, or charged with, or detained under such process, again refused to execute such deed or instrument, or make such surrender or transfer, order or appoint an officer of the court to execute such deed or other instrument, or to make such surrender or transfer for and in the name of such person. Court may appoint person to execute instrument for person in contempt.

(2) The execution of such deed or other instrument, and the surrender or transfer in his name made by such officer, shall in all respects have the same force and validity as if the same had been executed or made by the party himself. Effect of instrument.

(3) Within ten days after the execution or making of any such deed or other instrument, or surrender or transfer, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made: and such party, as soon as the deed or other instrument, surrender or transfer is executed or made, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged from custody, and the court shall make such order as shall be Notice to be given.

Secs. 138, 139.

deemed just touching the payment of the costs of or attending any such deed, surrender, instrument or transfer. R.S.O. 1897, c. 324, s. 18.

This section is based on Imp. Stat., 11 Geo. IV. & 1 W. IV. c. 36, s. 15, s.-s. 15.

The object of this section is to do away with the difficulty which formerly existed, where a person contumaciously refused to execute a deed when ordered by the Court so to do. Formerly, the only remedy was to keep the disobedient person in gaol, but, under this section, the act may be ordered to be done in the name of the contemnor by some officer of the Court, and when so done it is to have the same effect as if done by the contemnor himself. The procedure laid down in sub-section (1) should be carefully observed.

See *Rule* 551 and notes and s. 139 *post*.

Power of sequestrator in cases of contempt.

138.—(1) Where a person is committed for a contempt in not delivering to any person, or depositing in court or elsewhere, as by any order may be directed, books, papers or any other articles or things, any sequestrator appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings or other articles or things, being in the custody or power of the person against whom the sequestration issues, as he would have over his own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be deemed just.

Power of Court to discharge.

(2) After such seizure the court may, upon the application of the prisoner or of any other person in the cause or matter, or upon any report, make such order for the discharge of the prisoner upon such terms as to costs and otherwise as the court may deem proper. R.S.O. 1897, c. 324, s. 19.

This section is based on Imp. Stat., 11 Geo. IV. & 1 W. IV. c. 36, s. 15, s.-s. 16.

See *Rules* 547-549 and notes.

Court may compulsorily discharge prisoners confined for contempt.

139. Where any person committed for a contempt is entitled to his discharge upon applying to the court, but omits to make such application, the court may, upon any such report, compulsorily discharge such person from the contempt and from custody, and pay the costs of the contempt out of any funds belonging to him over which the court may have power, or make them costs in the cause as against him. R.S.O. 1897, c. 324, s. 20.

This section is based on Imp. Stat. 11 Geo. IV. & 1 W. IV. c. 36, s. 15, s.-s. 18.

Sections 137, 139 were framed when a person in contempt could not be discharged until he had cleared his contempt completely, *i.e.*, by doing the act required to be done by him, and also by paying the costs occasioned by his contempt. But since the Act was originally passed, *The Fraudulent Debtors' Arrest Act* (R. S. O. c. 83), was passed, which practically abolishes imprisonment merely for the non-payment of money, and as a contemnor can no longer be committed for contempt in not paying costs; see s. 13 of that Act, *quære*, can a contemnor now be detained in custody where he has in all other respects cleared his contempt, except the payment of costs?

Secs. 140, 141.

At all events this section enables the Court to order such costs to be paid out of any property of the contemnor in the control of the Court.

CHARGING ORDERS ON STOCKS, ETC.

Stock and shares in public funds, and public companies, belonging to the debtor, and standing in his own name, to be charged by order of a Judge.

140. If a person against whom a judgment has been entered up in any of His Majesty's Courts in Ontario, has any Government stock, funds or annuities, or any stock or shares of or in a public company in Ontario, whether incorporated or not, standing in his name in his own right, or in the name of any person in trust for him, a judge of the Supreme Court, on the application of any judgment creditor, may order that such stock, funds, annuities, or shares or such of them or such part thereof respectively as he shall think fit shall stand charged with the payment of the amount for which judgment has been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; but no proceedings shall be taken to have the benefit of such charge until after the expiration of six months from the date of such order. R.S.O. 1897, c. 324, s. 21.

This section is based on Imp. Stat. 1 & 2 Vict. c. 110, s. 14.

Order of Judge to be made in the first instance ex parte, and on notice to the bank or company to operate as an injunction.

141.—(1) Every such order shall be made in the first instance *ex parte* and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any Government stock, funds or annuities standing in the name of the judgment debtor in his own right or in the name of any person in trust for him are to be affected, shall restrain any transfer thereof being made in the meantime and until such order has been made absolute or discharged; and if any stock or shares of or in any public company standing in the name

Sec. 142.

of the judgment debtor in his own right or in the name of any person in trust for him nro to be affected by any such order, shall in like manner restrain such public company from permitting a traasfer thereof.

Liability of persons disregarding order.

(2) If, after notice of such order to tho person to be restrained thereby, or, in case of corporations, to any authorized agent of such corporation, and before the same order is discharged or mado absolute, such corporation or person permits any such transfer to be made, the corporation or person so permitting such trausfer shnll be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and no disposition of the judgment debtor in the meantime shall be valid or effeotual as against the judgment creditor.

When order absolute.

(3) Unless the jndgment debtor, within a time to be mentioned in such order, shows to a Judge sufficient cause to the contrary the order shall after proof of notice thereof to the jndgment debtor, his solicitor or agent, be made absolute.

Varying or discharging orders.

(4) Any such Judge, upon the application of the jndgment debtor or any person interested, may dischnrge or vary such order and award such costs upon such application as he may think fit. R.S.O. 1897, c. 324, s. 22.

This section is based on Imp. Stat. 1-2 Vict. c. 110, s. 15.

The application under section 141 would appear to be proper to be made in the action in which the judgment was recovered which is sought to be made a charge.

Provisions as to property of judgment debtors defined and extended.

142.—(1) Sections 140 and 141 shall extend to the interest of a judgment debtor, whether in possessiou, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares, as also in the dividends, interest or annual produce of any snch stock, funds, annuities or shares.

Order affecting funds in Court.

(2) Where any such judgment debtor has any estate, right, title or interest, vested or contingent, in possession, remainder, or reversion in or to stocks, funds, annuities or shares standing in the name of the Accountant of the Supreme Court or in or to the dividends, interest or annual produce thereof, such Judge may make any

order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. Sec. 143.

(3) No order of any Judge as to any stock, funds, annuities or shares standing in the name of the Accountant, or as to the interest, dividends or annual produce thereof, shall prevent any incorporated bank or any public company from permitting any transfer of such stocks, funds, annuities or shares, or payment of the interest dividends or annual produce thereof, in such manner as the Supreme Court may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor with the amount of the sum mentioned in any such order. R.S.O. 1897, c. 324, s. 23. Effect of such order.

This section is based on Imp. Stat. 3-4 Vict. c. 82, s. 1.

PENAL ACTIONS.

143.—(1) In any penal action brought in good faith in which the defendant sets up a prior judgment the plaintiff may reply in avoidance of such judgment that such prior judgment was had by covin or collusion; and no release by any person before or after action for a penalty shall be a ground for staying such action. In penal action if prior judgment set up, plaintiff may reply fraud.

(2) No plaintiff in any such action shall be permitted to set up by way of reply, or otherwise, any such charge of covin or collusion, where the merits of the matter in question in the action, or a like charge of covin or collusion, have been once tried and found either for or against the plaintiff. R. S. O. 1897, c. 324, s. 27. Exception.

This section is founded on 4 Hen. VII. c. 20.

Not only is a judgment recovered in a prior action a bar, but the bringing of a prior action which is pending also operates as a bar to a subsequent action, unless as mentioned in this section such prior judgment or action is fraudulent or collusive and merely brought to protect the defendant: see *Forbes* v. *Samuel*, 1913, 3 K. B. 706; 109 L. T. 599.

Where a plaintiff in a penal action founds his claim on the wrong statute an amendment will not be readily allowed: *Ib.*

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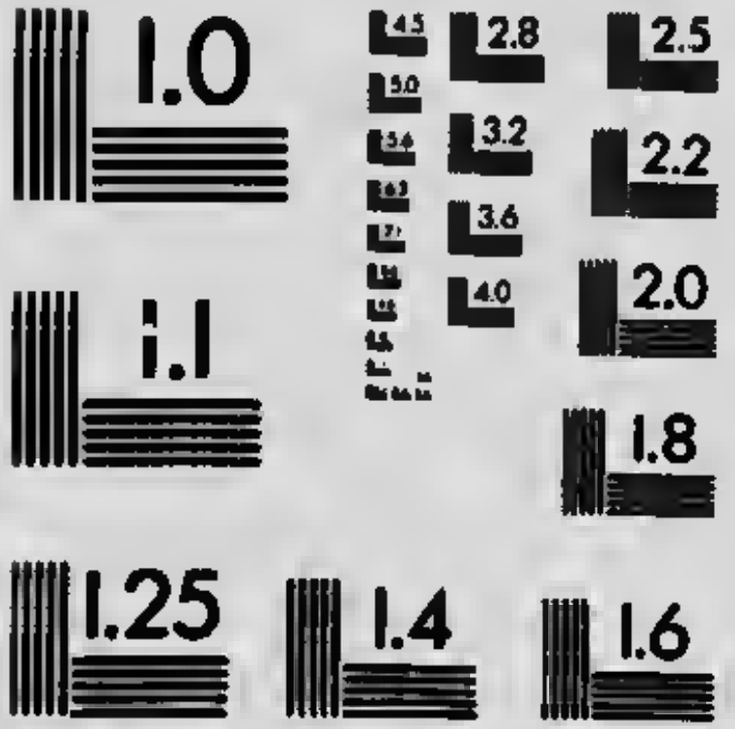

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Secs. 144-146.

Informer must be sui juris.

144. No person shall sue as a common informer in a penal action unless he is *sui juris*. R.S.O. 1897, c. 324, s. 28.

This section is founded on 18 Eliz. c. 5.

Compounding penal action.

145. No penal action brought by a common informer shall be compounded without the leave of the court. R.S.O. 1897, c. 324, s. 29.

This section is founded on 18 Eliz. c. 5.

See *Rules* 393-395 and notes *infra*.

QUO WARRANTO PROCEEDINGS.

Quo warranto, writ of, superseded, in certain cases,—proceedings in lieu of.

146.—(1) Except in the cases mentioned in sections 149 and 150, all proceedings against any person who unlawfully claims or usurps, or is alleged unlawfully to claim or to usurp any office, franchise or liberty, or who has forfeited or is alleged to have forfeited any franchise, by reason of non-user or mis-user thereof, which have heretofore been instituted or taken by writ of *quo warranto*, or by information in the nature of a writ of *quo warranto*, hereafter shall be instituted and taken, where the proceeding is by the Attorney-General *ex officio*, by notice of motion calling on the person against whom the proceeding is taken to show cause why he unlawfully exercises or usurps such office, franchise or liberty. R.S.O. 1897, c. 324, s. 31.

Motion, or order nisi.

Where relator named, proceedings how framed.

(2) Where the proceeding is at the instance of a relator it shall be taken in the name of His Majesty on the relation of such person, and such person shall before serving the notice of motion give security for the due and effectual prosecution thereof in like manner as nearly as may be and in the like amount as is, according to the practice of the Supreme Court, required to be given on an application to quash a conviction or order made by a Justice of the Peace, or in such manner and amount as the court may direct. R.S.O. 1897, c. 324, s. 32.

Relator to give security.

The proceedings under this section are probably intended to be instituted by an originating notice: see *Rule* 10; and: see *Rules* 215 (2). This section is intended to apply to all public officers subject to Provincial jurisdiction, except those referred to in section 149, viz., municipal, and school officers.

Security for Costs.—As to the security for costs required to be given by relators, on such applications: see Jud. Act, s. 63, sub-sec. 7 (*b*).

Secs. 147-150.

Issue may be directed, or injunction etc., granted.

147. The court may direct an issue for the trial of the matters in question on any such application, and may grant an injunction or a mandatory order in aid of the proceedings, or for the purpose of enforcing the judgment or order which shall be pronounced thereon. R.S.O. 1897, c. 324, s. 33.

Practice and appeals.

148. The practice and procedure, including the right of appeal, shall be, in all other respects, in accordance with the ordinary practice and procedure of the Supreme Court. R.S.O. 1897, c. 324, s. 34.

Municipal and school officers.

149. Where it is intended to call in question the right of any person claiming to be a municipal officer, or an officer of a school corporation, to the office which he claims to hold, exercise or occupy as such officer, or the right of a member of any school board or school corporation to have, hold or enjoy any office, either as a member of such board or corporation or otherwise under the school laws of Ontario, and the provisions of section 150 do not apply to the trial and determination of such question, the matter shall be tried and determined by the judge of the county court of the county in which the duties of the office are to be performed, in a summary manner, and the proceedings shall be the same, as nearly as may be, as those provided for trying and determining a complaint respecting the validity or mode of conducting the elections of school trustees in an urban municipality, excepting that such Judge shall have the same power to award costs to either party to the proceedings as he would have if the same were a proceeding in the County Court. R.S.O. 1897, c. 324, s. 35.

This section does not apply to controverted municipal elections: see s. 150; for these a special procedure is provided: see *The Municipal Act* (R. S. O. c. 192), s. 160, *et seq;* nor does it apply to Public School Trustees: see *The Public School Act* (R. S. O. c. 266), s. 54 (11), nor to Separate School Trustees: see *The Separate Schools Act* (R. S. O. c. 270), s. 43.

Where other special statutory provision, this Act not to apply.

150. Nothing in the next preceding section shall apply to or affect the proceedings in cases for which special provision is made by the municipal or school laws of Ontario, but in all such cases the proceedings shall be instituted and taken in the manner provided by those Acts, and not otherwise. R.S.O. 1897, c. 324, s. 36.

See note to s. 149.

Sec. 151.

CERTAIN PRACTICE AND PROCEDURE NOT AFFECTED.

Act not to apply to criminal matters or Dominion controverted elections.

151. Nothing in this Act shall affect the practice or procedure in criminal matters, or matters connected with Dominion controverted elections. 3-4 Geo. V. c. 19, s. 124.

See Eng. J. A. 1875, ss. 19, 21; Rules S. C. 1875, O. 62.

As to what are criminal proceedings: see *Seaman* v. *Burley*, 75 L. T. 91; *Southport* v. *Birkdale*, 76 L. T. 318: *O'Shea* v. *O'Shea*, 15 P. D. 59; *Ellis* v. *The Queen*, 22 S. C. R. 7; *Rex* v. *Bennett*, 4 O. L. R. 207; *Copeland-Chatterson Co.* v. *Business Systems*, 16 O. L. R. 481; *Rex* v. *Justices of Wilts*, 1912, 1 K. B. 566; 106 L. T. 364: and see *Rex* v. *Woodhouse*, 1906, 2 K. B. at p. 541-2 as to jurisdiction as to costs in proceedings for *certiorari*, or prohibition; and see notes to s. 74, *supra*.

Proceedings for contempt of Court in a civil action were at one time considered to be in the nature of criminal proceedings, but it has been settled by the House of Lords that they are not: see *Scott* v. *Scott* (1913), A. C. 417; 109 L. T. 1.

In *Reg.* v. *Cushing*, 26 Ont. App. at p. 250, Osler, J.A., said: "The jurisdiction of the High Court to review convictions made under Provincial Acts, when brought before it on *certiorari*, to the same extent and in the same manner as summary convictions under a Dominion Act, seems not to be interfered with: see Judicature Act, 1897, sec. 25. The practice in that respect followed in the High Court Division as to both classes of convictions is the same: see *supra*, s. 63, and C. RR. 1279-1288, in note to s. 26, *supra*.

The High Court Division is a continuation of the former High Court of Justice and has the same jurisdiction in Dominion Controverted Election matters as the former Courts of Law and Equity had under the Dominion Controverted Elections Act of 1874: *The Dominion Controverted Elections Act* (R. S. C. c. 7) s. 2 (i); *Mitchell* v. *Cameron*, 8 S. C. R. 126, reversing S. C. 1 Ont. 433. See also *Re N. York*, 32 C. P. 458, and *Re Russell*, 1 Ont. 439, and Holmested's Election Rules.

RULES OF COURT

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3 GEORGE V., CHAPTER 19, SECTION 103.

"If aad whea the Rules of Practice aad Procedure which are being prepared by the Honourable Mr. Justice Middleton, under instructioas from the Attoraey-General, are approved by the Licuteaaat-Goveraor in Council, the same, and the tariffs of costs aad the tariffs of fees payable to the Crown aad to the officers of the Court coatained thercia, shall oa or from a day to be named by the Lieuteaant-Goveraor ia Council by proclamatioa have the same force aad effect as if they had beea embodied ia this Act, and shall supersede the existing Rules and tariffs; aad section 102 shall after that day ao longer remaia or be ia force."

Order-in-Couacil approved by H' Ioaour the Lieutenant-Governor, the 11th day of Jul , A.D. 1913.

"Upon the recommeadatioa of the Honourable the Attoraey-Geaeral, the Committee of Couacil advise that the Rules of Practice aad Procedure prepared by the Honourable Mr. Justice Middleton be approved by Your Honour aad that the same be brought in force on the 1st day of September aext as provided by section 103 of the Judicature Act, 3 George V., chapter 19."

By proclamation of His Honour published in the Ontario Gazette of 2nd August, 1913, the Rules and tariff were ordered to come into force on the first day of September, 1913.

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CONSOLIDATED RULES OF PRACTICE

OF THE

SUPREME COURT OF JUDICATURE FOR ONTARIO

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CHAPTER I.

INTERPRETATION.

Date of coming into force of Rules.

1. These Rules shall take effect on the 1st day of September, 1913. C.R. 1.

The expresion "Rules of Court," when ueed in relation to any Court, mean Rules made hy the authority having for the time being power to make Rules or Orders regulating the practice and procedure of euch Court: *The Interpretation Act* (R. S. O. c. 1) s. 8; and the power of the said authority to make Rules of Court, as above defined, includes a power to make Rules of Court for the purpose of any Act directing or authorizing anything to be done hy Rulee of Court: *Ib.*, s. 8 (37).

These Rules were prepared hy the Hon. Mr. Juetice Middleton under instructions from the Attorney-General of Gntario, and were approved hy His Honour the Lieutenant-Governor in Council under the authority of The Jud Act, 3 Geo V., c. 19, s. 103, and under that section have tha force of an Act of the Legislature, and supereede the former Rules and tariffe theretofore in force, hut the eame are suhject to be varied or repealed from time to time hy the same authority and in the eame manner as other Rules of Court: eee Jud. Act, ss. 109, 110, *supra*.

It, therefore, doee not appear to be poeeible to question the velidity of any of these *Rules* on the ground that the Commissioner exceeded his authority, ae was done in *Williams* v. *Goose*, 1897, 1 Q. B. 471.

Former practice superseded.

2. All Rules and orders heretofore passed are rescinded, except those mentioned in the schedule hereto, and as to all matters not provided for in these Rules, the practice shall be regulated by analogy thereto. C.R. 2 and 3.

Matters unprovided for.

For cases in which the latter part of this *Rule* has been applied: see *Wolff* v. *Ogilvy*, 12 P. R. 645; *Flett* v. *Way*, 14 P. R. at p. 315; *Ladies' Tailoring Ass'n* v. *Clarkson*, 27 C. L. J. 501; *Morse* v. *Lamb*, 15 P. R. 9, in note to *Rule* 121; *Smith* v. *Houston*, 15 P. R. 18, in note to *Rule* 396 (1); *Re Murray*, 13 P. R. 367, in note to *Rule* 706.

Criminal matters not affected.

The *Rules* relate merely to civil matters.

See Eng. Jud. Act, 1890, e. 4; and *The Jud. Act*, s. 124, and notes, *supra*, p. 293.

A proceeding before Jueticee to recover a penalty against a municipal hody for not supplying gae up to the proper etandard was held to be a criminal proceeding: *Southport* v. *Birkdale*, 76 L. T. 318; and see other casee cited in note to e. 124, *supra*, p. .

Interpretation.

The Interpretation Act and the interpretation clauses of The Judicature Act, 1895, were hy former C. R. 5 made applicahle to the former *Rules* unless there wes anything in the suhject or context repugnant thereto.

This provision has not been included in the present *Rules*. By 3-4 Geo. V. c. 19 s. 108 these *Rules* are "to have the same force and effect as if embodied" in The Judicature Act: see 3-4 Geo. V., c. 19, s. 103; but it may be said that that does not make the *Rules* an "Act" within the meaning of *The Interpretation Act* (R. S. O. c. 1) ss. 29, 30. Whether therefore the interpretation clauses of *The Interpretation Act*, s. 29, or of *The Judicature Act* s. 2, *supra*, apply to the *Rules*, does not appear to be free from doubt. Rule 3.

3. In these Rules, Interpretation.

(*a*) "Acconntant" shall mean "The Accountant of the Supreme Court of Ontario." "Accountant."

(*b*) "Action" shall include garnishee proceedings and proceedings for relief by interpleader. C.R. 6. "Action."

See *The Judicature Act*, s. 2 (*a*), *supra*, p. 1.

(*c*) "County Court" shall include District Court, and "County" shall include "District." "County Court," "District Court," "County," "District."

See *The Judicature Act*, s. 2 (*d e*), *supra*, p. 2.

(*d*) "Judge" shall mean a Judge of the High Court Division of the Supreme Court. Judge.

See *The Judicature Act*, s. 2 (*l*), *supra*, p. 2.

By *Rule* 205 *infra* certain powers of the Court may be exercised by a Judge in Chambers, or the Master in Chambers, or a Local Judge in Chambers, or any Master or Referee to whom any cause or matter is referred.

(*e*) "Judgment creditor" shall mean the party or person who is entitled to receive payment or to enforce a judgment or order. "Judgment creditor."

(*f*) "Judgment debtor" shall mean the party or person to make payment under any judgment or order, or against whom the same may be enforced. "Judgment debtor."

(*g*) In Rules 533 to 599 "Judgment" shall include an order to the same effect. C.R. 835. "Judgment."

See *The Judicature Act*, s. 2 (*m*), *supra*, p. 2.

See Eng. (1883), R. 602.

This *Rule* only means that an order may be enforced in the action in the same way as a judgment. An order does not create a debt like a judgment, so as to enable an independent action to be maintained upon it: *Re Kerr* v. *Smith*, 24 Ont. 473. By *The Division Court Act* (R. S. O. c. 63) s. 61 (*e*), no action can be brought in a Division Court upon any judgment or order made by the Supreme Court or a County Court, where execution may issue upon or in respect thereof. Orders.

Rule 4.

In England it has been held that it is not intended that all orders are to be equivalent to judgments: *Ex. p. Chinery*, 12 Q. B. D. 342; and that the provisions respecting attachments of debts, (*Rule* 590 *et seq.*) which apply to judgments may not be employed to enforce an order dismissing an action with costs for want of prosecution: *Cremetti* v. *Crom*, 4 Q. B. D. 225; see also *Ex. p. Earl of Strathmore*, 20 Q. B. D. 512, *Ex. p. Whinney*, 13 Q. B. D. 476; *Ex. p. Grimwade*, 17 Q. B. D. 357; *Ex p. Moore, Re Faithfull*, 14 Q. B. B. 627; see, however, *Nott* v. *Sonds*, W. N. 1883, 74; *Whittaker* v. *Whittaker*, 7 P. D. 15.

As to the practice in this Province, see notes to *Rules* 580 and 590.

As to enforcing orders made by a Judge of the H. C. D. or of a C. C., as *persona designata*, and not in Court: see *The Judges' Orders Enforcement Act*, R. S. O. c. 79.

The non-service of an order under which an execution has been issued, is no ground for setting aside the execution: *Cronston* v. *Blair*, 15 P. R. 167.

"Sheriff."

(*h*) "Sheriff" shall include any Coroner, Elisor or other officer charged with the execution of any writ or process. C.R. 1102 and 892.

See R. S. O. 1877, c. 66, s. 65.

A coroner acting as Sheriff is liable for his acts in the same way as a Sheriff: *Horsfall* v. *Sutherland*, 35 C. L. J. 245.

"Time prescribed."

(*i*) "Time prescribed" shall mean time limited or appointed by the Rules or by any judgment or order.

"Writ of summons."

(*j*) In Rules 11 to 31, the words "Writ of Summons" and "Writ" shall include any document by which proceedings are commenced, and shall also include all proceedings by which a person not a party is added as a party either before or after judgment, e.g., proceedings in the Master's office and garnishee and third party proceedings. 3 Edw. VII. ch. 8, s. 13.

"Writ of execution." "Execution."

(*k*) "Writ of Execution" and "execution" shall include all writs by which a judgment may be enforced, and in the Rules relating to interpleader shall also include an order of attachment under the Absconding Debtors Act. C.R. 1102, *amended*.

Division of Rules and marginal notes.

4. The division of these Rules into chapters, titles, and headings is for convenience only, and shall not affect their construction.

This *Rule* is based on C. R. 7.

But for this *Rule* the construction of the *Rules* would be controlled by the title and headings: see *Inglis* v. *Robertson*, 1898, A. C. 616; 79 L. T. 224.

CHAPTER II.

FORM AND COMMENCEMENT OF PROCEEDINGS IN THE SUPREME COURT.

(1) *Writ of Summons.*

5.—(1) All actions shall be commenced by the issue of a writ of summons, tested in the name of the Chief Justice of Ontario, which shall be prepared by the plaintiff, and shall contain the names of the parties and the characters in which they sue and are sued, and the office in which and the time within which the defendant is to enter his appearance, and shall be indorsed with a short statement of the nature of the plaintiff's claim. C.R. 120 and 124.

Date and teste of Writ.

Defects in teste of writ.

The writ should run in the name of the reigning Sovereign; but where by mistake of the solicitor and officer of the Court, a writ issued in the name of a deceased Sovereign, the mistake was held to be merely an irregularity, and as such amendable: *Bank of Hamilton* v. *Baldwin*, 28 O. L. R. 175, and this, notwithstanding that such amendment prevented the defendant from setting up the Statute of Limitations as a bar to the action.

A clerical error in the teste is of no importance: *Pleasants* v. *East Dereham*, 47 L. T. 439; *Wesson* v. *Stalker*, 47 L. T. [illegible]. See also *Rule* 183.

Where the teste was "witness, , Lord High Chancellor," leaving out the name of the Lord Chancellor, the writ was held to be good: *McNay* v. *Alt*, 66 L. T. 832.

See *Rule* 183 as to irregularities in the teste of writs.

Absence from the Province of the Judge in whose name writs are tested, does not render it improper to teste writs in his name: *Brett* v. *Smith*, 1 P. R. 309.

Time of issue of writ.

A writ issued after the cause of action accrued, but on the same day is good. The issue of the writ is the act of the party and not of the Court, and the Court will in such case inquire as to the actual time, and not refer the act to the first moment of the day: *Clarke* v. *Bradlaugh*, 7 Q. B. D. 151; 8 Q. B. D. 63; see *Lord Dorchester* v. *Petrie*, 3 Doug. 273.

Costs.

If the plaintiff intends to claim costs, the indorsement of the writ should include a claim for costs. The costs claimed are subject to taxation: see *Rule* 659.

Actions generally.

Every writ must have the full title of the action, including the names of all the defendants and their addresses: *State Savings Bank* v. *Columbia Iron Works*, 6 O. L. R. 358; but need only be directed to the particular defendant or defendants intended to be served with

Rule 5.

it. Where different times have to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Traill v. Porter*, 1 L. R. Ir. 60; see *Burt v. Bowen*, 8 T. L. R. 28.

The term "action" is defined by the Act (s. 2), to be a civil proceeding commenced by writ, or in such other manner as may be prescribed by the *Rules*. As to the effect of this definition, see *Darcy v. Whittaker*, 33 L. T. 778; 24 W. R. 244; and notes to sec. 2.

There is to be no special form of writ for particular kinds of actions, such as proceedings by *capias*, and against absconding debtors, in dower, replevin, ejectment, etc.; all are to be commenced by writ of summons.

Proceedings appear to have been instituted by a writ of *scire facias* in *Shaver v. Cotton*, 16 P. R. 278.

Actions by the Crown with or without a relator.

An action may, by amendment of the writ and statement of claim, be turned into an action by the Attorney-General at the suit of a relator corresponding to an information under the old practice, the sanction of the Attorney-General being obtained: *Caldwell v. Pogham Harbour, etc., Co.*, 2 Ch. D. 221; *Wallasey v. Gracey*, 36 Ch. D. 599; see *Rule* 183. The title "information" is no longer to be used: *Attorney-General v. Shrewsbury Bridge*, 42 L. T. 79; W. N. 1880, 23; but the name of a relator is to be used where the action does not immediately concern the rights of the Crown: see *Brooks v. Terry*, 4 T. L. R. 678. Where the rights of the Crown are immediately concerned, the action may be brought by the Attorney-General alone without a relator: *Atty.-Gen. v. Logan*, 1891, 2 Q. B. 107; but such an action can only be instituted by his sanction: see *Attorney-General v. Toronto Street Railway Co.*, 2 Chy. Ch. 165, and his *fiat* should be obtained and indorsed on the writ and a copy thereof. The copy should then be filed under *Rule* 6.

Where the action is to enforce a public right, *e.g.*, the proper management of a city park, it must be brought by the Attorney-General: *Hope v. Hamilton Park Commissioners*, 1 O. L. R. 477.

Address of defendant.

The address of the defendant is a necessary part of the writ. If omitted the writ may, in a proper case, be amended by inserting it; but where defendant lived out of Ontario, and no cause of action within *Rule* 25 was shewn, the writ was set aside: *State Savings Bonk v. Columbia Iron Works*, 6 O. L. R. 358. See also notes to *Rule* 7.

Indorsement of claim.

Except so far as *Rule* 109 (1) applies, it is irregular to proceed by statement of claim upon a different cause of action from that mentioned in the writ: see *United Telephone Co. v. Tasker*, 59 L. T. 852, and notes to *Rule* 109.

In case a *mondamus*, or an injunction, or a receiver is claimed, the plaintiff ought to indorse his writ accordingly, though, if the necessity for such relief arises incidentally in the course of the action, the Court has power to give the relief even if a claim for it was not indorsed on the writ: see *Colebourne v. Colebourne*, 1 Ch. D. 690; *Norton v. Gover*, W. N. 1877, 206. A defective indorsement may be amended. A general power of amending proceedings is given by *Rule* 183.

In an action for administration, the writ should shew that such is the nature of the action, by being entitled "In the matter of the estate of": *Re Jones, Eyre v. Cox*, 24 W. R. 317.

No very precise indorsement of the nature of the claim is required: see *Rule* 33. Rule 5.

A writ against A. O. & R. indorsed to have set aside a deed from A. to O., and a deed from O. to A., was held sufficient, and a motion by R. to have service on him set aside as shewing no cause of action against him was refused: *Gilmore* v. *Orford*, 11 P. R. 437.

Where a woman is made a defendant, she ought to be described in the writ as a spinster, married woman, or widow: *Tofield* v. *Roberts*, 96 L. T. Jour. 11; W. N. 1894, 74; *Re Poinons*, W. N. 1891, 139; where a plaintiff sues on behalf of a class it should so appear in the title of the action; a statement to that effect in the body of the statement of claim is not sufficient: *Re Tottenham*, 1896, 1 Ch. 628; 74 L. T. 376; *sed vide McNab* v. *Macdonell*, *infra*. Character of parties.

In *Worraker* v. *Pryer*, 2 Ch. D. 109, it was held by Jessel, M.R., and in *Re Boyle*, 5 Ch. D. 540, by Bacon, V.C., and in *Adcock* v. *Peters*, W. N. 1876, 139; 2 Charl. N. C. (Court) 288, by Malins, V.C., that in an ordinary creditors' action for administration of the real and personal estate of a deceased debtor, the action must be by the plaintiff on behalf of himself and all the other creditors; and the writ must be indorsed accordingly. In the earlier case of *Cooper* v. *Blissett*, 1 Ch. D. 691, Hall, V.C., had taken a contrary view. In the later case of *Re Jones*, *Eyre* v. *Cox*, 24 W. R. 317, Jessel, M.R., said that when it appeared in the statement of claim that the plaintiff was suing on behalf of himself and other creditors, it was not necessary to amend the writ by the insertion of these words. See also *McNab* v. *Macdonnell*, 15 P. R. 14. But it has been said: "A statement buried somewhere in the statement of claim that the plaintiff is suing on behalf of all the creditors of the testatrix, would be of no use, the statement ought to appear in the title of the action": *per* North, J., *Re Tottenham*, 1896, 1 Ch. 628; cited by Riddell, J., in *Barton* v. *Hamilton*, 13 O. W. R. at p. 1128; see notes to *Rule* 75, as to class suits; and *Harris* v. *Goldfields*, 28 O. L. R. 625. Action on behalf of a class.

Where a judgment for administration is applied for under *Rule* 608, *et seq.*, it has not been the practice to require the style of the cause to shew that the action is on behalf of all the creditors, etc.: see also *Re Blount*, 27 W. R. 865.

Plaintiffs suing on behalf of a class, should specify the class as accurately as possible: *Marshall* v. *S. Staffordshire Tramways Co.*, 1895, 2 Ch. 36.

A statement of the representative capacity in which a plaintiff sues cannot be supplied from allegations in plaintiff's affidavits on a motion: *Hynes* v. *Fisher*, 4 Ont. 78; but may be shewn in the statement of claim if omitted in the writ: *McNab* v. *Macdonnell*, 15 P. R. 14.

The irregularity of omitting to indorse the character in which the plaintiff sues, if a representative one, may be waived by appearing: *Ib.*

Where notice of action is necessary it may not be required where the principal relief sought is an injunction, and damages are only claimed as subsidiary thereto: see *Flower* v. *Low Leyton Local Board*, 5 Ch. D. 347. Notice of action.

(2) Any claim on behalf of His Majesty, including a claim to repeal letters patent under the great seal, may Action by Crown.

Rule 6.

be enforced by an action brought by the Attorney-General on behalf of His Majesty. *See* C.R. 238-241.

See R. S. O. 1877, c. 58, ss. 6, 8, 9, 10, 11, 12.

The Court may on the application of the Crown strike out a jury notice in a Crown action: *Reg.* v. *Grant*, 17 P. R. 165.

The Crown has the same right of discovery as a subject has in an ordinary action: see *Atty.-Gen.* v. *Newcastle*, 1897, 2 Q. B. 384, but is not bound to give discovery: *Ib.* See note to *Rule* 348, *infra*.

As to the right of reply: see *Crim. Code*, s. 944 (3), and *Rex* v. *Martin*, 9 O. L. R. 218. This right was reserved in civil cases by C. R. 238, but that provision has not been continued in the present *Rules*.

In *Atty.-Gen.* v. *Williamson*, 60 L. T. 930, the Atty.-Gen. notified the defendant that the information would not be further prosecuted, and it was held that there was no power to dismiss it for want of prosecution, or to award costs to the defendant as the cause was not determined. *Quære*, in Ontario.

As to the jurisdiction of the Court in regard to the cancellation of letters patent: see J. A. (1897), s. 26 (7), (8), and note, p. 18, *supra*.

The former C. R. 241, on which this *Rule* is partly based, was considered to apply only to cases where under the practice prior to The Judicature Act, 1881, a *scire facias* would be necessary, and not to actions by private persons to cancel a patent as having been issued through fraud or improvidence, which it was held might be still instituted by a private person, without joining, or obtaining the leave or concurrence of the Attorney-General: *Farah* v. *Glen Lake Mining Co.*, 17 O. L. R. 1; *Zock* v. *Clayton*, 28 O. L. R. 447.

Officer to seal and sign writ.

6. The proper officer shall, on receiving a copy of the writ so prepared, to be filed with him, issue the writ by signing and sealing the same with his seal of office, and shall also note in the margin of the writ from what office and in what county it is issued, and shall subscribe his name thereto. C.R. 123 and 125.

Writ may issue in any county.

A writ of summons may be issued in any county. The writ in an action for recovery of land may issue out of the proper office in any county without reference to the locality of the land, though the trial must, under *Rule* 245, be in the county where the land lies: *Canada Permanent, etc.* v. *Foley*, 9 P. R. 273. In County Court cases an action for the recovery of land must be brought as well as tried in the County or District in which the land is: *The County Courts Act* (R. S. O. c. 59), s. 30 (2).

An action for assignment of dower is an action for the recovery of land: *McCullough* v. *McCullough*, 4 C. L. T. 252.

From what office.

Writs of summons in the county of York are issued out of the Central Office, and in other counties by either the Deputy Clerk of the Crown or Deputy Registrar at the option of the plaintiff, or in counties where there is a Local Registrar by such Local Registrar.

Issue of writs of summons.

The issue of the writ is not a judicial act and the Court will take cognizance of the fact that it was not issued till later in the day than the cause of action arose: *Clarke* v. *Bradlaugh*, 8 Q. B. D. 63.

A writ sealed but not signed was held valid: *Archibold* v. *Strathy*, 18 S. C. R. 116. Rule 7.

7. A writ for service in Ontario (either personally or in any other manner), shall be according to Form No. 1. A writ for service out of Ontario shall be according to Form No. 2. Where the defendant is not a British subject and is not in British Dominions, notice of the writ, according to Form No. 3, shall be served in lieu of the writ. C.R. 127, 128. Writ for service in, or out of, Ontario.

See Eng. (1883), RR. 5 and 7.

For Forms: see Nos. 1, 2 and 3.

A writ in the form for service within the jurisdiction will not be set aside before service because the defendant is resident without the jurisdiction, for the plaintiff may wait until he comes within the jurisdiction to serve him: *The Helenslea*, 7 P. D. 57; 47 L. T. 446; and see *Snow* v. *Cole*, 7 P. R. 162; *Fry* v. *Moore*, 23 Q. B. D. 395, 397. Writ for service within jurisdiction not irregular because defendant is out of jurisdiction.

Where a writ for service on persons domiciled within, was served on them without the jurisdiction, leave was given to issue *nunc pro tunc* a concurrent writ for service out of the jurisdiction, and to amend the copies served in accordance therewith: *Metcalf* v. *Davis*, 6 P. R. 275. Service of writ in wrong form.

A writ not according to the form for service out of the jurisdiction may, if served out of the jurisdiction, be set aside: *Sedgwick* v. *Yedros Mining Co.*, 35 W. R. 780.

Where a writ for service on a foreigner out of the jurisdiction was served on him while within the jurisdiction on a temporary visit, a judgment signed by default of appearance was held to be regular: *Snow* v. *Cole*, 7 P. R. 162.

Where a writ for service out of the jurisdiction is issued, and the defendant is abroad, the Judge may, if the circumstances warrant substitutional service, order a copy to be served within the jurisdiction: *Ford* v. *Shepherd*, 34 W. R. 63; 53 L. T. 564; *Western Suburban & N. H. B. Society* v. *Rucklidge*, 1905, 2 Ch. 472; 93 L. T. 664. Where a writ is served substitutionally it should be in the form in which it would be required to be if personal service were being effected; i.e., if the defendant is within the jurisdiction, the writ must be one for service within the jurisdiction; and if the defendant is out of the jurisdiction, the writ, though served substitutionally within the jurisdiction, must nevertheless be in the form of one for service out of the jurisdiction: see *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784; 70 L. T. 443; and notes to *Rule* 25. Substitutional service.

The forms contemplate the defendant's address being stated in the body of the writ, but an incorrect statement of his address will not invalidate the writ: *Smith* v. *Hommond*, 1896, 1 Q. B. 571; but its omission, coupled with the fact that no cause of action is shewn against the defendant properly sueable in Ontario, may be a ground for setting the writ aside: *State Savings Bank* v. *Columbia Iron Works*, 6 O. L. R. 358. Address of defendant in writ.

Rule 8.

In *The W. A. Scholten*, 36 W. R. 559, a writ was set aside for not containing the address of defendant as prescribed by the form of writ, but the decision seems to have proceeded upon the fact that the defendant was a foreign corporation, and if the address abroad had been inserted the writ could not have been issued without leave. But see *The Helenslea*, 7 P. D. 57; *Zuccato* v. *Young*, 38 W. R. 474.

The last clause is adopted from R. S. O. 1877, c. 50, s. 45, and is not in the English Rule. As to the form of affidavit of service: see *Bustros* v. *Bustros*, 14 Ch. D. 849, and H. & L. Forms, Nos. 70 *et seq.*

Writ and notice for service out of jurisdiction.

Where a foreigner is served out of the jurisdiction, with a writ, instead of a notice as prescribed by this *Rule*, the service is void: *Hewitson* v. *Fabre*, 21 Q. B. D. 6.

See also notes to *Rule* 25.

Concurrent writs or duplicate for service within or without the jurisdiction.

8. The plaintiff may issue a duplicate writ or concurrent writ for service either within or without Ontario, tested of the same day as the original writ, and marked "duplicate" or "concurrent," and with the date of actual issue. Such writs shall only be in force during the currency of the original writ. C.R. 129, 130, 131.

See Eng. (1883) RR. 40, 41. The original writ is only in force for twelve calendar months unless renewed: see *Rule* 9, and notes.

Time within which concurrent or duplicate writs may issue.

By the terms of this *Rule* the concurrent or duplicate writ can only be issued during the period for which the original writ is current: see also *Smallpage* v. *Yonge*, 17 Q. B. D. 644; but under *Rule* 176 the Court or Judge may enlarge the time, and after the renewal of the original writ under *Rule* 9, may allow a concurrent writ to issue: *Smallpage* v. *Yonge*, *supra*, and *Re Jones*, *Eyre* v. *Cox*, 46 L. J. Chy. 316; W. N. 1877, 38.

Where different times are to be mentioned for different defendants to appear, the proper course is to issue concurrent writs: *Traill* v. *Porter*, 1 L. R. Ir. 60; see *Burt* v. *Bowen*, 8 T. L. R. 28; so that, that course will be proper where several defendants out of the jurisdiction are given different times to appear, or where some defendants are within, and others without the jurisdiction: see *Beddington* v. *Beddington*, 24 W. R. 348; 34 L. T. 366; 45 L. J. (P. D. & A.) 44.

Where it is sought to issue a concurrent writ for service out of the jurisdiction on a party alleged to be a necessary party to an action against a defendant resident within the jurisdiction [see *Rule* 25 (*g*)], the defendant within the jurisdiction must be first served, and an application should then be made for leave to issue a concurrent writ for service on the absent party: see *Rules* 25, 26, 27, and in support of the application it must be shewn that the party sought to be served out of the jurisdiction is a necessary party: *Collins* v. *N. B. & M. Ins. Co.*, 1894, 3 Ch. 228; 71 L. T. 58. The omission to mark the copy served of a concurrent writ as "concurrent" is irregular: *Ib.* See also notes to *Rule* 25 (*g*).

Concurrent writ.

A concurrent writ may be issued after the original writ has been issued, and although there is only one defendant, and for service abroad although the original writ is for service within the jurisdiction: *Smallpage* v. *Yonge*, 17 Q. B. D. 644; cf. *Wilding* v. *Bean*, 1891,

1 Q. B. 100; but a concurrent writ for service abroad, where the original writ is for service within the jurisdiction, could not be served without an order being first obtained under *Rules* 25 and 26. Rule 6.

A defendant, whose domicil is within the jurisdiction, if served abroad, must be served pursuant to an order made under *Rule* 25; service on him of a writ in the form of a writ for service within the jurisdiction is a nullity: *Grant* v. *Kerr*, 2 O. W. N. 770; and is no longer amendable as formerly: see *Metcalf* v. *Davis*, 6 P. R. 275. Service abroad.

As to substitutional service, within the jurisdiction, of writs against defendants who are abroad: see notes to *Rules* 7 and 25.

Service on a defendant, within the jurisdiction, of a concurrent writ issued for service on him out of the jurisdiction was, on motion to set it aside, allowed to stand as good service: *Marshall* v. *McTavish*, 32 C. L. J. 199.

As to the provision for issuing duplicate writs: see Eng. (1883) R. 47. Introduced in Ont. in 1894 by Rule 1308 to meet the difficulty presented in *Davies* v. *Garland*, 1 Q. B. D. 250, in which it was held that only the original writ, when produced, could be renewed.

9. The writ shall be in force for twelve months from the date thereof, including the day of such date; but if for any sufficient reason any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months, and so from time to time during the currency of the renewed writ. The writ shall be marked by the proper officer, "renewed," with the date of the order. C.R. 132. Writ to be in force 12 months, but may be renewed.

This *Rule*, in 1881, introduced an important change. Theretofore, the writ, if not served, might, as of right, during its currency, be renewed for six months from the date of renewal, and so on from time to time during the currency of the renewed writ, so as to keep the action alive without service, and thereby defeat the Statute of Limitations for an indefinite time; whereas under this *Rule* a writ can only be renewed by leave, and if reasonable efforts have been made to serve the defendant, or for other good reasons. The application is made *ex parte*: see Chitty's Arch., 14th ed., 229. Change effected by Rule.

The Forms indicate expressly that the twelve months mentioned in this *Rule* are calendar months.

A local Judge has jurisdiction under this clause: *Gilmour* v. *Magee*, 14 P. R. 120.

An original writ of summons, notwithstanding the expiration of 12 months mentioned in this *Rule*, and even though not renewed, still continues effectual for all purposes, except that of service, the limit of time applying to service only: *Re Kerly, Son, & Verden*, 1901, 1 Ch. 467.

The twelve months are inclusive of the day of issue, or of the last renewal, if any: *Laird* v. *King*, 19 P. R. 307; 1 O. L. R. 51.

The writ will expire at midnight preceding the anniversary of its issue: see *Fitch* v. *Walker*, 7 P. R. 8.

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Order for renewal.

The order, besides providing for the renewal, should also provide that service of the writ may be made notwithstanding the lapse of a year: *Gilmour* v. *Magee*, 14 P. R. 120.

The twelve months run from the date of the writ: *Re Jones, Eyre* v. *Cox*, 48 L. J. Chy. 318; W. N. 1877, 38; and vacation is included: see *Rule* 179, and *Mullin* v. *Bonjor*, 5 Ir. C. L. 475.

Enlarging time.

By *Rule* 178, the Court may enlarge the time for any proceeding, and although the prescribed time has elapsed. In *Re Jones, Eyre* v. *Cox*, *supra*, Jessel, M.R., allowed a writ to be renewed after its period of currency had expired, the plaintiff not having been able to serve it: and see *Canadian Bank of Commerce* v. *Tenant*, 5 O. L. R. 524, see also *St. Louis* v. *O'Callaghan*, 13 P. R. 322, followed in *Gilmour* v. *Magee*, *supra; Cairns* v. *Airth*, 16 P. R. 100. The Judge exercises a discretion, however, where the time has expired, and where the Statute of Limitations had in the meantime run, the Court refused to renew the writ: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, affirmed in Appeal, *Ib.* 340; see also *Hewett* v. *Barr*, 1891, 1 Q. B. 98, where, however, it was said by Kay, L.J., that even in such a case there would, under exceptional circumstances, be a discretion to allow a renewal: *e.g.*, where the plaintiff has made every reasonable effort to serve the writ, or for some unavoidable reason the service has been prevented: see *Gilmour* v. *Magee*, *supra;* but where a writ is ordered to be renewed, notwithstanding that the action has become barred by the Statute of Limitations, and the order is not appealed or moved against, it is too late on an appeal from the judgment in the action to raise the objection that the writ ought not to have been renewed: *Butler* v *McMicken*, 32 Ont. 422,

In *Mair* v. *Cameron*, 18 P. R. 484, where orders had been made from time to time renewing the writ of summons, but the plaintiff knew, though he did not disclose that he knew, where the defendant could be served, and but for the renewals the Statute of Limitations had barred the plaintiff's claim, the orders were rescinded on defendant's application under *Rule* 217.

Setting aside order for renewal.

Where an order has been made *ex parte* under this *Rule*, it is open to the defendant to move against it within the time prescribed by *Rule* 217, and to shew that no reasonable efforts were made to serve the writ, and that there was no good reason for making the order for renewal, even though the result of setting the order aside will be to make the Statute of Limitations a bar to the claim: *Howland* v. *Dominion Bank*, 15 P. R. 56; 22 S. C. R. 130; *Mair* v. *Cameron*, 18 P. R. 484; *sed vide Canadian Bank of Commerce* v. *Tennant*, 5 O. L. R. 524; and *Williams* v. *Harrison*, *infra*.

The Master in Chambers has jurisdiction to rescind an *ex parte* order made by a Local Judge for the renewal of a writ, if material evidence has, even unintentionally, not been brought to the attention of the Local Judge: *Williams* v. *Harrison*, 6 O. L. R. 685, and see *Langley* v. *Costigan*, 5 O. W. R. 147.

But such a motion, unless made within the time prescribed by *Rule* 217, viz., within 4 days of its coming to the notice of the applicant, will be too late: *Cairns* v. *Airth*, 16 P. R. 100.

Where a defendant is entitled to immunity from suit, a writ of summons cannot properly be issued against him and kept renewed in the expectation that the immunity may cease: *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 352.

Where the writ has expired before service, the copy and service of the writ may be set aside, hut not the original writ: *Fitch* v. *Walker*, 7 P. R. 8. Rules 10, 11.

Whers a defendant has been served with an unrenewed writ after the expiration of twelvs months from the date of its issue, he probably cannot treat it is a nuility, hut shouid apply to set aside the service for irregularity: see *Hemp* v. *Warren*, 11 M. & W. 103; 2 Dowl., N. S. 758.

(ii) *Originating Notice.*

Originating notice.

10.—(1) Every proceeding iu the Court other thaa aa action or a proceeding that may be taken *ex parte*, shall, unless otherwise specially provided, be commenced by a notice of motioa called aa originating notice.

(2) When by any statute an application may be made to the Court or a Judge in a maaaer therein provided, such applicatioa may also be made by originating notice, but aay security required by such statute shall be given. *New.*

According to Mr. Justice Middleton's letter puhlished aa a preface to the original draft of these *Rules*, their intention is to abolish petitions. The *Rules* do not, however, in terms, forhid the filing of a petition, and it may he that there may yet be some cases in which it may be proper still to file a petition where a detailed statement of the facts which cannot well he mado in a notice of motion, is desirable as a means of laying before the Court the facts, or question of law, on which an adjudication is desired. Petition to quiet title is one of the cases "otherwise specially provided for": see *Rule* 692; siso petition of right: see *Rule* 738.

Although two normal methods of commencing actions or proceedings are here pointed out, it does not appear to be the intention of the *Rule* thst a suitor may eiect which of the two he will adopt. Where, according to the cstahlished practice, an action must he hrought, a writ of summons must still he issued; and it is only where the Court is expressly empowered hy Statute or *Rule* to act in a summary way that an originating notice may he adopted.

As to matters which may he commenced hy originating notice: see *Rules* 600-606, 608, 610, 615, 617, 618, 622.

(iii) *Indorsement of Address, Etc.*

Indorsement of name of solicitor.

11.—(1) Where a plaintiff sues by a solicitor, the writ of summoas (or aotice in lieu thereof), shall be indorsed with the solicitor's aaiae or firm aad place of busiaess, where service may be made.

When agent.

(2) Where the solicitor issuing a writ of summons is only ageat of aaother solicitor, his aame or firm and place of busiaess as well as the name or firm and place

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of business of the principal solicitor shall be indorsed. C.R. 134.

Compare Eng. (1883) R. 19.

By *Rule* 3 (*j*) in these *Rules* the words "writ of summons" include "any document by which proceedings are commenced" therefore, a similar indorsement should be made on every document by which proceedings are commenced, *e.g.*, originating notices, third party notices, garnishee orders, interpleader orders, notices to incumbrancers, or orders making persons parties in the Master's Office, petitions of right, and petitions to quiet titles.

Where a petition was indorsed by agents only, it was held to be irregular and was set aside: *Re Scholes*, 34 W. R. 501; 54 L. T. 466; see also *Wray* v. *Kemp*, 26 Ch. D. 169.

It has been held in Ontario that, though not expressly provided in this *Rule*, the plaintiff's address, as well as the solicitor's address, must be indorsed, as the form of writ No. 1 in the Appendix (H. & L., Form No. 35), so provides, and that form is made imperative by *Rule* 7; *Chess Carley Co.* v. *Rodger*, 4 C. L. T. 500; see also *Rule* 375. A writ not so indorsed may be set aside as irregular: *Ib.*; *Sherwood* v. *Goldmon*, 11 P. R. 433; see also *McCready* v. *Henessy*, 9 P. R. 489.

The address of the plaintiff indorsed must be that of his residence: *Mee* v. *Denbigh*, 27 Sol. Jour. 617; *Stoy* v. *Rees*, 24 Q. B. D. 748; 63 L. T. 49. The business address of a firm is sufficient: *Ib.*; 59 L. J. Q. B. 311.

Where the suit was on behalf of "the plaintiff and all others, the underwriters of a steamship *Cid* at the time of loss in 1873," it was held that there was only one plaintiff, that his address alone need be given; the other persons mentioned were not plaintiffs: *Leathley, etc.*, v. *McAndrew*, W. N. 1875, 259; 1 Chart. Ch. Ca. 58.

As to obtaining security for costs where an illusory address is given, see notes to *Rule* 373. The action is not irregular, though the address be illusory: *Pittsburgh C. S. Co.* v. *Marx*, 102 L. T. 532; W. N. 1897, 136.

Address of plaintiff in person.

12.—(1) Where a plaintiff sues in person, there shall be indorsed upon the writ or notice in lieu thereof, his place of residence and occupation.

Address for service.

(2) If the plaintiff's residence is more than two miles from the office in which the proceedings are commenced, there shall also be indorsed an address for service within that distance. In default, any paper not requiring personal service may be served by mailing the same to the plaintiff at his address, by registered letter. C.R. 135.

No one but a solicitor, or a plaintiff in person, may issue a writ. Where a person not a solicitor, but purporting to be next friend of a married woman, issued a writ, the writ and all subsequent proceedings were set aside: *Swann* v. *Swann*, 43 L. T. 530; 25 Sol. Jour. 134.

As to sufficiency of address: see *Smith* v. *Dobbin*, 3 Ex. D. 338.

As to what retainer of a solicitor authorizes him to issue a writ: see *Wray* v. *Kemp*, 26 Ch. D. 169. Rule 13.

A company can neither sue nor defend in person, and a managing director of a company is not competent to act in person for the company. A company can only sue or defend by a solicitor: *Scriven* v. *Jescott*, 126 L. T. Jour. 100.

13.—(1) The solicitor whose name is indorsed on any writ of summons, shall on demand declare forthwith whether the cause or matter has been commenced by him or with his authority or privity. He shall also, if demanded, disclose the profession or occupation, and place of abode (giving name of street and house number where practicable) of the plaintiff. In default the action may be stayed and the solicitor may be directed to pay the costs. Demand on solicitor instituting proceedings, whether commenced by his authority.

(2) If the solicitor declares that the writ was not issued by him or with his authority or privity, an order may be obtained *ex parte* directing that all proceedings shall be stayed, and thereafter no further proceedings shall be taken without leave. C.R. 143. Action commenced without authority may be stayed.

See Eng. (1883) R. 42.

The former Rule expressly applied to other proceedings than those commenced by writ, but as to such proceedings the present *Rule* is silent: see note to *Rule* 11.

Where a solicitor continued to act for a Company after it had been dissolved, he was held to be not liable for acting under his original authority after it had been revoked, until he knew, or by the exercise of due diligence he might have known, of the dissolution: *Salton* v. *New Beeston Cycle Co.*, 1900, 1 Ch. 43. Where he had not exercised such due diligence he was ordered to pay the opposite party's costs between solicitor and client: *Ib.*; *Yonge* v. *Toynbee*, 1909, 1 K. B. 215; 102 L. T. 57.

Where a solicitor without authority prosecutes or defends an action, the proceedings are not necessarily void in all cases; *e.g.*, an action prosecuted without authority binds the plaintiff, and his remedy is against the solicitor; he may, however, on getting notice of the proceedings, move to stay them: see *infra*, and *Chisholm* v. *Sheldon*, 1 Gr. 294. Effect of action commenced without authority.

A solicitor is assumed to know the status of parties for whom he acts; thus, where a solicitor for defendants who were sued in their firm name of "Liberal Opinion Limited" there being in fact no such limited company, entered an appearance in the name of "Liberal Opinion Limited" instead of for the defendants individually, he was held to be personally liable to pay to the plaintiff all costs lost by his so doing: *Simmons* v. *Liberal Opinion Limited*, 1911, 1 K. B. 966; 104 L. T. 264; but where a company which had obtained a charter of incorporation was sued, and a defence was entered in its name, and a judgment was recovered against it which proved fruitless because the

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company had never qualified itself to do business and had no assets, it was held that the solicitor who had acted for the company was not liable to the plaintiff for his costs which had thus been thrown away: *Campbell* v. *Taxicabs Verrall's Limited*, 27 O. L. R. 141.

Unauthorised appearance.

But where a defendant has not been served with process, and an unauthorized appearance is entered for him, the proceedings will be set aside on his applying promptly after he has notice of them: *Roissier* v. *Westbrook*, 24 C. P. 91; *Massey* v. *Rapelje*, 5 C. P. 134; *Wright* v. *Hull*, 2 P. R. 26; *Re Gray*, 65 L. T. 743; and this rule applies in the cass of partners, one of whom will not be bound by an appearance entered for him on the instructions of a co-partner, but without his authority: *Mason* v. *Cooper*, 15 P. R. 418; unless he be a dormant partner: see *Court* v. *Berlin*, *infra*; or unless the partner giving the retainer be the managing partner, in which case an appearance entered by authority of the managing partner for the other partners will be binding on them: *Tomlinson* v. *Broodsmith*, 1896, 1 Q. B. 386; 74 L. T. 265; and the retainer of the solicitor will not be terminated by the retirement of a sleeping partner from the firm, of which the solicitor has no notice: see *Court* v. *Berlin*, 1897, 2 Q. B. 396.

By delay defendant may waive his rights: *Kerr* v. *Malpus*, 2 P. R. 135. In *McLean* v. *Grant*, 20 Gr. 76, the party was held to be bound by an unauthorized defence to a Chancery suit, though he does not appear to have been served with the bill. Where a defendant has been personally served with process, he is bound by an unauthorized appearance and defence, and the proceedings will not be set aside unless the plaintiff had notice: see *Roissier* v. *Westbrook*, *supra*; *Moran* v. *Schermerhorn*, 2 P. R. 261; *Boyley* v. *Buckland*, 1 Ex. 1; Arch. Pr., 14th Ed., 107 (*y*); or unless the solicitor be insolvent: *Warely* v. *Poopst*, 7 U. C. L. J. 294. See note to *Rule* 15.

Dismissal on application of plaintiff whose name used without authority.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the plaintiff may, on notice to the defendant and the solicitor, move that the action be dismissed, and that the solicitor pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 13 Ch. D. 310; *Nurse* v. *Durnford*, 13 Ch. D. 764; *Wray* v. *Kemp*, 26 Ch. D. 169; *Scribner* v. *Porcells*, 20 Ont. 554; *Geilinger* v. *Gibbs*, 1897, 1 Ch. 479; a defendant is also entitled to move to strike out the name of a plaintiff which has been used without authority: *Barrie* v. *Weaymouth*, 15 P. R. 95; *Borrie Public School Board* v. *Borrie*, 19 P. R. 33. The fact that the action has been dismissed: *Morris* v. *Confederation Life*, 17 P. R. 24; *Scribner* v. *Porcells*, *supra*, or discontinued: *Gold Reefs of W. A.* v. *Dowson*, 1897, 1 Ch. 115, is no answer to the application.

Dismissal on defendant's application.

So where plaintiffs were joined without authority, their names were struck out, on the defendant's application, with costs payable by the other plaintiffs. The plaintiff's solicitors were not ordered to pay the costs personally, as they had acted *bona fide*. *Semble*, that any plaintiff joined without his authority should be made a party to the motion by a defendant: *Borrie* v. *Weaymouth*, 15 P. R. 95; but where a plaintiff was added as a party without his written consent as required by *Rule* 134 (2), although a verbal consent to his being added had been given by his solicitor in his presence, it was held that he was entitled to have his name struck out, and the solicitor who had added him was ordered, notwithstanding he appeared to

have acted *bonâ fide*, to pay the applicant's costs as between solicitor and client, and also the costs of the adverse party, which the applicant had been ordered to pay, together with all the costs of the application: *Fricker* v. *Von Grutten*, 1896, 2 Ch. 649; and see *Morris* v. *Confederation Life*, *supra*. A plaintiff residing out of the jurisdiction moving to set aside proceedings brought by a solicitor without his authority cannot be ordered to give security for costs on the solicitor's application: *Sample* v. *McLaughlin*, 17 P. R. 490. Rule 14.

The fact that a solicitor has acted as a solicitor for a trustee does not authorize the solicitor to enter an appearance for the trustee in an action in relation to the trust without any further retainer: *Re Gray*, 65 L. T. 743.

Where an order for security for costs has been obtained against a plaintiff for non-payment of the costs of a former action, in which his name had been used without his authority, he cannot apply to set aside the order on that ground, he must attack the root of the irregularity, and take proceedings to have his name struck out of the former action: *Lea* v. *Long*, 17 P. R. 203, and see S. C., 18 P. R. 1.

Any former rule of practice that an action brought without the authority of the plaintiff can be dismissed, on application of the plaintiff, only on payment of costs, is not now in force. He may now have the action stayed without payment of costs: *McKay* v. *Macfarlane*, 12 P. R. 149. In this case it was held that on an application of this kind after judgment, the action should not be dismissed, where it is brought for the benefit of a class: *sed quære*, see *Bank of Toronto* v. *Beaver*, *etc.*, 28 Gr. 87.

Where a solicitor acts as solicitor for a party without a direct retainer, and only upon the instructions of a third person, he may become personally liable for any loss arising to such party, in the proceedings, consequent on the fraud of the third person: *Slater* v. *Slater*, 1897, 1 Ch. 222, note.

14.—(1) Where an action is brought in the name of a firm or in a name or style other than the plaintiff's own name, the plaintiffs shall, on demand, declare forthwith in writing the names and places of residence of all the persons constituting the firm, or carrying on business under such name or style. Names and addresses of members of firm suing as partners.

(2) If the plaintiffs fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed. C.R. 144.

By *The Partnership Registration Act* (R. S. O. c. 139), s. 2, the names of the individual members composing a firm carrying on a trading, manufacturing or mining business, are required to be registered in the Registry Office for the county or registry division in which the business is carried on.

Where the names of partners are disclosed under this *Rule* it does not seem to be necessary to verify the declaration by an affidavit; but if so verified, it has been held in England that the deponent is not liable to cross-examination on the affidavit, nor can the Court order the trial of an issue to determine who are the actual

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partners of a plaintiff firm: *Abrahams & Co. v. Dunlop*, 1905, 1 K. B. 46; 91 L. T. 11: and see *Rule* 227.

A plaintiff in a class suit cannot under this *Rule* be compelled to disclose the names and addresses of the persons on whose behalf he sues: *Leathley v. McAndrew*, W. N. 1875, 259.

(iv) *Service.*

Undertaking to accept service.

15. Service of a writ of summons shall not be required where the defendant by his solicitor accepts service, and undertakes to appear. C.R. 145 and 174.

Former C. R. 145 applied not only to writs of summons, but also to any other document by which a cause, matter, or proceeding may be commenced, and that is still the effect of the present *Rule*: see *Rule* 3 (*j*).

Solicitor's undertaking.

The corresponding Eng. (1883) R. 48, has the words "undertakes in writing to accept service and enters an appearance." Former *Rule* 174 also required the undertaking to be in writing in order to found proceedings against the solicitor for an attachment for breach of the undertaking. It would seem to be imperative that the acceptance and undertaking should still be in writing: see *Rule* 36, which requires it to be filed, before proceedings can be taken for default. The undertaking of the solicitor is enforceable by attachment, on a summary application, and he may also be ordered to pay all costs occasioned by his neglect: *Cook v. Broomhead*, 16 Ves. 133; and see *Courtney v. Stock*, 2 D. & W. 251; *Townley v. Jones*, 29 L. J. C. P. 299. The plaintiff may also proceed against defendant upon default of appearance: *Rule* 36; he must take the risk, however, of the solicitor not having had authority to accept service: *Roissier v. Westbrook*, 24 C. P. 91; and it would therefore be proper, where no appearance is entered, to serve any subsequent proceedings upon the defendant personally. See note to *Rule* 13.

As to the effect of a judgment obtained by the plaintiff in an action where the appearance of defendant was entered without his authority: see notes to *Rule* 13, *supra*, p. 328.

A sleeping partner may be bound by an appearance entered for the firm by the authority of the acting partner: see *Court v. Berlin*, 1897, 2 Q. B. 396; *Tomlinson v. Broadsmith*, 1896, 1 Q. B. 386.

Where a solicitor accepted service, but did not in terms undertake to appear, a motion to attach him was refused: *The Anna & Bertha*, 61 L. T. 332.

An undertaking to "enter an appearance in due course" is unconditional, and must be performed forthwith. A solicitor's undertaking is binding even after the lapse of 12 months from issue of the writ, and it may, at the instance of the plaintiff, be enforced by attachment at any time within six years from its date: *Re Kerly, Son, & Verden*, 1901, 1 Ch. 467; 83 L. T. 521, 699.

An application to attach should be entitled not in the action but in the matter of the solicitor: *Ib.*, and the solicitor would in the first place be ordered to enter an appearance and in default would be ordered to be attached.

If a solicitor enter an appearance without authority, it may be set aside with costs, to be paid by him. *Re Lloyd*, 12 Ch. D. 419. See also cases in the note to *Rule* 13, p. 328; and *Re Gray, Gray* v. *Coles*, 65 L. T. 743; and see *Yonge* v. *Toynbee*, 1910, 1 K. B. 215; 102 L. T. 37, where the solicitor's authority was determined without his knowledge, his client having become insane. Rule 16.

Proceedings by attachment to compel an appearance to be entered, may perhaps be usefully adopted where it is desired to obtain from defendant a waiver of some irregularity: see *Carrick* v. *Young*, Jac. 524, or to prevent a relitigation of the matter in an action on the judgment in another country. The plaintiff should reques. the defendant's solicitor to enter the appearance before moving to attach: *Jacobs* v. *Magnay*, 7 Jur. 326.

See also as to the enforcement of an undertaking by a solicitor given out of Court, *Woodfin* v. *Wroy*, 51 L. J. Chy. 427; and see *Skyny* v. *Harland*, 1894, 1 Q. B. 707.

16. Save as hereinafter provided, in the absence of such acceptance of service every writ of summons shall be served personally, but if it appears that the plaintiff is unable to effect prompt personal service, substituted service, by advertisement or otherwise, may be ordered. Substitutional service may also be allowed of any other document which requires personal service. C.R. 146 and 167. Personal and substituted service.

As to service of infants: see *Rules* 18-20, and lunatics: see *Rule* 21, and corporations: see *Rule* 23.

Service of process must if possible be personal, or, in the case of a corporation, upon the duly constituted agent: the substitutional method is to be followed only when prompt personal service is shewn to be unavailable: *Young* v. *Dominion Construction Co.*, 19 P. R. 139.

Personal service may be by delivering the process into the defendant's hand; or by seeing him and bringing the process to his notice: *Thomson* v. *Phoney*, 1 Dowl. 441; and shewing him the original (see *Rule* 203), if he desires it: *Goggs* v. *Huntingtower*, 12 M. & W. 503; *Philipson* v. *Emmanuel*, 56 L. T. 858; *Hawthorn* v. *Harris*, 23 W. R. 214; within a reasonable time after service: *Thomas* v. *Pearce*, 2 B. & C. 761; *Petit* v. *Ambrose*, 6 M. & S. 274; a quarter of an hour was considered reasonable time in *Westly* v. *Jones*, 5 Moo. 162; or if he refuses to receive the copy, after being told its nature and being tendered it, then by placing it on his person: *Bell* v. *Vincent*, 7 D. & R. 233; *Rose* v. *Hempthorne*, 103 L. T. 739; or by throwing it down in his presence: 1 Dowl. 443. The copy must, however, be left with the defendant and not merely shewn to him; *Worley* v. *Glover*, 2 Str. 877, even though he refuses to take it: *Pigeon* v. *Bruce*, 8 Taunt. 410; *Ercin* v. *Powley*, 2 U. C. Q. B. 270. Handing a writ or notice of writ in an envelope, the defendant not being informed of the contents, and having no knowledge that an action has been or is about to be brought against him, is not good personal service: *Banque Russe, etc.* v. *Clark*, W. N. 1894, 203. Personal service.

In *O'Sullivan* v. *Murphy*, 78 L. T. Jour. 213, placing the writ on the ground within 20 or 30 yards, and holding up the original, the

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defendant having run away to evade service, was held to be insufficient.

Where the person serving did not shew the original, although requested to do so, service was set aside: *Philipson* v. *Emmanuel*, *supra*, p. 331.

Appearance precludes all question as to the sufficiency of service: *Dart* v. *Citizens' Insurance Co.*, 11 P. R. 513 see *Boyle* v. *Sacker*, 39 Ch. D. 251, and notes to *Rule* 46.

If it is intended to object to the service, a motion to set it aside should be made before appearance: *Boyle* v. *Sacker*, *supra*.

The Act (R. S. O. 1877, c. 40, s. 94), from which former C. R. 167 was originally taken, was held to apply to cases where defendants are very numerous or where they reside out of the jurisdiction at a very great distance, or where the residence is not known at all, or where from any other cause it would be difficult or expensive to effect a service: *Pearson* v. *Campbell*, 2 Chy. Ch. 25. Advertising has been dispensed with where it would be useless, and service allowed by mailing to the address of defendant's brother resident in the Province, though not in any way an agent of defendant: *Cooper* v. *Lane*, 1 Chy. Ch. 363; see also *Dobson* v. *Marshall*, 9 P. R. 1.

As to the constitutionality of such a provision as that contained in this *Rule*: see *Ashbury* v. *Ellis*, 1893, A. C. 339.

Mere absence from Ontario unaccompanied by any difficulty in effecting personal service, is no ground for resorting to substituted service under this *Rule*: *Young* v. *Dominion Construction Co.*, 19 P. R. 139, but a solicitor on whom service has been ordered to be effected, has no *locus standi* to move to set aside the service, even though before service his authority to act for the defendant had been revoked: *Taylor* v. *Taylor*, 6 O. L. R. 356, though it would be proper for him to notify the opposite party, and also the Court, of the fact of his want of authority.

Time for service.

Service of the writ may be effected at any time of the day or night: *Upton* v. *Mackenzie*, 1 D. & R. 172; *Priddle* v. *Cooper*, 1 Bing. 66; *Rule* 264 does not apply: *Murray* v. *Stephenson*, 19 Q. B. D. 60; but not on Sunday: *Mackreth* v. *Nicholson*, 19 Ves. 367; *Taylor* v. *Phillips*, 3 East. 155; *Mitch* v. *Frankau*, 1909, 2 K. B. 100; Jud. Act, s. 124, *supra*.

Where a person has been induced by fraud to come into the jurisdiction for the purpose of serving him, within it, with a writ, the service will be set aside as an abuse of the process of the Court; *secus*, if the invitation to come within the jurisdiction was *bonâ fide* for another purpose, even though it was also intended to take advantage of the opportunity to serve the person: *Watkins* v. *N. A. Land & Timber Co.*, 20 T. L. R. 534.

Action to recover land.

Action to Recover Possession of Land.—In actions for recovery of land where it is in the actual possession of several persons, all ought to be named as defendants, and served with the writ, as judgment must follow the writ, and can be awarded only against the defendants; and only the defendants, and those claiming under them, can be ejected: see *Minet* v. *Johnston*, 63 L. T. 507. Persons in the position of servants, or the members of the family of a person in possession, need not be made parties or served with the writ. A landlord or person not named as defendant, and claiming to be in possession, independently of the defendants, may appear: *Rules* 52, *et seq.*,

and, even after judgment against the defendants, may obtain leave to defendant: see notes to *Rule* 53. Rule 18.

In an action by a landlord against his tenant, sub-tenants of the tenant, though in actual occupation, need not be made parties, and may be ejected under a judgment recovered against the tenant: *Synod of Toronto* v. *Fisken*, 29 Ont. 738; *Green* v. *Herring*, 1905, 1 K. B. 152,

Substitutional Service.—The present *Rule* gives a wide discretion to the Court. It allows substituted service to be ordered in whatever way the Court or a Judge may direct: *Whitley* v. *Honeywell*, 24 W. R. 851; if, from any cause, the plaintiff is unable to effect prompt personal service. Present practice.

Substitutional service should not be ordered where service under *Rules* 16 or 23, might be effected: *Young* v. *Dominion Construction Co.*, 19 P. R. 139 (where an order for substitutional service was set aside). Substituted service of writ.

A statute authorizing Courts in the case of contracts made or to be performed within the jurisdiction, to decide whether they will, or will not, proceed in the absence of defendant, is *intra vires*, but whether a judgment obtained in such circumstances will be enforced by the Courts of another country is for those Courts to determine: *Ashbury* v. *Ellis*, 1893, A. C. 339.

As to substituted service where a defendant is out of the jurisdiction: see notes to *Rule* 25.

As to whether the *Rule* applies to the case of persons sued in the name of a firm, where no person having control or management of the business can be found: see notes to *Rule* 101.

Where defendant has an agent within the jurisdiction, substitutional service may be allowed on such agent, *e.g.*, a managing clerk at his place of business: *Armitage* v. *Fitzwilliam*, W. N. 1875, 238; general agents: *Jones* v. *Cargill*, 11 L. T. 566; special agents: *Hobhouse* v. *Courtney*, 12 Sim. 140; solicitors who had acted for defendant: *Hornby* v. *Holmes*, 4 Ha. 306; *Watt* v. *Barnett*, 3 Q. B. D. 183, 363; *Tottenham* v. *Barry*, 12 Ch. D. 798; but see The *Pommerania*, 4 P. D. 195; and *Young* v. *Dominion Construction Co.*, *supra*. When substituted service allowed. Substituted service.

Where the defendant, out of the jurisdiction, has expressly agreed to service being effected on him in a particular way, service effected in that way will be allowed as good service: *Montgomery* v. *Liebenthal*, 1898, 1 Q. B. 487; but only in a case in which there is jurisdiction to allow service upon him out of the jurisdiction; see *Brit Waggon Co.* v. *West*, 1896, 1 Q. B. 35, 37.

As it was said in *Watt* v. *Barnett*, 3 Q. B. D. 367, substituted service may be properly ordered upon any persons with whom the Court is satisfied that the party is in communication. The Court has a right to consider that the copy of writ served will be sent on, and the service will be good, though the service is not in fact communicated.

In cases decided under the former Chancery practice the agent was required to be such in relation to the subject matter of the suit: *Allan* v. *Pyper*, 5 U. C. L. J. 118 *Cupples* v. *Yorston*, 2 Chy. Ch. 31; *Canniffe* v *Taylor*, 2 Gr. 617; *Doremus* v. *Kennedy*, 2 Gr. 657; but under the present practice orders have been made though the person served has no connection with the subject of the action, if only he is likely to communicate the fact of service to the defendant: see *Watt* v. *Barnett*, *supra*.

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Where a defendant's wife, or other relative or pereon, ie shewn to be, or to be likely to be, in communication with him, and is within the jurisdiction, service may be allowed on such person: *Dicker* v. *Clarke*, 11 W. R. 635; *Bank of Whitehaven* v. *Thompson*, W. N. 1877, 45; *Somerville* v. *Joyce*, 1 Chy. Ch. 358; and even under the former Chancery practice such service has been allowed though the relative was not shewn to be at the time in communication with defendant: *Cameron* v. *Baker*, 2 Chy. Ch. 281. Such service may hs accompanied by advertising whsre the person upon whom eubetituted service is made, may not be able to communicate with defendant: *Bank of Whitehaven* v. *Thompson*, and *Cameron* v. *Baker*, *supra*; *Coulbourn* v. *Carshaw*, 32 W. R. 33, or by mailing to an address at which defendant is shewn to have recently been: *Cupples* v. *Yorston*, *supra*, p. 333.

Where a hill had heen filed for foreclosure, and the defendant, tbe official aseignee of the mortgagor, aheconded before eervice effected, service was allowed subetitutionally upon one of the Inspectors of the estate: *London Canadian Loan & Agency Co.* v. *Thompson*, 8 P. R. 91.

When not allowed.

Substituted service will not be ordered under this *Rule* unlese it is shswn that prompt personal service cannot he effected. The fact of a defendant being out of the jurisdiction ie not alone a reason for diepensing with personal service. He must he evading eervice, or his whereabouts be unknown: *Robertson v. Mero*, 9 P. R. 510; eee also *Adler* v. *Benjamin*, 1 T. L. R. 308; *Young* v. *Dominion Construction Co.*, 19 P. R. 139; and eee as to that case, *Taylor* v. *Taylor*, 6 O. L. R. 356, 545. Where his residence can be aecertained hy examination of relatives, that course will doubtlees be proper as formerly in Chancery: see *McMurrich v. Hogan*, 1 Chy. Ch. 307; *McDonald* v. *McMillan*, 2 Chy. Ch. 282.

In the case of actions hrought in reepect of a bueiness carried on in Ontario, by a defendant out of the juriediction, a special provision ie made hy *Rule* 24.

After a service, not pereonal, hae been effected, there ie power to make an order allowing the plaintiff to proceed on ths service made, but this power must be prudently exercised: *Adler* v. *Benjamin*, 1 T. L. R. 308.

Substituted service will not he ordered under tbie *Rule*, of a writ which could not legally have been served personally—ae a writ against a colonial government: *Sloman* v. *Governor of New Zealand*, 1 C. P. D. 563; or against a foreign sovereign: see *Mighell* v. *Sultan of Johore*, 1894, 1 Q. B. 149; 70 L. T. 64; or a foreign ambassador: see *Musurus Bey* v. *Gadban*, 1894, 1 Q. B. 533; or of a writ for eervice within the juriediction, where the defendant is without the juriediction, and there ie no evidence that he left the jurisdiction to avoid service: *Wilding* v. *Bean*, 1891, 1 Q. B. 100; or of a writ against a partnership firm, upon a partner resident out of the jurisdiction: *Worcester, etc.* v. *Firbank*, 1894, 1 Q. B. 784.

But where after issue of a writ for service witbin the jurisdiction the defendant, knowing of it, leaves tbe jurisdiction, though not for the purpose of evading service, substituted eervice of the writ may be authorized, and the plaintiff will not in such a case be required to issue a concurrent writ for service out of the jurisdiction: *Joy* v. *Budd*, 1898, 1 Q. B. 12; 77 L. T. 335; dietinguisbing *Wilding* v. *Bean*, *supra*.

See also *Fry* v. *Moore*, 23 Q. B. D. 395; *Field* v. *Barnett*, 56 L. J. Q. B. 89; *Hilliord* v. *Smyth*, 36 W. R. 7; and *Rule* 25.

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The principle upon which snbstituted service is granted is that the service is likely to come to the knowledge of the party: *Hope* v. *Hope*, *supra*; *Furber* v. *King*, 29 W. R. 535; where therefore the defendant was shswn to have absconded from his residence and place of husiness, leave to serve him substitutionally, by leoving copies of the writ at those places, was refused, and service was allowed by advertising: *Wolverhampton & Staffordshire Banking Co.* v. *Bond*, 43 L. T. 72; 29 W. R. 599; see also *Coulbourn* v. *Carshaw*, 32 W. R. 33.

For observations on an order made for substitutional service, where there was oot sufficient evidence that the service was likely to come to the knowledge of the defendant: see *Alexander* v. *Alexander*, 1 O. L. R. 639.

Setting service aside.

The Court will not set aside substitutional service if it appears, or can fairly be inferred, that the defendant hos notice of the proceedings: *Taylor* v. *Taylor*, 6 O. L. R. 356, 545. Where, after instructions to a solicitor to accept service had heen revoked, and the plaintiff's solicitor se loformed, an order for subetitutional service on the solicitor was obtaioed, it was held that the solicitor had no *locus standi* to move to set aside the order on the defendant's hehalf: *Taylor* v. *Taylor*, *supra*; but a person served as the agent of defendant may move to set aside the service if he is not the agent: *Doremus* v. *Kennedy*, 2 Gr. 65; *The Pommerania*, 4 P. D. 195; cited in *Taylor* v. *Taylor*, *supra*.

Not confined to service of writs.

The provision for substituted service has been held in England to apply to an originating summons, as well as to a writ: *Re Pepper*, 32 W. R. 765; 50 L. T. 580; 53 L. J. Chy. 1054; though it has also been held hy Denman, J., in Chambers, to relate only to service of writs of summons or notices thereof, and therefore substituted service of a ootice of application for a writ of attachment was refused: *Anon.*, W. N. 1876, 105; 2 Charl. Ch. Ca. 26. It is presnmed, however, that notices under *Rule* 165 (see last clause of *Rule* 16) may be so served, and that, under the general jurisdiction which the Courts of this Province have heretofore had, they may order such service of all pspers not required to he personally served: see *Rules* 3 (*j*), 16, 24; *McToggort* v. *Merrill*, 7 P. R. 405.

Substituted service has been allowed of a notice of motion: *Cook* v. *Dey*, W. N. 1876, 122; *Hamilton* v. *Davies*, W. N. 1880, 82; see Dan. Pr., 5th ed., 1442; an order for an interim injunction: *Young* v. *Brassey*, 1 Ch. D. 277; a summons to shew cause, where defendant was evadiog service: *Hunt* v. *Austin*, *Ex. p. Mason*, 9 Q. B. D. 598; a notice of appeal: *Ex* p. *Warburg*, *Re Whalley*, 24 Ch D. 364; 25 Ch. D. 336; and a notice of motion for an administration order under Chy. Gen. O. 638 (now *Rule* 608): *Re Allan*, 9 P. R. 77; see also *Re Morant*, W. N. 1879, 144; *Trubner* v. *Trubner*, 62 L. T. 186.

Ao order to proceed without service will not he made; substituted or equivsleot service must be effected, if personal service, or acceptance of servlce cannot he obtained: W. N. 1875, p. 202; 1 Charl. Ch. Ca. 37.

Substitution of notice for service.

In *Cook* v. *Dey*, 2 Ch. D. 218, it was held by V. C. Hall, that the substitutioo of notice for service mentioned in the latter part of the original *Rule* was not intended to apply to ordinary coses of persons not able to he found, but who were within the jurisdiction. He, however directed substituted service of the writ by advertising, and by leaving a copy at defendant's office and lodgings, which is plainly authorized by the *Rule* in its present shape. In *Leddell* v. *McDougall*,

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22 Sol. Jour. 838, Manisty, J., held that the Court had power to make an order for substitution of notice for service within the jurisdiction.

In such cases the time for appearance runs from the time the order takes effect, that is, from the service of the writ at the place mentioned, or publication of the advertisemsnt, whichever is the later: *Crone* v. *Jullion*, 2 Ch. D. 220; ses also *Johnson* v. *Moffot*, W. N. 1875. 248; 1 Charl. Ch. Ca. 39.

A combination of different modes of effecting service where defendant's address is not known, or he cannot be found, may be ordered, depending upon the circumstances of the particular case.

When service set aside.

Where defendant gave his club as his address, and an order for substitutional service had been granted on an affidavit of a clerk that he had been to the defendant's residence but had been unable to effect personal service, and judgment by default was signed on the substituted service, the affidavit was considered misleading, and the order for substitutional service was set aside, though two years had elapsed since the signing of judgment: *Johnson* v. *Menzies*, 72 L. T. Jour. 348.

An order directing substitutional service upon solicitors of defendant in a former action was set aside, it being shown that the solicitors had ceased to act for defendant in such former action: *The Pommeranio*, 4 P. D. 195. See also *Young* v. *Dominion Construction Co.*, 19 P. R. 139; and *Taylor* v. *Taylor*, 6 O. L. R. 356, 545.

Examples of substituted service allowed.

Examples.—Where the defendant was supposed to be within the jurisdiction, but had absconded or was evading service, service was allowed by leaving copies of writ with his wife or other relatives presumably in communication with him: *Bank of Whitehaven* v. *Thompson*, W. N. 1877, 45; *Atkins* v. *Atkins*, W. N. 1887, 92; at his last lodgings and place of business, and by advertising or mailing: *Cook* v. *Dey*, 2 Ch. D. 218; *Capes* v. *Brewer*, 24 W. R. 40; by serving his managing clerk at his offices, and upon his solicitors: *Armitage* v. *Fitzwilliom*, W. N. 1875, 238; by serving tenants of lands in question in the action to whom the defendant had given notice to pay rents to him, and advertisement: *Crane* v. *Jullion*, 2 Ch. D. 220; *Coulbourn* v. *Carshow*, 32 W. R. 33; by posting to defendant's last address: *Dymond* v. *Croft*, 3 Ch. D. 512; by leaving a copy of writ at defendant's only known place of residence, a club, and serving solicitors who refused to accept service, but had acted in other matters for defendant: *Rafael* v. *Ongley*, 34 L. T. 124; see *Anon.*, 1 Char. Ch. Ca. 38; *Hornby* v. *Holmes*, 4 Ha. 306; *Tottenhom* v. *Borry*, 12 Ch. D. 797; by mailing to his address and advertising: *Hamilton* v. *Davies*, W. N. 1880, 82; by serving defendant's wife or other relative, leaving copies at his residence and advertisiug: *Mullows* v. *Bonnister*, W. N. 1882. 183; 31 W. R. 238; *Waters* v. *Waters*, 24 W. R. 190; *Coulbourn* v. *Carshaw*, 32 W. R. 33. Where defendant is out of the jurisdiction, but his whereabouts is unknown, service may be allowed by advertising alone. if there is no agent within the jurisdiction or person likely to be in communication with defendant: *Hartley* v. *Dilke*, 35 L. T. 706; *Gordon* v. *Hanna*, 6 P. R. 266; *Whitley* v. *Honeywell*, 24 W. R. 851; *Rowley* v. *Southwell*, 61 L. T. 805; or by advertising and mailing to various addresses at which defendant has heen heard of: *Stimson* v. *Stimson*. 6 Gr. 379.

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Substituted service, when duly effected. is for all purposes equivalent to personal service: *Wott* v. *Barnett*, 3 Q. B. D 363.

Where it is necessary to effect substitutional service on several de- Rule 17.
fendants at the suit of the same plaintiff, and the application is based on the same facts, a single affidavit may be used setting out the necessary facts and entitled in all the actions: *Orkney* v. *Shanahan*, 8 L. R. Ir. 155.

Any objection to an order allowing any particular mode of service must be taken by motion to set aside the order, and not by pleading the objection as a defence: *Preston* v. *Lamont*, 1 Ex. D. 363; and it should be made before the defendant has taken any other step in the action, otherwise he will be deemed to have waived his right to object: see *Fry* v. *Moore*, 23 Q. B. D. 395; *Western Nat. Bank* v. *Perez*, 1891, 1 Q. B. 304, and notes preceding *Rule* 25.

Costs of a motion for leave to effect substituted service are taxable Costs.
in the cause: *Eoger* v. *Buckley*, 8 L. R. Ir. 99.

17.—(1) The person serving a writ of summons shall, Indorsement of service.
within three days after the service, indorse on the writ the day of the month and week of the service thereof, and the date of the making of the indorsement, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default [without leave, to be obtained at the sole cost of the plaintiff].

(2) Every affidavit of service of a writ of summons shall state the day on which such indorsement was made. C.R. 156.

See Eng. (1883), R. 62, which is expressly made to apply to substitutional service.

This *Rule* does not apply to cases of substituted service: see *Dymond* v. *Croft*, 3 Ch. D. 512; *Cruse* v. *Kuttingwell*, W. N. 1875, 250; 1 Charl. Ch. Ca. 40; or where notice in lieu of a writ (see *Rule* 29), is served: *Fish* v. *Chotterton*, W. N. 1882, 145; 31 W. R. 87; 47 L. T. 328; or where the writ is served by advertisement: *Davis* v. *Lound*, 78 L. T. Jour. 318; W. N. 1885, 54.

The words in brackets are not in the Eng. Rule. In *Hastings* v. *Hurley*, 16 Ch. D. 734, and in *Sproat* v. *Peckett*, W. N. 1883, 76; 48 L. T. 755, and in *Shepherd* v. *Silcock*, W. N. 1886, 84, the time for making the indorsement was extended under *Rule* 176.

An order to amend the indorsement of service was granted where a wrong date was indorsed by mistake: *Hyne* v. *Murphy*, 2 L. R. Ir. 35.

Judgment was allowed to be signed where the indorsement shewed the day of the month, but not the day of the week: *Foat* v. *Basset*, W. N. 1888, 255.

Holidays are not included in the three days: *Rule* 172.

In England it is held that the omission to comply with the corresponding Eng. Rule is an irregularity which cannot be waived, and a judgment in default of appearance was set aside for non-compliance with the *Rule*: *Hamp-Adams* v. *Hall*, 1911, 2 K. B. 942; 105 L. T. 326. In that case it was held, if the indorsement is not made, the plaintiff

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cannot proceed to enter judgment by default, and that it is the duty of the officer of the Court to refuse to sign such a judgment. Under *Rule* 17 (1), *supra*, an application may be made in such a case for leave to sign judgment.

Although by *Rule* 3 (*f*), the word "writ" in the *Rules* includes any document by which a proceeding is commenced, this *Rule* is probably not intended to apply to originating notices, garnishee orders, interpleader orders, etc., at the same time until that point has been decided it might be well to assume that it does.

Service on infants by serving Official Guardian.

18.—(1) Where an infant is sued in respect of his interest in an estate, he shall be served by delivering a copy of the writ to the Official Guardian.

Address of guardian.

(2) The post office address of the father or guardian of such infant or of the person with whom or under whose care the infant is shall be indorsed on the copy of the writ so served.

Official Guardian to act.

(3) From the time of such service, the said Official Guardian shall be the guardian *ad litem* of the infant, unless and until otherwise ordered, and it shall be the duty of the said Official Guardian, or of any other guardian appointed for such infant, forthwith to attend to the interests of the infant, and to take all such proceedings as may be necessary for the protection of such interests in the proceeding in which he is appointed guardian, and for that purpose to communicate with all proper persons and parties, including the father or guardian of the infant and the person with whom or under whose care the infant is.

One copy only need be served.

(4) In case there is more than one infant for whom service is made on the Official Guardian, one copy only of the writ need be served, but the name of each person on whose behalf the Official Guardian is served shall be stated on the copy served. C.R. 152.

The practice under Eng. (1883), R. 51 is different.

The cases in which the Official Guardian is to act under this *Rule* are those which formerly were dealt with in Chancery, viz., where an infant, whether within or without the Province, is interested in an estate in question in the action. The former C. R. 152 further expressly provided that whether the interest of the infant in the estate was beneficial or fiduciary he was to be represented by the Official Guardian: see *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475. It is probable that the present *Rule* is also intended to apply, whether the interest of the infant is beneficial or fiduciary. In all other cases not covered by this *Rule* and *Rules* 19 and 20, *Rule* 92 applies.

Where a plaintiff signs judgment against a defendant in ignorance that he is an infant, it is discretionary with the Court whether

such judgment shall be set aside: *Furnival* v. *Brooke*, 49 L. T. 134; *Straughan* v. *Smith*, 19 Ont. 558; *Millson* v. *Smale*, 25 Ont. 144. Rules 19-21.

Service on the Official Guardian of a notice under *The Quieting Titles Act* is good service upon infants who are required to be notified: *Re Murray*, 13 P. R. 367.

See also notes to *Rules* 91 and 92.

Service on infant personally when necessary.

19. Where the action against an infant defendant is for the recovery of lands, goods, or chattels of which he is personally in possession, service shall be made on the infant personally, and a copy of the writ shall also be delivered to the Official Guardian, indorsed as aforesaid, who may enter an appearance for the infant, in the absence of other order or direction. C.R. 153.

This *Rule* varies from Eng. (1883), R. 51.

Personal service on an infant is made in the same manner as upon an adult: Dan. Chy. Prac. (5th ed.), 368, 376.

Where an infant is out of the jurisdiction the Court has the like power to order service substitutionally, or by publication, or otherwise, as in the case of an adult: *Duffy* v. *O'Connor*, 1 Chy. Ch. 393.

In an action for foreclosure, where possession is claimed, the writ of summons need not be served personally on the infant heirs of the mortgagor if they are not personally in possession: *Sparks* v. *Purdy*, 15 P. R. 1, 295.

See also notes to *Rule* 18.

Infants sued for torts, etc.

20. Where the action is against an infant in respect of a personal tort or for the recovery of money only, the infant shall be served as in the case of an adult defendant. C.R. 154.

See notes to *Rules* 91 and 92.

Lunatics, etc., with committees.

21.—(1) Where a lunatic, or person of unsound mind not so found by inquisition [or judicial declaration], is a defendant, service on the committee of the lunatic or on the person with whom the defendant of unsound mind resides, or under whose care he is, shall, unless otherwise ordered, be deemed good service.

Inspector of Prisons, etc., not to be regarded as committee.

(2) The Inspector of Prisons and Public Charities shall not be regarded as the committee of a lunatic detained in any public Asylum within the meaning of this rule. (*See* R.S.O. 1897, c. 317, s. 55.) C.R. 157.

Sub-section 1 is similar to Eng. (1883), R. 52, except the words in brackets. *The Lunacy Act* (R. S. O. c. 68), s. 6, authorizes the Court to declare a person a lunatic without an inquisition.

By *The Hospitals for the Insane Act* (R. S. O. c. 295), s. 40, the Inspector of Prisons and Public Charities is *ex officio* the committee

Rules 22, 23. of every lunatic who has no other committee, and is detained in any public asylum, sanitarium for mental diseases or place of safe custody. Section 42 of that Act provides as follows:—

Proceedings against persons under detention.

42. If an action or other proceeding is brought against a patient it shall be sufficient in order to bind the estate of such patient, or to make the proceedings otherwise valid, to serve any writ, process, paper or other document upon the Inspector, if the Inspector is named therein as committee.

The above provision appears to be inconsistent with sub-section 2 of this *Rule*, for while the *Rule* says that the Inspector shall not be regarded as the committee of a lunatic detained in any public asylum within the meaning of the *Rule;* which would, in effect, prevent his being served with a writ for a patient under sub-section 1; *The Hospitals for the Insane Act* (R. S. O. c. 295) s. 42 provides that service on the Inspector shall be sufficient to bind the estate of a patient. If the Inspector is served, however, *Rule* 22 provides that a guardian must be appointed where the lunatic has no other committee except the Inspector.

Where a lunatic had no committee, service was, in England, directed to be made on the keeper of an asylum where the lunatic was living: *Thorn* v. *Smith*, W. N. 1879, 81; 27 W. R. 617. It is the duty of the keeper of an asylum to allow the writ to be served: *Denison* v. *Hardings*, W. N. 1867, 17, unless the service might be injurious to the lunatic: *Re Mein*, 2 Chy. 429. Service on the manager of a lunatic defendant's business was held insufficient: *Fore Street Co.* v. *Durant*, 10 Q. B. D. 471.

Guardian ad litem.

22. After service of the writ no further proceedings shall be taken against a defendant who is a lunatic and has no committee, or no committee except the Inspector of Prisons and Public Charities, or against a defendant of unsound mind not so found, until a guardian *ad litem* is appointed. C.R. 158.

See notes to *Rules* 94-98.

Where the fact of lunacy is disputed, and the defendant has not been judicially found lunatic, an inquiry would probably be ordered on this point, on the application of the defendant, before appointing a guardian: see *Howell* v. *Lewis*, 65 L. T. 672, the case of a plaintiff.

Where proceedings are taken against a lunatic defendant without the due appointment of a guardian, in the manner prescribed by this *Rule*, they may be set aside as irregular: *Warnock* v. *Prieur*, 12 P. R. 264.

Service on corporations, how effected.

23. A corporation may be served with a writ of summons by delivering a copy to the Mayor, Warden, Reeve, President, or other head officer, or on the Township, Town, City or County Clerk, or on the Cashier, Treasurer or Secretary, Clerk or Agent of such corporation, or of any branch or agency thereof in Ontario. Any person who, within Ontario, transacts or carries on any of the

business of, or any business for, any corporation whose chief place of business is without Ontario, shall, for the purpose of being served as aforesaid, be deemed the agent thereof. C.R. 159. Rule 23.

(2) Service may also be effected on any person appointed for that purpose under the Extra-provincial Corporation Act. 63 Vic., c. 24, s. 8 (*b*). R. S. O. c. 179.

(3) In the case of a railway, telegraph, or express corporation, service may be effected on the agent of such corporation at any branch or agency thereof, or on any station master of the railway company, or on the telegraph operator or express agent having charge of any telegraph or express office belonging to such corporation. C.R. 160. Services of papers on certain corporations.

See Eng. (1883) R. 55.

Former C. R. 159 provided not only for service of a writ of summons but also for service of any "other document" in any cause or matter.

As to the residence of a corporation: see *Bank of Nova Scotia* v. *McKinnon*, 12 C. L. T. 178; *Rex.* v. *Lovitt*, 1912, A. C. 212: *Royal Bank of Canada* v. *The King*, 1913, A. C. 283.

The Mother Superior of a convent is not the "head officer" within the corresponding English Rule upon whom to serve the writ in an action against an order whose governing body is in France: *Golding* v. *Order of La Sainte Union des Sacrées Coeurs*, 67 L. T. 605. Whether such a body is a corporation *quære: Ib.*

Rule 23 applies to a company incorporated by the Dominion. Such a company cannot in any Province be regarded as a foreign corporation: *Tytler* v. *Can. Pac. Ry.*, 29 Ont. 654, 659; 26 Ont. App. 467. As to such companies: see *The Dominion Companies Act* (R. S. C. c. 79), s. 95. Dominion companies.

Where the head office of such a corporation had been at Ottawa at the time of the issue of the writ, and, though it was said that the head office had been changed to Montreal, this was not clearly shown to be the case, an order for substitutional service of the corporation by advertising was upheld, there being at the time of service no place of business of the corporation in Ontario, nor any representative on whom service could be made: *Gold Run (Klondike) Mining Co.* v. *Canadian Gold Mining Co.*, 5 O. W. R. 411.

The Canadian Pacific Railway, whose head office is in Montreal, was served in Ontario with a writ of summons in an action to recover damages for negligence in British Columbia, and the service was upheld: *Tytler* v. *Canadian Pacific Ry.*, 29 Ont. 654; 26 Ont. App. 467.

But an action against a railway company in Ontario, whose head office is in Quebec, for damages to lands in another Province, the title of the plaintiff to which is denied, cannot be maintained in Ontario: *Brereton* v. *Canadian Pacific Ry.*, 29 Ont. 57.

Foreign Corporations.—A foreign corporation is not subject to process simply because some person in its employ as clerk or agent Foreign corporations.

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can be found in Ontario: *per* Moss, J.A., in *Murphy* v. *Phœnix Bridge Co.*, 18 P. R. 502. A foreign corporation in order to be sued in Ontario must be carrying on business there in such a way as to render it subject to be deemed resident within Ontario, and in order to serve a writ upon it within Ontario some person must be served within Ontario who sufficiently represents it; if a clerk, he must be one transacting business or performing duties in Ontario on behalf of the corporation of such a nature that if transacted or performed by a clerk of a domestic corporation, would make him a proper person to be served: *Ib.*, *per* Moss, J.A., 502; or one who transacts or carries on in Ontario or controls or manages for the corporation some part of the business which it professes to do, and for which it was incorporated: *per* Osler, J.A., *Ib.*, p. 501.

It is sufficient to warrant service under this *Rule* that the corporation is actually carrying on business within the jurisdiction, though it be merely temporarily doing so: *Dunlop, &c.*, v. *Actien-Gesellschaft*, 1902, 1 K. B. 342; 86 L. T. 472.

Where there is such an officer or agent as in this *Rule* mentioned of a corporation whose chief place of business is without Ontario, service may be effected on such officer or agent, even in an action respecting a liability incurred by the corporation out of the Province: *Armstrong* v. *Loncashire*, 3 O. L. R. 395.

Service within the Province on the President of a foreign corporation was held bad where it was not shewn that it transacted any business there: *Wilson* v. *Detroit & Milwaukee Ry. Co.*, 3 P. R. 37. Where a foreign insurance Co. had a head office for the Province in Toronto, service on the local agent of the Co. at Ottawa was held good, notwithstanding the provisions of the Dom. Act, 40 Vict. c. 42, s. 9: *Wilson* v. *Etna Life Insurance Co.*, 8 P. R. 131; see now *The Insurance Act*, 1910 (9-10 Edw. 7, c. 32. D.), s. 23; even though the company had transferred its business to another company, the authority of the agent remaining unrevoked: *Armstrong* v. *Lancashire*, *supra*.

For peculiar circumstances under which a corporation was held not to have had an agent in Ontario upon whom service might be effected: see *Murphy* v. *Phœnix Bridge Co.*, 18 P. R. 406, 495; *Burnett* v. *General Accident Assurance Corp.*, 6 O. W. R. 144.

Having an agent resident within the jurisdiction paid by commission on orders sent by him, and having power to make contracts for the corporation, and to receive payments of debts due to it, was held to be carrying on business within the jurisdiction: *Saccharin Corporation* v. *Chemische Fabrik, etc.*, 1911, 2 K. B. 516; 104 L. T. 886; and see *Rule* 33 and *Actiesselkabet, etc.* v. *Grand Trunk Pac. Ry.*, 1912, 1 K. B. 222; 105 L. T. 695; but if the agent has no power to make contracts binding on the foreign corporation, he is not such an agent as can be served under this *Rule*: *Okura Forsbocka*, 110 L. T. 464; 1914, 1 K. B. 715.

Foreign company carrying on business in Ontario.

"**Carrying on Business in Ontario.**"—See cases under *Rule* 100, and *Bennett* v. *Gen. Accident Ass. Corp.*, 6 O. W. R. 144.

It has been decided under the English O. 63 of 1875, and s. 100 of the Jud. Act of 1873 [see s. 2 (*h*) of the Ont. Act, and *The Interpretation Act* (R. S. O. c. 1), s. 29 (*x*)], that a foreign corporation, though it does not carry on business within the jurisdiction, may be sued there, in cases where an individual foreigner might be sued: see *Westmon* v. *Aktiebologet, etc.*, 1 Ex. D. 237; *Scott* v. *The Royal Wax Candle*

Co., 1 Q. B. D. 404; *Royal Mail Steam Packet Co.* v. *Braham*, 2 App. Cas. 381. Such a corporation might, under the old practice, have been sued in Ontario, and the mode of service in such a case was prescribed by Chy. O. 92, and R. S. O. 1877, c. 50, ss. 50 and 51. Since the Jud. Act a foreign defendant can only be sued where *Rules* 25, *et seq.*, apply. Rule 23.

A company registered abroad and having its head office abroad but the directors of which resided in England where they transacted the principal part of the company's business, was held to have its residence in England: *De Beers Con. Mines* v. *Howe*, 1906, A. C. 455; and see *Actiesselskabet, etc.* v. *Grand Trunk Pac. Ry.*, *supra*, p. 342.

Service under the Eng. (1883) R. 56 was held good on a foreign corporation which had an agency office in London: *Lhoneux & Co.* v. *Hong Kong & Shanghai Banking Co.*, 33 Ch. D. 446.

A foreign corporation which carries on business within Ontario is capable of being treated for the purpose of service as a Provincial corporation resident within the Province: *Haggin* v. *Comptoir, etc.*, 23 Q. B. D. 519; 61 L. T. 748; approving of and following *Newby* v. *Von Oppen*, L. R. 7 Q. B. 293; see also *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; *per* Lord St. Leonards in *The Corron Iron Co.* v. *Maclaren*, 5 H. L. C. at p. 459; *La Bourgogne*, 79 L. T. 310, 331; S. C., *sub nom. Compagnie-Generale* v. *Law*, 1899, A. C. 431; 80 L. T. 845; *Logan* v. *Bank of Scotland*, 1904, 2 K. B. 495.

A foreign corporation having no place of business within the jurisdiction, but which employs a traveller to solicit orders within the jurisdiction, which orders are sent to the corporation and there executed by forwarding goods in accordance with the orders for which payment was made direct to the corporation, was held not "to carry on business within the jurisdiction": see *Standard Ideal Co.* v. *Standard Sanitary Manufacturing Co.*, 1911, A. C. 78; *Woodbridge* v. *Bellamy*, 1911, 1 Ch. 326; 103 L. T. 852: *Allison* v. *Independent Press Cable Assoc.*, 28 T. L. R. 128; and a foreign corporation, all the directors and officers of which are abroad, but the majority of the shareholders of which are in England, and which has a London agent with a London office, but carries on no principal or material part of its business in England, is not liable to be sued in an English Court: *Badcock* v. *Cumberland*, 1893, 1 Ch. 362; 41 W. R. 204; 68 L. T. 155. Traveller.

Nor can a foreign corporation which advertises that inquiries may be made at the office of its agents within the jurisdiction, be served, by serving the managing clerk of such agents where the office is the agent's office, and the clerk is the agent's servant: *Re Princesse Clementine*, 75 L. T. 695, but see *La Bourgogne*, *supra*; but a foreign railway company having an agent in Ontario described as "General Canadian Agent" whose business was to solicit freight for the company, was held to be carrying on business in Ontario, and as such suable and servable in Ontario: *Wagner* v. *Erie Ry. Co.*, 6 O. W. N. 386; and see *Thomes & Mersey M. I. Co.* v. *Societa de Navigazione, etc.*, 136 L. T. Jour. 633. Agent.

Service within the jurisdiction on a broker employed by a foreign corporation to obtain subscriptions to its stock, was held good service on the corporation: *Globe P. Co.* v. *Hilltop, G. M. Co.*, 33 C. L. J. 771. Broker.

The word "clerk" in this *Rule* means a principal officer, and not a mere subordinate clerk: *Wolton* v. *Universal Co.*, 16 M. & W. 438; *Mackereth* v. *Glasgow*, L. R. 8 Ex. 149. Clerk.

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Liquidator.

Service on the liquidator of a company is not good service on the company: see *Re Flowers*, 75 L. T. 306.

Contract as to service.

A foreign corporation may contract that process, etc., may be served upon a person within the jurisdiction, and the appointment of such person is irrevocable until some other agent is appointed: *Tharsis Sulphur, etc., Co. v. Société Industrielle, etc., des Métaux*, 38 W. R. 78; 60 L. T. 924; *Montgomery v. Liebenthal*, 1898, 1 Q. B. 407; but only in a case where the Court has jurisdiction to allow service of a writ out of the jurisdiction: *British Waggon Co. v. West*, 1896, 1 Q. B. 35, 37.

Colonial Government.

A colonial Government: *Sloman v. Governor of New Zealand*, 1 C. P. D. 563, and a foreign Government: *Strousberg v. Costa Rica*, 29 W. R. 125, have been held not to be corporations.

Service as provided by any special statute, or by letters patent or special Act.

Former C. R. 161 provided:—

"Where, by any statute, provision is made for service in any other manner, service may be made accordingly."

Same as Eng. (1883) R. 55, last clause. This practice, it is presumed, must still be followed, and the provisions of any such statutes must be strictly followed: *Wood v. Anderston*, 36 W. R. 918.

Statutory authority as to service.

Where, by a statute, service of writ might be effected by being left at, or sent by post to, the company's office, or given to the secretary, or if no secretary, to a director, and the company had no office, and the action was brought by the secretary, service on a director was held invalid: *Lawrenson v. Dublin Metropolitan, etc., Railway*, 37 L. T. 32.

(v) *Service Out of Ontario.*

Substitutional service on manager of a business in Ontario.

24. Where service of a writ out of Ontario may be allowed, and the defendant, whether a British subject or not, is, or was at the time the cause of action arose, carrying on business within Ontario, if the cause of action arose in respect of such business, an order may be made allowing service upon any person having the control or management of the business. C.R. 147.

Jurisdiction to allow service out of Ontario.

The right of the Court to order service of proceedings out of the jurisdiction, whether on British subjects or foreigners, is not an inherent right, but depends altogether on statute: see *In re Anglo-African S. Co.*, 32 Ch. D. 350; and see *Re Busfield*, 32 Ch. D. 123; *Re Moughom*, 22 W. R. 748. The jurisdiction of all Provincial Courts is *primâ facie* only territorial, and, generally speaking, is exercisable only over persons and land and movables within the territorial limits within which this jurisdiction is to be exercised. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over movables within the territory, and in questions of status and succession governed by domicil, it may exist as to persons domiciled, or who, when living, were domiciled within the territory": see *Sirdar Gurdyal Singh v. Faridkote*, 1894, A. C. 670. In the same

...se the Privy Council laid down (1) that no territorial Legislature Rule 31.
...an give jurisdiction, which any foreign Courts ought to recognize, against absent foreigners who owe no allegiance or obedience to the power which legislates; and (2) that in all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the action arose, ought to be resorted to. And it was also said that "in a personal action to which none of the above named causes of jurisdiction apply, a decree pronounced *in absentid* by a foreign Court, to the jurisdiction of which the defendant has not in any way subjected himself, is by international law an absolute nullity."

The present English Rules as regards suits against absent foreigners, which are followed by the Ontario *Rules*, are the result of diplomatic remonstrance in regard to the previous practice of the English Courts, and they were passed "to bring that practice into accordance with well-settled rules of international law, or at all events, comity": see *per* Lord Coleridge, C.J., *Field* v. *Bennett*, 3 T. L. R. 239; 56 L. J. Q. B. 89; and see *per* Huddleston, B., *Lendens* v. *Anderson*, 12 Q. B. D. p. 57; and per Field, J., *Hewitson* v. *Fabre*, 21 Q. B. D. p. 8; and *per* Chitty, J., *Re Busfield*, 32 Ch. D. 123.

Present Practice.—Under the English Rules it has been held Present practice.
that the provisions of the new Rules are exhaustive, and even though under any former practice process might be served out of the jurisdiction it will not now be allowed, unless the case falls within these Rules: *Re Eager*, 22 Ch. D. 86; *Re Cliff*, 1895, 2 Ch. 21; and, following this English practice, the present Ontario *Rules* embrace all cases in which it is intended that the jurisdiction of the Supreme Court shall, for the present, be exercised in the case of a defendant out of the jurisdiction.

There is, for instance, no power given by the *Rules* to give leave to serve a writ out of the jurisdiction in an action to enforce a charge against personal property in Ontario: *Kolchmonn* v. *Meurice*, 1903, 1 K. B. 534; nor in an action for alimony: *Wheeler* v. *Wheeler*, 17 P. R. 45; and see *Allen* v. *Allen*, 15 P. R. 458, unless *Rule* 25 (c) applies. See *Bonbright* v. *Bonbright*, 1 O. L. R. 629; 2 O. L. R. 249; see also *Rasch* v. *Wulfert*, 1904, 1 K. B. 118, where it was held that there was no jurisdiction to authorize service out of the jurisdiction of a summons to enforce an award, under *The Arbitration Act*. Nor is there jurisdiction now to allow service out of Ontario of a statement of claim already filed, except, probably, in an action under *The Mechanics Lien Act*, which is commenced by a statement of claim: see *Rule* 3 (*j*).

A motion must be made for leave to issue the writ of summons showing a case falling within some clause of *Rule* 25: *Pennington* v. *Morley*, 3 O. L. R. 514; *Grant* v. *Kerr*, 2 O. W. N. 770, and see *Re Jones* v. *Bissonnette*, 3 O. L. R. 54.

Where, however, a foreign firm which cannot be sued within the jurisdiction brings an action, it thereby brings itself within the jurisdiction, and by a counter-claim the defendant can set up matters which could not be set up in an action against the foreign firm: *Griendtoveen* v. *Hamlyn*, 8 T. L. R. 231; but see *Imperial Japanese Govt.* v. *Peninsular & Oriental S. N. Co.*, 1895, A. C. 644.

A foreign sovereign suing in the Courts of this country submits to the jurisdiction to the extent only that (1) he must give discovery,

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and (2) cross-proceedings in mitigation of the relief claimed by him can be taken against him: *S. African Rep., etc.*, v. *La Compagnie, etc.*, 1898, 1 Ch. 190.

Motion for leave to issue and serve.

Motion for Leave to Issue and Serve Writ.—Leave to issue and serve the writ may, and generally should, be asked for on the same motion: *Young* v. *Brassey*, 24 W. R. 110; 1 Ch. D. 277; *Traill* v. *Porter*, 1 L. R. Ir. 60; *McVie* v. *Crown Point Mining Co.*, 19 P. R. 335; though separate motions may possibly sometimes be necessary: see *Stigand* v. *Stigand*, 19 Ch. D. 460.

The motion for leave should also be for the limiting of the time for defendant to appear, and the order giving leave should name the time: *Rule* 27; *Re Jones* v. *Bissonnette*, 3 O. L. R. 54.

The motion is made in Chambers: *Ib.*, before the Master in Chambers or other officer (except the Master in Ordinary) having like jurisdiction in Chambers: see *Rules* 208, 209, 433.

The evidence in support of the motion (usually an affidavit) is prescribed by *Rule* 26: see also *Seagrove* v. *Parks*, 1891, 1 Q. B. 551.

Affidavit.

The affidavit or other evidence should show that *primâ facie* the plaintiff has a good cause of action within the *Rules*: *Great Australian Mining Co.* v. *Martin*, 5 Ch. D. 1; *Société, etc.*, v. *Dreyfus*, 37 Ch. D. 215; but the Court need not try the action to determine the existence of a cause of action, if there is *primâ facie* evidence, that is sufficient: *Badische Anilin, etc.*, v. *Chemische Fabrik, etc.*, 88 L. T. 490; *Badische Anilin* v. *Thompson*, 88 L. T. 492*n*.

Although the affidavit need only establish a *primâ facie* case, it should be "candid": see *Hardingham* v. *Rowan*, 24 Sol. Jour. 309.

The facts must be fairly disclosed, or the order may be rescinded: *Ploskitt* v *Eddis*, 79 L. T. 136.

An *ex parte* order allowing service out of the jurisdiction was discharged upon its being shown that the affidavit on which the order was obtained contained misstatements of fact, which had the effect of showing the plaintiffs to have a good cause of action: *Republic of Peru* v. *Dreyfus*, 55 L. T. 802. The affidavit may be made by the solicitor, or any one who has a knowledge of the facts. Identifying a copy of the statement of claim is not enough; the material allegations contained in it as to the contract, etc., must be sworn to: *Great Australian, etc.*, v. *Martin*, *sup.*; *Perkins* v. *Mississippi, etc., Co.*, 10 P. R. 198; *Société, etc.*, v. *Dreyfus*, 37 Ch. D. 215. It is not necessary to use the words "there is a cause of action" if the facts sworn to shew it: *Fowler* v. *Barstow*, 30 W. R. 113; 20 Ch. D. 240.

The affidavit should be styled, "In the matter of an intended action between, etc."; *Young* v. *Brassey*, 1 Ch. D. 277; *Blake* v. *Lever*, 6 L. R. Ir. 476; *Re Jones* v. *Bissonnette*, *supra*.

Where a defendant out of the jurisdiction was a proper party to an action against defendants within the jurisdiction, and on that ground alone was made a defendant, the order allowing service on him was made subject to an undertaking by the plaintiff to submit to a dismissal of the action against the defendant out of the jurisdiction if he failed as against those within: *Re Jones* v. *Bissonnette*, *supra*; and see *Burson* v. *German Union Ins. Co.*, 10 O. L. R. 238, in which the action was for that reason dismissed.

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Service of proceedings other than writs of summons out of the jurisdiction.

Proceedings other than Writs of Summons.—The word "writ" in these *Rules* includes any document by which a matter or proceeding is commenced: *Rule* 3 (*j*).

As to service of infants with proceedings under *The Quieting Titles Act*: see *Re Murray*, 10 [illegible] T. 88.

In *Manitoba & [illegible] W. v. Allen*, 1893, 3 Ch. 432, it was held that the Court had no power to give leave for service of a notice of motion with a writ, where the writ is to be served out of the jurisdiction. But see *Hersey* v. *Tessier*, W. N. 1 94, 18.

Counterclaim.

Leave to serve a counter-claim on a third person out of the jurisdiction was granted in *Re Luckie*, W. N. 1880, 12; and see *Griendtoreen* v. *Homlyn*, 8 T. L. R. 231; but refused in *Potters* v. *Miller*, 31 W. R. 358; but this case is probably overruled by *Dubout* v. *Macpherson*, 23 Q. B. D. 340; and see *Rule* 113.

Third party notice.

As to service of a third party notice out of the jurisdiction: see notes to *Rule* 165: *Montgomery* v. *Soginow Lumber Co.*, 12 O. L. R. 144. Under the former C. R. 162 a petition for a declaration of lunacy was allowed to be served out of Ontario: *Re Webb*, 12 O. L. R. 194. Under the Eng. Rule a notice of motion to set aside an award was held not to be servable out of the jurisdiction on a foreign corporation: *Re Aktiebologet*, 1910, 2 K. B. 727; 103 L. T. 503. Possibly, under the wide effect given to this *Rule* by *Rule* 3 (*j*) such a proceeding might be authorized.

Discretion.

Discretion.—The Court is not bound to allow service in cases within *Rule* 25, but has a discretion on a consideration of the merits: *Société Generale de Paris* v. *Dreyfus*, 37 Ch. D. 215.

It has been held to be a matter for the discretion of the Judge or officer in Chambers whether he will give leave to issue a writ for service out of the jurisdiction to recover damages for breach of promise of marriage, where the affidavits on the motion do not show that the plaintiff is prepared to prove her case by corroborative evidence of the promise: *Franklyn* v. *Choplin*, 17 T. L. R. 84. See also *Cooper* v. *Knight*, *Ib.*, 299.

Where the contract was made in Quebec and the defendants resided there, but had a large amount of debts due them in Ontario it was held not to be a proper exercise of discretion to refuse an order for service out of the jurisdiction: *Gibbons* v. *Berliner Gramophone Co.*, 28 O. L. R. 620.

Motion to set aside service.

Motion to set Aside Service.—If the case is not one in which service should be allowed, the proper course is, not to raise the question by statement of defence, but to move to set aside the service or to rescind the order allowing service, if an order has been made: *Preston* v. *Lomont*, 1 Ex. D. 361; *Boyle* v. *Sacker*, 39 Ch. D. 249.

If defendant contends that the Court has not jurisdiction under *Rule* 25, he may move in the ordinary way in Chambers to set aside the order for service, and the service, and any judgment signed by default of appearance.

Where an order giving leave to serve out of the jurisdiction had been made, a motion against it, on the ground of irregularity, made after the lapse of a year, was held to be too late: *Reynolds* v. *Coleman*, 36 Ch. D. 453.

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Where defendant moves against the order, or to set aside the service, affidavits are admissible to try the question whether a cause of action arose within the jurisdiction, or other circumstances exist which are necessary under *Rule* 25 to give the Court jurisdiction, though not to try the merits of the case: *Fowler* v. *Barstow*, 20 Ch. D. 240; overruling on this point *Great Australian Gold Mining Co.* v. *Martin*, 5 Ch. D. 1; see also *Thomas* v. *Hamilton*, 17 Q. B. D. 592; *Société, etc.*, v. *Dreyfus*, 37 Ch. D. 215; and the order may be maintained by further evidence, though the affidavits on which it was granted were insufficient: *Kemerer* v. *Watterson*, 20 O. L. R. 451.

Where a defendant was resident in Scotland or Ireland the omission of any statement that he was a British subject was held immaterial: *Fowler* v. *Borstow*, *supra*.

Conflict of evidence.

Where there has been a conflict of evidence as to whether the cause of action arose within or without the jurisdiction, orders have been made similar to that in *Diamond* v. *Sutton*, L. R. 1 Ex. 130, *i.e.*, the service to stand, plaintiff undertaking to be non-suited if no cause of action within the jurisdiction be shewn at the trial: see *O'Donohoe* v. *Wiley*, 43 U. C. Q. B. 350; *Nottage* v. *Aitkin*, 71 L. T. Jour. 326; 25 Sol. Jour. 834; see also *Fowler* v. *Borstow*, 20 Ch. D. 240; *Shearman* v. *Findlay*, 32 W. R. 122; *Thomas* v. *Homilton*, 17 Q. B. D. 592, reversing the judgment of the Court below, reported in 55 L. T. 219; and *Perkins* v. *Mississippi*, *supra*, p. 346, where the practice was disapproved of; but it was again approved of in *Simpson* v. *Hall*, 14 P. R. 310; see also *Bell* v. *Villeneuve*, 16 P. R. 413; *Franchot* v. *General Securities Co.*, 18 P. R. 291; *Re Jones* v. *Bissonnette*, 3 O. L. R. 54; and *Burson* v. *Germon Union Ins. Co.*, 6 O. W. R. 21.

In the case of such a conflict of evidence another practice has sometimes been adopted since *Rule* 48 was passed, viz., to allow the defendant to enter a conditional appearance and raise on pleadings the want of jurisdiction, so that, where there would be great expense involved in the trial of all the merits, the preliminary question as to the jurisdiction may be tried separately: see *Canadian Radiator Co.* v. *Cuthbertson*, 9 O. L. R. 126; but this is contrary to the English practice, under which a conditional appearance is allowed merely to enable a defendant to move to discharge the order allowing service: see note to *Rule* 48.

Upon motion to set aside the service on the ground that the breach of contract did not occur within the jurisdiction, the plaintiff was refused leave to amend by setting up another and distinct cause of action: *Parker* v. *Schiller*, 17 T. L. R. 299.

A notice of motion to set aside an order for service out of the jurisdiction operates as a stay of proceedings till the motion is disposed of, so that the time for appearance does not run in the meanwhile: *Confederation Life, etc*, v. *Moore*, 6 O. L. R. 603.

The Court will not try the case on a motion to set aside an order allowing service out of the jurisdiction: *Badische Anilin* v. *Chemische Fabrik*, 88 L. T. 490.

Effect of appearance on right to move against order allowing service.

Effect of Appearance.—An appearance by a defendant in the usual way without notice of any objection to the jurisdiction estops him from moving to set aside a writ and service as being unwarranted by *Rule* 25; see notes to *Rule* 46: *Grocers' Wholesale Co.* v. *Bostock*, 22 O. L. R. 130; *Tozier* v. *Howkins*, 1885, 15 Q. B. D. 650, 680; *Sears*

v. *Meyers*, 15 P. R. 381, 456; *Dort* v. *Citizens*, 11 P. R. 513; but obtaining security for costs; and opposing a motion for speedy judgment without entering an appearance, does not estop him: *Heath* v. *Meyers*, 15 P. R. 387. An unconditional appearance is a waiver of the right to object to the jurisdiction as to the whole claim, though part of it may not be within *Rule* 25: *Manitoba & N. W.* v. *Allan*, 1893, 3 Ch. 432. Rule 24.

Where a defendant out of the jurisdiction had appeared and successfully opposed a motion for speedy judgment, an application to withdraw his appearance and for leave to enter a conditional appearance was refused: *Croil* v. *McCullough*, 11 O. L. R. 282.

An unauthorized appearance will not operate as a waiver of the right to object to the jurisdiction: *Crozier* v. *Auerbach*, 1908, W. N. 68.

There is an express *Rule* in England (O. 12, r. 30), under which a motion to set aside the service of a writ may be made before appearance: see *Western* v. *Perez*, 1891, 1 Q. B. 304; but a conditional appearance may be entered: *Firth* v. *De las Rivos*, 1893, 1 Q. B. 768; 69 L. T. 383, or an ordinary appearance, if defendant at the same time notifies plaintiff that he objects to the jurisdiction: *Moyer* v. *Claretie*, 7 T. L. R. 40, without waiving the right to set aside the service. Conditional appearance.

Unless within a reasonable time after the entry of a conditional appearance, the defendant moves to set aside the writ according to the English practice, the appearance becomes absolute: *Keymer* v. *Reddy*, 1912, 1 K. B. 215; 105 L. T. 541.

In Ontario a conditional appearance may now be entered by leave of the Court: *Rule* 48; and see *Burson* v. *German Union Ins. Co.*, 6 O. W. R. 22.

An objection to the jurisdiction of the Court, not based on the ground that *Rule* 25 does not authorize service, but upon other grounds which might arise even though the Court has jurisdiction over the person of the defendant, is not necessarily waived by an ordinary appearance: *Wilmott* v. *McFarlane*, 16 C. L. T. 83; 32 C. L. J. 129.

Objection to an order for service out of the jurisdiction was held to have been waived by appearing on a motion for an injunction and arguing the merits: *Boyle* v. *Sacker*, 39 Ch. D. 249; (but see *Heath* v. *Meyers*, *supra*); by taking out a summons for delivery of a statement of claim: *Fry* v. *Moore*, 23 Q. B. D. 398; and by applying for security for costs: *Lhoneux & Co.* v. *Hong Kong, etc., Corp.*, 33 Ch. D. 446; (but see *Heath* v. *Meyers*, *supra*); and by proceeding to examine witnesses after objection to the jurisdiction overruled: *Guy* v. *Grand Trunk Ry. Co.*, 10 P. R. 372: see also notes to *Rule* 46.

Substituted Service.—Under the Irish Rules it is held that a writ intended to be served substitutionally upon a person within the jurisdiction may be issued without leave, though the defendant be resident out of the jurisdiction: *Lewis* v. *Herberts*, 16 L. R. Ir. 340; but the contrary has been held in England: *Fry* v. *Moore*, 23 Q. B. D. 395, where it was said that holding otherwise would enable the *Rule* to be evaded, which requires leave to be obtained. Where a writ has been properly issued against a defendant out of the jurisdiction, an order for substitutional service within the jurisdiction may be obtained: *Ford* v. *Shepherd*, 53 L. T. 564; 34 W. R. 63; *Western Suburban & N. H. P. B. Society* v. *Rucklidge*, 1905, 2 Ch. 472; 93 L. T. 664; Substitutional service.

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or by mailing to an address out of the jurisdiction: *Dittan* v. *Bornemann*, 3 T. L. R. 3.

In Ontario, an order for substituted service of a defendant out of the jurisdiction can only be obtained in case the subject-matter of the action makes *Rule* 25 applicable; and the time for appearance, etc., will be the same as if the defendant had been served out of the jurisdiction.

The person on whom service is authorized should be served with such form of writ, or notice thereof, as would be proper if the service were being personally effected upon the defendant himself, at the place where he is at the time of the substituted service.

There cannot be substituted service of an ordinary writ for service within the jurisdiction on a defendant who cannot be served with it by reason of his being out of the jurisdiction: *Société Industrielle, etc.* v. *Companhia Portugueza, etc.*, W. N. 1889, 32; *Fry* v. *Moore*, 23 Q. B. D. 399; *Hillyard* v. *Smith*, 36 W. R. 7; see *Field* v. *Bennett*, 56 L. J. Q. B. 89; *Stewart* v. *Bank of England*, W. N. 1876, 263; *Wilding* v. *Bean*, 1891, 1 Q. B. 100; *Worcester, etc.* v. *Firbank, etc.*, 1894, 1 Q. B. 784, unless defendant is out of the jurisdiction to evade service: *Re Urquhart*, 24 Q. B. D. 723; see *Watt* v. *Barnett*, 3 Q. B. D. 186; or has left the jurisdiction after the issue of the writ without intending to evade service: *Jay* v. *Budd*, 1898, 1 Q. B. 12; 77 L. T. 335.

Under the former *Rule* substituted service on a lunatic out of the jurisdiction of a petition for a declaration of lunacy was allowed, it being proved to be dangerous to serve personally the alleged lunatic: *Re Webb*, 12 O. L. R. 194.

Foreign corporations.

Foreign Corporations.—A foreign corporation is within the *Rules* and may be served abroad; *Scott* v. *Royal Wax Candle Association*, 1 Q. B. D. 404; *Westman* v. *Aktiebolaget, etc., Snickarefabrik*, 1 Ex. D. 237, but not a foreign sovereign or state: *Strousberg* v. *Costa Rica*, 29 W. R. 125; see also *Sedgwick* v. *Yedras Mining Co.*, 35 W. R. 780; *Mighell* v. *Sultan of Johore*, 1894, 1 Q. B. 149.

A corporation incorporated by the Dominion is not in any Province a corporation of foreign origin: *Tytler* v. *Can. Pac. Ry.*, 29 Ont. 654; 26 Ont. App. 467.

Where a foreign corporation is carrying on business within the jurisdiction, and has an agent resident within the jurisdiction, no leave to serve is necessary: see *Rule* 23 and notes.

Statute of Limitations.

Miscellaneous.—The power conferred by *Rule* 25 of serving a writ or notice of a writ on a defendant out of the jurisdiction, who is neither a British subject, nor in British dominions, does not affect *The Statute of Limitations* (R. S. O. c. 75), s. 52, by which in certain specified actions, where a defendant is out of Ontario when the cause of action arises, the plaintiff is at liberty to bring his action after the defendant's return, but within the period limited by ss. 49 and 50: *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 352; 71 L. T. 51.

Consent.

It would seem that a party out of the jurisdiction cannot, even by consent, give the Court jurisdiction in cases not within the provisions of *Rule* 25: see *The British Waggon Co.* v. *West*, 1896, 1 Q. B. 35, 37; 73 L. T. 498; *sed vide, Manitoba & N. W.* v. *Allan*, 1893, 3 Ch. 432; but it was held that a party out of the jurisdiction may appoint a person within the jurisdiction to accept service for the purpose of being

sued within the jurisdiction: *Tharsis Sulphur, etc., Soc.* v. *Société, etc.*, 60 L. T. 924; 38 W. R. 78; and see *per* Lord Esher, 1896, 1 Q. B. 37; *Montgomery* v. *Liebenthal*, 1898, 1 Q. B. 487; and that the jurisdiction of any Court may be excluded by agreement: *Hoerler* v. *Hanover, etc.*, 10 T. L. R. 22. Rule 25.

25.—(1) Service out of Ontario of a writ of summons or notice of writ may be allowed wherever:— Service of writ out of jurisdiction.

This Rule is taken from Eng. (1883) R. 64.

The words "writ of summons" in this *Rule* shall include any document by which a matter or proceeding is commenced: *Rule* 3 (*j*).

The sub-sections of *Rule* 25 are to be read disjunctively, and each of such sub-sections is complete in itself, and independent of the others: *Tassell* v. *Hallen*, 1892, 1 Q. B. 321; *Livingstone* v. *Sibbald*, 15 P. R. 315; *Hadad* v. *Bruce*, 8 T. L. R. 409.

Where a person, though resident out of the jurisdiction, is carrying on business within the jurisdiction in a name other than his own, he may be sued as provided by *Rule* 108, which appears to constitute an exception to this *Rule*, unless the plaintiff wishes to serve the defendant personally, in which case the provisions of *Rules* 28, 29 must be complied with.

See notes to *Rule* 24.

(*a*) The whole subject-matter of the action is land situate within Ontario (with or without rents or profits); Land.

Same as Eng. (1883) R. 64 (*a*).

The fact that the defendant is the owner of land within the jurisdiction, against which the plaintiff seeks to realize the amount of a judgment recovered against a defendant in a foreign Court, does not raise a cause of action within this or any other section of *Rule* 25: *Heath* v. *Meyers*, 16 P. R. 381, unless the case can be brought within clause (*h*) *infra*.

In *Conrad* v. *Alberta*, 17 C. L. T. 134, under the similar Jud. Ordinance of the N. W. Territories, s. 32 (1), it was held that an action by judgment creditors to declare defendants, resident in a foreign country, trustees for the judgment debtor of lands situated within the jurisdiction of the Court, and for a sale of the land to satisfy the judgment, is an action in which the whole subject matter is land situate within the judicial district.

An action to perpetuate testimony in order to preserve evidence material to the ownership of land within the jurisdiction, is not an action in which the subject matter is land; and where an infant whose legitimacy was in question was defendant in such an action and domiciled out of the jurisdiction, leave to serve him with the writ out of the jurisdiction was refused: *Slingsby* v. *Slingsby*, 1912, 2 Ch. 21; 106 L. T. 666.

Specific performance of a contract for the exchange of lands out of Ontario for lands in Ontario, was decreed in favour of the plaintiff, who was the owner of the lands out of Ontario: *Montgomery* v. *Ruppensburg*, 31 Ont. 433; but see *Burns* v. *Davidson*, 21 Ont. 547; *Purdom* v. *Pavey*, 26 S. C. R. 112; *Henderson* v. *Bank of Hamilton*, 23 S. C. R. 716; 20 Ont. App. 646; *Gunn* v. *Harper*, 30 Ont. 650; 2 O. L. R. 611.

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Contracts, etc., affecting land.

(*b*) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Ontario is sought to be construed, rectified, set aside, or enforced;

Same as Eng. (1883) R. 64 (*b*).

An action for breach of covenant to repair, contained in a lease of premises situate within the jurisdiction was held to be within this clause: *Tassell* v. *Hallen*, 1892, 1 Q. B. 321; 66 L. T. 196; and see *Kaye* v. *Sutherland*, 20 Q. B. D. 147; so also was an action by a simple contract creditor on behalf of himself and other creditors to set aside an alleged fraudulent conveyance of lands in Ontario, made by the alleged debtor residing out of Ontario: *Livingstone* v. *Sibbald*, 15 P. R. 315. But an action for rent is held to be not within this clause, though the lands in respect of which it is payable are within the jurisdiction: *Agnew* v. *Usher*, 14 Q. B. D. 78; 51 L. T. 576, 752; but see *Tassell* v. *Hallen*, *supra*.

A statement in the nature of slander of title, made out of the jurisdiction, concerning property within the jurisdiction, has been held not to be an act or thing affecting such property within the meaning of this clause: *Casey* v. *Arnott*, 2 C. P. D. 24, where the *Rule* was held not to apply in a case in which the defendant in Ireland said that a ship in England was unseworthy.

A slander not actionable in itself without special damage, spoken out of the jurisdiction, but resulting in a special damage within the jurisdiction, was not within the original *Rule*: *Bree* v. *Marescaux*, 7 Q. B. D. 434; but may now fall within the case provided for by clause (*c*).

An action between foreigners on a foreign judgment to obtain equitable execution against lands of defendant in Ontario is not within this *Rule*: *Sears* v. *Meyers*, 15 P. R. 381; unless the case can be brought within clause (*h*) *infra*.

As to actions to perpetuate testimony as to the title to land within the jurisdiction: see *Slingsby* v. *Slingsby*, 1912, 2 Ch. 21; 106 L. T. 666, *supra*, p. 351.

Persons ordinarily domiciled in Ontario.

(*c*) Any relief is sought against any person domiciled or ordinarily resident within Ontario;

Same as Eng. (1883) R. 64 (*c*).

As to what amounts to domicil: see *Wanzer* v. *Woods*, 13 P. R. 511; *Allen* v. *Allen*, 15 P. R. 458; *Re Craignish*, 1892, 3 Ch. 180; *Bonbright* v. *Bonbright*, 1 O. L. R. 629; 2 O. L. R. 249.

If it is shewn that defendant is ordinarily resident within Ontario, it is not necessary to bring the case within any of the other clauses of this *Rule*: *Hadad* v. *Bruce*, 8 T. L. R. 409; but notwithstanding this *Rule* the High Court has no jurisdiction to entertain an action for damages for trespass to land situated in a foreign country against a defendant resident within Ontario: *Companhia de Mocambique* v. *B. S. African Co.*, 1892, 2 Q. B. 358; 1893, 1 A. C. 602; *Brereton* v. *Canadian Pacific Ry.*, 29 Ont. 57; and see *Black Point* v. *Eastern Concessions*, 79 L. T. 658; or to set aside an alleged fraudulent conveyance of lands out of the jurisdiction: *Burns* v. *Davidson*, 21 Ont.

547, approved in *Purdom* v. *Pavey*, 26 S. C. R. 412; or to declare a conveyance of lands out of the jurisdiction, though absolute in form, to be by way of mortgage only, after an absolute conveyance by the grantee to other parties: *Gunn* v. *Harper*, 30 Ont. 650; or to redeem lands out of Ontario; *Henderson* v. *Bank of Hamilton*, 20 Ont. App. 646; 23 S. C. R. 716. As to the appointment of a receiver of lands out of the jurisdiction: see *Mercantile I. Co.* v. *River Plate*, 1892, 2 Ch. 303; 66 L. T. 711; Kerr on Receivers, p. 100; and see further as to the jurisdiction in respect of lands out of the jurisdiction, 94 L. T. Jour. 30. Rule 25.

It has been held in England that an Admiralty writ *in personam* cannot be issued for service abroad in respect of a wrong done on the high seas. The phrase "within the jurisdiction," was construed to mean "within the territorial jurisdiction": *Re Smith*, 1 P. D. 300; *The Vicar*, 2 P. D. 29; which does not extend beyond low water mark: *Harris* v. *Owners of the Franconia*, 2 C. P. D. 173; see *Reg.* v. *Keyn*, 2 Ex. D. 63.

A company with a registered office in Scotland and branches in England, was held not to be domiciled or ordinarily resident in England: *Jones* v. *Scottish Accident Insurance Co.*, 17 Q. B. D. 421; *Watkins* v. *Scottish, etc., Co.*, 23 Q. B. D. 285; *sed vide In re Burland, Burland* v. *Broxburn Oil Co.*, 41 Ch. D. 542; *Tytler* v. *Canadian Pacific Ry.*, 29 Ont. 654; 26 Ont. App. 467.

As to foreign corporations doing business within the jurisdiction, see *Palmer* v. *Goulds Mfg. Co.*, in note to clause (*c*).

An action to recover damages for negligence alleged to have been committed in British Columbia was held to be maintainable against the Canadian Pacific Railway in Ontario: *Tytler* v. *Canadian Pacific Ry.*, *supra*.

No action will lie against a defendant out of the jurisdiction for a wrong committed out of the jurisdiction, unless it was a wrong according to the law of the place where it was committed: *Carr* v. *Fracis*, 1902, A. C. 176. Neither can a contract be enforced in Ontario, which would be void as against public policy if made in Ontario, notwithstanding it may be legal according to the law of the place where it was made: *Kaufman* v. *Gerson*, 1904, 1 K. B. 591.

A person who has acquired a domicil of choice in Ontario, and has not abandoned it, may be served out of Ontario with a writ claiming alimony: *Bonbright* v. *Bonbright*, 1 O. L. R. 249.

(*d*) Administration is sought of the personal estate of a deceased person who at the time of his death was domiciled within Ontario, or the execution (as to property situate within Ontario) of the trusts of a written instrument of which the person to be served is a trustee, which ought to be executed according to the law of Ontario; Administration of personal estates and trusts.

Taken from Eng. (1883) R. 64 (*d*).

It is a condition precedent to the proper service of a writ out of the jurisdiction under this clause that there be property within the jurisdiction, either when leave to serve the writ is applied for, or when

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service is affected, or at the latest when an application to set aside the service is made: *Winter* v. *Winter*, 1894, 1 Ch. 421; 69 L. T. 759. It is not sufficient that according to the terms of the trust it ought to be within the jurisdiction, if in fact it is not: *Ib.*

This clause it may be observed is limited to the "personal estate" of a deceased person; where the realty, within the jurisdiction, of a deceased person is also sought to be administered, the case would seem to come within clause (*a*).

A notice of motion for an administration judgment under *Rules* 207, 608, may be ordered to be served out of the jurisdiction in a proper case: see *Rule* 3 (*j*).

(*e*) The action is founded upon [a judgment or on] a breach within Ontario of a contract, wherever made, which is to be performed within Ontario [or on a tort committed therein];

Except the words in brackets, similar to first part of Eng. (1883) R. 54 (*c*): the Eng. *Rule* has instead of the words "is to be performed," the words "according to the terms thereof ought to be performed."

A foreigner resident in the Province, or a foreign corporation having a place of business in the Province, may be served without any leave though the contract was made and breach thereof occurred out of the jurisdiction: see *Palmer* v. *Gould's Manufacturing Co.*, W. N. 1884, 63; and notes to *Rule* 23.

The effect of *Rule* 3 (j) is to make the present *Rule* applicable to all documents whereby proceedings are commenced. It therefore applies to a third party notice, and when so applied the word "action" in this *Rule* is read as if it were "third party proceedings": *Montgomery* v. *Saginaw Lumber Co.*, 12 O. L. R. 144.

Contract.—No difficulty can now arise such as used to arise under R. S. O. 1877 c. 50, s. 49, as to the meaning of a "cause of action which arose in Ontario": see *Gildersleeve* v. *McDougall*, 31 C. P. 164, 166. The breach within Ontario is the test of the application of the *Rule*, and it is, therefore, enough if any part of the contract in respect of which the breach is alleged, is to be performed within the jurisdiction: *Rein* v. *Stein*, 1892, 1 Q. B. 753; 66 L. T. 469.

It is not necessary that a contract should expressly state that it is to be performed within the jurisdiction. It is sufficient if this appear from the contract either expressly, or by necessary implication, or surrounding circumstances: *Reynolds* v. *Coleman*, 36 Ch. D. 453; *Duval & Co.* v. *Gans*, 1904, 2 K. B. 685; 91 L. T. 308; but it must appear from the contract either expressly, or by necessary implication: *Bell & Co.* v. *Antwerp Line*, 1891, 1 Q. B. 103; 64 L. T. 276; see also *The Eider*, 1893, P. 119; 69 L. T. 622; *Baxter* v. *Faulkner*, 6 O. W. R. 198. If by the contract, as an express or implied term, payment is to be made in Ontario, an action based on a breach of that term will be within this clause: *Anger* v. *Vasmer*, 18 T. L. R. 596; *Atkinson* v. *Pimpton*, 6 O. L. R. 566; *Duval* v. *Gans*, *supra*, and see *Phillips* v. *Malone*, 3 O. L. R. 47, 492; but *quære*, whether under the Ontario *Rule* 25 (*e*), in construing the contract, the rule of law must be applied that the debtor must seek out his creditor to pay him, unless the application

of that rule is inconsistent with the terms of the contract, construing it in the light of the facts which existed when it was made: *Blockley v. Elite Costume Co.*, 9 O. L. R. at p. 387. See also cases *infra*, under "Examples." Rule 25.

Where on its face a contract is in part to be performed in Ontario, parol evidence is not admissible to shew a contrary intention: *Niron v. Jamieson*, 18 O. L. R. 425.

Where a contract is primarily performable out of the jurisdiction, the fact that it may also be performed within the jurisdiction was held not to be sufficient to authorize service out of the jurisdiction under clause (*e*): *Gibbons v. Berliner Gramophone Co.*, 27 O. L. R. 402; *sed vide* S. C. 28 O. L. R. 620.

Where the contract was not in writing, and would only be within this *Rule* if, by it, payment was to be made in Ontario, and this was disputed, leave to issue the writ was held to be proper; but the defendant was given leave to enter a conditional appearance, so as to enable the question of jurisdiction to be raised in the action: *Canadian Radiator Co. v. Cuthbertson*, 9 O. L. R. 126; *Kemerer v. Watterson*, 20 O. L. R. 451. Claims on contracts.

The ordinary rule is that where no place of payment is named the debtor is bound to seek his creditor, and that rule was held not to be displaced, where goods were sold to be delivered out of the jurisdiction, and part of the price was made payable on delivery: *Leonard v. Cushing*, 5 O. W. N. 453.

Where no place of payment is named in a policy of insurance, it must be assumed that payment is to be made at the head office of the company, and that fact may determine the question of the *lex loci contractus*: *Burson v. German Union Ins. Co.*, 6 O. W. R. 21.

Where part of a contract only is to be performed within the jurisdiction, and a foreign defendant is sued for breach of the contract, the order giving leave for service out of the jurisdiction should expressly limit the relief to be given against such defendant to relief in respect of the breach within the jurisdiction: *Manitoba & N. W. Co. v. Allan*, 1893, 3 Ch. 432; 69 L. T. 558; see also *Indigo Co. v. Ogilvy*, 1891, 2 Ch. D. 31, and *Lovell v. Coles*, 3 O. L. R. 291.

The plaintiff may be directed so to restrict his statement of claim without prejudice to his bringing an action elsewhere for breaches committed without the jurisdiction: *Lovell v. Coles*, *supra*.

A contract which may be performed either within or without the jurisdiction is not within this *Rule*: *Bell & Co. v. Antwerp Line*, 1891, 1 Q. B. 103; *Comber v. Leyland*, 1898, A. C. 524; 79 L. T. 180; see also *The Eider*, 1893, P. 119; 69 L. T. 622; *Thompson v. Palmer*, 1893, 2 Q. B. 80; 69 L. T. 366.

Where an offer to purchase goods was made by letter from London (Ont.), and accepted by letter posted at Quebec, and delivery was to be on the cars at Quebec, it was held that the contract was to be performed in Quebec: *Empire Oil Co. v. Vallerand*, 17 P. R. 27; and see *Phillips v. Malone*, 3 O. L. R. 47, 492.

Where a contract of hiring is made within Ontario, and the work thereunder is to be done there, the remuneration is payable there: *Bell v. Villeneuve*, 16 P. R. 413.

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Where a *c. i. f.* contract was made with a defendant resident out of the jurisdiction for sale of goods to be delivered within the jurisdiction, and the plaintiff accepted delivery at a place out of the jurisdiction, it was held that an action for breach of contract on the ground that the goods were not of the stipulated quality was not within clause (*e*): *Crozier* v. *Auerbach*, 1908, 2 K. B. 161; 99 L. T. 225.

Foreclosure of equity in personal property.

An action simply to foreclose a mortgage of personal property is held not to be an action founded on a breach of contract within the meaning of clause (*e*): *Hughes* v. *Oxenham*, 1913, 1 Ch. 181, as reversed by C. A.: *Ib.*, 254; 108 L. T. 316; and an action to foreclose a mortgage on a policy of insurance against a subsequent incumbrancer was held not to come within clause (*e*): *Deutsche Nat. Bank* v. *Paul*, 1898, 1 Ch. 283; 78 L. T. 35; and it may be doubted whether a writ for foreclosure of the equity of redemption in personalty in which a claim for relief on a covenant is joined, could be authorized to be served out of the jurisdiction, except on the terms of first striking out the claim for foreclosure. An action to foreclose the equity of redemption in land would probably be held to be within clause (*a*), *supra*; see *Paget* v. *Ede*, *supra*, p. 28.

Action to enforce charge.

It was held in *Moritz* v. *Stephen*, 36 W. R. 779; 58 L. T. 850, that an action to enforce a charge obtained by a judgment creditor under a statutory provision (1 & 2 V. c. 110, s. 14), (see Jud. Act, ss. 40, 41, *supra*), in that behalf, does not fall within this clause, nor any other clause of this *Rule*, and that, therefore, service of a writ in such an action out of the jurisdiction is not authorized: *Kolchmann* v. *Meurice*, 1903, 1 K. B. 534; and see *Re La Campagnie Generale, etc.*, 1891, 3 Ch. 451, where, although leave to serve was refused, the Court nevertheless held that the party required to be served, might be notified, without order, that proceedings affecting his interests were pending, leaving him to appear and submit to the jurisdiction if so advised, and the Court, if satisfied that a notice so served was sufficient, will act upon the notice: *Re Cliff*, 1895, 2 Ch., p. 28.

The following are further examples of the application or non-application of this clause:

Service allowed.

Service was Allowed.—Where the plaintiff complained of an agreement made in England, as infringing his rights under an agreement made in India; because the action was in respect of a breach within the jurisdiction, of a contract made abroad: *Harris* v. *Fleming*, 13 Ch. D. 208; and where a contract made in England by a defendant resident in Ireland, to pay for a rink constructed in Dublin, was broken by non-payment to the plaintiff in England: *Green* v. *Browning*, 34 L. T. 760. See *Atkinson* v. *Plimpton*, 6 O. L. R. 566.

Where goods were furnished by an English firm to defendants in Man. and no place for payment was named, it was presumed that it was to be in England, and the breach therefore took place there: *Robey* v. *Snaefell Mining Co.*, 20 Q. B. D. 152.

So where according to the course of business in similar transactions payment was to be made in England: *Rein* v. *Stein*, 1892, 1 Q. B. 753; *Fry* v. *Raggio*, 40 W. R. 120; but where money is payable under a contract, and no place for payment is stated, the case is not brought within the *Rule* by the fact that the person to whom the money is payable resides within the jurisdiction: *Bell & Co.* v. *Antwerp, etc.*, 1891, 1 Q. B. 103; *Banque Nationale* v. *S. A. Trading Co.*, 12 C. L. T. 20;

Phillips v. *Molone*, 3 O. L. R. 47, 492; see, however, *Thompson* v. *Palmer*, 1893, 2 Q. B. 80, and *Leonard* v. *Cushing*, *supra*, p. 355. Rule 25

Where goods were to be shipped in British Columbia and delivered freight paid at Toronto, and payment was to be made in Toronto, an action in Ontario for the amount paid by plaintiff for freight and for damages for breach of contract, the goods not being up to sample, was held to be within the *Rule*: *Fisher* v. *Cassady*, 14 P. R. 577; and in such a case an action will also lie in Ontario for the price: *Atkinson* v. *Plimpton*, 6 O. L. R. 566; *Duval* v. *Gans*, 1904, 2 K. B. 685; so also where a firm in Montreal delivered an order to the plaintiffs' traveller in Montreal, which was accepted by letter of plaintiffs, posted in Toronto, under which goods were to be delivered f. o. b. in Toronto: *Blackley* v. *Elite Co.*, 9 O. L. R. 382; *Nixon* v. *Jamieson*, 18 O. L. R. 625.

Where defendant, a commercial traveller, under a contract for selling and taking orders for goods over a route through British Columbia and Ontario, resigned his position by letter from British Columbia, before the entry upon performance of the contract in Ontario, the plaintiffs after waiting until the expiration of the time by which the entire contract was to be performed, moved for leave to issue a writ for damages for non-performance of the entire contract, and leave was given to issue a writ confined to breaches of the contract within Ontario, but reserving to the plaintiffs the right to bring action for breaches out of Ontario: *Lovell* v. *Coles*, 3 O. L. R. 291.

As to the principles applicable where a plaintiff sues for an account, upon a contract to pay in a foreign currency: see *Manners* v. *Pearson*, 1898, 1 Ch. 581; 78 L. T. 432. The payments due must be ordered to be paid in Canadian currency, and must be converted into such currency at the rate of exchange current at the time of the ascertainment of the amount due: *Ib.*

Where the action is founded on a breach of trust committed in Ontario, but both plaintiff and defendant are resident out of the jurisdiction, it may be a question whether the action is brought oppressively and vexatiously in Ontario: *Russell* v. *Greenshields*, 23 O. L. R. 171; 24 O. L. R. 113; but where the Court is satisfied that such is not the case the action may be allowed to proceed: *Ib.*

Service was not Allowed.—Where the writ was indorsed with a claim to restrain a ship-owner from dealing with a ship in port at Cardiff contrary to a charter party entered into in Scotland between a plaintiff and defendant who both resided in Scotland: *Ex parte McPhail*, 12 Ch. D. 632; where the claim was by a *cestui que trust* resident in England for administration of trusts of Scotch property by Scotch trustees: *Cresswell* v. *Parker*, 11 Ch. D. 601. Service not allowed.

Where mortgagees of a ship and her freight, in an action against second mortgagees, discovered that some freight had previously to the suit been collected by brokers in Antwerp, who claimed to retain the money against a debt due to them by the second mortgagees, the plaintiffs obtained leave to serve the brokers, but the order was on motion set aside, the Court holding that the right to the freight was claimed by virtue of a right as mortgagees to take possession of the ship and its earnings, and not by way of enforcement of the contract: *McStephens* v. *Carnegie*, 28 W. R. 385; 42 L. T. 309.

Where by the contract, defendants, a steamship company, were exempted from liability for damage for loss arising beyond their

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line of steamships, and there was no breach alleged within Ontario, but one beyond the said line of steamships, in not delivering the subject of the contract, it was held that as no damage would result from the breach, though the case was technically within this *Rule*, discretion, if any existed, should be exercised in refusing to allow the service: *Perkins* v. *Mississippi*, 10 P. R. 198.

Service was not allowed in an action for wrongful dismissal where the appointment was in Glasgow, and the letter of dismissal was posted there. The defendant was a Scotch coal merchant, who verbally appointed the plaintiff commission agent in Ireland. The posting of the letter was held to be the act of dismissal: *Hamilton* v. *Barr*, 18 L. R. Ir. 297; *Offord* v. *Bresse*, 16 P. R. 332; but see *Bell* v. *Villeneuve*, 16 P. R. 413; *Holland* v. *Bennett*, 1902, 1 K. B. 867; 81 L. T. 485.

Where a servant employed within the jurisdiction was dismissed by a letter written and posted by his employer out of the jurisdiction, leave to serve a writ for wrongful dismissal was refused, there being no breach of the contract within the jurisdiction: *Holland* v. *Bennett*, 1902, 1 K. B. 867; 81 L. T. 485; but where the letter of dismissal was written and posted within the jurisdiction, the breach was held to have taken place within the jurisdiction and service on the defendant abroad was allowed: *Mutzenbecher* v. *Asseguradora*, 1906, 1 K. B. 251; 94 L. T. 127.

As to breach of a promise to marry in Ontario: see *Cooper* v. *Knight*, 17 T. L. R. 299.

Actions for torts.

Tort.—A transfer of goods effected in Ontario as a fraudulent preference, the goods being afterwards removed to Quebec, is a "tort committed within the jurisdiction" within this *Rule*: *Clarkson* v. *Dupré*, 16 P. R. 521.

The publication within Ontario of a libel written without, entitles the plaintiff to sue in Ontario: *Shearman* v. *Findlay*, 32 W. R. 122.

The making of a fraudulent conveyance of land out of the jurisdiction, would not appear to be a tort for which the plaintiff could sue under this *Rule*, even though the deed were actually executed within the jurisdiction: see *Burns* v. *Davidson*, 21 Ont. 547.

Criminal proceedings begun in Quebec, under which the plaintiff was arrested in Ontario and taken to Montreal, where he was discharged, were held to constitute one entire tort, founded upon transactions in Quebec, so that leave to issue a writ of summons for malicious prosecution was refused: *Oligny* v. *Beauchemin*, 16 P. R. 568.

A foreigner out of the jurisdiction cannot be sued in Ontario for a tort committed out of the jurisdiction: *Badische Anilin, etc.*, v. *Johnson*, 76 L. T. 434. (See S. C. 1896, 1 Ch. 25, where leave was given for the service, a *primâ facie* case having been made out): see also *Rourke* v. *Wiedenbach*, 1 O. L. R. 581.

It is open to question how far a judgment recovered against a defendant sued under this clause would be binding on the defendant in a foreign country: see *Sidar Gurdyal Singh* v. *Faridkote*, 1894, A. C. 670.

Tort committed abroad.

To entitle a plaintiff to sue in Ontario for a tort committed abroad, the act complained of must be wrongful according to the law of England, and must not have been justifiable according to the law of the

place where it was committed: *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; *Machado* v. *Fontes*, 1897, 2 Q. B. 231. See also *Carr* v. *Francis, etc.*, 1902, A. C. 176; and *Story* v. *Stratford Mill Building Co.*, 30 O. L. R. 271. In such an action the defendant can only be sued in Ontario if he can be served therein; leave to serve out of the jurisdiction cannot be given under clause (*c*): see *Rourke* v. *Wiedenbach*, 1 O. L. R. p. 383. Rule 25.

(*f*) An injunction is sought as to anything done or to be done within Ontario, or any nuisance within Ontario is sought to be prevented or removed, whether damages are or are not claimed in respect thereof; or Injunction.

The same as Eng. (1883) R. 64 (*f*).

(*x*) As to the effect of this disjunctive "or": see *Tassell* v. *Hallen*, 40 W. R. 221; 1892, 1 Q. B. 231.

Semble, leave cannot be given for service of a notice of motion for an injunction out of Ontario, with the writ: *Manitoba, etc.* v. *Allan*, 1893, 3 Ch. 432.

See also *Lisbon, etc.*, v. *Heddle*, 52 L. T. 796; *Speckhart* v. *Campbell*, W. N. 1884, 24.

Unless the injunction can properly be asked against the party out of the jurisdiction he cannot be sued under this clause: *Postlethwaite* v. *McWhinney*, 6 O. L. R. 412; and a claim for an injunction which does not appear to be *bonâ fide*, but merely to bring the case within this *Rule*, will not be sufficient: *De Bernales* v. *N. Y. Herald*, 68 L. T. 638; 1893, 2 Q. B. 97 (n); and see *Marshall* v. *Dominion Mfrs.*, *infra*, p. 361.

If the Court is satisfied that, even assuming the plaintiff has a good cause of action, there is no reasonable probability that he will obtain an injunction, the Court ought not to consider the making of a claim for an injunction as sufficient to justify the service of the writ out of the jurisdiction, if, apart from such claim, the case is not one in which service should be authorized. Therefore where plaintiff claimed to restrain the publication in England of an alleged title by a newspaper published and circulated in Scotland, and of which only a few copies were sold in England, leave to serve the writ out of the jurisdiction was refused: *Watson* v. *Daily Record*, 1907, 1 K. B. 853; 96 L. T. 485.

In *Tozier* v. *Hawkins*, 15 Q. B. D. 680, however, it was held that the Court might allow service out of the jurisdiction of a writ claiming an injunction to restrain the defendant from sending libels to the plaintiff, resident within the jurisdiction, where the defendant does not state on affidavit that he never comes within the jurisdiction.

The Court has no jurisdiction to grant an injunction restraining a person resident abroad from doing acts abroad, which, if done within the jurisdiction, would be an infringement of the plaintiff's Canadian patent of invention: see *Badische Anilin, etc.* v. *Johnson*, 1896, 1 Ch. 25; 76 L. T. 424; and see *Sirdar Gurdyal Singh* v. *Faridkote*, 1894, A. C. 670; but the Court may entertain an action for an injunction against a defendant resident out of the jurisdiction, to restrain an infringement of a patent within the jurisdiction: *Badische Anilin* v. *Chemische Fabrik*, 88 L. T. 490.

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A claim to an injunction to restrain defendant from parting with his assets in a case not otherwise within the *Rule* does not give jurisdiction by virtue of above clause (*f*): *Seors* v. *Meyers*, 15 P. R. 381.

An injunction to restrain executors out of the jurisdiction from suing within the jurisdiction to recover part of the estate, is an injunction "as to something to be done within Ontario": *Re De Penny. De Penny* v. *Christie*, 1891, 2 Ch. 63.

And as to the effect of a judgment recovered under this *Rule*: see *Sirdor Gurdyal, etc.*, v. *Faridkote*, 1894, A. C. 670.

Necessary party.

(*g*) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario.

This same as Eng. (1883), R. 64 (*g*).

This clause applies to a foreigner resident out of the jurisdiction: *Firth* v. *De las Rivos*, 1893, 1 Q. B. 768; 42 W. R. 100; 69 L. T. 383. 666; *Duder* v. *Amsterdamsch*. 1902, 2 Ch. 138; *The "Duc D'Aumale."* 1903, P. 18; 87 L. T. 674; and whether the action be founded on contract or tort: *Croft* v. *King*. 1893, 1 Q. B. 419; but ought only to be applied to an action of tort in extreme cases: *Williams* v. *Cartwright*. 43 W. R. 145, *per* Lord Esher; but see *The Duc D'Aumole*, *supra*.

Defendant within jurisdiction must be first served.

Where a person out of the jurisdiction is made a defendant to an action under clause (*g*), the application for leave to serve him should not be made until the defendant within the jurisdiction has been served: *Postlethwaite* v. *McWhinney*, 6 O. L. R. 412; and see *Firth* v. *De las Rivas*, 95 L. T. Jour. 297; *Yorkshire Tannery Co.* v. *Eglinton*. 54 L. J. Ch. 81; 33 W. R. 162; *Collins* v *N. B. & Mer. Insce. Co.*, 1894, 3 Ch. 228. See, however, *Livingstone* v. *Sibbald*. 15 P. R. 315; *Tossell* v. *Hollen*, 1892, 1 Q. B. 321. This person served within the jurisdiction must be one against whom relief is *bonâ fide* sought, and not a person colourably joined, against whom the plaintiff has no cause of action: *Shorples* v. *Eoson*, 1911, 2 Ir. R. 436; *Ross* v. *Eoson*, 1911, 2 Ir. R. 459.

Claim against party within jurisdiction must be bona fide.

On the application it should be shewn that the party within the jurisdiction has been served, and that against him substantial relief is claimed: *Yorkshire Tannery Co.* v. *Eglinton*, 54 L. J. Chy. 81; 33 W. R. 162; *Collins* v. *North British, etc., Insce. Co.*, 71 L. T. 58; 1894, 3 Ch. 228; *Wolsely Tool & Motor Company* v. *Jockson*, 6 O. W. N. 109. Failure to so proceed (viz., first to serve the defendant who is within the jurisdiction, and then to apply for leave to serve the defendant who is out of the jurisdiction, with a concurrent writ), is not an irregularity merely which can be condoned: *Postlethwaite* v. *McWhinney*, 6 O. L. R. 412.

In order to make the *Rule* apply, the plaintiff must have an apparent cause of action against the person served within Ontario, or an alternative claim either against the person within or the person without Ontario, though it cannot be ascertained till the trial which of the two is liable: *Witted* v. *Galbraith*, 1893, 1 Q. B. 431, 577; 68 L. T. 421; and the relief sought against the person within and the person without the jurisdiction must be connected: *Collins* v. *North British, etc., supra;* and see *Marshall* v. *Dominion Mfrs., infro*, p. 361. The *Rule* cannot be evaded by making persons against whom there is no

cause of action, parties, only in order to obtain leave to serve the persons out of the jurisdiction whom it is really desired to sue: *Ib.*; and see *Simpson* v. *Hall*, 14 P. R. 310. Rule 25.

The plaintiff cannot by making a person within the jurisdiction a defendant, when he ought properly to have made him a co-plaintiff, thereby acquire a right to add a party out of the jurisdiction as a necessary party under clause (*g*): *Deutsche Nat. Bank* v. *Paul*, 1898, 1 Ch. 283; 78 L. T. 35; and where the party out of the jurisdiction is made a defendant solely on the ground that he is the proper party to the action against a co-defendant within the jurisdiction, the plaintiff may be required to undertake as a condition of being allowed to serve the defendant out of the jurisdiction, that if he fails against the defendant within the jurisdiction, he will submit to a dismissal of the action as against the defendant out of the jurisdiction: *Re Jones* v. *Bissonnette*, 3 O. L. R. 54.

Clause (*g*) has no application to a third party notice for contribution, unless, *semble*, there were at least two joint contributors, one of whom is within the jurisdiction: *McCheane* v. *Gyles*, 1902, 1 Ch. 287; 86 L. T. 1. Third parties.

In an action to set aside an agreement between a Quebec and an Ontario loan company, transferring the assets of the Quebec company to the Ontario company, and for the distribution of the proceeds of the assets, service was allowed on the Quebec company and its liquidator as necessary parties to the action brought against the Ontario company under clause (*g*): *McKay* v. *Colonial Investment, etc., Co.*, 4 O. L. R. 571. Actions to set aside transactions.

In an action against a company in Ontario, and a defendant resident out of the jurisdiction, to set aside a transfer of shares for alleged fraud of the defendant resident out of Ontario, it was held that the defendant resident out of the jurisdiction was a necessary party to an action against the company for an injunction to restrain it from dealing with the shares in question, but that the alleged fraud was not necessarily cognate to the action for the injunction, and, therefore, the defendant out of the jurisdiction was allowed to enter a conditional appearance: *Marshall* v. *Dominion Mfrs.*, 6 O. W. N. 385.

In the absence of special circumstances no term ought to be imposed that the plaintiff is not to sign judgment without leave of the Court or a Judge: *Firth* v. *De los Rivos*, *supra*.

In an action for salvage against owners of a vessel within the jurisdiction, leave was given to serve the owner of the cargo out of the jurisdiction: *The Elton*, 1891, P. 265.

Where an action was brought in respect of a collision which took place out of the jurisdiction, and the party sought to be served out of the jurisdiction was a necessary party to the action in respect of the tort in question, but had himself begun an action in respect of the same matter in the place where he resided, and where the plaintiff's cause of action arose; it was held to be an improper exercise of discretion to authorize service of a writ on him out of the jurisdiction: *The Hagen*, 1908, P. 189. Action for collision.

Where the plaintiff's action was on policies of insurance made by co-insurers one of whom was out of the jurisdiction, it was held that he might be properly joined as a co-defendant in an action against the Co-insurers.

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other co-inaurer, who was within the jurisdiction: *Oesterreichische, etc., v. British Indemnity Insce. Co.*, 1914, 2 K. B. 747; 110 L. T. 955.

Conspiracy.

An order was made where the alleged cause of action was a conspiracy hy three defendants, one of whom resided out of the jurisdiction; hut the plaintiff was required to undertake to suhmit to a non-suit, in case he failed to prove the cause of action alleged: *Simpson* v. *Holl*, 14 P. R. 310.

Breach of warranty.

In an action against defendants in London, for hreach of wnrranty of authority, their principals out of the jurisdiction having repudiated ahrond a contract as made without authority, it was held that the foreign principals were proper parties, and service on them ahroad was allowed: *Massey* v. *Heynes*, 21 Q. B. D. 330; and see *Bennetts* v. *McIlwraith*, 1896, 2 Q. B. 464; 75 L. T. 145.

Trusts.

In an action hy dehenture holders of a foreign corporation against trustees for the plaintiffs residing within the jurisdiction, the validity of the dehentures being in dispute, it was held that the corporation was a necessary party, and service on it ahroad was allowed under this clause: *Bowtree* v. *The Great Northern Ry.*, 105 L. T. Jour. 104.

See also *The Steamship Shonemore, Limited* v. *Thompson*, 52 L. T. 552; *Lisbon, etc.*, v. *Heddle, Ib.*, 796; *Livingstone* v. *Sibbold*, 15 P. R. 315; *Duder* v. *Amsterdomsch, etc.*, 1902, 2 Ch. 132, *supro*, p. 360.

In *Horvey* v. *Dougherty*, 56 L. T. 322, an action for hreach oi trust was hrought against the executors of a testator dying in England, two of whom were in Ireland and one in England. The action was to compel them to replace assets invested in Ireland: service on the defendants resident in Ireland was allowed: see also *Re Lane*, 55 L. T. 149.

To an action against the personal representatives of a deceased trustee for hreach of trust, the solicitors for the trustee, who resided out of the jurisdiction, and had made the investment which had resulted in a loss, were held not to he necessary parties: *Ploskitt* v. *Eddis*, 79 L. T. 136.

Partn'rship.

In *Lightowler* v. *Lightowler*, W. N. 1884, 8, an order was made where the party out of the juriadiction was a partner of the defendant already served, and the action was for specific performance of an agreement to convey the partnership property.

Land.

Where the land in queation was out of the jurisdiction, but some of the parties were within, liberty was granted to serve a defendant out of the jurisdiction: *Jenney* v. *Mockintosh*, 33 Ch. D. 595; *Dickson* v. *Low*, 1895, 2 Ch. 62; 72 L. T. 680; and see clause (o) *supra*.

Whether a third party notice can be served under this clause, *quære:* see *Speller* v. *Bristol*, 13 Q. B. D. 96; *Rule* 3 (*j*).

The order granting leave to serve the persons out of the jurisdiction, may he for the issue of a writ to be concurrent with the writ served on the other defendants within the jurisdiction: *Burt* v. *Bowen*, 8 T. L. R. 28.

Assets within jurisdiction.

(*h*) Service may also be allowed where the action is for any other matter and it appears that the plaintiff has a good cause of action against the defendant upon a contract or judgment, [or

in respect of a claim for alimony], and that the defendant has assets in Ontario, of the value of $200 at least, which may be rendered liable for the satisfaction of the judgment; but the order allowing service shall in such case provide that in case the plaintiff should recover judgment if the defendant does not appear, the plaintiff shall prove his claim, in such manner as may be deemed proper. Rule 25.

"Contract or Judgment."—The words "where the action is for any other matter" in the first line, would appear to extend the class of cases in which service of a writ out of the jurisdiction may be allowed to all other cases not within any of those enumerated in the preceding clauses, but the subsequent words shew that the operation of this *Rule* is limited to cases where the plaintiff is suing upon a contract or judgment, or for alimony, and it is shewn that the defendant has assets in Ontario of the value of at leeast $200, which may be rendered liable to satisfy the plaintiff's claim, if judgment is recovered. Contract or judgment.

The right to alimony is not based on "contract," and, before the amendment of this clause by 5 Edw. 7. c. 13, s. 22. by inserting the words in brackets, an action for alimony could be brought against a defendant residing out of the jurisdiction only under clause (*c*). upon a judgment recovered out of the jurisdiction: *Wheeler* v. *Wheeler*, 17 P. R. 45; or under clause (*c*) *supra*. Alimony.

Debts by simple contract are assets where the debtor resides, but a debt by specialty is an asset where the specialty is: see *Kemerer* v. *Watterson*, 20 O. L. R. 451; a garnishable debt due to the defendant by a debtor within the jurisdiction on a simple contract will be assets within clause (*h*): *Ib*: therefore, where it appeared that the defendants had large floating balances of accounts due them in Ontario, an order allowing service in Ontario was made: *Gibbons* v. *Berliner Gramophone Co.*, 27 O. L. R. 402, as reversed, 28 O. L. R. 620. Debts may be assets.

Amendment of Writ.—The indorsement of a claim on a writ served out of the jurisdiction may be ordered to be amended after service, without requiring re-service, but not so as to add any claim which could not under this *Rule* be indorsed on a writ for service out of the jurisdiction: *Holland* v. *Leslie*, 1894, 2 Q. B. D. 450; followed *Hogaboom* v. *MacCullough*, 17 P. R. 377. Amendment of writ.

Where plaintiff and defendant were both residing out of Ontario, and neither of them was a British subject, and the plaintiff's right, if any, to sue depended upon the above clause (*h*), and defendant, contending that there was no jurisdiction, a summary judgment under former C. R. 603 was refused, in view of a former provision in clause (*h*), requiring that the plaintiff prove his claim "before a Judge or jury, etc.," and the case was allowed to go to trial in the regular way: *Campau* v. *Randall*, 17 P. R. 243.

(2) Where it is necessary or proper to serve persons, not already parties to an action, with an office copy of Service of office copy of judgment out of jurisdiction.

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any judgment or order, or notice to prove claims thereunder, service of the same out of Ontario may be allowed.

The order allowing service of a copy of a judgment under this *Rule* must also prescribe the time within which the party served may move against the judgment: see *Rule* 27 (3), (4).

Attaching order.

(3) Service out of Ontario may also be allowed of an attaching order in cases falling within the provisions of Rule 590. C.R. 162 and 126, and 5 Edw. VII. ch. 13, sec. 22.

Former C. R. 162 (2), expressly authorized service out of Ontario of any order or notice in the winding-up of a company: see also *The Winding-up Act* (R. S. C. c. 144), s. 111; and also service out of Ontario of a petition or notice of motion in an action or matter relating to the administration of the estate of a deceased person, or to the execution of a trust, or, praying for an order dealing with any funds in Court, and in interpleader proceedings, but though these provisions have not been continued, this *Rule* by virtue of *Rule* 3 (*j*), extends to, and includes, all documents by which proceedings are commenced.

All originating notices of motion under *Rule* 600 are within this *Rule*.

Semble, leave cannot be given to serve a notice of motion for an injunction out of the jurisdiction with the writ: *Manitoba, etc.*, v. *Allan*, 1893, 3 Ch. 432.

See also notes *supra*, p. 347.

Notice of a summary application for an interpleader order by an insurance company was allowed to be served out of the jurisdiction under the former C. R. 162: *Re Confederation Life Ass. Co. & Cordingly*, 19 P. R. 89.

Application to be supported by evidence.

26. Every application to allow service out of Ontario shall be supported by an affidavit stating that in the belief of the deponent the applicant has a right to the relief claimed, and shewing in what place or country the person to be served is or probably may be found, and whether he is a British subject or not, and that the case is a proper one for service out of Ontario under these Rules. C.R. 163.

The affidavit must shew that the plaintiff has a *primâ facie* case: *Collins* v. *North British & M. Ins. Co.*, 1894, 3 Ch. 228; 71 L. T. 58. And a material mistake in the affidavit, though unintentional, will be a ground for rescinding the order: *Republic of Peru* v. *Dreyfus*, 55 L. T. 802. The affidavit was allowed to be filed *nunc pro tunc* in *Gilpin* v. *Hazel*, 5 O. W. N. 518; but where the plaintiff had not filed a proper affidavit, and had not served with the writ a statement of claim, as required by *Rule* 28, and the writ served had not indorsed thereon any minute shewing it to have been issued pursuant to an order: the order, and writ, and service, were set aside: *Heaman* v. *Humber*, 6 O. W. N. 221.

it may be difficult for a conscientious plaintiff to comply literally with this *Rule*, as the relief can only be claimed by the writ and statement of claim, and the affidavit is required to be made before the writ is issued, and therefore before the relief can be claimed: see a form of affidavit, H. & L. Forms, No. 84. Rules 27-29.

Order to fix time for appearance to writ, or for moving against judgment.

27.—(1) An order allowing service of a writ of summons out of Ontario may be made before the writ is issued and shall limit the time for entering appearance.

(2) An order allowing service out of Ontario of a notice of motion or attaching order, shall limit a time, which must elapse after service before the day when the motion is to be heard.

(3) An order allowing service ont of Ontario of a judgment or order or notice to prove claims thereunder shall limit a time for moving to add to, vary or set aside the judgment or order.

(4) In limiting the time, regard shall be had to the place where service is to be effected. C.R. 164.

Compare Eng. (1883) R. 68.

See notes to *Rule* 45.

The order allowing service, besides regulating the time for appearance, should also authorize the service of the statement of claim, if any, at the same time: see *Rule* 28, and limit a time for the delivery of the statement of defence, which should not be earlier than eight days from the last day of appearance: *McIver* v. *Crown Point Mining Co.*, 19 P. R. 335. See *Lovell* v. *Taylor*, 5 O. W. R. 525.

Service out of Ontario.

28. Where a defendant is to be ser ed out of Ontario with a writ of summons or notice in lieu thereof, the statement of claim shall be served therewith unless the writ is specially indorsed. C.R. 166.

The statement of claim referred to in this *Rule* means the pleading so called, and not any indorsement, however full, upon the writ, of the nature of the claim: *Summers* v. *Summers*, Mr. Dalton, 6th February, 1882; but it will be observed that under the present *Rules* it is no longer necessary to serve a statement of claim out of Ontario with the writ, where the writ is specially indorsed under *Rule* 33.

Notice in lieu of writ.

29.—(1) Where the defendant is to be served out of Ontario, and is neither a British subject nor in British dominions, notice of the writ and not the writ itself shall be served. Such notice shall, save as herein provided, be served personally, unless otherwise directed. C.R. 165.

Compare Eng. (1883), RR. 69, 70; and see notes, p. 345.

Service of a writ may be made on a British subject abroad, or upon a foreigner within the jurisdiction: *Fowler* v. *Barstowe*, 20 Ch. D.

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246; but service of process abrosd upon a defendant, not a British subject, might involve unpleasant questions of jurisdiction. Where therefore, a defendsnt to be served out of the jurisdiction is a foreigner, or a foreign corporation, notice of tbe writ, and not the writ itself, is to be served: *Beddington* v. *Beddington*, 1 P. D. 426; *Westman* v. *Aktiebolaget, etc.*, 1 Ex. D. 237; the Court having jurisdiction to so order service: *James* v. *Despott*, 14 L. R. Ir. 71. If the defendant is a British subject residing abroad, the writ itself should be served on him; *Great Australian Mining Co.* v. *Martin*, 5 Ch. D. 1, and so if the defendant is the British wife of a foreigner: see *Bacon* v. *Turner*, 34 L. T. 647: *Re Howard*, 10 Cb. D. 550; but see R. S. C. c. 77, s. 32; Piggott. On service out of the jurisdiction, 100. Where the writ was served instead of notice thereof, it was held, under the similar practice before the Judicature Act, that it was an irregularity which could not be cured hy amendment, and the service was accordingly set aside: *Henderson* v. *Hall*, 8 P. R. 353; and in *Hewitson* v. *Fabre*, 21 Q. B. D. 6, sucb service was held to be a nuility, unless made good by appearance to it without objection.

A respondent to a petition, or a notice of motion, wbich can be served out of Ontario, may properly be served with the petition or notice of motion itself, and not merely with notice of it. It is only in the case of a writ (or formerly a summons) wbicb commands the attendance of the party served, that service of tbe document itself is only proper upon a subject who owes obedience to the Conrts of the Sovereign.

A foreigner who cannot be served personally out of the jurisdiction, may, by order, be served substitutionally: see *Field* v. *Bennett*, 56 L. J. Q. B. 89; but only in a case in which there is jurisdiction to allow service of a writ, or notice thereof, upon him personally: *Ib.*: *Worcester, etc.* v. *Firbank*, 1894, 1 Q. B. 784; 70 L. T. 443; see also note to *Rule* 16.

If the defendant is ont of the jurisdiction, snd is not a British subject, and on order for substitutional service on some one within the jurisdiction is made, the order should direct service of a notice of the writ, and not the writ itself, otherwise tbe service will be invalid: *Kemp* v. *Necchi*, 134 L. T. Jour. 455.

Service of process in certain foreign countries.

30. Where service is to be effected in any foreign country to which this Rule is by direction of the Chief Justice of Ontario made to apply, upon any one other than a British subject, the following procedure shall be adopted:—

Documents to be furnished.

(1) The notice of the writ and statement of claim shall be transmitted by the Clerk of Records and Writs to the Secretary of State with a copy thereof, translated into the language of the country in which service is to be effected, with a request for further transmission of the same to the Government of the country in which it is to be served, with the request that service, either personal or in such manner as is consistent with the practice and usage of that country when personal service cannot be

made, be effected and that return be made shewiag how such service has been effected. Rule 31.

(2) Any such official return shall be regarded as proof of the facts therein stated. Return.

(3) The plaintiff's solicitor shall, before the papers are transmitted, pay or secure to the satisfaction of the Clerk of Records and Writs a sufficient sum to answer the fees and charges in connection with such service. *See* Eag. Rule, 71. *New.* Disbursements to be prepaid.

This *Rule* only applies to those countries to which it is expressly made applicable by order of the Chief Justice of Ontario. No order has so far been made, and therefore the previous *Rules* apply to all foreign countries. The Eng. Rule 71 on which this *Rule* is based has been made applicable to Germany, Russia, France, Spain, and Belgium.

31. Where in any civil or commercial matter pending before a Court or Tribuaal of a foreign couatry, a letter of request from such Court or Tribunal for service oa any person in Ontario of any proc ess or citation in such matter, is transmitted to the Supreme Court for Ontario, the following procedure shall be adopted:— Service of process of foreign Court in Ontario.

(1) The letter of request for service shall be accompanied by a traaslation thereof ia the Eaglish language, and by two copies of the process or citation to be served, and two copies thereof in the English laagnage. Letters of request.

(2) Service of the process or citation shall, by a direction of a Judge, be effected by any Sheriff or his authorized agent. Service, how to be effected.

(3) Sach service shall be effected by delivering to and leaviag with the person to be served one copy of the process to be served and one copy of the translation thereof, or may be effected in such other manner as aay be directed by the letter of request.

(4) After service has been effected the process shall be returaed to the Clerk of the Supreme Court, together with the evidence of service by affidavit of the person effecting the service, sworn before a Notary Public and verified by his seal, and particulars of charges for the cost of effecting such service. Proof of service.

(5) The Clerk of the Supreme Court for Oatario sball return the letter of request for service, together with the evideace of service, with a certificate appended thereto, Return of process.

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duly sealed with the seal of the said Court. Such certificate shall be in accordance with Form No. 16.

(6) Nothing in this Rule shall prevent service from being effected in any other manner in which it may now be made. C.R. 1320.

This *Rule* prescribes the procedure to be followed for serving the process of a foreign Court in Ontario, and does not in any way affect, or relate to, proceedings in the Supreme Court of Ontario.

Among the officers enumerated in The Jud. Act, s. 76, there is no officer styled "Clerk of the Supreme Court."

Taking evidence for use in foreign Courts.

The following is an extract from a circular letter addressed by the Secretary of State to Colonial authorities, in reference to the taking of evidence in Ontario for use in foreign Courts:—

"2. The following are the general principles which I am advised should be borne in mind. When an application for the taking of evidence is received with respect to a civil or commercial case pending before a foreign tribunal, the matter would not appear to be one in which the Colonial authorities should intervene, beyond calling the attention of the Consul, or other person making the application, to the provisions of the Act 19 and 20 Vict., cap. 113, and informing him that he, or some other person duly authorized by the foreign tribunal, should apply directly to the Court for the required evidence to be taken; except where there is a treaty obligation to a contrary effect, the same course should be followed in cases where a criminal matter is pending, as the above-cited Act is extended to criminal cases by s. 24 of *The Extradition Act*, 1870 (33 and 34 Vict., cap. 52). The expression 'Criminal matter pending' is understood to mean a matter or proceeding in which a specific charge has been brought against some person or persons of having committed a criminal act, and which is actually pending before a Court or tribunal."

(vi) *Indorsement of Claim.*

Indorsement of claim.

32. Upon every writ the plaintiff shall indorse a concise statement of his claim. It shall not be essential to set forth the precise ground of complaint, or the precise remedy or relief sought. (*See* Form No. 4). C.R. 137.

Indorsements under *Rule* 5 (1) are compulsory, as also are those under *Rule* 460, in the cases therein provided for. Indorsements under *Rule* 33 are optional.

See Eng. (1883) RR. 12 and 13. The object of the indorsement is to identify the claim to which the action relates: one advantage of this being to facilitate a settlement without the action going further. In some cases the indorsement will take the place of a pleading: see *Rules* 39, 111, etc.

Though the plaintiff's precise ground of complaint, or the precise remedy or relief claimed, need not be set forth under this *Rule*, still a claim for an injunction, or receiver, should be indorsed, where the obtaining of either is a substantial object of the action: see notes to *Rule* 5 (1), and *Colebourne* v. *Colebourne*, there cited.

It is also to be observed that unless the claim of the plaintiff is precisely stated no interlocutory judgment can be signed for default of appearance: see *Rule* 39 (2). Rule 33.

As to amendment of the indorsement on the writ: see notes to *Rule* 183.

An amendment of the indorsement by increasing the amount claimed was allowed after judgment: *The Dictator*, 1892, P. 64; 66 L. T. 863; and see *Wyatt* v. *Rosherville*, 2 T. L. R. 282; *Modera* v. *Modera*, 10 T. L. R. 69; *Wilde* v. *Crowe*, 10 C. P. 406, 412; *Robinson* v. *Hatt*, 1 Ont. 265; *Smith* v. *Goldie*, 11 P. R. 24; *Rowland* v. *Bennett*, 12 P. R. 667; but when, without any such amendment, judgment was signed for damages assessed at a greater amount than was claimed, it was set side: *Chattell* v. *Daily Mail*, 18 T. L. R. 165. Amendment of indorsement.

Where a plaintiff seeks to enforce a claim against the separate estate of a married woman, the writ should be indorsed with a claim for that relief, though an amendment may be allowed where such indorsement has been omitted: see the remarks in *McNab* v. *Macdonnell*, 15 P. R. 17; referring to *Nesbitt* v. *Armstrong*, 14 P. R. 366; *Sweetland* v. *Neville*, 21 Ont. 412; see also other cases in notes to *Rule* 57.

Where a husband is sued as trustee of separate estate of his wife as well as in his personal capacity, the claim against him as such trustee should be made expressly in the indorsement: *Dixon* v. *Dougan*, 8 L. R. Ir. 211.

Lis Pendens.—As to the registration of a certificate of *lis pendens*: see Ths Jud. Act, s. 36, and notes, *supra*, pp. 200-203.

(vii) *Special Indorsements.*

Special indorsements.

33.—(1) The writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest, and whether the interest be payable by way of damages or otherwise), arising—

(*a*) Upon a contract, express or implied (as for instance on a bill of exchange, promissory note, cheque, or other simple contract debt); or

(*b*) On a bond or contract under seal for payment of a liquidated sum; or on a judgment; or

(*c*) On a statute where the amount sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(*d*) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

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(*e*) On a trust; and also

(*f*) In actions for the recovery of land (with or without a claim for rent or mesne profits); and

(*g*) In actions for the recovery of chattels. C.R. 138.

(*h*) In actions for foreclosure or sale. *New.*

(2) The writ in such case shall be in accordance with Form No. 5.

See Eng. (1883) R. 10.

Clauses (*g*) and (*h*) are not in the Eng. Rule, and (*g*) was first introduced in C. R. 138.

Sub-sect. 2 refers to Form 5 as applicable to all the cases mentioned in sub-sect. 1; but a reference to that Form will shew that it does not include the indorsements in actions for foreclosure or sale; these are to be found in Form 4.

The use of this indorsement is optional; the chief advantage in using it is that it will entitle the plaintiff to final judgment in case of default of appearance, and even notwithstanding appearance, unless the defendant can satisfy a Judge that he has a defence or ought to be allowed to defend: see *Rule* 57; and where the plaintiff's claim is properly the subject of a special indorsement under this *Rule* he may not be entitled to any extra costs occasioned by his omitting so to indorse his writ: see *Rule* 667.

Special indorsements of money demands.

Special Indorsement.—For forms of special indorsement, see Forms Nos. 4, 5; H. & L. Forms Nos. 39, 57, 58. Such forms must be substantially followed to entitle plaintiff to judgment under *Rules* 37 or 57, but a merely formal difference will not prejudice: *per* Archibald, J., *Anon*, W. N. 1876, 53.

As the object of the special indorsement is to give the defendant an opportunity of avoiding further proceedings by payment of the debt, as well as to entitle the plaintiff to a summary remedy, the indorsement must give sufficient particulars to enable the defendant to satisfy his mind as to whether he ought to pay, or resist: *Walker* v. *Hicks*, 3 Q. B. D. 8; and if it gives sufficiently specified particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, it is a good special indorsement: *Bickers* v. *Speight*, 22 Q. B. D. 7.

The indorsement may be sufficient though not so full as a statement of claims see *Satchwell* v. *Clark*, 66 L. T. 641; but it must be sufficient to show a cause of action: see *Fruhauf* v. *Grosvenor*, 67 L. T. 350; 8 T. L. R. 744.

It cannot be supplemented by affidavits: see notes to *Rule* 57.

In *Anon*, W. N. 1875, p. 220, Lush, J., said that it could not be intended that a list of items, extending perhaps over three or four years, should be indorsed on the writ. In an action for the price of goods sold, the dates and amounts of consignments were held necessary: *Porpaite* v. *Dickinson*, 38 L. T. 178; 26 W. R. 479.

A claim for arrears of alimony, and alimony *pendente lite*, payable under an order or judgment is a claim for "a debt or liquidated demand in money" within this *Rule*: *Robertson* v. *Robertson*, 16 O. L. R. 170; but see *contra Bailey* v. *Bailey*, 13 Q. B. D. 855; *Robins* v. *Robins*, 1907, 2 K. B. 13; 96 L. T. 787. A claim for a sum in dispute and requiring assessment or valuation, as a claim by lessor against lessee for amount of dilapidation to premises leased; is not a debt or liquidated demand within the *Rule*: *Clarke* v. *Berger*, 36 W. R. 809; nor a claim for quarterly payments of an annuity secured by a bond for a penal sum, as breaches have to be assigned: *Tuther* v. *Caralampi*, 21 Q. B. D. 414; nor is a claim on a bond conditioned for payment of a sum of money by instalments with interest in the meantime on the unpaid principal, where only some of the instalments are overdue: *Star Life, etc.*, v. *Southgate*, 18 P. R. 151; nor a claim on a bond given as security for costs: *Appleby* v. *Turner*, 19 P. R. 145; but in an action on a common money bond, where only one breach can be assigned, and the penal sum is not for the performance of several covenants, a special indorsement can be framed, *e.g.*, on a bond conditioned for the payment of a sum certain on a day certain: *Gerrard* v. *Clowes*, 1892, 2 Q. B. 11, 67 L. T. 204. Rule 33.

A claim for damages against an over-holding tenant for double the yearly value of the land, under *The Landlord and Tenant Act* (R. S. O. c. 155) s. 57, is an unliquidated claim: *Magann* v. *Ferguson*, 29 Ont. 235. Overholding tenant.

A claim for unliquidated damages other than interest, whether arising out of contract or tort, even though the amount of damages be fixed and definite, cannot be specially indorsed: *Knight* v. *Abbott*, 10 Q. B. D. 11; nor a claim by an unpaid vendor to recover possession of the land sold, and also a money demand: *Spears* v. *Fleming*, 19 P. R. 127; nor a claim to recover alleged overpayments made under a contract, on the ground that it has not been carried out by the opposite party, where the amount of the overpayments has not been ascertained or settled between the parties: *McIntyre* v. *Munn*, 6 O. L. R. 290; nor a claim by a vendor for a balance of purchase money under a contract, on the ground that he had shown, and was ready to show title, and was willing to convey: *Leader* v. *Tod-Heatley*, 1891, W. N. 38; *Hood* v. *Martin*, 9 P. R. 313. Such a claim is not a liquidated demand, but only for damages: *Baird* v. *Pim*, 7 M. & W. 474. Unliquidated damages.

A claim on a bond for a penal sum to secure payment of money by instalments cannot be specially indorsed: *Star Life, etc.*, v. *Southgate*, 18 P. R. 151; but a bond to secure payment of a sum as liquidated damages may be specially indorsed; thus a bond conditioned to obey an injunction restraining defendant from committing trespasses of various kinds was held to depend upon one event only, viz., the breach of the injunction, and that the sum secured by it was a liquidated sum which might therefore be specially indorsed: *Strickland v. Williams*, 1899, 1 Q. B. 382. Bond.

A special indorsement within *Rule* 33 may be framed upon a covenant for payment in a mortgage, where foreclosure or sale is not also claimed; but the particular covenant which makes the money payable (*e.g.*, by default in payment of interest), must be sufficiently stated in the indorsement, also the agreement to pay interest, if interest is claimed, under the terms of the mortgage: *Munro* v. *Pike*, 15 P. R. 164. But where foreclosure or sale is also asked, the writ must be indorsed under *Rule* 465, and not under this *Rule*: *Canadian Bank of Commerce* v. *Bricker*, 1 C. L. T. 729; *Hill* v. *Sidebottom*, 47 L. T. 224. Covenant.

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Implied contract. A claim based on an implied covenant, or equitable obligation to pay, cannot be specially indorsed, or support an application under *Rule* 57: *Davidson* v. *Gard*, 15 P. R. 31.

Foreign judgment. An action upon a foreign judgment is within the *Rule*: *Grant* v. *Easton*, 13 Q. B. D. 302: *Solmes* v. *Stafford*, 18 P. R. 78 (where the foreign judgment is one that can be sued on at all, i.e., where it is a final and conclusive judgment: *Re Henderson*, 37 Ch. D. 244; S. C. *sub nom.*; *Nouvion* v. *Freeman*, 15 App. Cas. 1; 82 L. T. 189, and see *Huntington* v. *Attrill*, 20 Ont. App. Appx. 1; *Dohn* v. *Gillespie*, 33 C. L. J. 304).

Solicitor's bill. A claim on a solicitor's bill though untaxed may be specially indorsed, though the defendant may be entitled to have the bill taxed: *Logos* v. *Grunwaldt*, 1910, 1 K. B. 41; 101 L. T. 820; and see *Smith* v. *Edwardes*, 1888, 22 Q. B. D. 10; 60 L. T. 10: *Re Brockman*, 1909, 2 Ch. 170; 100 L. T. 821.

Married woman. Where a specially indorsed writ is served on a married woman, the judgment to be signed thereon, in default of appearance, or defence, should be in the restricted form. See Form 110; H. & L. Forms Nos. 932, 924. If in absolute form it will be void: *Oxley* v. *Link*, 1914, 2 K. B. 734; 110 L. T. 248; even though signed against her by consent: *Re Hamilton* v. *Perry*, 24 O. L. R. 38.

Place of trial. A place of trial should be named in a special indorsement as no statement of claim may be delivered; and when a place of trial is so named it cannot be changed by the plaintiff by naming a new one in a subsequent statement of claim: *Segsworth* v. *McKinnon*, 19 P. R. 178; but this rule does not apply to writs not specially indorsed: *St. Mary's* v. *Webb*, 18 O. L. R. 336.

Interest. **Interest.**—Formerly interest could only be claimed by "special indorsement" where it was payable under a contract, or by a statute: *Gold Ores Reduction Co.* v. *Parr*, 1892, 2 Q. B. 14; *Wilks* v. *Wood*, 1892, 1 Q. B. 684; 88 L. T. 520; *Cosselman* v. *Borrie*, 14 P. R. 567; *Huyck* v. *Wilson*, 18 P. R. 44: and if a contract was relied on, it must have appeared from the indorsement itself, and any defect in that respect could not be supplied by affidavit on a motion for summary judgment: *Gold Ores, etc.* v. *Parr*, *supra*; and see *Clarkson* v. *Dixon*, 17 P. R. 92; but now the first clause of the *Rule* is so framed as to enable a claim for interest, though payable only by way of damages, to be specially indorsed.

In *Richardson* v. *Molloy*, before Falconbridge, J., on 5th Aug., 1898, an indorsement respecting a merchant's account with the addition of "And for interest thereon $12." was held to be sufficient within this *Rule*, to enable the plaintiff to sign judgment for the interest, under *Rule* 37.

The fact that an account is stated does not entitle the creditor to interest as of course: *George* v. *Green*, 13 O. L. R. 189; 14 O. L. R. 578; 42 S. C. R. 219; but a claim for interest thereon may now be specially indorsed: see *Rule* 33 (1).

See also notes to *Rule* 57.

Interest on foreign judgment. Interest on a foreign judgment is recoverable as unliquidated damages: *Hollender* v *Foulkes*, 18 P. R. 175, 204; and *Solmes* v. *Stafford*, *ib.* 78, and formerly could not, but under the present *Rule* may be "specially indorsed." Under ss. 134 and 186 of *The Bills of Exchange Act* (R. S. C. c. 119), interest accruing from the maturity of a

bill or note, and the "expense of noting" or protesting: *London and Universal Bank* v. *Clancarty*, 1892, 1 Q. B. 689; *Lawrence* v. *Willcocks*, *ib.* 696; *McVicar* v. *McLaughlin*, 16 P. R. 450; *Clarkson* v. *Dwan*, 17 P. R. 92; are recoverable as liquidated damages and may be specially indorsed, and expenses of noting and protesting are sufficiently expressed by the words "bank charges": *Dando* v. *Boden*, 1893, 1 Q. B. 318. Rule 33.

Where more than the statutory rate of interest is claimed on a promissory note, the ground on which the claim is based should be specifically stated in the indorsement: see *Clarkson* v. *Dwan*, 17 P. R. 92.

Indorsements Insufficient.—The following indorsements have been held to be insufficient in point of form and particularity: Insufficient indorsements.

(1) "The plaintiff's claim is £399 9s., 7d., the defendant's share or contribution to the payment of certain bills of exchange and promissory notes in which he and the plaintiff were jointly liable, and which bills and notes have been taken up by the plaintiffs": *Walker* v. *Hicks*, 3 Q. B. D. 8.

(2) A claim on a dishonored cheque, where the indorsement did not aver that notice of dishonour had been given to the drawer: *Fruhauf* v. *Grosvenor*, 8 T. L. R. 744.

(3) "The plaintiff's claim is £399 9s,. 7d., being seventy-five per cent. of the invoice price of goods supplied by the plaintiff to the defendant under an agreement" (giving its date and nature).

"The plaintiffs also claim to recover from the defendants the following bills of exchange, drawn by the plaintiffs and payable to the order of the defendants, being bills drawn for the price of goods supplied by the plaintiffs to the defendants as aforesaid." A list of bills was then set out in the indorsement, giving their dates and amounts: *Parpaite* v. *Dickinson*, 38 L. T. 178; 26 W. R. 479.

(4) The plaintiff's claim is for $420.37, balance of work, etc., less credits as agreed upon. The plaintiff claims interest on $420.37 until judgment: *Fitzsimmons* v. *Wilson*, 4 C. L. T. 91.

(5) The plaintiff's claim is for $213.90, balance due for sawing wood by the plaintiff for the defendant: *Villeneuve* v. *Wait*, 12 P. R. 505.

(6) The plaintiff's claim is against the defendants as makers of a joint and several promisanry note, dated 11th April, 1892, £36 6s., 0d. and payable by certain instalments in respect whereof default has been made: Particulars.—To balance of moneys owing upon the said promissory note £24 6s.: *Manchester & D. Bank* v. *Watton*, 68 L. T. 167; 5 R. 147.

(7) Where a plaintiff had brought an action for the foreclosure of a mortgage, and had obtained therein the appointment of a receiver, it was held that a subsequent action on the covenant to recover interest payable under the same mortgage, the interest claimed was not a liquidated sum having regard to the order for the receipt of rents by the receiver, and therefore could not be "specially indorsed": *Poulett* v. *Hill*, 1893, 1 Ch. 277; 68 L. T. 476.

(8) "The plaintiff's claim is for the price of goods supplied. The following are the particulars:—$621.06 for money payable by the defendant to the plaintiff for goods bargained and sold and delivered by the plaintiff to the defendant, and interest thereon from 25th July, 1882": *Lucas* v. *Ross*, 9 P. R. 251. No reasons are given

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for holding this to be insufficient, but the omission of the date of sale and the claim of interest would appear to have rendered it bad under the *Rule* as it then stood.

(9) A claim for $404 for services rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items, was held to be not a special indorsement: *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15.

In some of the foregoing cases though the indorsements were adjudged to be insufficient, the claims were nevertheless proper subjects for a special indorsement, if the indorsement had been properly framed.

Claims for damages for breach of contract are not within the *Rule*: *Knight* v. *Abbott*, 1882, 10 Q. B. D. 11; *e.g.*, a claim to enforce an agreement to repurchase shares at a definite sum.

Liquidated demand.

"Liquidated Demand."—A claim is said to be liquidated where it is a matter of calculation from fixed data; when the amount is a matter of assessment to be made according to circumstances and the opinion of the assessor, it is unliquidated: see *Williamson* v. *Playfair*, 5 O. W. N. 354.

Claims on bills of exchange and promissory notes are within the *Rule*, but a claim for "exchange" in respect of a foreign bill is a claim for unliquidated damages: *Re Gillespie*, 16 Q. B. D. 702; 1886, 18 Q. B. D. 286, and is not a claim which can be specially indorsed.

As to what are liquidated claims, or claims ascertained by the signature of the party, see *Kreutziger* v. *Brox*, 32 Ont. 418, following *Kinsey* v. *Roche*, 8 P. R. 515; *McDermid* v. *McDermid*, 15 Ont. App. 287; but see *contra*, *Re Graham* v. *Tomlinson*, 12 P. R. 367; *Thompson* v. *Pearson*, 18 P. R. 308, 420; *Ostrom* v. *Benjamin* (2), 21 Ont. App. 467; *McCormick H. M. Co.* v. *Warnica*, 3 O. L. R. 427; *McLaughlin* v. *Schaefer*, 13 Ont. App. 253.

The plaintiff sued for $228.20, the balance of a claim for $1,828.20 worth of butter at 22c. per lb., on which $1,600 had been paid, and obtained a verdict for $228.20. It was held that the amount was liquidated by the act of the parties within R. S. O. 1877, c. 43, s. 19 (2) *Durnin* v. *McLean*, 10 P. R. 295; and see *Lovell* v. *Phillips*, 5 O. L. R. 235. Where the suit was to recover "$272.03, the return of moneys received by defendant belonging to plaintiff, being the proceeds from sales of goods in plaintiff's shop, as follows—etc.," it was held that the sum was not liquidated: *Robb* v. *Murray*, 16 Ont. App. 503; so also a claim for work and labour and materials to the amount of $197.01, and $14.54 for interest, was held not to be liquidated: *Malcolm* v. *Leys*, 15 P. R. 75; and a sale according to a price list was held not to make the claim a liquidated one: *Evans* v. *Chandler*, 19 P. R. 160, *sed quære*, nor a claim for commission on the sale of land: *Re McKay* v. *Martin*, 21 Ont. 104.

A claim for a specified sum for work, labour and attendance as a medical man, has been held to be a liquidated demand, and capable of being made the subject of a special indorsement, entitling the plaintiff to obtain final judgment on default of appearance: *Kilgariff* v. *McGrane*, 8 L. R. Ir. 354.

Indorsements held sufficient.

Indorsements Sufficient.—The following indorsements have been held to be sufficient:—

(1) "The plaintiff's claim is £36 5*s*. for the balance of goods sold." *Anon.*, W. N. 1875, 220; 1 Chart. Ch. Ca. 44. See, however, *Parpaite* v. *Dickinson*, *supra*, p. 373, as to effect of absence of dates.

(2) "The plaintiff's claim is £49 5*s.* 8*d.*; the following ars ths particulars: Rule 33.

		£	*s.*	d.	
1879. Feb. 14	To goods	0	16	1	
15	To goods	4	13	6	
etc.	etc.	etc.			
May 21	Brit. Com.				
	Bank draft returned	20	0	0	
	Notary charges on same	0	1	6	
					£90 0 8

		£	*s.*	*d.*	
Cr. March 8	By Brit. Com.				
	Bank draft	9	15	0	
April 23	By Cash	10	0	0	
April 29	By Brit. Com.	20	0	0	
May 23	By Cash	10	0	0	
					49 15 0
					£49 5 8

and £2 15*s.* for costs": *Smith* v. *Wilson*, 4 C. P. D. 392; 5 C. P. D. 25.

(3) "Tn· plaintiff's claim is for £116 0*s.* 10*d.*, being the halance due to him from the defendant, for moneys paid at ths said defendant's request, and on his behalf, for the purchass of certain stocks and shares, between the 3rd June, 1879, and the 31st August, 1879, an secount of which has heen rendered and exceeds three folios": *Ashton* v. *Hurwitz*, W. N. 1879, 194. Ths ground of ths decision was that such an indorsement wonld have heen sufficient under C. L. P. Act: see R. S. O. 1877, c. 50, s. 19, and the schedule, where the form given states that an account previously delivered may be referred to by its dste: see also *Bickers* v. *Speight*, *infra*.

(4) "Ths plaintiff's claim is £130 due him from the defendant, under sn assignment, under the hand of one M. J., and dated July 14, 1888; particulars, whereof are as follows: I do herehy authorize and request you to pay to Mr. E. Bickers, of, etc., the sum of £130, being the amount dus or to become due from you to me, as appears by an I. O. U. signed hy you, and dated Feh. 4, 1885, and his receipt for the same shall he a good discharge": *Bickers* v. *Speight*, 22 Q. B. D. 7.

(5) "Ths plaintiffs claim $2,000, heing the amount of the defendants' overdrawn account with the plaintiffs' hank on the 18th September, 1882": *Imp. Bank* v. *Britton*, 9 P. R. 274. A similar indorsement omitting the date of the overdraft wns held to he insufficient: *Ontario Bank* v. *Burke*, 10 P. R. 648.

(8) Claim for payment of a legacy of £2,750, "which hss remained nnpsid hy resson of a hreach of trust" with interest, the interest being payahle nnder the will and not as damages: *Hamilton* v. *Brogden*, 60 L. J. Chy. 88.

(7) Clsim for ths amount due under a covenant in a mortgage in an action by sn assignee, without averring ihat the ortmgagor had been notified of ths assignment: *Satchwell* v. *Clark*, 66 L. T. 641; 8 T. L. R. 592.

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(8) "To 12 Debentures of Municipality of Morris, in the Province of Manitoba, which debentures are dated . . . and numbered . . . and were issued under a By-law passed . . . being By-law No. 5 of said municipality, which said By-law, and the coupons attached thereto, were legalized and confirmed by the Act of the Manitoba Legislature, 46 & 47 Vict. c. 70. The said debentures fall due respectively, Nos. 10, 11 and 12, on . . . To interest on debentures 10, 11 and 12 since their due date to the issue of this writ, at 6 per cent.: *London & Canadian L. & I. Co.* v. *Rural Mun. of Morris*, 11 C. L. T. 20.

(9) Claim by a surety for a debt and costs paid by him for the principal debtor: *Borland* v. *Curry*, 4 L. R. Ir. 273.

(10) Claim by a *cestui que trust* against his trustee for money payable under an express trust: *Wilson* v. *Dundas*, W. N. 1875, 232.

(11) Claim for overdue instalments payable under a contract for building a ship, in course of construction, with interest thereon; under an agreement to pay the same when the work had reached a certain stage: *Workman* v. *Lloyd Brazileiro*, 1908, 1 K. B. 968; 99 L. T. 477.

(12) Claim on an agreement by defendant to pay £210 to the plaintiff, if he would deliver to defendant's husband certain bills, was held to be good, notwithstanding that it contained no averment of performance by plaintiff of the conditions precedent: *Bradley* v. *Chamberlyn*, 1893, 1 Q. B. 439; 68 L. T. 413.

(13) Claim for arrears of alimony due under a foreign judgment: *Robertson* v. *Robertson*, 16 O. L. R. 170.

Special indorsement in actions to recover land.

Actions to Recover Land.—The power to specially indorse a writ in an action for the recovery of land now extends to all actions of ejectment, and is not now limited as it was by the former Con. Rule 245, to certain cases between landlord and tenant. In *Jarred* v. *Edwardes*, 92 L. T. Jour. 8, it was held that the former Con. Rule applied (and *a fortiori* the present *Rule* applies) in the case of a tenancy at will.

The indorsement of a claim for possession of the mortgaged land in an action for foreclosure was held not to be "a special indorsement" under C. R. 138, so as to enable the plaintiff to apply for judgment under C. R. 603: *Foresters* v. *Pegg*, 19 P. R. 80; nor *semble*, is a claim by an unpaid vendor of land for possession: *Spears* v. *Fleming*, 19 P. R. 127.

But a claim by a mortgagee "to recover possession of" land (describing it) and "for an order that defendant do forthwith deliver up possession thereof" where that was the only claim, was held to be a sufficient indorsement within *Rule* 33: *Central Trust Co. of N. Y.* v. *Algoma Steel Co.*, 6 O. L. R. 464.

Where, in an action by a landlord for possession, the copy of writ served omitted the length of the tenant's term, which was in the indorsement on the original writ, it was held on a motion under C. R. 603 for final judgment that sufficient information was given by the copy: *Hanmer* v. *Clifton*, 1894, 1 Q. B. 238.

Amendment.

Amendment of Indorsement.—The particulars of claim indorsed on the writ may, by leave, be amended, even though the writ has been served out of the jurisdiction, so long as no claim is introduced by

amendment, which could not have been properly indorsed on the writ originally: *Holland* v. *Leslie*, 1894, 2 Q. B. 450; 71 L. T. 33; *Hogaboom* v. *MacCulloch*, 17 P. R. 377. Rule 34.

Where claims are added by amendment, the order allowing the amendment may provide that the action as to such added claims shall be deemed to have been commenced only as from the date of the amendment: *Holland* v. *Leslie*, *supra*.

The place of trial named in the indorsement of a specially indorsed writ cannot be altered without leave in a subsequently delivered statement of claim: *Segsworth* v. *McKinnon*, 17 P. R. 178; but where the writ is not specially indorsed the plea of trial if any named in the writ may be changed: *St. Mary's* v. *Webb*, 18 O. L. R. 336.

Claim for Costs.—A specially indorsed writ must include a claim for costs: see *Rule* 773, such costs may be taxed even after payment: *Rule* 659. Claim for costs.

34. Where the plaintiff in an action of dower claims damages for detention of her dower, the indorsement shall contain a statement that the plaintiff claims damages for the detention of her dower, from some day to be stated. C.R. 142. Indorsement in action of dower.

Where the plaintiff's husband did not die seised of the land out of which dower is claimed, no damages for detention are recoverable: *Lowe* v. *Armstrong*, 11 Gr. 517, even though a demand for dower may have been made by the plaintiff before action: *Morgan* v. *Morgan*, 15 Ont. 194. See further as to damages in actions for dower: *Wallace* v. *Moore*, 18 Gr. 560; *Ryan* v. *Fish*, 4 Ont. 335, and notes to *Rule* 51.

CHAPTER III.

DEFAULT OF APPEARANCE.

Non-appearing defendant.

35. Except where otherwise provided or otherwise ordered a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action. C.R. 573.

In case of default of defence: see *Rule* 354, notwithstanding that *Rule*, a defendant who had appeared would be entitled to notice of motion for judgment.

A defendant apparently is entitled to notice of assessment of damages, notwithstanding this *Rule*: see *Rule* 247.

Where a reference is directed, a defendant who has not appeared is entitled to notice of the first proceeding on the reference: *Rule* 403. Generally speaking, a defendant is entitled to notice of proceedings to commit him for contempt, and, usually, personal service of the notice is necessary. Where any other proceedings are required to be served on a non-appearing defendant: see *Rule* 200.

As to re-service of amended writ on a defendant who has not appeared: see notes to *Rule* 183 *infra*.

A defendant who has not appeared is, nevertheless, entitled to notice of an application to appoint a receiver by way of equitable execution: *Tilling* v. *Blythe*, 1899, 1 Q. B. 557; 80 L. T. 44; and so also of an application to discontinue against a co-defendant sued as a joint tort feasor: *Jennings* v. *Cripps* (Div'l Court, 14th Nov., 1904). But notice of filing a report need not be served on a defendant who has not appeared, or taken any part in the reference: *Toronto General Trusts Corp.* v. *Craig*, 2 O. L. R. 238.

Proceedings in default of appearance.

36. Where a defendant fails to appear the plaintiff before signing judgment or noting the pleadings closed, shall file an affidavit of service of the writ or the notice in lieu thereof, [or the undertaking of the defendant's solicitor accepting service and agreeing to enter an appearance, with an affidavit verifying the undertaking as the case may be]. C.R. 574.

This *Rule* corresponds with the Eng. (1883) R. 102, except that the clause in brackets is not in the latter. *Rule* 15 provides for a solicitor's acceptance of service, and undertaking to appear. *Rule* 63 prescribes the procedure in case of default of appearance to a writ indorsed with a claim for an account: and see *Rule* 37, as to specially indorsed writs.

Where notice of writ served.

The substitution of notice in lieu of service of the writ, is authorized in cases where the Court sees fit to allow that mode of service, whenever the plaintiff is unable to effect prompt personal service:

Rule 16, and notice of the writ, and not the writ itself, is required to be served where the defendant is served out of the jurisdiction and is not a British subject: see *Rule* 7. Rule 37.

Where a notice was served in lieu of a writ, an affidavit stating that defendant had been served with "a notice in writing, a true copy of which is hereto annexed," was held sufficient: *Bustros* v. *Bustros*, 14 Ch. D. 849. In cases, however, to which *Rule* 17 applies, the affidavit of service should state the day on which the indorsement of the time of service was made.

The writ should be annexed to the affidavit of service in accordance with the former practice: *The Eppos*, 32 W. R. 154; 49 L. T. 604. Affidavit of service.

This *Rule* must be complied with, and an affidavit of service of the writ filed, before a statement of claim can be served on default of appearance: *Appleby* v. *Turner*, 19 P. R. 145, 175, and see *Lovell* v. *Taylor*, 5 O. W. R. 525.

As this *Rule* requires an affidavit it has been held that the Court will not accept a certificate, though British consuls, in the country to which the defendant belonged, had instructions not to administer oaths to subjects of that country: *Ford* v. *Miescke*, 16 Q. B. D. 57.

Ordinarily, a solicitor's signature does not need verification in proceedings in an action, but in the case of an acceptance of service of a writ of summons, before any proceedings can be taken on it, this *Rule* requires it to be verified by affidavit. The wording of this *Rule* indicates that in default of a solicitor complying with his undertaking to appear, judgment may be signed in default of appearance, if the case be one in which that proceeding may be taken; or the plaintiff may file a statement of claim and in default of defence note the pleadings closed, without compelling the solicitor to comply with the undertaking. Before this course is adopted, however, it would be well to be assured that the solicitor was authorized to act for the defendant, because if it should turn out that he was unauthorized to accept service, the whole proceedings might prove nugatory, for although a defendant is bound by an unauthorized appearance, where he has been personally served; he is not bound by the unauthorized act of a solicitor, if he has not been personally served and he promptly moves against it as soon as he has knowledge of it: see notes to *Rule* 13. Solicitor's undertaking to be verified.

37. Where the writ is specially indorsed for a debt or liquidated demand in money, and any defendant fails to appear, the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may, as against such defendant, sign final judgment for any sum not exceeding the amount for which the writ is so specially indorsed, together with interest as claimed to the date of the judgment, and for his costs, without prejudice to his right to proceed with the action against any other defendant, and as to any other claims indorsed. C.R. 575. Where writ is specially indorsed for a debt or liquidated demand.

See Eng. (1883) R. 103, which, however, does not admit of a judgment being signed where there is any other claim indorsed on the writ besides the special indorsement.

Rule 37.

"Specially Indorsed."—See notes to *Rules* 33 and 57.

Under the *Rules*, claims properly the subject of a special indorsement may be combined with others which are not, and, in default of appearance, final judgment may be signed for the former, and the action may be proceeded with as to the other claims.

The present *Rules* therefore override a number of decisions settling the former practice: see *Hollender* v. *Fjoulkes*, 16 P. R. 175; *Solmes* v. *Stafford*, *Ib.*, 264; *McVicar* v. *McLaughlin*, *Ib.*, 450, and cases there referred to. The *Rule* was applied in *Huyck* v. *Wilson*, 18 P. R. 44.

The result of this *Rule* has been held to be that where a judgment is signed for default of appearance on a specially indorsed writ, for more than is properly the subject of a "special indorsement" the judgment is not absolutely null and void as formerly, but is merely irregular: see *George* v. *Green*, 13 O. L. R. 189; 14 O. L. R. 578; 42 S. C. R. 219; and see *Armitage* v. *Parsons*, 1908, 2 K. B. 510; 99 L. T. 329; but see *Muir* v. *Jenks*, 1913, 2 K. B. 412; 108 L. T. 747.

It may be observed, however, that the *Rule* merely authorizes a final judgment for "any sum not exceeding the amount for which the writ is so specially indorsed," and a final judgment for any sum which is not properly the subject of a special indorsement is clearly unwarranted by the *Rules*.

Where judgment is signed purporting to be under this *Rule*, but the writ is not specially indorsed, the judgment is a nullity: *Hoffmon* v. *Creror*, 18 P. R. 473; 19 P. R. 15; *Appleby* v. *Turner*, 19 P. R. 145, 175: *Stor Life* v. *Southgote*, 18 P. R. 151.

Judgment by Default.—Judgment can only be signed for the amount due at the time the writ was issued, not for claims which had not then matured: *Pork* v. *Patton*, 3 C. L. T. 264; but see *Hughes* v. *Justin* and *Muir* v. *Jenks*, *infro*.

In an action for foreclosure, and on the covenant for payment, judgment was signed on a claim on the covenant under this *Rule*: *Bisset* v. *Jones*, 32 Ch. D. 635; but the practice in Ontario is not to sign a separate judgment on the covenant, but to sign one judgment which awards relief on the covenant, and also provides for redemption or sale, or foreclosure.

Judgment may be signed by default of appearance against a married woman, when the writ is specially indorsed, and, in the case of contracts entered into before 13th April, 1897, the special indorsement should allege that she had, when she made the contract, and still has, separate estate: *Nesbitt* v. *Armstrong*, 14 P. R. 366; and see *Tetley* v. *Griffith*, 36 W. R. 96; 57 L. T. 673; but that allegation is not necessary in the case of contracts made after 13th April, 1897: see *The Married Women's Property Act* (R. S. O. c. 149), ss. 4, 5.

Where several defendants.

Where there are several defendants jointly liable, some of whom appear, and some of whom do not, judgment may be signed under this *Rule* against the latter without prejudice to the plaintiff's claim against the others: and see *Montgomery* v. *Ferris*, 20 L. R. Ir. 282; *Rice* v. *Dillon*, 28 L. R. Ir. 376; and *Dueber Watch Case Mfg. Co.* v. *Taggart*, 26 Ont. App. 295; 30 S. C. R. 373. But if the plaintiff sues and recovers judgment against one of two joint debtors, without making the other a party, the latter is discharged: *Hammond* v. *Schofield*, 1891, 1 Q. B. 453; *Toronto Dental Mfg. Co.* v. *McLoren*, 14 P. R.

89; such a judgment will not be vacated on the plaintiff's application in order to join the co-debtor, even with the defendant's consent: *Hammond* v. *Schofield*, *supra*, and see *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15. See also note to *Rules* 105, 106, pp. 498-501, and to *Rule* 59, p. 410. Rule 37.

If a plaintiff alleges a joint liability against two defendants, and signs judgment against one, and at the trial only proves a sole liability against the other defendant, he cannot recover against him; so also where defendants are sued as alternatively liable, if the plaintiff enters final judgment against one of them, he cannot thereafter proceed against the other: *Morel* v. *Westmoreland*, 1903, 1 K. B. 64; 1904, A. C. 11; 89 L. T. 702 (a case of husband and wife); *French* v. *Howie*, 1906, 2 K. B. 674; 95 L. T. 274; *Cross* v. *Mathews*, 117 L. T. Jour. 220 (a case of principal and agent). Joint liability.

But where a judgment entered against a person erroneously assumed to be liable, was void under a statute, and was set aside by consent, it was held to be no bar to a subsequent action against other persons liable for the debt: *Keating* v. *Graham*, 26 Ont. 361.

In an action on a promissory note, the plaintiff may sign judgment on default of appearance to a specially indorsed writ, without production of the note: *Oliver* v. *Fryer*, 7 P. R. 325.

Where an action is commenced in a local office, a judgment by default should be entered in the local office: *Chamberlain* v. *Armstrong*, 18 C. L. J. 99, and see *Rules* 531, and 762.

Where the copy of writ served was not an accurate copy, the *teste* being 1880 instead of 1882, this was held not to be a fatal error, and a motion to set aside a judgment signed was refused: *Wesson* v. *Stalker*, 47 L. T. 444.

Where the defendant is a married woman the judgment against her must follow the limited form: see Form No. 110; H. & L. Forms 923, 924, otherwise it will be null and void and not capable of amendment: *Orley* v. *Link*, 1914, 2 K. B. 734; 110 L. T. 248; even though consented to by the defendant: see *Hamilton* v. *Perry*, 24 O. L. R. 38. Married woman.

Execution.—Execution may in all cases be issued forthwith, unless otherwise ordered: see *Rule* 538.

Setting aside Judgment by Default.—See *Rule* 520. Setting aside judgment.

Under R. S. O. 1877, c. 50, s. 64, it was provided that an application to set aside a judgment must be based upon affidavits "accounting for the non-appearance, and disclosing a defence upon the merits." Under the present *Rules* the matter is left at large to the discretion of the Court or Judge; but, no doubt, in practice, the non-appearance will have to be explained, and a defence shewn. The terms commonly imposed have been the payment by the defendant of the costs of the application, pleading without delay, and sometimes bringing money into Court: see Harrison C. L. P. Act (R. S. O. 1877, c. 50), s. 64; Arch. Pr., 13th ed., 790, and 800; and *Smith* v. *Dobbin*, 3 Ex. D. 340. In *Hillyard* v. *Swan*, 12 P. R. 226, the judgment and execution were directed to stand as security. See also *Ontario Bank* v. *Burke*, 16 P. R. 561, 565.

Where the defendant paid the claim sued on, after the writ issued, a judgment subsequently entered for non-appearance, for the amount of the claim and costs, was set aside as irregular: *Hughes* v. *Justin*, Claim paid wholly or in part before judgment.

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1894, 1 Q. B. 667; 70 L. T. 365; and see *Muir* v. *Jenks*, 1913, 2 K. B 412; 108 L. T. 747, where judgment was entered for too much, and plaintiff refused to amend, and it was set aside.

Where service substituted.

Substituted service, when regularly effected, is, for all purposes, equivalent to personal service, and, even though it has in reality never come to the knowledge of the defendant, he will not be let in to defend, as of right: *Watt* v. *Barnett*, 3 Q. B. D. 183, 363. Lapse of time is no bar to an application to set aside a judgment obtained by default, where no irreparable mischief will be done to the plaintiff, and the injury caused by the delay may be compensated for by payment of costs: *Atwood* v. *Chichester*, 3 Q. B. D. 722; see also *Davies* v. *Ballenden*, W. N. 1882, 92; 46 L. T. 797, and notes to *Rules* 520 and 499, but, especially after delay in moving, a judgment regularly signed, will only be set aside on proper terms: sees *McVicar* v. *McLoughlin*, 15 P. R. 454.

Appearance entered but mislaid.

Where an appearance was duly filed, but the appearance was mislaid by the officer and not entered in his book, and in consequence a judgment for default was signed, the judgment was set aside as irregular: *Moore* v. *Simons*, 1 C. L. J. 183; and see *Bank of Montreal* v. *Harrison*, 4 P. R. 331.

Technical defence.

The application will not be granted to give the defendant the advantage of a technical defence: *Forbes* v. *Middleton*, 2 Str. 1242.

Meritorious defences.

The following have been considered meritorious defences: The Statute of Limitations: *Maddocks* v. *Holmes*, 1 B. & P. 228; *McIntyre* v. *The Canada Co.*, 18 Gr. 367; *Seaton* v. *Fenwick*, 7 P. R. 146; and see *Elms* v. *Hedges*, 95 L. T. 145; Usury: *Trust & Loan Company of Canada* v. *Boulton*, 18 Gr. 234; Infancy: *Delafield* v. *Tanner*, 5 Taunt. 836; *Cavallier* v. *Michael*, 17 L. T. 290; that the claim is not one that can be specially indorsed: *Rogers* v. *Hunt*, 10 Ex. 474; want of jurisdiction: *Homelyn* v. *White*, 5 P. R. 120. As to want of stamps: see *Coughill* v. *Clark*, 9 P. R. 471.

A judgment signed for default was set aside after the lapse of two years, on the ground that the covenant sued on, which was contained in a mortgage settled by an officer of the Court, was inserted *per incuriam*: *Brown* v. *Grady*, 31 Ont. 73.

Where writ specially indorsed for recovery of chattels.

38. Where the writ is specially indorsed with a claim for the recovery of chattels, and any defendant fails to appear the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may, as against such defendant, sign final judgment for the recovery of the chattels and his costs without prejudice to his right to proceed with the action against any other defendant and as to any other claims indorsed. C.R. 577.

This provision applies where claims for the recovery of chattels are specially indorsed: see *Rule* 33 (*g*).

It may be a question how far a plaintiff would be entitled to issue execution for the recovery of chattels in the joint possession of several defendants, some of whom appear, and some of whom do not, until he has recovered judgment against all: see *Rules* 41, 2.

For form of judgment: see Form No. 96; H. & L. Forms, No. 848. Rule 39.

In such actions in case of default of defence a similar judgment may be signed: see *Rule* 355.

39.—(1) Where the writ is not specially indorsed but as indorsed includes a claim for the detention of goods and pecuniary damages, or either of them, and any defendant fails to appear, interlocutory judgment may be signed against such defendant, directing an assessment of damages, without prejudice to the right of the plaintiff to proceed against any other defendants, and such damages may, unless otherwise ordered, be assessed, as against such defendant, either before or at the same time as the trial of the action, against any other defendant, or the Court may order that instead of an assessment the value of the goods and amount of damages, or either of them, shall be ascertained by a reference or in any other way. C. R. 578, 579. Where claim is not specially indorsed.

(2) No interlocutory judgment shall be signed for default of appearance, unless the precise cause of action is clearly stated in the indorsement of the writ. *New.*

In such actions, in case of default of defence a similar judgment may be signed: see *Rule* 355.

This *Rule* in effect embodies similar provisions to those in Eng. (1883) RR. 105 and 106, except that under the Eng. Rules interlocutory judgment cannot be signed for the value of the goods or damages, where the writ is indorsed for other claims, such as for example an injunction: see *Port* v. *Griffiths*, 28 Sol. Jour. 339; the same was the case under former Con. Rule 708: *McCallum* v. *McCallum*, 11 P. R. 16.

Under the present *Rule* the plaintiff may sign interlocutory judgment, and proceed with the action as to the claim for an injunction, and to assess damages.

Interlocutory judgment may be entered immediately upon default of appearance; and the indorsement on the writ will govern the inquiry as to damages without any pleading, so far as the claim for the detention of goods is concerned, but as to any other claims it would seem necessary that a statement of claim should be filed.

The old learning on the subject of "conversion" need not be imported into the system introduced by *The Judicature Act*, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them: *Stimson* v. *Block*, 11 Ont. 103.

For a form of interlocutory judgment: see Form No. 97; H. & L. Forms, No. 850, and of judgment in default of appearance after assessment of damages, No. 147; H. & L. Forms, No. 851.

A claim indorsed "for damages for slander" is for pecuniary damages within this *Rule*, there being nothing to shew that the action is brought under section 19 of *The Libel and Slander Act* (R. S. O. Claim for damages.

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c. 71); *Stanley* v. *Litt*, 19 P. R. 101; but whether the *Rule* would apply to an action for libel or slander brought under that section, *quære*: *Ib.*

Specific chattels.

It would seem that, under this *Rule*, where the action is brought for the specific recovery of chattels, the plaintiff may, upon default of appearance, have judgment for the delivery of the chattels; and may then enforce that judgment under *Rule* 544; *Ivory* v. *Cruickshonk*, W. N. 1875, 249; *per* Quain, J., at Chambers.

Vacating judgment.

Where a final, instead of an interlocutory judgment was signed, and was therefore set aside, it was held under the former practice, that the plaintiff was not forthwith entitled to take out and file the order, and sign an interlocutory judgment. The final judgment was held to be not set aside without an entry on the roll, and the defendant, without laches, could not be deprived of the carriage of the order: *Covonagh* v. *Hastings Mutual*, 7 P. R. 111.

No interlocutory judgment for equitable relief.

Where the plaintiff claims equitable relief, *e.g.*, specific performance of a contract, an interlocutory judgment cannot be signed in default of appearance: *Stuart* v. *McVicar*, 18 P. R. 250. In such cases, in default of appearance a statement of claim must be filed, and in default of defence a motion for judgment should be made: *Ib.*

In *Ivory* v. *Cruickshonk*, W. N. 1875, 249, the action was for rent, and for the return of certain chattels; the defendant had failed to appear; it was held that the plaintiff was entitled to have judgment for the rent, and for the return of the goods.

See *Dix* v. *Groom*, in note to *Rule* 355.

Action on bond.

Where the action is on a bond which is subject to 8 & 9 Wm. 3, c. 11 (now section 125, *supra*): see notes to that section, p. 296, *supra*.

Assessment of damages.

Modo of Assessment of Damages.—See the last clause of the *Rule*.

An inquiry was directed before a Master on affidavit evidence in *Macdonald* v. *Antelme*, W. N. 1884, 72; and it would seem that, under *Rule* 39, the Court or a Judge might so order.

Joint tortfeasors.

Where several defendants are sued as joint tortfeasors each is liable for the whole damage and there cannot be separate assessments of damages, or separate judgments, against them for different amounts: *Greenlands* v. *Wilmshurst*, 1913, 3 K. B. 507; and see *Smith* v. *Streatfield*, 1913, 3 K. B. 764. Where in such a case damages were assessed against the defendants separately, it was held that judgment should be entered against all the defendants for the aggregate amount assessed: *Domiens* v. *Modern Socy.*, 27 T. L. R. 164; but see *Copeland-Chatterson Co.* v. *Business Systems*, 11 O. L. R. 292.

Appeal.

Where a Judge at a trial refers it to a Master to assess damages, and judgment is awarded for the damages so to be assessed, *semble*, any motion for a new trial, or a new assessment of damages, must be made to the Appellate Division: see *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, 1913, 2 K. B. 207; 108 L. T. 361; but see *Rules* 400, 502, 503.

Action for dower. Judgment of seisin. Execution Costs.

40.—(1) Where a defendant fails to appear in an action for dower, the plaintiff may sign judgment of seisin forthwith, and sue out a writ of assignment of dower, but she shall not, unless otherwise ordered, be entitled to costs.

(2) Where the plaintiff claims arrears of dower or damages for detention of her dower, the entry of a judgment of seisin and the taking of proceedings for the assignment of her dower thereunder shall not prevent her from proceeding with the action for the recovery of such arrears or damages. C.R. 581.

On motion for judgment on the pleadings where detention and demand were denied, and defendants alleged that they always had been and were ready to assign dower, judgment of seisin was granted, but no damages (or, apparently, costs): *Malone* v. *Malone*, 17 Ont. 101.

See notes to *Rule* 51.

Action for land.

41.—(1) Where an action is for or includes a claim for the recovery of land, and any defendant fails to appear, or if an appearance is entered but the defence is limited to part only, the plaintiff, notwithstanding that the writ may be indorsed with any other claim, may sign judgment against such defendant for possession of the land or of the part thereof to which the defence does not apply. C.R. 582.

This corresponds with the Eng. R. (1883) R. 108, and is in substance the same as the former practice. For form of judgment which may be adapted to meet such cases: see Nos. 91, 92, 93; H. & L. Forms, Nos. 843, 844, 845.

This judgment does not carry costs, without an affidavit being filed to the effect mentioned in *Rule* 43, or an order obtained under that *Rule*.

Execution not to issue until judgment given as to all defendants.

(2) Where judgment by default is signed, but is not signed against all the defendants, a writ of possession shall not be issued unless directed by the Court. C.R. 584.

This *Rule*, although in general terms, appears to be intended to be limited to actions for the recovery of land: see Form No. 117; H. & L. Forms, No. 1125, a similar provision seems necessary in actions for the recovery of chattels in the joint possession of several defendants; but see *Rule* 2.

Assessment of damages in action for land.

42. Where an action is for or includes a claim for the recovery of land, and any defendant fails to appear, and the writ is indorsed with a claim for mesne profits, arrears of rent, or double value (*a*) in respect of the premises claimed or any part of them, or damages for breach of contract, or wrong or injury to the premises claimed, the plaintiff may sign judgment against such defendant

Rule 42.

for possession, and may proceed as to the other claims. C.R. 583.

Corresponding with Eng. (1883) R. 109. The former practice confined this right to the suit of a landlord against a tenant.

A form of judgment which may be adapted to meet such cases will be found in the Form No. 93; H. & L. Forms, No. 845.

Actions to recover dower are specially provided for by *Rule* 40.

(*a*) A landlord, or person entitled in remainder, or reversion, claiming possession against a tenant overholding after notice to quit, is entitled to double value: *The Landlord and Tenant Act* (R. S. O. c. 155), s. 57; and for double rent when the tenant has given the notice: *Ib.*, s. 58.

Execution not to issue till judgment against all defendants.

In such an action as that mentioned in this *Rule*, on default of defence a like judgment may be entered: *Rule* 355. C. R. 592, provided that: Where a judgment is not entered against all the defendants a writ of possession shall not be issued unless directed by the judgment against the defendants who defend, or by the order of the Court or a Judge.

That Rule applied generally to actions for the recovery of land, and prevented a plaintiff from issuing execution to recover possession of the land in question against some defendants, so long as there were others on the record, as against whom he was not entitled to judgment, without first obtaining leave; which leave would, ordinarily, not be granted, so long as the plaintiff's right to possession was in dispute.

Although that Rule has been omitted, it is presumed no change is intended in the practice. In any case, a writ for delivery of possession by A., would not appear to warrant the ejectment of any other person not claiming under A; and see *Rule* 41 (3), *supra*, which is probably intended to have a general application to like cases, and not merely to those within that *Rule*.

A judgment for recovery of land (unlike the former judgment in ejectment) has the same finality as any other judgment: see *Ball* v. *Cothcart*, 16 Ont. 525; *Cochrane* v. *Hamilton Prov.*, 15 Ont. 128.

Where the judgment is for a liquidated sum for arrears of rent, it would seem to be final in the first instance, and not interlocutory: see *Rule* 37.

Mesne profits.

Where mesne profits were claimed on a specially indorsed writ in an action for the recovery of land, on a motion for judgment under former C. R. 603 the mesne profits were ordered to be calculated up to the date when the plaintiff should recover possession: *Southport Tramways Co.* v. *Gondy*, 1897, 2 Q. B. 66; but whether judgment could be entered as of course for mesne profits accruing subsequent to the date of the judgment seems doubtful, although there appears to be authority for saying that whenever a judgment is authorized to be entered without motion, it may properly embody all such provisions as would be included in the judgment if pronounced by the Court on a hearing *pro confesso*: see *Kirkpatrick* v. *Howell*, 22 Gr. 94. A judgment for mesne profits up to the date of recovery of possession would seem to necessitate its being framed so as to direct a reference to ascertain the amount, inasmuch as the amount to be recovered could not be ascertained until the writ of possession to be issued under the judgment should be executed.

Rules 43, 44.

Costs where adverse possession.

43. Where any defendant fails to appear in an action for recovery of land, the plaintiff shall not be entitled to costs unless he files an affidavit showing that such defendant was at the time of the issue of the writ in actual adverse possession of the land, or obtains an order allowing him to sign judgment as well for his costs as for possession of the land. C.R. 585.

Statement of claim when when necessary.

44. In all cases not hereinbefore provided for a statement of claim must be delivered. (New.)

Where a statement of claim is delivered [illegible] if a defence is delivered raising any issue of fact, the action must be set down to trial in the ordinary way; but where the defence raises no issue of fact, or the mere proof of the execution of documents is needed, such evidence may be given by affidavit, and the action disposed of, on a motion for judgment; and where no defence at all is delivered then on the pleadings being noted closed, the action may be heard *pro confesso* on a motion for judgment: see *Rule* 354.

Where there are some defendants as to whom issues of fact are to be tried, and other defendants as to whom the action can be disposed of on motion for judgment, it is usually advisable to move for judgment as against the latter defendants at the trial of the action; where a defendant is entitled to notice of the motion he should be served. Motions for judgment, where there is no issue of fact to be tried, are made in the Weekly Court.

Where a statement of claim is delivered, on default of defence, a motion for judgment is necessary, except in those cases in which the plaintiff would be entitled to sign judgment for default of appearance, and in those cases a similar judgment may be signed for default of defence: see *Rule* 356 and notes.

CHAPTER IV.

APPEARANCE, ETC.

Time for appearance.

45. When a defendant is served within Ontario, he shall appear within ten days, including the day of service. C.R. 168 and 130, *amended*.

It is made clear by this *Rule* that the period limited for appearance is to be inclusive of the day of service: see *Cornish* v. *Manning*, 18 C. L. J. 76, 143; 2 C. L. T. 105.

Under the terms of a special order limiting the time for appearance to "10 days from the service of the writ," *Rule* 173 (1) was held to apply, and the period was computed "exclusively of the first day and inclusively of the last day": *Bank of B. N. A.* v. *Hughes*, 16 P. R. 61.

In case of service by advertising, the advertisement should specify the time for appearance, and the time allowed should date from the last publication, unless otherwise ordered: *Crone* v. *Jullion*, 2 Ch. D. 220.

Service out of Ontario.

Service out of Ontario.—Where service is to be effected on a defendant resident out of Ontario, the order which allows service to be effected must name the time for appearance (see *Rule* 27), which will be regulated in the discretion of the Court or Judge making the order, according to the distance of the place where service is to be effected, or (in case of substitutional service), according to the distance of the place where defendant is: see *Rule* 27, and *Sparks* v. *Purdy*, 15 P. R. 1. For form of order: see No. 69; H. & L. Forms, No. 85.

Time for appearance.

The time for appearance of a defendant to be served out of the jurisdiction is regulated according to the facilities of communication with the place where the defendant is shewn to be residing. Two weeks are ordinarily limited by the Master in Chambers where the defendant resides in Montreal, and three weeks where defendant resides in some place in the United States not far from the border of Ontario. Similar periods will now probably be fixed in orders giving leave to serve defendants resident in such places.

Where a writ has been issued for service within the jurisdiction, and a defendant out of the jurisdiction is added as a party, a concurrent writ according to Form No. 2 should be issued: see *Dickson* v. *Law*, 1895, 2 Ch. 62; 72 L. T. 680; *Burt* v. *Bowen*, 8 T. L. R. 28; *Manitobo, etc., Co.* v. *Allon*, 1893, 3 Ch. 434.

Appearance, how entered.

46. A defendant shall appear by filing with the proper officer a memorandum in writing, if he appears by solicitor, stating the name and place of business of such solicitor, or, if he appears in person, stating that he defends in person, and giving his address and naming a place to be called his address for service, which shall

not be more than two miles from the office from which the writ of summons was issued. (*See* Form No. 6.) C.R. 169. Rule 46.

See Eng. (1883), RR. 77, 80, 81, 83.

An appearance entered by two solicitors for one defendant is not a nullity, but is irregular: see *Williams* v. *Williams*, 10 M. & W. 178; *Walton* v. *Thompson*, L. R. 6 Eq. 7. If sued in a wrong name defendant should appear by the right one, stating that he was sued by the wrong one: *Lomax* v. *Kilpin*, 4 D. & L. 295; *Hobson* v. *Wadsworth*, 8 Dowl. P. C. 601; (see *Zuccato* v. *Young*, 38 W. R. 474, where a motion by a defendant wrongly named and described to set aside the writ as irregular was refused), otherwise the plaintiff may proceed against him by the wrong name: *Clark* v. *Baker*, 13 East, 273; *Williams* v. *Bryant*, 5 M. & W. 447. Two appearances for same defendant.

Where a party who appears in person subsequently appoints a solicitor, a notice of the appointment must be filed, and served on the opposite party: see *Rule* 390. The omission to do this is not fatal to the right to recover solicitor's costs, if the opposite party has had actual notice of the appointment: see *Mason* v. *Grigg*, 1909, 2 K. B. 341. Defendant appearing in person, subsequently, appointing solicitor.

An appearance entered without an address is not a nullity, and therefore judgment cannot be signed disregarding it. It must first be set aside as irregular: *Gordon* v. *Roadley*, 34 C. L. J. 135 (Brit. Col.). Address for service.

Where at an address for service given by a defendant in person, no one was found but a housekeeper who refused to receive documents, service of a summons for judgment under *Rule* 57 by putting it into a letter box was held not sufficient: *Jiminey* v. *Owen*, 28 Sol. Jour. 165.

Where several defendants represent one interest (*e.g.*, trustee and *cestui que trust*, mortgagee and mortgagor, partners, etc.), they should appear by the same solicitor, and if they do not, will be allowed only one set of costs: Morgan & Wurtzburg, 124; see also *Barrett* v. *Campbell*, 7 P. R. 150; but where a trustee has really a separate interest, as where he claims that a co-trustee is liable, he may receive a separate set of costs: *Webb* v. *Webb*, 16 Sim. 55. Defendants in same interest.

An ordinary appearance usually operates as a waiver of any prior irregularity in the proceedings taken against the defendant: see *Oulton* v. *Radcliff*, L. R. 9 C. P. 189; *Preston* v. *Lamont*, 1 Ex. D. 362; *Diamond* v. *Sutton*, L. R. 1 Ex. 131; *Boyle* v. *Sacker*, 39 Ch. D. 249; *Re Merchants Bank* v. *VonAllen*, 10 P. R., *per* Osler, J.A., at p. 35; *Manitoba* v. *Allan*, 1893, 3 Ch. 432; *Dart* v. *Citizens Ins. Co.*, 11 P. R. 513. See, however, *Benecke* v. *Frost*, 1 Q. B. D. 421; *Moore* v. *Gamgee*, 38 W. R. 669; *Western National Bank of N. Y.* v. *Perez*, 1891, 1 Q. B. 304; see also note, *supra*, pp. 348, 349. Waiver of irregularity by appearance.

An appearance by a foreign ambassador is not a waiver of the right to claim privilege from suit: *Re Republic of Bolivia*, 1914, 1 Ch. 139; 109 L. T. 741.

An appearance to the original writ stands as a good appearance to the writ though subsequently amended: *Hanmer* v. *Clifton*, 10 R. 55.

Appearance Gratis.—A defendant need not necessarily wait till he is served, before entering an appearance, and where he is prejudicially affected by the issue of the writ, he may appear *gratis*, so as Appearing gratis.

Rules 47, 48. to compel the plaintiff to proceed promptly: see *McTaggart* v. *Toothe, etc.*, in notes to sec. 36 of the Act, *supra*, p. 201 (where a certificate of *lis pendens* had been issued). Where appearance is so entered notice should he given to the plaintiff's solicitor: *Vigeon* v. *Northcote*, 12 C. L. T. 101.

Where no address, or improper address given.

47. If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) it shall not be filed; and if such address is illusory or fictitious, the appearance may be set aside. C.R. 170.

See Eng. (1883) R. 82.

Where a defendant givea an address for service at which he is not to be found, and there is no person authorized to take in or forwsrd documents, such address is illusory, and the appearance will he set aside: *A.* v. *B.*, W. N. 1883, 174; W. N. 1884, 241; *Edell* v. *Cave* (prohably S. C.), 51 L. T. 621; 33 W. R. 208; *E.* v. *C.*, 54 L. J. Chy. 308.

Conditional appearance.

48. Where a defendant desires to contend that an order for service out of Ontario conld not properly be made, a conditional appearance may be entered by leave. C.R. 173.

Effect of ordinary appearance.

An ordinary appearance is deemed a suhmission to the jurisdiction of the Court, and a waiver of the right to dispute the same: see *Seors* v. *Mcyers* and other cases *infra*, and notes to *Rule* 24, *supra*, p. 348. If the appearance is absolute, though the question of jurisdiction be raised hy the defence it will he of no avail: *Grocers Wholesale Co.* v. *Bostock*, 22 O. L. R. 130.

Where, therefore, a defendant wishes to contend that he is not properly subject to the jurisdiction of the Court, he should ohtain leave under this *Rule* to enter a conditional appearance: see *Howland* v. *Insurance Co.*, 16 P. R. 514; *Campou* v. *Rondall*, 17 P. R. at p. 244; as an unconditional appearance will he deemed a waiver of the right to take the ohjection: *Sears* v. *Meyers*, 15 P. R. 381, 456; *Western National Bonk* v. *Perez*, 1891, 1 Q. B. 304, 313; hut an unconditional appearance, though a waiver of the right to ohject to the jurisdiction of the Court over the person of the defendant, would seem not to be a waiver of the defendant's right to object to the jurisdiction of the Court over the subject matter of the action: see *Wilmott* v. *McForlone*, 32 C. L. J. 129.

In *Howlond* v. *Insurance Co.*, and *Compau* v. *Randall*, *supra*, the ohjection to the jurisdiction was allowed to he taken hy defence; hut the English practice requires the ohjection to he raised and disposed of *in limine*, and is in accordance with the former practice aa to pleas in ahatement; as to the English practice respecting conditional appearances: see The Yearly Practice, 1914, 104.

Object of conditional appearance.

But it has heen said: "A conditional appearance is not intended to be a provisional appearance as in Englsnd, hut a form of appearance to be used, where, for some reason, it is not convenient to determine the question whether the case can he brought within *Rule* 25, until the hearing of the action. Sometimes this question depends upon a finding of fact collateral to the issues in the action which cannot consequently

be made without a trial upon oral evidence. The conditional appear- Rule 48.
ance is substituted for the practice which prevailed in the Common Law Courts of requiring the plaintiff to prove at the hearing the facts necessary to bring the case within the provisions of the law permitting service out of the jurisdiction, and, in default, to submit to a non-suit. Experience has shewn that it is only in rare cases that this, or any similar expedient, should be resorted to, it being generally desirable to determine the question of jurisdiction once and for all at the earliest possible stage of the action." *Per* Middleton, J., *Wolsely* v. *Jackson*, 6 O. W. N. 109.

Where it appears clearly that the defendant out of the jurisdiction When disallowed.
has been properly made a defendant, leave to enter a conditional appearance will be refused: *Bain* v. *University Estates*, 6 O. W. N. 22.

The object of obtaining leave to enter a conditional appearance according to the English practice, appears to be to obtain time to move to set aside the writ. Where a defendant is served out of the jurisdiction, it will often happen that the time for entering an appearance will be up before the defendant is in a position to move to set aside the writ. If he enters an absolute appearance his right to except to the jurisdiction is waived, and if he enters no appearance he runs the risk of judgment being signed against him by default. To meet this difficulty he must either apply for leave to extend the time for appearance, or obtain leave to enter a conditional appearance. Having obtained leave to enter, and entered a conditional appearance, he must then, according to the English practice, move, within a reasonable time (usually ten days), to set aside the writ. If he does not move, or, having moved, fails, then his appearance becomes absolute and he is no longer able to object to the jurisdiction of the Court: see *Keymer* v. *Reddy*, 1912, 1 K. B. 215; 105 L. T. 841.

The Form of conditional appearance, No. 6, in these *Rules*, states: "The defendant by order of day of is permitted to appear without prejudice to his right to dispute the jurisdiction of the Court in this action (*or as the case may be*)." Whether he may dispute the jurisdiction by his defence, or, as in England, is limited to moving to set aside the writ, is not stated. If he may dispute the jurisdiction by his defence, then the preliminary question of jurisdiction cannot be disposed of till all the expense of a trial on the merits has been incurred. Where a defendant moved in Chambers to set aside the order allowing service out of the jurisdiction, and the writ and service thereof, on the ground that the Court had no jurisdiction to make the order, and the motion was refused, leave to enter a conditional appearance was also refused on the ground that the question of jurisdiction had been decided: *Standard Construction Co.* v. *Wallberg*, 20 O. L. R. 646; *Bain* v. *University Estates*, *supra*; but see *Auburn Nurseries* v. *McGredy*, 5 O. W. N. 104, 165, where a conditional appearance was allowed, although the motion to set aside the order allowing service was refused; *sed quære*, in such circumstances whether the question of jurisdiction would not be *res judicata*, the defendant having raised the question and had it determined against him, and the order refusing to set aside the order and writ, etc., remaining unreversed, unless the order in appeal expressly protects a defendant from that contingency.

So far as the *Rules* and the form of a conditional appearance go, there is really nothing in them to indicate that the practice regarding conditional appearance should vary from the English practice.

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The power to allow a conditional appearance should be exercised only where it is doubtful whether the plaintiff has brought, or can bring himself, within *Rule* 25; where a case is shown to be within that *Rule* there is no reason for allowing a conditional appearance. A defendant served out of the jurisdiction and not moving to set aside the order allowing such service, was refused leave to enter a conditional appearance, and the Court on the application determined the question of jurisdiction: *Standard Construction Co.* v. *Wallberg*, 20 O. L. R. 646; but this is contrary to the English practice, under which the leave is granted in order to enable the defendant to move to set aside the order allowing service and the writ, etc.: see *supra*.

The object of a conditional appearance is to raise the question of the jurisdiction of the Court over the defendant, and it cannot be made use of for the purpose of objecting to the regularity of the proceedings: *National Trust Co.* v. *Toronto Guarantee Co.*, 2 O. W. N. 222.

In *Burson* v. *German Union Insurance Co.*, 10 O. L. R. 238, a conditional appearance was allowed, and it was ordered "that the plaintiff do prove at the trial of this action a cause of action upon which they are entitled to sue the defendants within the Province of Ontario to recover their claim in this action, and in default of their doing so, that their action be dismissed with costs," and the plaintiff having failed at the trial to prove such a case, his action was dismissed: and see *Farmer's Bank of Canada* v. *Heath*, 3 O. W. N. 692, where it seems to have been assumed that without a conditional appearance, or special order, the like result might be attained: *sed quære*.

When appearance may be entered.

49. A defendant may appear at any time before judgment. C.R. 175, *amended*.

See Eng. (1883) R. 92.

For the time limited for appearance: see note to *Rule* 45

Former C. R. 175 provided that where an appearance was entered after it was due, notice of it had to be served on the plaintiff.

A form of notice of appearance will be found in Form No. 7; H. & L. Forms, No. 106. Whether this notice is now essential seems doubtful. It may be that the form is intended only to apply to *Rule* 54.

An appearance entered or tendered while the plaintiff is signing judgment is in time: *Horris* v. *Andrews*, 3 U. C. L. J. 31; and the judgment is not complete until the stamps are affixed: *Smith* v. *Logan*, 17 P. R. 219. See also note to *Rule* 758.

If an appearance has been entered but the plaintiff nevertheless proceeds as if none had been entered, the proceedings are not null, but merely irregular, and the irregularity may be waived: see *Misager* v. *Crisp*, 9 Dowl. 353; *Strange* v. *Freeman*, 5 Dowl. 407; *Mople* v. *Woodgate*, 1 B. & C. 79; but under C. R. 175, where notice of an appearance, entered after the proper time was not given, judgment signed disregarding the appearance was upheld: *Smith* v. *Dobbin*, 3 Ex. D. 338; see also *Hunter* v. *Wilcockson*, 9 P. R. 305; and the knowledge of the fact that an appearance had been entered did not constitute such notice as C. R. 175 required: *Hudson's Bay Co.* v. *Hamilton*, 13 P. R. 461.

Ejectment.

In an action for recovery of land, an appearance by the original defendant, after the landlord had intervened and appeared, so as to

join with the landlord in a statement of defence, was held regular: *Goring* v. *Cameron*, 10 P. R. 496. Rules 50, 51.

Although an appearance may, under this *Rule*, be entered at any time before judgment, yet the defendant may be precluded from putting in a defence after the proper time, by the plaintiff's noting the pleadings closed under *Rule* 121.

Limitation of defence to question of amount only.

50. A defendant appearing to a writ, indorsed to recover a money demand, may, in his appearance, state that he disputes only the amount claimed. The plaintiff may thereupon proceed to take an account of the amount due to him before the officer with whom the judgment is to be signed on four clear days' notice, and judgment may be signed for the amount found due, or the plaintiff may move for a judgment of reference. C.R. 176.

For Form: see No. 8; H. & L. Forms, No. 112.

Mortgage action.

Actions upon a mortgage are specially provided for by *Rule* 467. Upon the appearance, disputing the amount only, being filed, the record is complete. No statement of claim is necessary or proper. Express provision is by this *Rule* made for the proceedings which may thereupon be taken by the plaintiff to take the account and obtain judgment. Formerly a motion for judgment was necessary: see *Peel* v. *White*, 11 P. R. 177; *Mahoney* v. *Hopkins*, 14 P. R. 117.

A defendant cannot limit his appearance to part of the plaintiff's claim, and offer to submit to another part of it: *Padget* v. *Padget*, 38 C. L. J. 207; except in the case of an action to recover land, as to which: see *Rule* 55.

Statute of Limitations.

Statute of Limitations.—If the defendant wishes to set up the Statute of Limitations as a bar to the action, he should set it up by a defence. He can not avail himself of the Statute for that purpose by filing a notice under this *Rule*: see *Cattanach* v. *Urquhart*, 6 P. R. 28, explained, 1 Ont. App. 616, and notes to *Rule* 143.

As to how far the Statute may be taken advantage of in taking the account under this *Rule*: see *Wright* v. *Morgan*, 1 Ont. App. 613, and note to *Rule* 467.

Defendant may file appearance and acknowledge tenancy.

51.—(1) A defendant in an action for dower, may, with his appearance, file an acknowledgment that he is tenant of the freehold of the land named in the writ, together with his consent that the plaintiff may have judgment for her dower therein, and may take the proceedings authorized by *The Dower Procedure Act* to have the same assigned to her, unless the parties otherwise agree, and he shall forthwith serve the plaintiff or her solicitor with a copy of such acknowledgment and consent, and upon such consent the plaintiff may enter judgment of seisin, and may obtain a writ of assignment of dower, but

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shall not, without an order, be entitled to tax or recover the costs of the action or judgment against the defendant.

Judgment of seisin and writ of assignment thereon.

(2) The entry of a judgment of seisin and the taking of proceedings for the assignment of her dower thereunder shall not prevent the plaintiff from proceeding with the action for the recovery of arrears of dower or damages.

Where defendant may issue writ.

(3) Where the defendant has filed and served such acknowledgment and consent, and the plaintiff does not within 3 months thereafter sue out and cause to be executed a writ of assignment of dower, the defendant may, by leave, sue out such writ; and the writ shall be, as nearly as may be, in the same form as a writ sued out by the plaintiff, and the like proceedings shall be had thereon. C. R. 177 and 178.

The former *Dower Procedure Act* is now combined with *The Dower Act* (R. S. O. *c.* 70).

Dower judgment for seisin.

Clause (2) was introduced in Con. Rules 1888, to meet the decisions of *Linfoot* v. *Duncombe*, 21 C. P. 484, and *Cameron* v. *Gilchrist*, 7 P. R. 184, which decided that judgment of seisin is conclusive, and when signed the defendant cannot be proceeded against for damages: see also *Harvey* v. *Pearsall*, 31 C. P. 239. Those cases are therefore no longer to be followed.

Damages when movable.

It was held in *Ryan* v. *Fish*, 4 Ont. 335, that a dowress may recover damages as well for *mesne* profits, as for detention, against all persons, and in all cases where they were recoverable before Aug. 10th, 1850. An action for dower is under The Jud. Act to be carried on the same as other actions for recovery of land; the right to damages would appear not to be affected by the change in the mode of procedure to obtain them: but see *Giles* v. *Morrow*, 1 Ont. 527. Costs are not given unless a demand for dower was made and refused before action: *Losee* v. *Armstrong*, 11 Gr. 517.

A widow is not entitled to damages for detention of dower till after demand: *Ryan* v. *Fish*, 4 Ont. 335; *Malone* v. *Malone*, 17 Ont. 101; nor to either arrears of dower, or damages for detention, unless her husband died seised: *Losee* v. *Armstrong*, 11 Gr. 517; *Morgan* v. *Morgan*, 15 Ont. 194; even though demand made, and refused: *Ib.*

As to whether damages are to be computed against the tenant of the freehold from the death of the husband, or the date of demand, *quære*: see *Ryan* v. *Fish*, *supra*.

The mere fact that at the death of, or alienation by, the husband, his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or the vendee; in such case a portion of the rent is attributable to the land: *Wallace* v. *Moore*, 18 Gr. 560.

For forms of writs of assignment of dower: see Forms Nos. 122, 123; H. & L. Forms Nos. 1128, 1129.

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Landlord may be substituted as defendant.

52. In an action for dower the landlord or other person under whom a tenant in possession, who is not also tenant of the freehold, holds or entered into possession, may, without leave, appear and defend, by filing with his appearance an affidavit that he is tenant of the freehold, and is advised and believes that there is good ground for disputing the plaintiff's claim to dower. C.R. 179.

Appearance without leave by person not named as a defendant.

53. Any person not named as a defendant in a writ for the recovery of land, may, without leave, appear and defend, by filing with his appearance an affidavit stating that he is in possession either by himself or his tenant (as the case may be). C. R. 180.

This *Rule* in part corresponds with Eng. (1883) R. 95.

For form of affidavit: see H. & L. Forms No. 115.

It would seem that the power hereby conferred must be exercised before judgment is entered. If judgment is entered then an application to the Court to be let in to defend would appear to be necessary.

It may sometimes be a question whether a person can be said to be "in possession by himself or his tenant" within the meaning of this *Rule*: for example a mortgagee out of possession in an action against his mortgagor: *McDermott* v. *Keeling*, 7 U. C. L. J. 150; see also *Morris* v. *Smythe*, 2 U. C. L. J. 212. In such cases it may be necessary to apply for leave to defend.

Even where judgment had been signed against the defendant named in the writ, any other person claiming to be in possession independently of him, might under former C. R. 181 obtain leave to defend the action: see *Minet* v. *Johnson*, 63 L. T. 507. That Rule has not been included in the present *Rules*.

In ejectment by a landlord against his tenant, the sub-tenants of the lessee are not necessary parties; and under a judgment recovered against the plaintiff's lessee, the defendant's sub-tenants may be ejected: *Synod of Toronto* v. *Fisken*, 29 Ont. 738. See also *Geen* v. *Herring*, 1905, 1 K. B. 152.

The Court will not on the application for leave to defend consider nice questions as to the right of possession: see *Croft* v. *Lumley*, 4 E. & B. 614, and *Thompson* v. *Tompkinson*, 11 Ex. 442. In *Longbourne* v. *Fisher*, W. N. 1878, 28; 47 L. J. Ch. 379, an equitable tenant for life was given leave to defend an action of ejectment in the place of her trustees, using their names and indemnifying them: see also *Leader* v. *Hayes*, 54 L. T. 204.

Notice of appearance by person not named as a defendant in writ.

54. Any person entering an appearance under the two preceding rules, shall forthwith give notice thereof, and shall in all subsequent proceedings be named as a party defendant; if notice of appearance is not forthwith given

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the plaintiff may proceed as in case of non-appearance. C.R. 183.

For form of notice of appearance: see Form No. 7; H. & L. Forms, No. 106.

The notice should of course be given to the plaintiff if he sues in person, otherwise to his solicitor.

Limited appearance in action for land.

55. Any person appearing to a writ for the recovery of land may limit his defence to a part only of the land, describing the part with reasonable certainty in his appearance, or in a notice to be served within four days after appearance. C. R. 184.

Compare Eng. (1883) Rs. 98 and 99.

For Form see No. 9; H. & L. Forms, No. 113.

This *Rule* has been held to be applicable in an action of dower: *Cunningham* v. *Pearce*, Mr. Dalton, 21st Sept., 1881; see also *McCulloch* v. *McCulloch*, 4 C. L. T. 252. Better particulars may be obtained where there is a want of "reasonable certainty": *Watson* v. *Brewer*, 4 P. R. 202.

The notice should be served upon the plaintiff if he sues in person, otherwise upon his solicitor.

An appearance without limitation therein, or by notice served within four days after appearance, will of course be an appearance to defend for the whole land.

This *Rule* does not enable a defendant, in actions other than for recovery of possession of land, to limit his appearance to part of the plaintiff's claim: *Padget* v. *Padget*, 38 C. L. J. 207.

Affidavit to be filed by defendant with appearance to specially indorsed writ.

56.—(1) Where the writ is specially indorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action and shall forthwith serve a copy of such affidavit upon the plaintiff. The affidavit may be made by the defendant or by any one having knowledge of the facts.

Notice of trial.

(2) If the plaintiff so elects he may then treat the claim indorsed upon the writ, and the affidavit, as constituting the record, and may within five days serve notice of trial. In such case the defendant shall be entitled to 21 days' notice of trial.

Discovery.

(3) Either party may then have discovery and shall make production as in ordinary cases.

Appearance not to be received without affidavit.

(4) If the defendant fails to file an affidavit the appearance shall not be received and the plaintiff shall be entitled to sign judgment for default of appearance.

(5) A defendant may obtain leave to deliver a statement of defence setting up any further or other answer to the plaintiff's claim. *New.* Rule 55. Statement of defence.

(6) An affidavit shall not be necessary where an appearance is entered by the Official Guardian for an infant or lunatic. (See *Rules* of 24th December, 1913).

Where the defendant is a corporation an affidavit by one of its officers having knowledge of the facts would appear to be a sufficient compliance with the *Rule*: see *Rule* 294.

The deponent in the affidavit is liable to cross-examination thereon, and if the plaintiff can thereby establish by his admissions, that the alleged defence is not well founded, he may forthwith move for judgment under *Rule* 57.

If the plaintiff is unable to extract such admission from the deponent, then he may proceed to a speedy trial of the action as provided in this *Rule*.

The decisions under C. R. 603 in regard to the defendant's affidavit may be useful in the construction of this *Rule*. Under C. R. 603 the affidavit was, ordinarily, required to be made by the defendant himself, where he was a person who could make an affidavit: *Muirhead* v. *Direct U. S. Cable Co.*, 27 W. R. 708; *Shelford* v. *Louth, etc., Ry. Co.*, 4 Ex. D. 317; and if a corporation, the affidavit was required to be made by its proper officer disclosing the defence of the defendant corporation: *Ib.* The affidavit would not be insufficient merely because it contained only hearsay evidence: *Harrison* v. *Boltenheim*, 26 W. R. 362. Affidavit of defendant.

A simple affidavit of merits is not sufficient; the affidavit must disclose a good defence, i.e., shew its nature, and give some reason for thinking that it exists in fact: *Collins* v. *Hickok*, 11 Ont. App 620; *Pascal* v. *Stone*, 9th Sept., 1881 (Mr. Dalton); *Bank of Toronto* v. *Keilly*, 17 P. R. 250; see also *Anon*, 1 Chnr. Ch. Cn. 48; W. N. 1875, 249, 250. In the words of Lord Blackburn in *Wallingford* v. *Mutual Soc.*, 5 App. Cns. 704: "It is not enough for defendant to swear 'I say I owe the man nothing.' Doubtless if it were true that you owed the man nothing, as you swear, that would be a good defence; but that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again if you swear there was a fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that there are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned." A mere statement that he has a good defence is not sufficient: *per* Quain, J., *Anon.*, 1 Charl. Ch. Cas 48; W. N. 1875, 249, 250. Merits must be disclosed.

In *London & Canadian, etc.* v. *Morris*, 11 C. L. T. 20, a defence alleging that an Act legalizing debentures, and relied on by the plaintiff, was obtained by fraud, was held to be no defence.

Where the action was on a foreign judgment, and the defendant set up that it was obtained by fraud, but the only fraud alleged was the perjury of a witness, and it was not shewn that the plaintiff was in any way party to that fraud, or knew that the evidence was false, leave to sign judgment was granted: *Dohn* v. *Gillespie*, 33 C. L. Fraud.

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J. 394; but see *Robinson* v. *Fenner*, 106 L. T. 722; *Jacobs* v. *Beaver*, 17 O. L. R. 496; *Codd* v. *Delap*, 92 L. T. 510.

Leave was granted to sign judgment against a firm on a specially indorsed writ, notwithstanding that one of the partners was shown to be an infant: *Harris* v. *Beauchamp*, 1893, 2 Q. B. 534; 69 L. T. 373; but in such a case the judgment should not be against the firm generally, but "against the firm other than the infant"; *Lovell* v. *Beauchamp*, 1894, A. C. 607.

A judgment obtained against a partner under this *Rule* cannot be pleaded in bar to the action by any other partner who obtains leave to defend: *Wecll* v. *Jones*, 68 L. T. 515; and see note to *Rule* 105 p. 498.

In an action against a limited company incorporated under R. S. O. (1897) c. 199, for goods sold and delivered, the company set up that their indebtedness when the goods were purchased exceeded the limit prescribed by ss. 11, 40 of that Act, and that the directors of the company were personally liable,—and a motion for judgment against the company under former C. R. 603 was dismissed: *Canadian General Elec. Co.* v. *Togono Water Co.*, 6 O. L. R. 641.

On such a motion the only question to be determined is whether the Judge is satisfied that there is a good defence on the merits: *per* Jessel, M.R., *Ex. p. Morshall*, 5 Ch. D. 877.

What defendant must shew.

What must be shewn to entitle the defendant to defend has been variously expressed: see H. & L. Jud. Act, 2nd ed., pp. 756-7 *et seq.*

The various decisions are probably summarized in the judgments in the House of Lords in *Jacobs* v. *Booth's Distillery*, 1901, 50 W. R. 49; 85 L. T. 262, and *Canadian Gen. Electric* v. *Togono Water & Light Co.*, 6 O. L. R. 641, in which it was held that the merits of the case are not to be tried (though they must of course to some extent appear and be discussed), and a defence is not to be shut out where on the disclosed facts a triable issue arises; and the plaintiff is to be awarded judgment only where it appears that, assuming all the facts set up by the defendant to be true, they nevertheless do not amount to a defence in law; see also *Nisbet* v. *Hill*, 5 O. W. R. 155; *Wells* v. *Allcott*, 1904, 2 K. B. 842; *Castle* v. *Kouri*, 18 O. L. R. 462; *Rutherford* v. *Murray-Kay*, 3 O. W. N. 29.

A question of law in dispute may perhaps be decided on the motion, but where it is a question of foreign law it was held to be impossible to decide this upon affidavits: *Western Nat. Bank of N. Y.* v. *Percz*, 6 T. L. R. 366.

When counter-claim sufficient.

The fact that there is a valid counter-claim is not necessarily sufficient, as the admission of a counter-claim is not of right but in the discretion of the Judge: *Anglo-Italian Bank* v. *Wells*, W. N. 1877, 263; 1878, 10; 38 L. T. 197; *Fowler* v. *Lee*, W. N. 1876, 86; *Roberom* v. *Priest*, 49 L. J. C. P. 104; *Anon.*, 1 Charl. Ch. Ca. 45; *Bank of Ottawa* v. *Johnston*, 9 C. L. T. 251.

Where a counter-claim is, however, proper, the defendant will generally be allowed to set it up: *Anon.*, 60 L. T. Jour. 85; 1 Charl. Ch. Ca. 45; *Morin* v. *Colcock*, 26 Oct., 1881 (Mr. Dalton in Chambers); and, if sufficiently connected with the same transaction as that which is the subject of the plaintiff's claim, the counter-claim may be sufficient to entitle the defendant to defend, even where set up as a defence to a liquidated claim, as on a bill of exchange: *per*

Thesiger, L.J., in *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197. So where the defendant has a valid set-off greater than the plaintiff's claim: *Groom* v. *Rathbone*, 41 L. T. 591; and see *Bowyear* v. *Fawson*, 6 Q. B. D. 540; *Government Co.* v. *Dempsey*, 50 L. J. Q. B. 199; or where a counter-claim is set up, execution may be stayed for so much of the plaintiff's claim as equals the amount of the counter-claim, subject to the defendant paying the amount into Court: *Workman* v. *Lloyd Brazileiro Co.*, 1908, 1 K. B. 968; 99 L. T. 477. Rule 56.

In *Shepherd* v. *Wilkinson*, 6 T. L. R. 13, judgment was granted for an amount admitted to be due to plaintiff, but execution was stayed till after the trial of the counter-claim; similar orders have been made in Ontario. See also *Rule* 117.

A claim for indemnity against a third party will not suffice; *Thorne* v. *Steel*, W. N. 1878, 215; *German Bank* v. *Schmidt*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53; nor a promise to give time without consideration: *Woolston* v. *Baines*, W. N. 1876, 74; 2 Charl. Ch. Ca. 21. Claim for indemnity not a defence.

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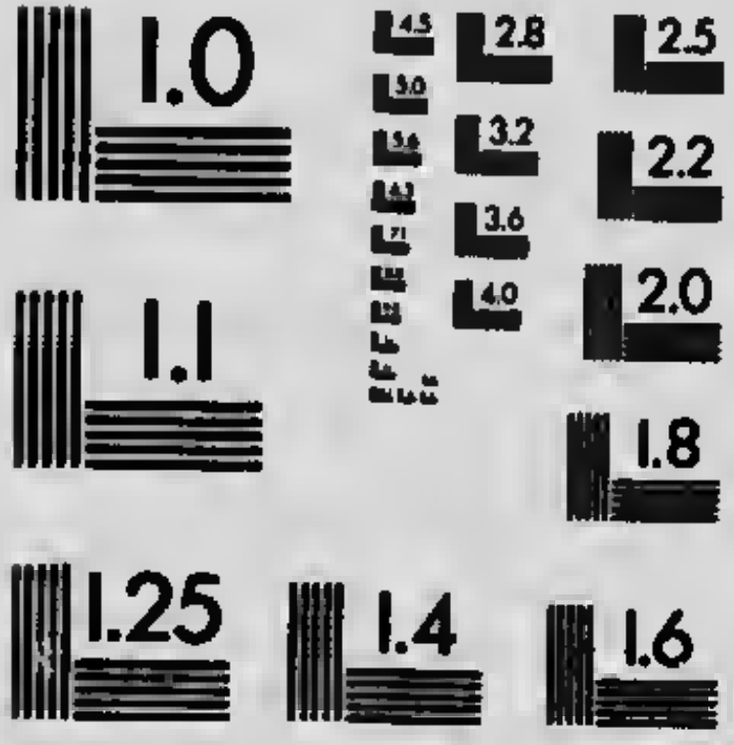

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Rule 57.

CHAPTER V.

MOTION FOR JUDGMENT ON SPECIALLY INDORSED WRITS AND IN ACTIONS FOR ACCOUNT.

Motion for final judgment on specially indorsed writ.

57.—(1) Where the defendant appears to a writ specially indorsed and files the affidavit required by Rule 56, the plaintiff may cross-examine upon such affidavit and move for judgment, and if the Court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff.

(2) Such motion may be made in respect of a cause of action specially indorsed, though the writ may also be indorsed with any other claim.

(3) On any such motion any amendment of the writ which might be ordered on a substantive motion may be directed, and judgment may be awarded in accordance with the writ as amended. C.R. 603. *Amended.*

When Rule applies.

This *Rule* has changed the practice heretofore prevailing in regard to obtaining judgment on specially indorsed writs. Under former C. R. 603, on a motion for judgment on a specially indorsed writ, an affidavit of the plaintiff or of some one who could swear positively as to the debt, or cause of action, and stating that in his belief there was no defence, was required; but this no longer appears to be necessary, the onus is cast on the defendant of showing in the first place that he has a good defence to the action, and this he must do by affidavit filed with his appearance under *Rule* 56. Unless the plaintiff can by cross examination of the defendant establish that the alleged defence is non-existent, it would seem to be useless to move for summary judgment under this *Rule*.. The Court will not on such a motion try the case where the facts are in dispute, judgment can only be awarded under this *Rule* where the defendant's affidavit, or admissions in his cross-examination shew that he has no *bonâ fide* defence to the plaintiff's claim: see *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 262; *Thompson* v. *Marshall*, 28 W. R. 220; *Munro* v. *Orr*, 17 P. R. 53; *Jones* v. *Stone*, 1894, A. C. 124; *Bank of Minnesota* v. *Page*, 14 Ont. App. 347; *Stephenson* v. *Dallas*, 13 P. R. 450; decisions under the former C. R. 603, or its English counterpart.

Formerly where the nature of the claim involved the taking of accounts between the parties, C. R. 603 was not applicable: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; but see now *Rule* 61.

The right to direct a reference to take accounts is now expressly given by *Rule* 61, but even before that *Rule*, in the case of an action

on a solicitor's hill, where it was clear that something was due to the plaintiff, the usual order for taxation was made, combined with a judgment under this *Rule* for payment of the amount which, as the result of the taxation should be payable: *Smith* v. *Edwardes*, 22 Q. B. D. 10. Rule 57.

An application under this *Rule* can only be made where the writ has been specially indorsed under *Rule* 33, *i.e.*, where the claim is in respect of the causes of action therein specified, or any one or more of them: see *Rule* 33. Where, therefore, the claim was upon a covenant in a chattel mortgage given as a continuing security for future advances, and the writ was indorsed for the amount mentioned in the mortgage, and not for the various advances, and the Master in Chambers had directed judgment to be signed for a sum less than $2,500, which upon affidavits and the depositions of defendant, appeared to him to be due, it was held on appeal that the plaintiff's claim was not a debt, or liquidated demand: *Barber* v *Russell*, 9 P. R. 433, 442. Where writ specially indorsed under Rule 33.

Where equitable relief was claimed in addition to a liquidated demand, that was formerly a bar to a motion under former C. R. 603: see *McCollum* v. *McCollum*, 11 P. R. 16; *Yeatman* v. *Snow*, 42 L. T. 502, and, unless the claims are distinct and properly severable, it may still be a reason for refusing an application under this *Rule* in such cases.

The addition of any claim in the writ which was not capable of being specially indorsed under *Rule* 33 formerly vitiated the whole indorsement, even as regarded claims which were properly the subject of a "special indorsement," and prevented any summary motion for judgment under C. R. 603, even in respect of the demand which might, if it had stood alone, have been specially indorsed: *Wilks* v. *Wood*, 1892, 1 Q. B. 684; *Sheba Gold Mining Co.* v. *Trubshawe*, and *Ryley* v. *Master*, 1892, 1 Q. B. 674; *Cosselman* v. *Borrie*, 14 P. R. 507; *Solmes* v. *Stafford*, 16 P. R. 78, 264; *Hollender* v. *Ffoulkes*, 16 P. R. 175; *Clarkson* v. *Dwan*, 17 P. R. 206. But all of these cases are in effect superseded by the changes made in the framing of the present Rules: see *Rule* 57 (2). Additional claims.

A writ may now be "specially indorsed" for claims coming within *Rule* 33, and other claims may also be added in the indorsement, and judgment may now be obtained as to the claims specially indorsed under *Rule* 33, and the action may be proceeded with thereafter as to any other claims.

Under the present *Rule* the motion is to be one for judgment, and where the judgment is granted it will be drawn up and issued in Chambers and will have then to be entered in the proper office as in the case of other judgments: see *Rule* 207 (8).

Plaintiff could apply for judgment under C. R. 603 where the defendant was a corporation: see *Shelford* v. *Louth & H. C. Ry. Co.*, 4 Ex. D. 317, and the like motion can no doubt be made under this *Rule*.

A judgment may be obtained against one or more of several partners, or other joint debtors, without preventing the plaintiff from proceeding in the same action to judgment in the ordinary way against the other defendants: *Dueber Watch Case Mfg. Co.* v. *Taggart*, 26 Ont. App. 295; see also *infra*, p. 501. Joint debtors.

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As to a claim for recovery of land with other claims: see *Spears* v. *Fleming*, 19 P. R. 127.

For instances of indorsements sufficient and insufficient under *Rule* 33: see notes to that *Rule*.

Mortgage actions.

In actions where the writ was indorsed for foreclosure, and immediate payment of the amount due under a covenant in a mortgage, former C R. 603 did not apply: *Canadian Bank of Commerce* v. *Bricker*, 1 C. L. T. 729; *Hill* v. *Sidebottom*, 47 L. T. 224; *Imbert-Terry* v. *Carver*, 34 Ch. D. 506; *Clarke* v. *Berger*, 36 W. R. 809; and it did not apply to a claim for immediate possession under *Rule* 460: *Foresters* v. *Pegg*, 19 P. R. 80. But *Rule* 33 includes claims for foreclosure or sale among those which may be specially indorsed: *Rule* 33 (1) *h*.

Where plaintiff was entitled to costs payable by defendant, between solicitor and client, he was held not entitled to the costs of a motion made under C. R. 603 and refused, because the indorsement on the writ was not a good special indorsement: *Baldwin* v. *Quinn*, 16 P. R. 248.

Indorsement must be complete.

In order to entitle a plaintiff to judgment under this *Rule* the indorsement on the writ must be complete in itself, and shew a cause of action, which is properly the subject of a special indorsement under *Rule* 33. A defect in the indorsement cannot be supplemented by the affidavits on the motion: *Davidson* v. *Gurd*, 15 P. R. 31; *Fruhauf* v. *Grosvenor*, 67 L. T. 350; *Munro* v. *Pike*, 15 P. R. 164; unless an amendment can be made under clause (3) of this *Rule*: see, however, *Nesbitt* v. *Armstrong*, 14 P. R. 366.

But, in an action to recover land, where the writ was indorsed to recover £80 for meane profits, explanation was allowed to be given by the affidavit that the £80 was claimed as double value for 6 months in consequence of a refusal to deliver up possession, and an order was made for judgment: *Southport Tramways* v. *Gandy*, 45 W. R. 684.

Formal defect.

A formal error in the indorsement of the writ, such as the misplacing of a date, is no answer to an application under this *Rule*: *Anon.*, W. N. 1876, 53; 2 Charl. Ch. Ca. 20. Neither is a mistake in the teste in the copy of the writ served: *Wesson* v. *Stalker*, 47 L. T. 444, where the year was given in the copy as "eighty" instead of "eighty-two": see also *Re Johnson*, 25 Ch. D. 112.

Married woman.

In Ontario, since 47 V. c. 19 (now R. S. O. c. 149), it has been held that the *Rule* may be applied, and judgment entered in a plain case against a married woman, with execution against her separate estate not subject to a restraint on anticipation: *Nesbitt* v. *Armstrong*, 14 P. R. 366; *Kinnear* v. *Blue*, 10 P. R. 465; *Quebec Bank* v. *Radford*, 10 P. R. 619; *Comeron* v. *Rutherford*, 10 P. R. 620; see *contra*, *Comeron* v. *Heighs*, 14 P. R. 56; and the later English cases seem to have established the same right in England: see *Bursill* v. *Tanner*, 13 Q. B. D. 691, and other cases referred to in the notes to *Rule* 99, p. 486.

In an action against a married woman on a contract made prior to 13th April, 1897 (see R. S. O. c. 149, s. 4), the plaintiff must allege that the married woman was capable of contracting by alleging the possession of separate estate at the date of the contract: see Holmested's *Married Women's Property Act*, p. 32 *et seq.*, and *Canadian Bank of Commerce* v. *Woodstock*, 13 P. R. 242. Where this did not appear by the writ, but was shewn by the affidavits on the motion, an amendment of the writ was allowed: *Nesbitt* v. *Armstrong*, 14 P. R. 366; and see *Sweetland* v. *Neville*, 21 Ont. 412.

In actions founded on contracts made by a married woman since 13th April, 1897, it is no longer necessary to allege or prove the possession of separate estate at the date of the contract: see *The Married Women's Property Act* (R. S. O. c. 149) s. 4. Rule 57.

For the form of judgment against a married woman: see Form No. 110; H. & L. Forms Nos. 923, 924.

A judgment against a married woman founded on contract must follow the prescribed form, whether it be entered against her by default: *Oxley* v. *Link*, 110 L. T. 248; or by consent: *Hamilton* v. *Perry*, 24 O. L. R. 38, otherwise it will be null and void and incapable of amendment.

An Indian may sue, and be sued, and judgment may be obtained against an Indian (R. S. O. c. 149), though by *The Indian Act* (R. S. C. c. 81), s. 102, the judgment will not bind any property of the Indian except that described in sec. 100: *Bryce, etc., Salt*, 11 P. R. 112. Indians.

As to actions to recover land, to which the present *Rule* has now been made applicable: see notes to *Rule* 33, *supra*, p. 369, *et seq.* Actions to recover land.

Judgment cannot be given under this *Rule* in an action for possession of land where the right to possession is disputed for some *bond fide* reason: see *Jones* v. *Stone*, 1894, A. C. 124; 70 L. T. 174.

In an action for the recovery of land where other questions are raised by counter-claim, judgment for the recovery of the land should not be granted, where the Judge at the trial might be thereby hampered in dealing with the other questions: *Spears* v. *Fleming*, 19 P. R. 127.

Where the action is for recovery of land and mesne profits, and the plaintiff obtains judgment under this *Rule*, the mesne profits may be ordered to be calculated up to the date of the plaintiff's obtaining possession, so as to avoid the necessity of bringing another action: *Southport Tramways Co.* v. *Gandy*, 1897, 2 Q. B. 66. Mesne profits.

The effect of the *Rules* is to abolish the non-finality which a judgment in ejectment formerly had. A former judgment in ejectment on the same question will now sustain a defence of *res judicata*: *Ball* v. *Cathcart*, 16 Ont. 525; *Cochrane* v. *Hamilton Prov. L. S.*, 15 Ont. 128. Finality of judgment.

Where the plaintiff is liable to give security for costs, and an order for that purpose has been obtained, but the plaintiff has a case for setting it aside, it was held under the former C. RR. that he might move *nunc pro tunc*, and upon the same materials, to vacate the order for security, and to sign judgment: *Anglo-American Casings Co.* v. *Rowlin*, 10 P. R. 391. This course cannot be taken now; but it is open to a plaintiff, under *Rule* 383 (2), to pay $50 into Court as a partial compliance with the order for security, and proceed with the motion for judgment: *Payne* v. *Newberry*, 13 P. R. 354. Security for costs.

The Master in Chambers, and the Local Judges and Masters, under Rules 207 (8), 208, 209, have jurisdiction to entertain applications under the present *Rule*. Jurisdiction.

Time for Moving.—No time is limited within which an application may be made, and it has therefore been held to be regular after statement of claim delivered: *Hope* v. *Neill*, 12th Sept., 1881 (Mr. Dalton); and see *Hanmer* v. *Flight*, 36 L. T. 279. It is held in Ireland Time for moving.

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under a similiar *Rule* that, after issue joined on a statement of defence, a plaintiff cannot resort to this summary procedure, as he has adopted the defendant's mode of procedure: *Hackett* v. *Lalor*, 12 L. R. Ir. 45; also that where the plaintiff, after appearance, takes any deliberate step to have the action tried by a jury by serving a statement of claim, he cannot move under this *Rule*: *Stewartstown Loan Co.* v. *Daly*, 12 L. R. Ir. 418, and an unexplained delay from 5th July to 20th November was held to be a bar to the motion: *German American Bank* v. *Kingston Sugar Co.*, 20 O. L. R. 555.

In Ontario the rule is that motions after a statement of claim is delivered, are not to be encouraged, though in cases of necessity, allownble: *Woodruff* v. *McLennon*, 11 P. R. 22; but see *McLardy* v. *Slateum*, 24 Q. B. D. 504.

If the time for delivering a defence is running pending the motion, the Judge or Minster will by his order give further time if necessary: *Hobson* v. *Monk*, W. N. 1884, 8.

Second motion after dismissal of previous one.

Under the practice in Ireland where a motion was refused, because no affidavit was filed at the time of service of the summons, the Court refused to entertain a renewal of the motion: *Trench* v. *Mulcahy*, 8 L. R. Ir. 146; but in England the dismissal of the motion on the ground of a technical defect in the writ, has been held to be no bar to a fresh application on fresh materials after the defect has been cured: *Wagstoff* v. *Jacobowitz*, W. N. 1884, 17; *Dombey & Son* v. *Playfair*, 1897, 1 Q. B. 368; 75 L. T. 676; and the doctrine of *res judicata* has no application to such renewal of the motion: *Ib.* A dismissal for not complying with the provisions of *Rule* 383 (2), is no bar to a subsequent motion when the provisions of that *Rule* have been complied with: *Payne* v. *Newberry*, 13 P. R. 392.

Although under former C. R. 603 an affidavit proving the plaintiff's claim was essential, under the present *Rule* it is no longer so, the intention of the *Rule* appparently being that the motion must be based on the defendant's admissions, and if sufficient admissions cannot be got from the defendant, then that the plaintiff may adopt the alternative of a speedy trial as provided by *Rule* 56 (2).

If a motion is made under this *Rule* without such admission having been obtained the plaintiff may be ordered to pay the costs of the motion if it fails.

Affidavit in answer.

Under C. R. 603 the Judge might, in his discretion, allow the plaintiff to file affidavits in answer to the defendant's affidavit: *Davis* v. *Spence*, 1 C. P. D. 719; but this case was disapproved of in *North Central Waggon Co.* v. *The N. Wales Waggon Co.*, 39 L. T. 628, but was followed in *Girvin* v. *Grepe*, 13 Ch. D. 174. The filing of an affidavit in answer under C. R. 603 was, however, not a matter of right: see *Rotheram* v. *Priest*, 49 L. J. C. P. 104; W. N. 1879, 190, and *semble*, under the present *Rule*, no affidavits in contradiction of defendant's affidavit and examination ought to be permitted.

Where the plaintiff files an affidavit the defendant is, *ex debito justitia*, entitled to cross-examine the deponent: *Kingsley* v. *Dunn*, 13 P. R. 300.

Opposition to the motion.

The application may be adjourned, if necessary, for better particulars of the plaintiff's claim: *Aston* v. *Hurwitz*., W. N. 1879, 194.

That defendant was served in New York, and had not time to instruct his solicitors, was considered sufficient reason for refusing

an order: *Anon.*, 60 L. T. Jour. 213; 2 Charl. Ch. Ca. 18, and under the present *Rule* it would probably be considered a sufficient ground for extending the time for filing the affidavit required by *Rule* 56. Rule 57.

The orders which may be made upon the application are:—

(1) Final Judgment.—This order ought not to be made save where the case is free from doubt: *Ray* v. *Barker*, 48 L. J. Ex. 569; 4 Ex. D. 279; *Thompson* v. *Marshall*, 28 W. R. 220; *Bank of Minnesota* v. *Page*, 14 Ont. App. 347; *Stephenson* v. *Dallas*, 13 P. R. 450; *Jones* v. *Stone*, 1894, A. C. 124; *Munro* v. *Orr*, 17 P. R. 53. It will be made if defendant's affidavit states that there is a good defence, without stating what it is: *Wallingford* v. *Mutual Society*, 5 App. Cas. 704; though an opportunity of filing a better affidavit may be given: *Pascal* v. *Stone*, p. 397, *supra*; or if no fairly arguable defence be shewn: *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197; *Thorne* v. *Steel*, W. N. 1878, 215; *Anon.*, W. N. 1876, 23; 2 Charl. Ch. Ca. 18; *East Assam, etc.*, v. *Roche*, W. N. 1875, 238; 1 Charl. Ch. Ca. 46; *Bank of Toronto* v. *Keilty*, 17 P. R. 250; *Jacobs* v. *Booth's Distillery*, 50 W. R. 49; 85 L. T. 262; *Jones* v. *Mason*, 18 P. R. 442; *Imp. Bank* v. *Tuckett*, 6 O. W. R. 121, 161. Judgment was ordered to be signed where the only defence was that the defendant had commenced proceedings in bankruptcy: *Anon.*, W. N. 1875, 220; W. N. 1876, 23; *Clifford* v. *Budds*, W. N. 1884, 40. So where in an action against two defendants, one admitted the debt and let judgment go by default, and the other only deposed that he was willing to pay his share, and that his co-defendant was acting in collusion with the plaintiff: *East Assam Company* v. *Roche*, W. N. 1875, 238. Final judgment.

Execution was stayed to enable defendant to appeal, in *Anglo-Italian Bank* v. *Wells*, 38 L. T. 197. An order directing payment by a day named, otherwise judgment to be signed, need not be served before signing judgment on default of payment: *Hopton* v. *Robertson*, 23 Q. B. D. 126; W. N. 1884, 77; 28 Sol. Jour. 375; and see *Cranston* v. *Blair*, 15 P. R. 167. Stay of execution.

Where the action was on an untaxed bill of costs delivered within a year, the order made was for taxation and judgment for the amount certified: *Larkin & Co.* v. *McInerney*, 16 L. R. Ir. 246; see also *Smith* v. *Edwardes*, 22 Q. B. D. 10.

Under Eng. Rules 115, 116, judgment was ordered to be signed where it was stated that the defendant was at sea on his way to join his regiment, and that he had been served with the writ the day before leaving England: *Anon.*, W. N. 1875, 260; 1 Charl. Ch. Ca. 49.

Where a judgment is granted under this *Rule* a delay for a year in signing it would be no waiver: *Deighton* v. *Cockle*, 1912, 1 K. B. 206.

(2) Leave to Defend Unconditionally: This will be the order where the affidavit shews what the defence is, and the Court is of opinion that a triable issue arises: *Jacobs* v. *Booth Distillery*, 50 W. R. 49; 85 L. T. 262; *Canadian Gen. Electric* v. *Tagona, etc.*, 6 O. L. R. 641; *Runnacles* v. *Mesquita*, 1 Q. B. D. 416; *Castle* v. *Kouri*, 18 O. L. R. 462. Where the defendant was a surety, and had not acknowledged his indebtedness, and there was nothing to shew that the defence was merely for delay, he was held entitled to put the plaintiff to proof of his claim, and was admitted to defend: *Lloyd's Banking Co.* v. *Ogle*, 1 Ex. D. 263. Leave to defend unconditionally.

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Set-off

So also where a set-off was shewn exceeding the plaintiff's claim: *Groom* v. *Rathbone*, 41 L. T. 391; *Commee* v. *Can. Pac. Ry.*, No. 2, 11 P. R. 222, but see *Branch's Case*, 40 L. T. 652: so also, where the action was on a covenant for payment in a mortgage, and defendant swore that the mortgage was signed on the express understanding that he was not to be personally liable, and there were circumstances to corroborate this statement: *Munro* v. *Orr*, 17 P. R. 53. Where in an

Fraud.

action on a promissory note the defendant swears to facts affecting the note with fraud, he is entitled to defend unconditionally, as the onus of proof is on the plaintiff that he is a *bonâ fide* holder for value: *Fuller* v. *Alexander*, 47 L. T. 443; 52 L. J. Q. B. 103; *Millard* v. *Baddeley*, W. N. 1884, 96; 28 Sol. Jour. 412, 427; 76 L. T. Jour. 408; *Farmer* v. *Ellis*, 2 O. L. R. 544. In the case, however, of a note not alleged to have been obtained by fraud, but only to have been made for the accommodation of another, the presumption of value is not removed, and the onus is on the defendant; leave to defend in such a case was refused, except on the terms of paying money into Court: *Merchants Nat. Bank* v. *Ontario Coal Co.*, 16 P. R. 87.

Non-performance of condition.

Where the action was on a note, and defendants swore that it was given on conditions which had not been fulfilled by the payees, and the defendants also swore that they were informed and believed (without indicating the source of information), that the plaintiffs (who were indorsees) were suing for the benefit of the payees, and were not holders for value, or took the note after maturity, and the plaintiffs denied that they had any notice of any condition, it was held that no valid defence was shewn: *Jones* v. *Mason*, 18 P. R. 442, distinguishing *Munro* v. *Orr*, 17 P. R. 53, and following *Bank of Toronto* v. *Keilty*, 17 P. R. 250.

Want of consideration.

A defendant setting up that the note sued on was made without consideration, and that the plaintiff was suing on behalf of the payee who had notice, was allowed to defend unconditionally: *Farmers' Bank* v. *Sargent*, 17 P. R. 67; also where the defendant set up that the note sued on was void under *The Bills of Exchange Act* (R. S. C. c. 119) s. 16, because, to the knowledge of the plaintiff, it was given for a patent right, which fact did not appear on its face as the Act requires: *Davey* v. *Sadler*, 1 O. L. R. 626.

Want of notice of dishonour.

Indorsers who denied receipt of notice of dishonour, although the protest was produced, were held entitled to have the matter tried: *Ontario Bank* v. *Burke*, 10 P. R. 561; see also *Hughson* v. *Gordon*, 10 P. R. 565.

Defence must be bona fide.

Leave to defend unconditionally will be granted where a *bonâ fide* defence is set up, (even though novel in its character: *Jones* v. *Stone*, 1894, A. C. 124), wherever there is a *bonâ fide* contest on a question which is a fair subject for litigation: *Wilkes* v. *Kennedy*, 16 P. R. 204; *Munro* v. *Orr*, 17 P. R. 53; *Dueber* v. *Taggart*, Ch. D. Ont. 23 Dec., 1895; *Clark* v. *Lee*, 5 O. W. R. 631; *Hill* v. *Edey*, *Ib.*, 690, 719; *McGeachin* v. *Compbell*, 6 O. W. R. 94; *Imp. Bank* v. *Tuckett*, 6 O. W. R. 161; *Codd* v. *Delap*, 92 L. T. 510; *Can. Pac. Ry.* v. *Matthews*, 5 O. W. N. 437.

See also where the only defence set up is to the jurisdiction of the Court under *Rule* 25, (*h*), having regard to the special nature of that jurisdiction: *Campau* v. *Randall*, 17 P. R. 243.

In an action on a covenant in a mortgage where there is a *bonâ fide* dispute as to the amount due, leave to defend will be given:

Lynde v. *Waithman*, 1895, 2 Q. B. 180; but *quære*, in such a case in Ontario whether a reference might not be directed under *Rule* 61. Rule 57.

Where a plaintiff, pending an action on a covenant in a mortgage, without the leave of the Court, gives notice of sale under a power of sale contained in the mortgage, that, *ipso facto*, operates as an extension of the time of payment, and the plaintiff cannot without the defendant's consent, withdraw the notice or move for judgment under this *Rule* until the time for payment under the notice has expired: *Lyon* v. *Ryerson*, 17 P. R. 516. Stay of action by reason of collateral proceedings.

In *Anon.*, 60 L. T. Jour. 176; 1 Charl. Ch. Ca. 52, on an appeal from a Master who had ordered money into Court, a fresh affidavit not used before the Master being read, leave to defend unconditionally was given. Further evidence on appeal.

Where an order is made directing a trial of the action without a jury, and such order is not appealed from, the defendant is thereafter precluded from applying for a trial by jury: *Kelsey* v. *Dame*, 1912, 2 K. B. 482. Order for trial without a jury.

(3) Leave to Defend on Payment of Money into Court within a Reasonable Time, or on Other Terms.—Where on an application for judgment under former C. R. 603, it was not clear that there was a defence, but the defendant shewed such a state of facts as led to the inference that at the trial he might be able to establish a good defence, leave was given to defend on payment of the amount claimed into Court: *Ray* v. *Barker*, 4 Ex. D. 279; *sed vide*, *Leslie* v. *Poulton*, 15 P. R. 332; *Merchants Notional Bank* v. *Ontario Cool Co.*, 16 P. R. 87 (where the defence urged was not founded on any known facts, but was merely a suggestion of what might be disclosed if the case went to trial); see also *Dunnet* v. *Harris*, 14 P. R. 437, where the defence set up was negatived by the plaintiff's affidavits. On terms.

In *Anon.*, 60 L. T. Jour. 85; 1 Charl. Ch. Ca. 45, Quain, J., gave leave to defend where a proper counter-claim was the defence, but confined the defence to the counter-claim; but see *Shepherd* v. *Wilkinson*, 6 T. L. R. 13. Counter-claim.

Where the defendant shews what his defence is, and his reasons for thinking it substantial, and it appears to be fairly in dispute, he ought not to be ordered to bring money into Court: *Runnacles* v. *Mesquito*, 1 Q. B. D. 416; *Dobie* v. *Lemon*, 12 P. R. 64; even though the plaintiff's case appears to be supported by documents: *Word* v. *Plumbley*, 6 T. L. R. 198; *Bowes* v. *Caustic Soda, etc.*; *Ford* v. *Harvey*, 9 T. L. R. 328; and it would seem from the later cases that, as a general rule, whenever the Court is of opinion that the defendant should be allowed to defend at all, no terms should be imposed: *Munro* v. *Orr*, 17 P. R. 53; *Ducber* v. *Taggart*, Ch. D. Ont. 23 Dec., 1895. Payment into Court not ordered if defence substantial.

Where in a claim for payment of sums of money, the defence set up is a denial and contradiction of the accounts on which the claim is founded, it is erroneous to make an order under this *Rule* refusing leave to defend, except upon the condition of the defendant paying into Court a definite sum within a certain time, and that, unless he does so, judgment shall be signed against him. This is especially the case where the plaintiffs are mortgagees, and have been in possession as mortgagees: *Wallingford* v. *Mutual Society*, 5 App. Cas. 685.

In *Roberts* v. *Guest*, W. N. 1876, 10; 1 Charl. Ch. Ca. 53, judgment was ordered to be signed, unless the defendant paid the money into

Rule 57.

Court, where the defence was a counter-claim for costs in a suit in Chancery, in which an order for costs had not been obtained. See also *Germon Bank* v. *Schmidt*, W. N. 1876, 10, and as to the amount to be paid: *Oriental Bank* v. *Fitzgerald*, W. N. 1880, 119.

Fraud.

Where the defence to an action by the holder of a bill of exchange was sworn to be that the acceptance was obtained by fraud, to which the plaintiff replied that he took the bill for value without notice of any fraud, it was held reasonable to give defendant leave to defend upon payment into Court of the amount of the bill: *Brooks* v. *Aylmer*, 73 L. T. Jour. 80.

Action for calls.

In an action by a company on a call, a clerk of the company swore that notice of allotment was duly posted to the defendant, but though the defendant swore that the letter was never received, it was held that this constituted no defence: see *Household Fire Insurance Company* v. *Grant*, 4 Ex. D. 216; but it was held that the defendant was entitled to cross-examine the clerk who swore to the posting, and leave was therefore given to defend on payment into Court: *Carta Para Gold Mining Company* v. *Fastnedge*, 30 W. R. 80.

Married woman.

Where a *primâ facie* case was made out on notes signed by a married woman in the course of a business carried on by her, and the Judge not being satisfied that there was ground for a defence that the business was her husband's, and that she only acted as his agent, and the defendant declining to pay money into Court, leave to sign judgment was granted: *Nelson* v. *Thorner*, 11 Ont. App. 616.

Right to defend.

Under C. R. 603, a defendant was not entitled as of right to defend upon paying money into Court, without an affidavit of merits: *Crump* v. *Cavendish*, 5 Ex. D. 211.

Money paid in, abides result.

The money paid in, is paid in as security to abide the event, and therefore where the plaintiff succeeds he is entitled to have the money paid out to him: *Bird* v. *Barstow*, 1892, 1 Q. B. 94; and his right is not affected by the subsequent insolvency of the defendant: *Re Ford*, 1900, 2 Q. B. 211; and a defendant who has paid money into Court has been held entitled to have it paid out to him if successful in the action, notwithstanding that a notice of appeal has been given: *Yorkshire Banking Co.* v. *Beatson*, 4 C. P. D. 213; but see notes to *Rule* 496.

Judgment for part.

(4) Judgment for Part, and Leave to Defend as to the Residue Unconditionally.—Where the defendant's affidavit or examination admits part of the claim to be due, and discloses a defence upon the merits as to the residue, there is no power to grant leave to defend as to part of the claim only, on condition of payment of the amount as to which there is no defence. The plaintiff is entitled to have judgment for the amount admitted; the defendant being at liberty to defend as to the residue: *Dennis* v. *Seymour*, 4 Ex. D. 80, and see *Rule* 58.

Defence to part only.

Where a good defence is not shewn to the whole of the plaintiff's claim, judgment may be obtained under this *Rule* for so much of the claim as is not answered: see *Rule* 58; *Anon.*, W. N. 1876, 53; 2 Charl. Ch. Ca. 22; *Hanmer* v. *Flight*, 35 L. T. 127; W. N. 1876, 54; 2 Charl. Ch. Ca. 23. On appeal, however, in the last case, 36 L. T. 279, it was considered that the facts set out in the pleadings did not support the claim in respect of which the plaintiff sought to sign judgment, and the order was therefore refused. See also *Dennis* v. *Seymour*, 1 Ex. D. 80.

Rule 58.

Defence allowed on giving security—appeal.

It has been held in England that where leave is given to defend upon giving security to the satisfaction of a Master in Chambers, there is no appeal from the decision of the Master in regard to the sufficiency of the security tendered: *Hoare & Co. v. Morshead*, 1903, 2 K. B. 359; 89 L. T. 225; but in Ontario probably the Master's decision is not necessarily final merely because the subject of it, or some matter decided forming part of it, is more or less in his discretion.

Effect of dismissal of motion.

(5) Dismissal of the Motion.—The simple dismissal of the plaintiff's motion will be equivalent to leave to defend: *Margate Pier, etc., Co. v. Perry*, W. N. 1876, 52; 2 Charl. Ch. Ca. 19; and where the motion is dismissed the plaintiff must proceed with the action either under *Rule* 56 or in the usual way, the indorsement being a statement of claim under *Rule* 111. Where the motion is dismissed it may be well to provide that it is without prejudice to the further prosecution of the action.

Amendment of indorsement of writ.

Amendment of Indorsement.—Formerly where at the time of the motion the indorsement on the writ was defective, the motion was refused, and the defect could not be cured by amendment pending the motion: *Gurney v. Small*, 1891, 2 Q. B. 584; 65 L. T. 754; but after the amendment of the indorsement a new motion for judgment might be made: *Paxton v. Baird*, 1893, 1 Q. B. 139; 67 L. T. 623; *Satchwell v. Clark*, 66 L. T. 641; *Clarkson v. Dixon*, 17 P. R. 92, 206; but see *Nesbitt v. Armstrong*, 14 P. R. 366, and *Casselman v. Barrie*, 14 P. R. 507; *Roberts v. Plant*, 1895, 1 Q. B. 597.

Under *Rule* 57 (3) a substantive motion to amend is not necessary, but, in a proper case, an amendment may be granted on the motion for judgment; but it is to be presumed that an amendment under that clause will not be granted, if a defendant will be unfairly prejudiced thereby.

Where a motion under *Rule* 57 is dismissed, there is no jurisdiction to treat the application as a motion for judgment under *Rule* 222: *Solmes v. Stafford*, 16 P. R. 264.

Forms of judgment, orders, etc.

For form of judgment: see Form No. 106; H. & L. Forms, No. 424.

For forms of orders under this *Rule*: see H. & L. Forms, Nos. 421, 422, 423.

Appeal.

An appeal lies to a Judge in Chambers, and from him to a Divisional Court of the Appellate Division, from an order granted by a judicial officer or local Judge under *Rule* 57, notwithstanding that it is interlocutory: see *Jud Act*, sec. 25, and *Bank of Toronto v. Kelly*, 17 P. R. 250; but where leave to defend has been given, an appeal against the discretion thus exercised will hardly ever be entertained: *Papayanni v. Coutpas*, W. N. 1880, 109.

Where the costs of a motion under this *Rule* are disposed of by an order made on the motion, the mode of disposing of them is not reviewable by the Judge at the trial: *Koosen v. Rose*, 76 L. T. 145; 45 W. R. 337.

Defence as to part.

58. Where the defence disclosed applies only to a part of the plaintiff's claim, or any part of his claim is admitted to be due, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not

Rules 59, 61.

apply to, or as is admitted to be due, subject to such terms, if any, as to suspending execution, or payment into Court as may seem just, and the defendant may be allowed to defend as to the residue of the plaintiff's claim, or a reference may be directed under Rule 61. C.R. 604.

See the Eng. (1883) R. 118. The *Rule* was applied in *Hanmer* v *Flight*, 24 W. R. 346; 36 L. T. 279.

See notes to *Rule* 57. The jurisdiction conferred by this *Rule* may be exercised in Chambers: *Rule* 207 (8).

Judgment not to prejudice proceeding against other defendants.

59. Judgment may be awarded and execution issued against any defendant without prejudice to the plaintiff's right to proceed against any other defendant. C.R. 605.

Cf. Eng. R. (1883) 119, which, though not in the same words, is to the same effect. Jurisdiction may be exercised under this *Rule* in Chambers: *Rule* 207 (8).

This *Rule* does not apply where the right of action can only be in the alternative against one or other of two defendants. In such case judgment signed against one defendant is conclusive evidence of election not to proceed against the other: *Morel, etc.*, v. *Westmoreland*, 1904, A. C. 11, 14; *French* v. *Howie*, 1905, 2 K. B. 580; 1906, 2 K. B. 674; 95 L. T. 274.

See notes to *Rule* 57.

Where one of two partners submits to judgment, and the other obtains leave to defend, the latter cannot set up the judgment so recovered against his partner as a bar to the recovery of judgment against himself: *Weall* v. *James*, 68 L. T. 54, 515; see also *Dueber Watch Case Manufg. Co.* v. *Taggart*, 26 Ont. App. 295. *Semble*, if the judgment is obtained by consent: *McLeod* v. *Power*, 79 L. T. 67; see notes to *Rule* 106.

Leave to defend may be absolute or conditional.

60. On any such motion, an order may be made, giving the defendant leave to defend either unconditionally, or subject to such terms as may seem just, or for a speedy trial of the action upon such terms as may be deemed proper. C.R. 606. *Amended.*

Compare Eng. (1883) R. 120.

See notes to *Rule* 57.

Reference when may be ordered.

61. On any such motion, if it appears that the defence disclosed is substantially only as to the amount recoverable, the Court may direct a reference, and either pronounce judgment to take effect on the confirmation of the report, or reserve further directions and questions

of costs for consideration after the report is made. C.R. 607. Rule 62.

There is no corresponding English Rule.

62. Where a writ is specially indorsed and some special reason for urgency is shewn the plaintiff may, at any time, by leave, serve notice of motion for judgment. Such leave may be given *ex parte* and subject to such directions, as to the service of the notice of motion and filing and service of the affidavits and otherwise, as may seem just. C.R. 608. *Amended.* Motion for judgment by leave after service of writ.

There is no corresponding English Rule. The *Rule* applies only where the writ is specially indorsed. Former *Rule* 608 was not so limited.

The Master, or a Judge in Chambers, may grant leave under this clause to make the motion *Rule* 207 (8), 208, but the motion itself must be made in Court: *Morrison* v. *Taylor*, 46 U. C. Q. B. 492. The report of *Lucas* v. *Fraser*, 9 P. R. 319, is erroneous; the motion was before Osler, J., in Court. Jurisdiction.

Where an order was erroneously made in Chambers instead of in Court, it was held that advantage of the irregularity must be taken by a summary motion to set aside the judgment, and that its invalidity could not be set up in an action founded upon it: *Martin* v. *Evans*, 6 Ont. 238; in this case the Judge of a County Court pronounced the judgment in question in a County Court action, and the judicial personality was the same in Court as in Chambers.

In *Federal Bank* v. *Hope*, 6 Ont. 209, the Court refused to decide on a motion under this *Rule* whether a defence set up was a valid one, as not being clearly bad.

An execution issued upon a judgment obtained under this *Rule* is, of course, subject to the provisions of *The Creditors' Relief Act*.

The plaintiff must make out as clear a case for judgment as on a motion under *Rule* 57; *Leslie* v. *Poulton*, 15 P. R. 332; *Copeland Brewing Co.* v. *Brooks*, 35 C. L. J. 419; and in addition special circumstances necessitating a hearing out of the ordinary course must be shewn: *Francis* v. *Francis*, 9 P. R. 209; *Leslie* v. *Poulton*, *supra*; *e.g.*, that some injury or injustice is likely to happen to him if he is not awarded immediate relief: *Greene* v. *Wright*, 12 P. R. 426. Something beyond the plaintiff's desire to get a speedy judgment is necessary: *Kinloch* v. *Morton*, 9 P. R. 38; *Lucas* v. *Fraser*, 9 P. R. 319; *Leslie* v. *Poulton*, *supra*.

Judgment will not be granted where a substantial defence is indicated in the affidavits for the defendant: *Molson's Bank* v. *Cooper*, 16 P. R. 195.

Where the affidavits filed for and against the motion were conflicting, the action was ordered to be entered for trial: *Francis* v. *Francis*, 9 P. R. 209; *Greene* v. *Wright*, 12 P. R. 426; and even though the Court is unable to say that a clear legal defence is shewn, yet if, on the facts presented, it is of opinion that there is a question to be tried, the motion will not be granted: *Leslie* v. *Poulton*, Conflicting affidavits.

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supra. The fact that the sheriff had sold the goods of the defendant in another action, and that the plaintiff desired to obtain a share in the distribution of the proceeds under *The Creditors' Relief Act*, was held not to be of itself a sufficient reason for granting judgment under this *Rule*: *Molsons Bank* v. *Cooper*, 16 P. R. 195. *In Lake of the Woods Milling Co.* v. *Apps*, 17 P. R. 96, the motion was refused though unopposed, and the defendant was sworn to have fraudulently assigned his property: *sed vide Kinloch* v. *Morton*, *supra*, p. 411.

Action for account.

63. In default of appearance when the plaintiff's claim is for an account, the plaintiff may apply for a judgment for the taking of the account claimed, with all directions usual in similar cases. C.R. 645.

See Eng. (1883) R. 121. The order or judgment for an account under this *Rule* can only be obtained on motion to the Court.

The claim as indorsed should involve an account: *Re Gyhon*, 29 Ch. D. 834, and notes *infra*.

Before taking proceedings under this *Rule* in default of appearance the plaintiff must file an affidavit of service of the writ of summons, or the notice in lieu thereof: see *Rule* 36.

This *Rule* applies not merely where the plaintiff claims an account from defendant, but also where the plaintiff will himself be the accounting party: *Molony* v. *Molony*, 21 L. R. Ir. 91.

Indorsement of claim for account.

No form is given of an indorsement of a claim for an account by principal of an agent. The following may suffice: "The defendant acted as the plaintiff's agent for (*stating nature of agency*) and the plaintiff claims an account of the dealings and transactions, receipts and disbursements by the defendant for the plaintiff as his agent. The plaintiff submits to pay what, if anything, on the taking of such account, may appear to be due from him to the defendant, and he claims payment by the defendant of what, if anything, may be found due by him to the plaintiff." A claim for an account by a trustee, mortgagee, or of a partnership may be framed from the above: and see Form No. 4, Equitable Relief; H. & L. Forms Nos. 54, 55, 56.

It is not quite clear from the *Rule* whether it is, or is not, intended that the motion shall be made on the indorsement of the writ without filing a statement of claim: see *Green* v. *Colby*, 24 W. R. 246, but from the heading of the chapter and the collocation of the *Rules* it may perhaps be safely assumed that a statement of claim is unnecessary, and that all that is necessary on the motion is proof of service of the writ indorsed with a claim for an account and the non-appearance of the defendant: see *Rule* 64, where in case of appearance pleading is expressly dispensed with. The motion should be made in the Weekly Court: but see *Ladies Tailoring Association* v. *Clarkson*, 27 C. L. J. 501, where it was held that the Master in Chambers may pronounce any judgment where the parties consent. But this can hardly be said to be the established practice.

Under the corresponding English Rule, where the account claimed is an executorship or administration account, the order made is the same as the usual administration decree formerly made in Chancery: see *Bell* v. *Lowe*, W. N. 1875, 229; 1 Chan. Ch. Ca. 56; and *Pratt* v. *Brown*, cited in Dan. Forms, 3rd ed., 206. Under such a judgment,

the account may, in Ontario, be taken on the footing of wilful neglect and default: see notes to *Rules* 410, 608. Rules 64, 65.

In Ontario it is not customary to make orders for an account under this *Rule*, in mortgage actions, a special procedure being provided to meet such cases: see *Rules* 466-467.

Administration accounts are also usually taken under other special *Rules*: see *Rules* 608, 613, and Form No. 104; H. & L. Forms Nos. 378, 379. Where, however, complete administration of the estate of a deceased person, or of a trust, or the winding-up of a partnership, is not desired, but only an account, this *Rule* may probably be usefully applied: see *Leyborne-Popham* v. *Spencer-Brown*, 9 T. L. R. 309.

The provisions of the *Rules* 331, 353, for enforcing orders for discovery or inspection of documents, are not applicable to an order for accounts under this *Rule*: *Pike* v. *Keene*, 35 L. T. 341; 24 W. R. 322; but see *Rule* 411.

This *Rule* is intended to enable parties upon a summary application to obtain a judgment to take accounts, and the Court may, by the same judgment, order payment of what may be found due on the taking of the account, or reserve to for a subsequent hearing the appropriate judgment.

A form of a notice of motion will be found in H. & L. Forms, No. 404. Two days' notice of motion is all that is necessary: *Rule* 215. Forms.

64. Where the plaintiff's claim is for an account and appearance is entered the plaintiff may move for judgment, without pleading, and unless the defendant satisfies the Court that there is some preliminary question to be tried the appropriate judgment shall be pronounced. *New.* Motion for account after appearance.

This *Rule*, though said to be new, appears to be based on C. R. 645.

If the right to an account depends upon a preliminary question which is in dispute, that question must first be decided in some manner authorized by the *Rules* before an account will be ordered: see *Re Gyhon*, 29 Ch. D. 834 (disputed question of breach of trust): *Batthyany* v. *Walford*, 36 Ch. D. 276 (Plaintiff's claim as a creditor disputed): *Dyott* v. *Neville*, W. N. 1887, 35.

65. The Court may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that some special or further relief is sought, or some issue is to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. C.R. 646. Reference at any stage.

To the same effect as the Eng. (1883) R. 381.

A reference under this *Rule* may be to a Master, or other proper officer, or to an Official Referee, under sec. 64, *supra*, p. 225.

An inquiry was directed in *West London Dairy Soc.* v. *Abbott*, 29 W. R. 584; 44 L. T. 376, as to a question of fact, leaving questions

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of law for subsequent determination; and in *Turquond* v. *Wilson*, 1 Ch. D. 85, for taking of accounts of a partnership which by his defence defendsnt hsd sdmitted.

An order msy sometimes he msde under the combined suthority of this *Rule* snd *Rule* 220. See notes to thst *Rule* and *Turquand* v. *Wilson*, *supro*; see slso *Re Borker's Estate*, 10 Ch. D. 165-6; *Rolfe* v. *Mocloren*, 3 Ch. D. 106; *Rumsey* v. *Reode*, 1 Ch. D. 643.

It wss considered that under this *Rule* it is not proper that the issue in the action should he referred to he tried on the reference; hut only accounts suhsidisry to the rights of the parties should he directed to he tsken: *Gornhom* v. *Skipper*, 29 Ch. D. 566; see slso *Mocdonold* v. *Piper*, 10 P. R. 586.

Where an sction wss hrought to ohtain s decisration of plaintiff's rights in certsin mortgsged property, snd to restrain a ssle hy the mortgsgees, snd the plaintiff ohtsined judgment declaring his rights, hut the Court refused to restrsin the ssle, it wss held that s supplementsry order to tske the mortgsgees' account, tsx costs and ascertain the surplus in their hsnds after the ssle wss properly made under this *Rule*: *Meyers* v. *Homilton Provident, etc.*, 15 P. R. 39.

The motion should be msde in Court: see sec. 64, *supra*, p. 225; but see *Lodies' Toiloring Assoc.* v. *Clorkson*, 27 C. L. J. 501, *supro*. p. 412.

Rule 66.

CHAPTER VI.

PARTIES AND JOINDER OF CAUSES OF ACTION.

(i) *Generally.*

Parties to actions.

The Court has no jurisdiction, inherent or otherwise, over any person other than those properly brought before it as parties, or persons whom it is authorized by stntute to treat as if they were parties (*e.g.*, persons served with nn ndministration judgment, or in the samn interest with persons appointed to represent them), or persons coming in and submitting to the jurisdiction of their own free will, to the extent which they so submit (*e.g.*, creditors of a bankrupt executor, who has carried on business under a power in the will, coming in to claim against the testator's estate in order to obtain subrogation to the executor's right of indemnity); see *per* Farwell, L.J., *Brydges* v. *Brydges*, 1909, 2 K. B. at p. 191.

The following *Rules* are framed with a view to binding persons by judgments rendered in actions to which they ars not parties in certain cases, by reason of their being represented in the action by persons who are parties. It will be seen by the cases hereafter referred to, that though the rights of absent parties may be bound by representation under the *Rules*, yet if any relief is sought against them individually, such as an account, or execution of conveyances, or recovery of money, etc., they must be made actual parties to the proceeding either originally, or by supplementary proceedings,—"The Courts have no jurisdiction to make orders against persons not before them merely because an order made, or to be made, may, or will be ineffectual," *per* Farwell, L.J., *Brydges* v. *Brydges*, *supra*.

Joinder of plaintiffs.

66. All persons may be joined in an action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or occurrence, or series of traasactions or occurrences, is alleged to exist, whether joiatly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; but, if, upon the application of a defeadant, it appears that such joinder may embarrass or delay the trial of the action, the Court may order separate trials, or make such other order as may be expedient; and without any amendment, judgment may be givea for such one or more of the plaintiffs as may be fouad entitled to relief, for such relief as he or they may be entitled to, but the defendant, though unsuccessfnl, shall be entitled to his costs occasioned by joining any persoa who is not found entitled to relief, unless the Court otherwise orders. C.R. 185.

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(2) On the signing of default judgment the officer signing judgment may fix and ascertain costs without taxation. (See Rules of 24th December, 1913).

See the Eng. Rule 123 of 26th Oct., 1896.

Clause 2 would appear to be more appropriate as an addition to *Rule* 661.

Practice under former Rules and decisions.

Speaking generally the original Jud. Act provided that all parties might be joined whose presence before the Court was necessary to enable the Court effectually and completely to adjudicate upon, and settle all the questions involved in the action. On the question, however, how far separate causes of action by several plaintiffs, or against several defendants, might be investigated in one action, the cases do not present a consistent and uniform course of decision. A change of view began about 1893, and culminated in the decision of the House of Lords in *Smurthwaite* v. *Hannay*, 1894, A. C. 494, where it was held that several shippers, or several consignees of different shipments, of goods shipped on board the same ship, for carriage from and to the same places, could not join as plaintiffs in one action, against the ship-owners to recover damages for short delivery; because the causes of action were separate and distinct, and could not under the *Rule*, as it formerly stood, be joined in one action; see also *Peninsular and Oriental S. N. Co.* v. *Tsune Kijima*, 1895, A. C. 661.

The numerous cases in which the decision of the House of Lords was subsequently applied led to the passing in England of the Rule of 1896, above mentioned, and in Ontario of the above *Rule* 66.

Under the *Rule* as it now stands, probably all of the cases which follow *Smurthwaite* v. *Hannay*, 1894, A. C. 494, would now be differently decided. Even under the former Rules it was held that separate actions by husband and wife for damages caused by the same wrongful act ought not to be brought, but that they should join in one action: *Noyes* v. *Young*, 16 P. R. 254; but see *Heimbs* v. *Newcastle*, 76 L. T. 109.

The power to order separate trials contained in *Rule* 66 is in accordance with the decision in *Hannay* v. *Smurthwaite*, in the C. A. 1893, 2 Q. B. 412.

"Series of transactions."

"Series of Transactions."—The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs, is not sufficient to constitute the transactions a "series" within the meaning of this *Rule*: *Mason* v. *Grand Trunk Ry. Co.*, 8 O. L. R. 28.

But an action by mother and daughter against a defendant for trespass to the mother's land, and an assault made on the daughter in the course of the trespass, was held to be properly constituted within the *Rule*: *Lanister* v. *Crawford*, 2 O. W. N. 7.

Eight different contracts of insurance, made by six different persons with the same insurance company, were held not to constitute a series of transactions within the *Rule*: *Honsinger* v. *Mut. Reserve*, 5 O. W. R. 528.

Joinder of plaintiffs.

Joinder of Plaintiffs.—Two or more holders of debentures may join as plaintiffs in an action against directors of a company for damages for alleged misrepresentations in the prospectus of the company: *Drincqbier* v. *Wood*, 1899, 1 Ch. 393; 79 L. T. 548.

A plaintiff claiming on his own behalf damages against directors of a company, in respect of his having been induced by fraud of defendants to purchase shares, was held not entitled under this *Rule*

to make, in the same action, that claim, and also a claim on behalf of himself and all shareholders to a declaration that a declaration of a dividend on shares, when there were no profits, was *ultra vires* and illegal, and for judgment for repayment of the dividend: *Stroud* v. *Lawson* 1898, 2 Q. B. 44; 78 L. T. 729. Rule 66.

The proper person to sue directors of a limited company for acts done by them *ultra vires*, is the company itself; but if the company will not allow its name to be used, a shareholder on behalf of himself and other shareholders may sue, making the company a defendant: per Jessel, M.R., in *Russell* v. *Wakefield*, *etc.*, L. R. 20 Eq. 474; *Atwool* v. *Merryweather*, L. R. 5 Eq. 464 *n*. Action against directors.

Two plaintiffs whose names had been wrongfully used in publications of the defendant were held entitled to join in an action to restrain such user: *Oxford* v. *Gill*, 1899, 1 Ch. 55; 79 L. T. 338. So also two plaintiffs, a married man and an unmarried woman, against whom charges of criminal intimacy had been made by the defendant, on three different occasions, were held entitled to sue in one action in respect of the three charges, there being publication as to all, and the three occasions being a series with a common question of fact: *Agar* v. *Escott*, 8 O. L. R. 177; but the male plaintiff was held not entitled to join in the action a claim for libel contained in a letter to the female plaintiff, except by way of aggravation of damages: *Ib.*; and several plaintiffs claiming to have been damnified by several defendants combining and conspiring together as officials of different trades unions, to prevent the plaintiffs doing acts they were legally entitled to do, were held entitled to join in one action, and the defendants were also held to be properly sued together: *Walters* v. *Green*, 1899, 2 Ch. 696. Actions for libels.

Where two or more fruit-growers brought an action claiming to enforce certain preferential rights in Covent Garden Market, it was held that the plaintiffs, as representing a class who had an interest in common, could maintain the action; the Attorney-General was directed to be added as a defendant to represent the rest of the public; *sed quære*, if that was necessary: *Ellis* v. *Duke of Bedford*, 1899, 1 Ch. 494; 1901, A. C. 1; 83 L. T. 686.

Where the action is brought to enforce a public right, the Attorney-General should be plaintiff: *Devonport* v. *Tozer*, 1903, 1 Ch. 759 (an action to enforce a municipal building by-law). Some only of the public cannot maintain such an action unless they have a special and private interest in the subject matter of the action: *Hope* v. *Hamilton Park Comrs.*, 1 O. L. R. 477; *Liverpool* v. *Chorley*, 1852, 2 D. M. & G. 852. Attorney-General.

Mortgagees asking to have a lease set aside as having been made by the mortgagor after the mortgage, and an assignee for the benefit of creditors asking to have the lease set aside as being voluntary and void as against creditors, were held not entitled to join as plaintiffs: *Bank of Hamilton* v. *Anderson*, 7 O. L. R. 613; 3 O. L. R. 153. Conflicting claims.

One of two joint promisees can maintain an action on a contract making the other joint promisee a co-defendant, if after tender of an indemnity against costs he refuses to be joined as a co-plaintiff: *Cullen* v. *Knowles*, 1898, 2 Q. B. 380. Joint contractors.

So also one of several joint covenantees may sue alone to restrain a breach of the covenant, where the other covenantees have ceased to be

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interested in the covenant; but, *semble*, they should be joined as defendants: see *Pornell* v. *Deon*, 31 Ont. 517.

Joint owners of patent.

One of several joint owners of a patent may sue for a recovery of profits due for the use of the patent without joining the other owners: *Sheehon* v. *G. E. Ry. Co.*, 16 Ch. D. 59.

Co-mortgagees.

One of several mortgagees may bring a foreclosure action, making his co-mortgagees defendants, if they will not join as plaintiffs: *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121.

Joint reversioners

One of several owners of a reversion may sue for injury to the reversion without joining his co-tenants: *Roberts* v. *Holland*, 1893, 1 Q. B. 665.

Independent causes of action.

Several plaintiffs cannot join in the same action separate and distinct causes of action to which they are respectively entitled, against the same defendants, where such causes are in no way dependent on each other: *Horris Maxwell Lorder Lake Mining Co.* v. *Gold Fields*, 23 O. L. R. 625.

Seduction, and breach of promise.

The *Rule* does not permit claims for seduction, and breach of promise of marriage, to be joined in one action: *Dixon* v. *Tracey*, 17 C. L. T. 381.

Misjoinder

As to the mode of objecting to a misjoinder, or non-joinder, of plaintiffs: see *Rule* 134.

Counter-claim to joint claims.

Where two or more plaintiffs sue for a joint claim, the defendant may set up a separate counter-claim against each plaintiff: *Manchester, etc., Ry.* v. *Brooks*, 2 Ex. D. 243.

Actions by companies in liquidation.

A company in liquidation retains its corporate powers, and suits to recover debts or property of the company should be brought by the liquidator in the company's name: *Kent* v. *Communauté des Sœurs de Chorité*, 1903, A. C. 220; where, however, the liquidator is suing as representative of the creditors or contributories, he should sue in his own name: *Ib.*

An objection that one of several plaintiffs has no title to maintain the action, should be taken by defence: *Morong* v. *Rose*, 3 O. L. R. 354.

Foreign Sovereign.

A Sovereign of a foreign state is not obliged to sue in his own name to enforce contracts made on his behalf by his ministers, but such ministers, or their successors in office, though not expressly named in the contract, may sue for the enforcement thereof: *Yzquierdo* v. *Clydebank E. Co.*, 1902, A. C. 524; 87 L. T. 339.

Costs.

Where two plaintiffs joined in an action and one was successful and the other unsuccessful, the successful plaintiff was held to be chargeable with the costs of joining the unsuccessful plaintiff: *D'Hormusjee & Co. and Isaacs & Co.* v. *Grey*, 10 Q. B. D. 13; 52 L. J. Q. B. 192; but in *Viscount Gort* v. *Rowney*, 17 Q. B. D. 625, where costs had been ordered "to abide the event," it was held that the unsuccessful plaintiff only was liable for the costs occasioned by his being joined in the action.

Where some plaintiffs were successful but some were absent at the trial from illness and gave no evidence, the latter were ordered to pay defendants the costs occasioned by their being joined as plaintiffs, without prejudice to their bringing a fresh action: *Arnison* v. *Smith*, 41 Ch. D. 348.

Rule 67.
Joinder of defendants

67.—(1) Where the plaintiff claims that the same transaction or occurrence, or series of transactions or occurreaces, give him a cause of action against one or more persons, or where he is in doubt as to the person from whom he is entitled to redress, he may join as defendaats all persons against whom he claims any right to relief, whether jointly, severally, or in the alternative; and judgment may be given against one or more of the defendants according to their respective liabilities.

(2) The Court may order separate trials or make such other order as may be deemed expedient, if such joinder is deemed oppressive or unfair. *New.*

See Eng. (1883) R. 126.

This *Rule* enables defendants to be joined in the like circumstances that plaintiffs may be joined under the preceding *Rule.*

As to what is meant by series of transactions: see notes to *Rule* 66.

This *Rule* must he read with *Rule* 134: *Edwards* v. *Lowther*, 24 W. R. 434.

See former C. RR. 188, 189, 192, 202.

All or any parties liable on one contract may be joined.

By the present *Rule* it is optional with the plaintiff in actions on bills and notes, as well as in actions on any other contract, to proceed against any one or more of the parties jointly or severally liable: see *Re Arcedeckne, Atkins* v. *Arecdeckne*, 24 Ch. D. 709; *Murray* v. *Gillett*, 18 C. L. J. 78; but one of such parties if sued alone is entitled to have his co-contractors joined, wherever under the old practice a plea in abatement might have been pleaded: *Pilley* v. *Robinson*, 20 Q. B. D. 155, as explained in *Wilson* v. *Balcarres*, 1893, 1 Q. B. 422; S. C. *sub nom. Wilson* v. *Killick*, 68 L. T. 169. Where, however, the joint contractor is a foreigner residing out of the jurisdiction the defendant cannot insist on his being joined: *Ib.*; see also *Robb* v. *Murray*, 13 P. R. 397. The Court will ordinarily stay the plaintiff's proceedings until the co-contractor is added, when the latter is within the jurisdiction, but where he has been added as defendant, and after reasonable efforts, the plaintiff is unable to serve him with process, the action will he allowed to proceed against the other parties: *Robinson* v. *Geisel*, 1894, 2 Q. B. 695; 71 L. T. 70. *Semble*, in such a case the name of the defendant who cannot be found ought to be ordered to be struck out.

As to the rule that judgment recovered against one of two joint contractors, or tortfeasers, is a bar to an action against the other: see *Hammond* v. *Schofield*, 1891, 1 Q. B. 453; *Toronto Dental Mfg. Co.* v. *McLaren*, 14 P. R. 89; *Kelly* v. *Hammond*, 2 T. L. R. 804; *Weall* v. *James*, 68 L. T. 515; and note to *Rules* 100 and 101.

Under Chy. Gen. Order 62, a plaintiff might select one or more of several persons liable. Under the corresponding English Con. Order VII. R. 2, it was held in *Smith* v. *Horsfall*, 24 Beav. 331, that if the plaintiff chose to sue all or some of them, and the suit became defective or abated by reason of a transmission of the interest of one of them, he could not afterwards proceed against the other. This

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gloee on tha Order was described as highly technical' *Gray* v. *Lewis*, L. R. 8 Chy. 1035, 1052, and will not be imported hy analogy into the present *Rule*: *Lloyd* v. *Dimmack*, 7 Ch. D. 398. In the latter case two of five defendants became bankrupt, and it was held that the action might proceed against the other three without hringing the trustees of the bankrupte before the Court. For other restrictions upon the application of Chy. G. O. 62, see Lewin, 6th ed., 807. See also *Wilson* v. *Rhodes*, 8 Ch. D. 777.

Where a plaintiff's claim was on four policies of insnrance by co-insurers one of whom was out of the jurisdiction, it was held that the latter might be properly joined as a defendant in an action against the other co-insurer who wns within the jurisdiction: *Osterreichische, etc.*, v. *British Indemnity Ins. Co.*, 1914, 2 K. B. 747; 110 L. T. 955.

Surety may be joined with mortgagor, relief obtained against both.

Liability of assignee of mortgagor.

Of assignor of a mortgage on covenant for its payment.

Sureties.—Under this *Rule* a surety for ths payment of a mortgage debt may be made a party to the action for the eala of the mortgaged property; but an assignee of the mortgagor who had covenanted with the mortgagor to pay the mortgage debt, could not formerly have been ordered to pay the mortgagee, to whom he wss under no legal liability: *Turnbull* v. *Symmonds*, 6 Gr. 615; *Clarkson* v. *Scott*, 25 Gr. 373; and seo other cases in notes to *Rule* 460. And where the original mortgagee had assigned the mortgage to the plaintiff, and covenanted for payment, it was held that he was not a surety, but that tho contract amounted merely to a guaranty, to enforce which, a separate action must he hrought: *Clarke* v. *Best*, 8 Gr. 7. But it would seem that in such cases the appropriate relief as hetween the plaintiff and defendants, and hetween the defendants *inter se*, may now he granted in the same action. Ses *Rule* 170, and *Campbell* v. *Robinson*, 27 Gr. 634; *Chamberlain* v. *Sovais*, 28 Gr. 404.

Principal, when a necessary party.

Where th^ surety had given a mortgage on his own property, the principal debtor was formerly a necessary party to an nction for foreclosure, or sale thereof: *Seidler* v. *Sheppard*, 12 Gr. 456.

A surety cannot be required to pay the amount of a judgment which it has been agreed ehall stand as security for the deficiency on a mortgage, until the security has been realized and the deficiency ascertained: *Teeter* v. *St. John*, 10 Gr. 85.

Liability of surety for deficiency.

Where a surety is not joined in an action against his principal, he may bs released from liahility for interest accruing subsequent to the judgment against his principal, on the ground that the right of action against the principal is merged in the judgment: *Faber* v. *Lathom*, 77 L. T. 168.

Joinder of Defendants.—In considering the propriety of the joinder of defendants, the nature of the action and the relief asked must he considered. If that relief is of an equitahle nature all parties must he before the Court whose preeence is necessary to give ths plaintiff, if successful, the full measure of his rights, assuming that the action is not multifarious. On the other hand the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise hetween the parties: *Andrews* v. *Forsythe*, 7 O. L. R. 188; *Vachon* v. *Crown Reserve Mining Co.*, 2 O. W. N. 378.

Ordinarily the right to sue, and the liahility to be sued attaches only to individuals, corporations or firms, and as a general rule all persons interested in the subject matter of an action should he made

parties either as plaintiffs, or defendants; but there are many cases in which the persons interested are so numerous, that if it were necessary to make them all parties, the difficulty in suing them and carrying on the suit would be insuperable. The rules as to parties to suits in equity were not the same as those which governed Courts of Common Law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interests. This was avowedly done to prevent a failure of justice: see *per* Lord Lindley: *Taff Vale Ry. Co.* v. *Amalgomoted Society of Railway Servants*, 1901, A. C. 426; 85 L. T. 147. Suits so constituted were technically called class suits, and provision is made by *Rule* 75 for the continuance of the former equity practice as to parties in such cases. Rule 67.

Following *Honnoy* v. *Smurthwaite*, 1894, A. C. 494; 71 L. T. 157, it was held by the House of Lords that a plaintiff could not join several defendants in an action to abate several separate nuisances, though occasioned by similar but separate acts: *Sadler* v. *G. W. Ry.*, 1896, A. C. 450; 74 L. T. 561. And it has been held that several defendants, sued under *The Liquor License Act* (R. S. O. c. 215), s. 114, for wrongfully supplying liquor to a person at different times, could not be joined as defendants in the same action: *Crane* v. *Hunt*, 26 Ont. 641; but under *Rule* 67 as it now stands: *Semble*, such a joinder of defendants would be admissible. Defendants severally sued on several causes of action.

Where several defendants are sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all: *Gower* v. *Couldridge*, 1898, 1 Q. B. 348 (explained in *Frankenburg* v. *Great Horseless Carriage Co.*, 1900, 1 Q. B. 504; see also *Thompson* v. *London County Council*, 1899, 1 Q. B. 840); claims against two or more defendants in respect of separate torts cannot be joined in the same action: *Appleton* v. *Fuller*, 6 O. L. R. 683: *Hinds* v. *Barrie*, 6 O. L. R. 656; *Greenwood* v. *Greenwood*, 126 L. T. Jour. 57; even though the damage complained of may be the same as against each defendant: *Thompson* v. *London County Council*, 1899, 1 Q. B. 840; and generally speaking, a plaintiff cannot claim on separate causes of action against different persons in one action, if the real causes of action that exist against them are separate: *Quigley* v. *Waterloo*, 1 O. L. R. 606; *Hinds* v. *Barrie*, 6 O. L. R. 656; *Vochon* v. *Crown Reserve Mining Co.*, 2 O. W. N. 378; but there may be such unity in the matters complained of as between all parties as to justify the joining of defendants who are not all interested in the same way, or in the same inquiries: *Evans* v. *Jaffray*, 1 O. L. R. 614; *Crowther* v. *Cobourg*, 2 O. W. N. 1216. Torts—Separate causes of action against different persons.

Causes of action for a similar slander spoken at different times by each defendant, but arising out of the same matter, cannot be joined in the same action; and a cause of action for conspiracy between the defendants wrongfully to dismiss the plaintiff cannot properly be joined with either of the causes of action for slander: *Pope* v. *Howtrey*, 17 T. L. R. 717; 85 L. T. 263; but persons who conspire illegally to watch and beset a place with a view to persuade workmen not to work, or to cease work for a person, may be sued jointly in the same action: *Wolters* v. *Green*, 1899, 2 Ch. 696. (There the right to the relief claimed arose out of the same series of transactions, and there was a common question of fact as well as law, whether all the acts complained of were done in pursuance of a combination so

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as to render the defendants jointly liable.) Even if it were not established that all the defendants had committed the acts complained of, judgment might be recovered against some or one of them: *Ib*: see also *Copeland-Chatterson* v. *Business Systems*, 11 O. L. R. 292.

In an action against two joint tort-feasors for conversion, a claim may be joined against one of them for money had and received, if it arise out of the same transaction: *Rice* v. *Reed*, 1900, 1 Q. B. 54; so also an action may be maintained against a company and its directors and the executors of a deceased director, asking against the company for cancellation of plaintiff's shares, and asking against the directors, damages, on the ground of misrepresentations in the prospectus of the company: *Frankenburg* v. *Great Horseless Carriage Company*, 1900, 1 Q. B. 504: and see *Kent Coal Co.* v. *Martin*, 1900, 16 T. L. R. 486.

A plaintiff may sue two or more persons for damages for injuries caused by the combined effect of their respective negligence; he cannot be compelled to elect against which he will proceed: *Bullock* v. *London General Omnibus Co.*, 1907, 1 K. B. 27, 264; 95 L. T. 905; *Tracey* v. *Toronto Ry.*, 13 O. W. R. 15; and see *Componio Sonsinena Congeladas* v. *Houlder*, 1910, 2 K. B. 354; 103 L. T. 333 (a case of breach of contract). Where several defendants are joined as joint tort-feasors each is liable for the whole damages occasioned by the joint tort: see *Greenlands* v. *Wilmshurst*, 1913, 3 K. B. 507 and other cases cited in note to *Rule* 39, *supra*, p. 384.

A plaintiff cannot, in an action against a municipal corporation for damages for obstructing a highway, add as a defendant a person as against whom under *The Municipal Act* (R. S. O. c. 192), s. 464, the corporation is entitled to relief over: *Baines* v. *Woodstock*, 10 O. L. R. 694.

Several defendants in cases of doubt.

Under this *Rule*, where a plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants, in order that the question as to which, if any, of them is liable and to what extent, may be determined as between all parties.

This *Rule* is applicable to actions which have been already commenced, as well as to those in which the plaintiff is in doubt at the commencement of action: per Cockburn, C.J., in *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 305. In that case the plaintiffs claimed against L. specific performance of a contract alleged to have been made by T., the authorized agent of L.; they afterwards alleged that L. denied that T. was his authorized agent, and were therefore in doubt as to who was liable, and they obtained leave to add T. as defendant, claiming that if he was not the authorized agent of L. he was liable as principal. See also *Bennetts* v. *McIlwraith*, 1896, 2 Q. B. 464, followed in *Tote* v. *Natural Gas Co.*, 18 P. R. 82, but it is doubtful whether these cases would now be followed: see *Quigley* v. *Waterloo*, 1 O. L. R. 606; *Chandler* v. *Grand Trunk Ry.*, 5 O. L. R. 589; *Andrews* v. *Forsythe*, 7 O. L. R. 188; and it would seem that the *Rule* would now be held only to apply to the case of the plaintiff having a single claim, and being in doubt as to which of two or more defendants is liable to satisfy it: *sed vide*, *Langley* v. *Low Society*, *infra*, p. 423.

If the doubt arises after an action has been commenced as to whether the defendant sued is the party liable, other parties may be added under *Rule* 134: *Tote* v. *Natural Gas Co.*, *supra*.

This *Rule* was applied in *Harvey* v. *G. T. Ry. Co.*, & *G. W. Ry. Co.*, 9 P. R. 80, affirmed on appeal 7 Ont. App. 715, where injury

was done to goods carried by two railway companies, but the plaintiff was not able to ascertain which line of railway the goods were on at the time of the injury. The plaintiff was held entitled to join both companies as defendants; and see *Witted* v. *Galbraith*, 1893, 1 Q. B. 431. But this *Rule* does not authorize the recovery of judgment against two or more parties separately liable, and where damages were assessed against two defendants under such circumstances, the Court directed judgment to be entered against one defendant only, on the plaintiff agreeing to abandon judgment as to the other defendant: *Crane* v. *Hunt*, 26 Ont. 641. Rule 67.

In an action brought against an Irish railway con. any claiming damages for breach of contract in not carrying pigs from a station in Ireland to Liverpool, and for trover and conversion of the pigs; the company having stated in answers to interrogatories, that some of the pigs were sold by the L. & N. W. Ry. Co., on whose line part of the journey had to be performed, but without communication with the defendants, leave was given to add the L. & N. W. Ry. Co. as defendants: *Creeton* v. *Midland G. W. Ry. Co.*, 10 L. R. Ir. 74.

In *Heed* v *Bowmon*, 9 P. R. 12, the plaintiff sued in respect of the flooding of land by a mill-dam. The G. W. Ry. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water, even though the defendant's dam were removed, so that complete relief could not be given, even though the plaintiff were successful against the defendant. The plaintiff was therefore allowed under this *Rule* and *Rule* 134 to add the G. W. Ry. Co. as defendants.

An action against four independent saw-mill owners, from whose mills sawdust and refuse matter were carried down the River Ottawa and lodged upon and in front of the plaintiff's land, was held to have been properly brought against all four owners as defendants: *Ratté* v. *Booth*, 10 P. R. 649.

Where several defendants are joined each of whom is alleged to have been guilty of negligence, the combined result of which was to cause injury to the plaintiff, he cannot be required to elect against which one he will proceed, but is entitled to proceed against them all: *Symon* v. *Guelph & Goderich Ry.*, 13 O. L. R. 47.

In an action by the assignee of a debt, the plaintiff was allowed to add the assignor and claim alternative relief against him, in the event of being unable to recover against the debtor: *Longley* v. *Law Society*, 3 O. L. R. 245. But the later cases seem to establish that this *Rule* is confined to cases in which the alternative relief asked by a statement of claim against one defendant is consistent with that asked against another; and entirely separate and distinct causes of action, founded upon different rights, cannot be joined in the same action: *Quigley* v. *Waterloo*, 1 O. L. R. 606; *Chandler* v. *Grand Trunk Ry.*, 5 O. L. R. 589; *Andrews* v *Forsythe*, 7 O. L. R. 188; but see *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301; *Child* v. *Stenning*, 5 Ch. D. 695; *Philips* v. *Philips*, 4 Q. B. D. 134; *Boines* v. *Woodstock*, *supra*, p. 422. Alternative claims.

In actions of tort as well as actions of contract, defendants may be joined against whom relief is claimed in the alternative: *Bullock* v. *London General Omnibus Co.*, 1907, 1 K. B. 27, 264; 95 L. T. 905; *Tilt* v. *Oakville*, 5 O. W. N. 601.

If the defendant can shew that there is inconvenience or additional expense in trying both the claims at the same time, or that the Election by plaintiff compelled.

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disposition of one will render the trial of the other unnecessary, he may apply under *Rule* 73 for the trial of one issue before the other is approached: *Bogot* v. *Easton*, 7 Ch. D. 1; or he may apply to compel a plaintiff to elect against which defendant he will proceed: *Andrews* v. *Forsythe*, 1 O. L. R. 98.

If alternative cases are alleged, the facts ought not to be mixed up, but should be stated so as to shew on what facts each alternative of the relief sought is founded: *Davy* v. *Garrett*, 7 Ch. D. 489.

Where the claim of the plaintiff is in the alternative against one or the other of two defendants, if the plaintiff take final judgment against one of the defendants, that is a bar to the further prosecution of his action against the other defendant: *Morel* v. *Westmoreland*, 1903, 1 K. B. 84; 87 L. T. 635; 1904, A. C. 11; 89 L. T. 702; *French* v. *Howie*, 1905, 2 K. B. 580; 93 L. T. 202; 1906, 2 K. B. 674; 95 L. T. 274; and see *Cross* v. *Mathews*, 117 L. T. Jour. 220.

Costs.

Where the plaintiff succeeds against one defendant, but not against another, the costs of the successful defendant must be borne by the plaintiff, and not by the unsuccessful defendant, unless the Court orders otherwise: see *Child* v. *Stenning*, 7 Ch. D. 413; 11 Ch. D. 82, and *Bingham* v. *Alexander*, cited Charley's Judicature Act, 3rd ed., 455. See also Jud. Act, s. 74, note p. 254 *et seq.*

If a plaintiff brings separate actions against a number of persons whom he might have joined as defendants in one action, he may have to pay the defendants' extra costs: *Gucret* v. *Young*, W. N. 1883, 216.

A man cannot be both plaintiff and defendant in the same action, and, therefore, where the plaintiff was also made a defendant in another capacity his name was struck out as a defendant: *Wavell* v. *Mitchell*, W. N. 1891, 88; 84 L. T. 560.

Other cases.

It is not proper to make individual corporators defendants for the sole purpose of making them pay costs: *Atty.-Gen.* v. *Vestry of Bermondsey*, 23 Ch. D. 60. Neither is it proper to make solicitors, agents, or arbitrators parties merely for asking discovery, or costs, against them: see *Matthias* v. *Yetts*, 46 L. T. 497; *Barnes* v. *Addy*, L. R. 9 Chy. 244, 255, 256; *Burstall* v. *Beyfus*, 26 Ch. D. 35; *Amos* v. *Herne Bay*, 80 L. T. Jour. 356, for this is contrary to what was formerly known in Chy. as the rule of the three A.'s.

Officers of corporations not to be made defendants merely for discovery.

Officers may be parties when charged with wrongful acts.

Where an action is brought against a corporation aggregate, an officer of the corporation should not be made a defendant for discovery only: see former C. R. 191; but where the plaintiff charges the officers of a corporation with collusion and conspiracy to deprive plaintiff of his rights, or damages are claimed against them for wrongful acts, such officers may be properly made defendants: *Cuthbert* v. *The Commercial Travellers' Association*, 24 Gr. 551; *Clin.* v. *The Mountainview Cheese Factory*, 20 Gr. 227; *Betts* v. *Neilson*, L. R. 3 Chy. 429; L. R. 5 H. L. 1.

As to discovery by corporations: see *Rule* 32 (2), (3).

In *Heatley* v. *Newton*, 51 L. J. Chy. 225, an action by a purchaser for rescission of a contract of sale and costs, auctioneers were made co-defendants with the vendors, the plaintiff alleging that they and the vendors had joined in a fraud whereby the plaintiff was induced to pay too high a price. It was held that the auctioneers were rightly joined and could not claim to be dismissed merely on payment of the deposit into Court, and costs to the date of the order.

In an action to recover the value of goods, a person who had notified the plaintiff not to remove the goods, which had not been paid for, and the property in which had not passed, was made a defendant in the action: *Polson* v. *DeGreer*, 12 Ont. 275. Rule 67.

Though a restrictive covenant in a lease is omitted in a sub-lease, both lessee and sub-lessee are properly made defendants in an action for breach of the covenant: *Triffon* v. *Honkart*, 35 W. R. 474; 56 L. T. 306; 56 L. J. Chy. 629.

In an action by a creditor to recover a debt, persons to whom the debtor had made an alleged fraudulent conveyance of his property, which the plaintiff claimed to have set aside, were held to be properly joined as defendants: *Heaton* v. *McKellar*, 13 P. R. 81.

In an action by a simple contract creditor claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee: *Gibbons* v. *Darvill*, 12 P. R. 478.

As to adding a party for discovery only: see *Symonds* v. *City Bank*, 79 L. T. Jour. 175.

Foreign Sovereign.—A sovereign of an independent foreign state, though within the jurisdiction of the Court, is not liable to a civil action unless he chooses to submit to the jurisdiction: *Mighell* v. *Sultan of Johore*, 1894, 1 Q. B. 149; 70 L. T. 64; neither is a foreign ambassador: *Musurus Bey* v. *Gadban*, 1894, 1 Q. B. 533; *Re Republic of Bolivia*, 1914, 1 Ch. 139; 109 L. T. 741; 110 L. T. 141. As to the extent to which a foreign sovereign by suing submits to the jurisdiction: see *S. African Republic* v. *Compagnie Franco Belge*, 1898, 1 Ch. 190, in the note, *supra*, p. 346.

Administrators ad litem.—Under C. R. 195, it was provided that: "Where probate of the will of a deceased person, or letters of administration to his estate, have not been granted, and representation of such estate is required in any action or proceeding in the High Court, the Court may appoint some person administrator *ad litem*;" but that Rule has not been continued, and the power to appoint an administrator *ad litem*, would seem to rest, as it does in England, with the Probate Court, *i.e.*, in Ontario, the Surrogate Courts. Appointment of administrator to represent estate in proceedings in High Court.

A judgment against an administrator *ad litem*, will as effectually bind the estate as if a general administrator were a party; but in any action which involves general inquiries as to next of kin, or general inquiries as to assets, and creditors, an administrator *ad litem* should not be appointed as he would not sufficiently represent the estate; a general administrator would in such case be necessary: *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; and see *Rodger* v. *Moran*, 28 Ont.; *per* Meredith, J., at p. 283; and *McLean* v. *Allen*, 18 P. R. 255.

The authority of an administrator *ad litem* in a probate action terminates on the pronouncing of a judgment in favour of a will; a grant of probate is not necessary to put an end to his powers: *Weilland* v. *Bird*, 1894, P. 262; 71 L. T. 267.

An administrator *ad litem* in an administration action has no power to commence another action in respect of the lands of the deceased, and *a fortiori* where the lands have vested in the heirs of the deceased through no caution having been filed: *Rodger* v. *Moran*, 28 Ont. 275; and it may be open to question whether an administrator

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ad litem has any power to register a caveat under *The Devolution of Estates Act* (R. S. O. c. 119), s. 13.

A general administrator *pendente lite*, appointed by the Surrogate Court in a probate action, may be served without first obtaining the leave of the Court: *In re Toleman*, 1897, 1 Ch. 866.

Executor de son tort.—Under former C. R. 196, an action for an account might be brought against an executor *de son tort* without joining a legal personal representative; but that *Rule* has not been continued; and, consequently, to an action for an account against an executor *de son tort*, the legal personal representative is now a necessary party. By the same C. R. 196, it was also provided that where the Court appointed a receiver of a deceased person's estate, the estate might be administered by the Court without the appointment of any personal representative, but that *Rule* having been dropped, that procedure can no longer be adopted.

Attorney-General as Defendant.—Where the rights of the Crown are involved, or a declaration is sought against the Crown, the Attorney-General may be made a defendant as representing the Crown, and the Crown will be bound by the adjudication in an action so framed: see *Pawlett* v. *Attorney-General*, Hardrea Rep. 465; *Laragoity* v. *Attorney-General*, 2 Price 172; *Dyson* v. *Attorney-General*, 1911, 1 K. B. 410; 1912, 1 Ch. 158; 103 L. T. 707; *Burghes* v. *Attorney-General*, 1911, 2 Ch. 139; 1912, 1 Ch. 173; 105 L. T. 193, 758.

Where relief is claimed against the Crown then a petition of right is the usual procedure: see *Rules* 738 *et seq.*

Where defendant not interested in all the relief prayed.

68. It shall not be necessary that every defendant to an action shall be interested as to all the relief claimed, or as to every cause of action included therein. C.R. 187.

See Eng. (1883) R. 127.

See *Cox* v. *Barker*, 3 Ch. D. 359, where this *Rule* was considered and given a liberal construction. The judgment of V.-C. Bacon, which was affirmed on appeal, contains the following passages:—"I take it that it was the intention of the Legislature, when any question of any sort, or any set of questions, arose, to endeavour by one hearing and one decree to dispose of all matters in litigation between all the parties who were interested in the subject of the litigation. The Act of Parliament, at the same time that it has enabled any person stating a claim to bring before the Court all persons interested in that claim, and to include in the claim every question that can belong to it, or arise out of it, has, at the same time, carefully provided that no one shall be prejudiced by the fact of his being joined. The *Rules* are distinct on the subject."

It was held that notwithstanding this *Rule* separate tort feasors could not be joined as defendants in the same action: *Sadler* v. *Great Western Ry.*, 1896, A. C. 450; 74 L. T. 561; *Gower* v. *Couldridge*, 1898, 1 Q. B. 348; *Thompson* v. *Lardon*, 1899, 1 Q. B. 840; 80 L. T. 512; *Pope* v. *Hawtrey*, 85 L. T. 263; *Quigley* v. *Waterloo*, 1 O. L. R. 606; but see *Walters* v. *Green*, 1899, 2 Ch. 696; 81 L. T. 151; *Evans* v. *Jaffray*, 1 O. L. R. 614.

See notes to *Rule* 68.

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

Rule 69. What causes of action may be joined.

Substantially identical with the first clause of Eng. (1883), R. 138.

Multifariousness, or the uniting of separate and distinct subjects in one suit, was formerly a ground for demurrer; but is now no objection of itself: see *Cox* v. *Barker*, 3 Ch. D. 359; and the right to join several causes of action is not limited to cases where they are between the same parties, nor (save as provided in these *Rules*) in the same right.

The present *Rule* is an extension of s. 84 of the C. L. P. Act, and it is apprehended that the words "cause of action" must receive the same construction as they received under the above section of the C. L. P. Act: see *Bustros* v. *White*, 1 Q. B. D. 423. The *Rule* must, therefore, as put by an able commentator on the English *Judicature Act*, be taken to include, not only different legal relations arising out of the same transaction, but also separate and independent transactions: Wilson's Jud. Act, 7th ed., 189.

One plaintiff and one defendant.

Where there is but one plaintiff and one defendant, then the plaintiff may, apparently, without any restriction, join in an action any number of separate and distinct causes of action, but subject to separate trials being directed of issues which cannot, without prejudice to either of the parties, be tried at the same time: see *Rule* 73. Thus claims for separate liens for taxes on separate lots were held to be properly joined in an action to enforce such liens: *Sturgeon Falls* v. *Imperial Land Co.*, 31 O. L. R. 62.

Two or more plaintiffs or defendants.

Where, however, there are two or more plaintiffs or defendants, then different considerations arise, and the plaintiff's right to join separate and distinct causes of action is subject to important limitations. Though it is not necessary that every defendant in an action shall be interested as to all the relief claimed by the plaintiff, or as to every cause of action included therein (*Rule* 68), yet it is not competent for a plaintiff or plaintiffs to join in the same action several defendants against whom wholly separate and distinct causes of action are alleged.

This provision of this *Rule* are therefore subject to *Rule* 67, respecting the joinder of parties defendant.

In an action against two defendants, two causes of action cannot be joined, in one of which one of the defendants has no concern: *Hinds* v. *Barrie*, 6 O. L. R. 656; *Ney* v. *Ney*, 3 O. W. N. 927.

Examples.

In *Honduras Ry. Co.* v. *Tucker*, 2 Ex. D. 301, there was one subject matter, a contract made and broken. The plaintiffs claimed relief against L. who made it, if T. was authorized to make it as agent of L., but if not so authorized then against T. as principal. Both were held to be rightly made defendants.

In *Bagot* v. *Easton*, 7 Ch. D. 1, separate alternative causes of action were held to have been properly joined against the same defendant.

In *Dessila* v. *Schunck, etc.*, W. N. 1880. 96, it was held that separate causes of action against separate defendants might be joined with joint and several causes of action, where all related to the same subject matter.

Rules 70, 71.

A plaintiff cannot join an individual claim with one by him on behalf of a class, unless they arise out of the same transaction: *Stroud* v. *Lawson*, 1898, 2 Q. B. 44; 78 L. T. 729; *Harris Maxwell Larder Lake Mining Co.* v. *Gold Fields*, 23 O. L. R. 625.

A cause of action against promoters and directors of a company, for a fraud and conspiracy in pursuance of which they had carried out certain purchases, loans, etc., and a cause of action against directors alone for, in regard to the first cause of action, having been guilty of a breach of duty as directors, were held to be properly joined: *Kent, etc.*, v. *Martin*, 16 T L. R. 486; and see *Harris Maxwell Larder Lake Mining Co.* v. *Gold Fields*, *supra*.

A claim by plaintiffs who were mortgagees to set aside a lease by the mortgagor, joined with a claim by a co-plaintiff, who was assignee for the creditors of the mortgagor, for the avoidance of the lease, as having been made voluntarily and with intent to defraud creditors, were held to be improperly joined: *Bank of Hamilton* v. *Anderson*, 7 O. L. R. 613; 8 O. L. R. 153.

A claim by two plaintiffs, a married man and an unmarried woman, in respect of charges of criminal intimacy made on three different occasions by the defendant, was held to be proper, there being publication as to all, and the three occasions being a series with a common question of fact: *Agar* v. *Escott*, 8 O. L. R. 177.

Lord Selborne, in *Burstall* v. *Beyfus*, 26 Ch. D. 39, said: "To bring into one claim distinct causes of action against different persons neither having anything to do with the other (and only historically connected) is not contemplated by Order 18, s. 1, (Rule 232).

The liberty given by the present *Rule* is, however, subject to the limitations contained in the following *Rules*, and to the discretion of the Court (see *Rule* 73), to interfere in order to prevent issues being raised which embarrass a fair trial of the action.

Ejectment.

There is nothing to prevent any cause of action from being joined with one for the recovery of land; but the Court has power to prevent the joining in one action of claims which are incongruous and inconvenient to try together: *Rule* 73.

Claims by assignee in insolvency.

Under former C. R. 233 a claim by an assignee in insolvency, or for the benefit of creditors, could not, unless by leave of the Court or a Judge, be joined with any claim by him in any other capacity.

Such claims may now be joined, but of course subject to *Rule* 73.

Claims by or against husband and wife.

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

Same as Eng. (1883) R. 191.

Claims by or against executor.

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

Same as Eng. (1883) R. 192.

"Alleged," i.e., in the writ or pleadings: *Davis* v. *Saintsbury*, 1 T. L. R. 538. Rules 72, 73.

In an action against executors founded on an alleged promise of a testator to leave a sum of money to the plaintiff by his will, it was held that the plaintiff could not join a claim against the executors personally for fraudulently influencing the testator to omit such bequest: *Whitworth* v. *Darbishire*, 41 W. R. 317; 68 L. T. 216; 5 R. 198.

Semble, that as regards claims by an executor, this *Rule* refers to a case where the plaintiff's personal claim is in respect of the assets of the testator *qua* assets; the claim as executor and the claim personally must be with reference to the same estate: *Johnson* v. *Burgess*, 47 L. J. Chy. 552. Thus a claim by an executor for arrears of rent due to his testator's estate cannot be joined with a claim by him as tenant for life of the same estate: *Tredegar* v. *Roberts*, 1914, 1 K. B. 283; 9 L. T. 731.

The *Rule* it seems does not apply to a counter-claim, so as to enable the defendant to set up by way of counter-claim, claims against the plaintiff personally and as executor, where he is only suing in a distinct personal character: *Macdonald* v. *Carington*, 4 C. P. D. 28.

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

Same as the Eng. (1883) R. 193.

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

See Eng. (1883), RR. 188, 194, 195, 196, 432. Former C. R. 531 contained a similar provision.

In *Re Worssam, Hemery* v. *Worssam*, 51 L. J. Ch. 669, the Court declined to entertain an action to set aside a transaction, and in the same proceedings inquire whether to do so was for the benefit of infants or unborn persons.

The provisions of the *Rules* for preventing any of the parties from being prejudiced are two:

(1) A claim which embarrassed a fair trial of the action may be struck out: *Rules* 73, 137. This was done in a case where a claim was made for inconsistent alternative relief by different plaintiffs: *Smith* v. *Richardson*, 4 C. P. D. 112, where the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price, jointly sued the purchaser, the vendor, to recover the price, and the other plaintiffs to recover upon the dishonoured bill. Striking out embarrassing claims for diverse causes of action.

Where the paintiff's claim was for infringsment of 23 different patents, this was considered embarrassing to the defendants, and the action was confined to a limited number: *Saccharin, etc.*, v. *Wild*, 1903, 1 Ch. 410; *Saccharin, etc.*, v. *White*, 1903, W. N. 120; 88 L. T. 850.

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Separate trials.

(2) The Court may direct the different causes of action to be tried separately under this *Rule*: see *Bagot* v. *Easton*, 7 Ch. D. 1; *Child* v. *Stenning*, 5 Ch. D. 695, and *Doy* v. *Rodcliffe*, 24 W. R. 844; *Barker* v. *Cox*, 3 Ch. 359; *Honnay* v. *Smurthwaite*, 1893, 2 Q. B. 412; 1894, A. C. 494. This course might formerly have been directed under R. S. O. 1877, c. 50, s. 85; see *Fitzsimmons* v. *McIntyre*, 5 P. R. 119. In *Rodger* v. *Noxon Co.*, 19 P. R. 327, it was held to be proper where the two causes of action were wrongful dismissal, and slander.

Compare similar power given in *Rules* 136-137, and see *Hall* v. *Old Talargoch Leod Mining Co.*, 45 L. J. Chy. 775; 34 L. T. 901; *Re Woodfine*, 38 L. T. 753; *Dessilla* v. *Schunck, etc.*, W. N. 1880, 96; *Cox* v. *Barker*, 3 Ch. D. 372.

Rule 122 enables the Court to direct a preliminary point of law to be decided before the trial of issues of fact; or it may be decided at the same time as issues of fact.

The present *Rule* enables the Court to direct one or more issues of fact, which may decide the case, to be tried before the others: see *Simson* v. *New Brunswick, etc., Co.*, 5 T. L. R. 148; but it is to be read in connection with sec. 16 (*h*) of the Act, which provides that multiplicity of proceedings is to be avoided: *Village of Fort Erie* v. *Fort Erie Ferry Co.*, 13 P. R. 444.

Preliminary trial of questions of law.

An order for the trial of a point of law first, was made in *Corporation of Preston* v. *Fullwood*, 80 L. T. Jour. 41. See also *Irwin* v. *Sperry*, 11 P. R. 229; *Smith* v. *Horgrove*, 16 Q. B. D. 183; *Temperance Colonization Society* v. *Evans*, 12 P. R. 48, 380; *Elmore* v. *Pirrie*, 57 L. T. 333; *London C. & D.* v. *S. E. Ry.*, 53 L. T. 109. See also *Graham* v. *Temperance, etc., Ass'n Co. of N. A.*, 16 P. R. 536; but it will not be made unless the decision of the preliminary point will dispose of the action so far, at least, as to dispense with a second trial: *Northern Crown Bank* v. *Motzo*, 3 O. W. N. 373, and cases there referred to. In that case, owing to the exceptional circumstances, a special order was made: see 3 O. W. N. 517, 518.

Where a preliminary point of law is ordered to be tried first, the trial of the issues of fact will not take place until after the final determination of the preliminary point: *Owners, etc., Maori King* v. *Hughes*, 73 L. T. 141. See, however, notes to *Rule* 122.

Separating issues at trial.

A separation of the issues may be made at the trial, and one issue may be left to the jury and another disposed of by the Judge: *Hoist* v. *G. T. Ry.*, 22 Ont. App. 504; *Johnson* v. *G. T. Ry. Co.*, 25 Ont. 64; 21 Ont. App. 408; and his discretion will not be interfered with on appeal, unless he acted on a mistaken view of the law: *Ib.*, and see *Re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365.

Mode of applying Rule.

In *The Emmo Silver Mining Co.* v. *Grant*, 11 Ch. D. 918, Jessel, M.R., said (p. 930), that a "case to be brought within this Rule ought to be one of simple issues. I do not think it is convenient to travel through a long record, and to get a number of complicated issues, and except them, so to say, from the pleadings." He explained in what cases the *Rule* had theretofore been acted upon. All had been cases in which the application was by the defendant.

In the subsequent case of *Piercy* v. *Young*, 15 Ch. D. 474, the learned Judge stated that the *Rule* was intended to be applied in exceptional cases only; that the object of The Judicature Act was to

try all disputes together, and that, it was considered, was a beneficial object. "Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds." It was there held that a defendant in a partnership action, who had set up by counter-claim, an agreement by the plaintiff for sale of his interest in the partnership to the defendant, at a stated price, was not entitled to have this issue tried before the plaintiff's issues in the action. Sec. 74.

In *Tasmanian Railway Company* v. *Clark*, W. N. 1879, 106; 27 W. R. 677, the Court refused leave to try the liability of a surety, before that of the principal; and the Court of Appeal declined to interfere with their discretion.

Where a reference would be ordered by the Judge as to a question of account, it is proper that the question of liability should be tried separately from the question to be so referred: *Liverpool, Brazil, etc., Navigation* v. *London & St. Katherine, etc., Co.*, W. N. 1875, 203; 1 Chan. Ch. Cs. 121. Account.

Where discovery of accounts and dealings is sought, but the plaintiff's right to the account is disputed, a preliminary trial of that question may be ordered: *Graham* v. *Temperance and Gen. Life, etc.*, 16 P. R. 536. Discovery.

In *Milissich* v. *Lloyds*, W. N. 1875, 200; 36 L. T. 423, an action for libel, an application by the defendant to have the question of libel tried before the question of damages was refused by Lush, J., who said, "'I do not think that I could in this case separate the question of damages from the question of fact without injury to the plaintiff." In *Dent* v. *Sovereign Life Assurance Co.*, 27 W. R. 379; W. N. 1879, 33, the validity of a life policy being the matter in dispute, an application by the plaintiff that the issue, whether the deceased was a man of temperate, or intemperate, habits, should be tried first, was refused by V.-C. Bacon, who said that "this particular issue could not be so severed from the rest of the case as to admit of its being heard separately by a jury." Libel action.

Where the plaintiff, who had been injured in a railway accident, signed a receipt for a sum of money paid to him in full satisfaction of all claims, but, having subsequently become totally blind, he brought an action for damages, the question of law whether, owing to his conduct, the action was not maintainable, was directed to be tried first by a Judge alone before the trial of the issues of fact: *Ellen* v. *Great Northern Ry. Co.*, 49 W. R. 396. Release of action.

The *Rule* applies not merely to questions of fact, but to mixed questions of law and fact: *Tasmanian Ry. Co.* v. *Clark, supra*; *Simson* v. *New Brunswick, etc., Co.*, 5 T. L. R. 148.

See also *Tattersall* v. *National Steamship Co.*, W. N. 1884, 32, and *Pooley* v. *Driver*, 5 Ch. D. 458.

74.—(1) Trustees, executors, and administrators may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested, and shall represent them; but the Court may Trustees, executors and administrators.

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at any time order any of them to be made parties in addition to, or in lieu of, the previous parties. C.R. 193.

(2) This Rule shall apply to an action to enforce a security by foreclosure or otherwise. Eng. Rule 130.

(*Note.*—As to parties to foreclosure actions where no personal representative. See 10 Edw. VII. ch. 56, sec. 10.)

Substantially the same as Eng. (1883) R. 130, and an extension of Chy. O. 61.

Trustees represent their c. q. t.

The effect of *Rule* 74 is that in litigation with strangers, trustees and executors represent their *cestuis que trustent*: *Re Cooper, Cooper* v. *Vesey*, 20 Ch. D. 611; *Bulley* v. *Bulley*, 8 Ch. D. 489; *Brooke* v. *McLean*, 5 Ont. 209; thus in a suit for redemption a trustee of the equity of redemption has been held to sufficiently represent the trust estate: *Mills* v. *Jennings*, 13 Ch. D. 639; 6 App. Cas. 698; *sub nom. Jennings* v. *Jordan;* see *Day* v. *Radcliffe*, 24 W. R. 844; so trustees of real estate, in a partition suit under *The Partition Act*: *Stace* v. *Gage*, 8 Ch. D. 451; *Simpson* v. *Denny*, 10 Ch. D. 28; *Goodrich* v. *Marsh*, W. N. 1878, 186; *In re Cooper, Cooper* v. *Vesey, supra*, one of four trustees under a will was a beneficiary and son of the testator and bore the same name. He, personating the testator, mortgaged the trust estate, and applied the mortgage money for his own use. After his death the remaining trustees brought an action against the mortgagees and beneficiaries to have the mortgage declared void. It was held that the plaintiffs represented the beneficiaries, and that the latter were improperly made parties, and an order directing the mortgagees to pay their costs was therefore reversed on appeal.

Next of kin.

In an action to establish a will, the executors do not sufficiently represent the next of kin, nor does one of the next of kin sufficiently represent the rest; all should be made parties: *Cornell* v. *Smith*, 14 P. R. 273; *O'Sullivan* v. *Phelan*, 14 P. R. 278; *Gunn* v. *Corson*, 11 C. L. T. 47; and see *Clifton* v. *Crawford*, 18 P. R. 316.

Where persons are joined with trustees as defendants on the ground that they have become constructive trustees, all are equally liable: there is no primary or secondary liability as between them: *Cowper* v. *Stoneham*, 68 L. T. 18.

Action by c. q. t. against trustee.

Where the action is brought by a *cestui que trust* in respect of an alleged breach of trust, the trust estate must be represented, *e.g.*, where the trustees have died, and none been appointed in their stead, the personal representative of the last surviving trustee must be before the Court, or new trustees must be appointed and made parties to the action, because a *cestui que trust* has no legal title to the trust estate, and it is always necessary that the party having the legal title to the property in question shall be a party to the litigation: *Re Jordan*, 1904, 1 Ch. 260.

Where the subject of a settlement was an equitable chose in action and the legal estate was not in the trustees of the settlement, but in the trustees under a prior will who were charged with mis-application of the fund, the *cestui que trust* was held entitled to institute the suit: *Pigot* v. *Stewart*, W. N. 1875, 69.

Notwithstanding this *Rule* where the interests of the *cestuis que trustent* are in conflict with those of the trustee, they should all be made parties: see *Meldrum* v. *Scorer*, 56 L. T. 471. Rule 74.

A *cestui que trust* may probably also still be properly joined where the chief object of the suit is to affect the right of the *cestui que trust*: *Liddell* v. *Deacon*, 20 Gr. 72; *Day* v. *Radcliffe*, 24 W. R. 844; or the trustee has an adverse interest: *Payne* v. *Parker*, L. R. 1 Chy. 327; or there is a question of fraud: *Read* v. *Prest*, 1 K. & J. 183. When c. q. t. necessary party.

Where the action is against a personal representative to recover a debt due by the deceased, if the defendant does not plead and prove *plene administravit*, he is liable to be personally ordered to pay the costs of the action; but when the action is brought for foreclosure as well as to enforce a covenant for the payment of the mortgage debt, only so much of the costs as relate to the claim on the covenant should be ordered to be paid by an executor or administrator personally: *Miles* v. *Brown*, 15 P. R. 375. Liability of personal representative not pleading plene administravit.

In an action respecting the realty of a deceased person, where the personal representatives neglect to register a caution under *The Devolution of Estates Act* (R. S. O. c. 119) s. 13, the parties beneficially entitled to such realty as heirs or devisees, sufficiently represent it after the lapse of 3 years: see *Ramus* v. *Dow*, 15 P. R. 219; and *The Devolution of Estates Act*, s. 13. Action by heirs or devisees.

Where a party was only agent and not trustee, the principal was required to be made a party: *Wright* v. *Mills* (No. 2), 63 L. T. 186.

The question of the beneficiaries being parties, or not, is now entirely in the discretion of the Court: see *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. 593. It has been laid down that in the exercise of this discretion, wherever the suit is to set aside the trust, or is adverse to the rights of the beneficiaries, the Court should require one or more of the beneficiaries to be made parties: *Read* v. *Prest*, 1 K. & J. 183; *Baker* v. *Trainor*, 15 Gr. 252; *Payne* v. *Parker*, L. R. 1 Ch. 327; and see *Thomas* v. *Torrance*, 1 Chy. Ch. 46, and *Clarke* v. *Cook*, 23 Gr. 110; *Liddell* v. *Deacon*, 20 Gr. 72. Discretion of Court as to requiring c. q. t. to be made parties.

It would seem that, notwithstanding the general terms of *Rule* 74, it is only where the trustee has the like absolute control over the trust estate which an executor has over personalty, that he can, in general, be said to sufficiently represent his *cestui que trust*: *Cox* v. *Barnard*, 5 Hare, 253. As to the extent to which the personal representative prior to *The Devolution of Estates Act* represented those interested in the realty: see *Eccles* v. *Lowry*, 23 Gr. 167. Under *The Devolution of Estates Act* (R. S. O. c. 119), ss. 3, 4, the personal representative may, if his letters of administration extend to the realty, as fully represent those interested in the realty as he does those interested in the personalty: see *Malone* v. *Malone*, 17 Ont. 101; see, however, *Keen* v. *Codd*, 14 P. R. 182; *Watts* v. *Lane*, 84 L. T. 144; and *Ramus* v. *Dow*, *supra*. Where, however, the beneficiaries are infants or persons not *sui juris*, they are usually required to be added as defendants.

In a suit for administration, by a plaintiff claiming as a beneficiary under a will, but whose title was doubtful, one of the *cestuis que trustent* was required to be added as a party before the hearing, in order to have an opportunity to argue the question of the plaintiff's title: *Day* v. *Radcliffe*, 24 W. R. 844.

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Cases where c. q. t. required to be added.

In a suit to execute the trusts of a will, where the trustee had only a power of sale on the death of tenants for life who were still living, the parties interested in remainder were ordered to be added: *Cox* v. *Barnard*, 5 Hare, 253; where the plaintiff claimed under an assignment, the validity of which was denied by the trustee, who set up that the heir of the assignor was entitled to the trust estate, the heir was required to be added: *Miller* v. *Ostrander*, 12 Gr. 349.

Cases where c. q. t. not required to be added.

For cases where the *cestui que trust* was not required to be added under the former practice, see H. & L., 2nd ed., pp. 320-321.

Effect of representation of c. q. t. by trustee.

Effect of Representation.—Where the action is brought by, or against, a trustee without adding the *cestuis que trustent* as parties, if the question in issue has been fairly tried, all parties represented by the trustee would, generally speaking, seem to be concluded by the judgment, but not otherwise: *Eccles* v. *Lowry*, 23 Gr. 167. Thus a decree made after replication filed, dismissing a bill brought by an official assignee, was, in the absence of fraud, conclusive against the creditors of the estate of which he was assignee: *Morrison* v. *Robinson*, 19 Gr. 480, and see *Jardine* v. *Wood*, 19 Gr. 617.

Where, however, a suit by trustees had failed for want of evidence, it was held that a subsequent suit might be maintained for the same purpose by the *cestui que trust* on the discovery of new evidence: *Pierce* v. *Brady*, 2 Jur. N. S. 772. See, however, *Commissioners, etc., of London* v. *Gellatly*, 3 Ch. D. 610; 24 W. R. 1059; *Morrison* v. *Robinson*, 19 Gr. 480.

Actual knowledge of, and acquiescence in, the proceedings, and an acceptance of the benefit thereof, may preclude a person interested from afterwards disputing their validity, even though he were not sufficiently represented in such proceedings: see *In re Lart*, 1896, 2 Ch. 788.

Parties to Foreclosure Actions.—*The Devolution of Estates* (R. S. O. c. 119) provides as follows:—

Who to be defendants in actions for foreclosure, where no personal representative of mortgagor.

"10.—(1) Where there is no legal personal representative of a deceased mortgagor of freehold property it shall be sufficient for the purposes of an action for the foreclosure of the equity of redemption in, or for the sale of, such property that the person beneficially entitled under the last will and testament, if any, of the deceased mortgagor, or under the provisions of this Act, to such property or the proceeds thereof, be made defendant to such action, and it shall not be necessary that a legal personal representative of the deceased mortgagor be appointed or made a defendant thereto unless it shall be otherwise ordered by the Court in which the action is brought or by a Judge thereof; but if during the pendency of such action the equity of redemption devolves upon or becomes vested in a legal personal representative of the mortgagor he shall be made a party to the action.

"Mortgagor," meaning of.

(2) In sub-section 1 the word mortgagor shall include the assignee of a mortgagor and any person entitled to or interested in the equity of redemption: 10 Edw. VII., c. 56, s. 10."

This section it will be observed is a sort of converse to *Rule* 74: for while the *Rule* provides that a trustee may represent his *cestui que trust*, this section virtually provides that the action may in certain circumstances be carried on against the beenficiaries without the

presence of a fiduciary representative of the estate. Where the mortgaged property is more than sufficient to pay the incumbrances thereon, it would seem to be desirable that the personal representative should always to be made a party, otherwise it is difficult to see how the rights of the creditors will be safeguarded. Rule 78.

The section applies only to mortgages of freeholds; and therefore to foreclose the equity of redemption in personal property a personal representative of a deceased mortgagor would still be a necessary party to the action.

The "Sale" referred to in this section must mean a sale of property at the instance of a mortgagee for the purpose of realizing the mortgage debt, and would not include an action for a sale by a creditor or other person not being a mortgagee, although possibly an action to enforce a lien on freehold property might be held to be within the section.

In an action for foreclosure, although since *The Devolution of Estates Act* (R. S. O. c. 119), the record may as a matter of title be complete with the general administrator as sole defendant, yet as a matter of procedure the infant children of the deceased intestate mortgagor are proper parties, and should, as a rule, be made parties, unless good reason exists for omitting them: *Keen* v. *Codd*, 14 P. R. 182, and in *Watts* v. *Lane*, 84 L. T. 144, a devisee beneficially interested in the equity of redemption was required to be added as a defendant. But where the mortgagor had devised his lands to his executors, the latter were held to be the only necessary defendants to an action for foreclosure, even though the widow and children of the deceased mortgagor were in actual possession of the mortgaged premises: *Emerson* v. *Humphries*, 15 P. R. 84; and see *Re Booth* v. *Kettlewell*, 67 L. T. 551. Foreclosure actions. Infant parties.

Where the trustee was bankrupt: *Francis* v. *Harrison*, 43 Ch D. 183; and even where not bankrupt: *Griffith* v. *Pound*, 45 Ch. D. 553; *Wavell* v. *Mitchell*, 64 L. T. 560, it has been held that he does not sufficiently represent his c. q. t. as defendant in an action for foreclosure unless he is also personal representative of the mortgagor: S. C. 65 L. T. 851; *Re Booth & Kettlewell*, 67 L. T. 551.

In a suit for foreclosure, where a trustee was defendant and was bankrupt, the *cestuis que trustent* were added: *Francis* v. *Harrison*, 43 Ch. D. 183.

75. Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of all. C.R. 200. Where parties are numerous.

This is the same as Eng. (1883) R. 131, and corresponds with what had long been the practice of the Court of Chancery: see Dan. Ch. Pr., 5th ed. 207, *et seq.*, 1088; *Thomson* v. *Victoria Mutual Company*, 29 Gr. 56.

The object of this *Rule* is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons all having the same interest: *Ward* v. *Benson*, 3 O. L. R. 199; and to prevent a denial of justice: see observations of Lord Macnaghten: *Taff Vale Ry.* v. *Amalgamated Society, etc.*, 1901, A. C. 426; 85 L. T. 147.

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A plaintiff suing under this *Rule* must frame his writ accordingly, see *Rule* 5 (1), and *Hynes* v. *Fisher*, 4 Ont 76; and the class should be specified as accurately as possible: *Marshall* v. *S. Staffordshire Tramways Co.*, 1895, 2 Ch. 36; and he should specify shortly those for whom he sues, in the title of the action: see *per* North. J., *Re Tottenham*, 1896, 1 Ch. 628; and other cases cited in notes to *Rule* 5 (1) *supra*, p. 317.

By whom order should be made.

Under C. R. 200 a Judge of the High Court only could exercise the jurisdiction conferred by this *Rule*; Local Judges, the Master in Chambers, and other judicial officers, could not do so: *Chisholm* v. *Herkimer*, 19 O. L. R. 600; and if the jurisdiction under this *Rule* is not included in *Rule* 207 (4), that case would still seem to govern; but if the jurisdiction may now be exercised under that clause by a Judge in Chambers, then it is not excluded from the jurisdiction of the Master in Chambers and Local Masters by *Rules* 206, 209. It follows that if a Judge in Chambers has no jurisdiction, then the application for an order under this *Rule* must now be made in Court.

A plaintiff is under no obligation to obtain the leave of the Court to sue on behalf of others besides himself. He cannot, however, sue for others as to matters in which he is not also himself individually concerned: see *infra*.

A defendant has no authority to defend for other persons than himself unless authorized by the Court so to do under this *Rule*.

The *Rule* does not authorize the making of an order on the plaintiff's application for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action: *Taff Vale Ry.* v. *Amalgamated Society, etc., supra*, p. 435.

Plaintiffs in class actions.

Plaintiffs.—A plaintiff can only sue under this *Rule* where he has the same interest as all the members of the class he claims to represent: see *Parkinson* v. *Wainwright*, 72 L. T. 495; *Johnston* v. *Consumers' Gas Co.*, 23 Ont. App. 566; *Herman* v. *Wilson*, 32 Ont. 60; and where a person suing on behalf of himself and others is disentitled to sue on his own behalf, he cannot do so on behalf of the others interested: *Dillon* v. *Raleigh*, 13 Ont. App. 53; *Harris Maxwell Larder Lake Mining Co.* v. *Gold Fields*, 23 O. L. R. 625.

Shippers of part of a cargo sued the ship-owners on behalf of themselves "and all other shippers," for "breach of contract and duty," but it was held that as regards "all other shippers" the plaintiffs could not maintain the action: *Markt* v. *Knight S. S. Co.*, 1910, 2 K. B. 1021; 103 L. T. 369; but in *De Hart* v. *Stevenson*, 1 Q. B. D. 313, it was held that one part-owner of a ship might sue under this *Rule* on behalf of himself and his co-owners for freight. So also one underwriter on behalf of all: *Leathley* v. *McAndrew*, W. N. 1875, 259; 1 Charl. Ch. Ca. 58; one of a number of co-owners of a patent: *Sheehan* v. *G. E. Ry.*, 16 Ch. D. 59; or bondholders: *Frazer* v. *Cooper, Hill & Co.*, 21 Ch. D. 718, or policy holders in an insurance company: *Thomson* v. *Victoria Mutual Company*, 29 Gr. 56; or shareholders of a company: *International Wrecking Company* v. *Murphy*, 12 P. R. 423; see also *Bergman* v. *McMillan*, W. N. 1881, 39; *Ellis* v. *Bedford*, 1899, 1 Ch. 494; 1901, A. C. 1, 80 L. T. 332; 83 L. T. 686.

Debenture holders' action.

Where a plaintiff described himself as suing on behalf of himself and all other debenture holders of the defendant company, "and its

predecessors in title," the fact being that the plaintiff was the debenture holder of a company which had been dissolved, and which had transferred its business to the defendant company, it was held that the description of those on whose behalf the plaintiff sued was too vague, and that he should describe himself as suing on behalf of all other debenture holders of the (*naming the Company*) "now dissolved": *Marshall* v. *South Staffordshire T. Co.*, 1895, 2 Ch. 36. Rule 75.

An action cannot be brought by a plaintiff on behalf of himself and other persons to recover damages for conspiracy or any other tort: *Murray* v. *Clopp*, 33 C. L. J. 771: *Canadian Cordage Co.* v. *Lea*, 11 O. L. R. 171; 37 S. C. R. 672; and see *Temperton* v. *Russell*, 1893, 1 Q. B. 435; nor "on behalf of himself all other owners of cargo not being shippers of cargo contraband of war" claiming damages arising out of the capture of the vessel for having on board contraband of war: *Market* v. *Knight, S. S. Co.*, 1910, 2 K. B. 1021; 103 L. T. 369. Torts.

A plaintiff cannot join a claim by himself and others of a class asserting rights on behalf of the class with a claim asserting public rights which can only be asserted by the Attorney-General: *Parsons* v. *London*, 3 O. W. N. 55.

A plaintiff in a class suit under this Rule cannot be compelled to disclose the names and addresses of the persons on whose behalf he sues: *Leathley* v. *McAndrew*, W. N. 1875, 259.

In *Stroud* v. *Lawson*, 1898, 2 Q. B. 44; 78 L. T. 729, it was held that notwithstanding *Rule* 60, a claim cannot be joined by a plaintiff individually with one by him on behalf of a class.

Quite independently of this *Rule* any number of persons claiming mechanics' liens on the same property may join in an action to enforce their liens, and an action brought by one lien-holder is to be taken as brought on behalf of all other lien-holders on the property in question: see *The Mechanics' Lien Act* (R. C. O. c. 140) s. 32.

Defendants.—To bind the absent parties, an order must be made under this *Rule* authorizing one or more persons to defend on behalf of all persons interested: *Re Richerson*, 1893, 3 Ch. 146; 3 R. 643; *Fairfield* v. *London*, W. N. 1895, 64; *Saragossa Ry. Co.* v. *Collingham, etc.*, 1904, A. C. 159; and an order may be made against the will of the persons so authorized to defend: *Wood* v. *McCarthy*, 1893, 1 Q. B. 775; 69 L. T. 431. Defendants in class actions.

It should be shown that the parties having the same interest are numerous, before a party can be authorized to defend on "behalf of all": *Wilson* v. *Church*, 9 Ch. D. 552.

The officers of an unincorporated benevolent society may be sued, to compel them to make a levy for the plaintiff's benefit on the members of the society in accordance with its rules, and an order may be made under this *Rule* authorizing them to represent both themselves and the other members of the society: *Wood* v. *McCarthy*, *supra*. Benevolent society.

The *Rule*, however, is held not to authorize an order being made enabling a plaintiff to sue for an alleged tort, some members of a club as representing themselves and all other members of the club: *Scully* v. *Ontario Jockey Club*, 4 O. W. N. 379.

Apart altogether from this *Rule* the executive officers of an unincorporated club may be sued personally, for contracts entered into by them on behalf of the club: see *Aikins* v. *Dominion Live Stock* Clubs.

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Ass., 17 P. R. 393; *Pears* v. *Stormont*, 24 O. L. R. 509. But it has recently been held that in an action for debt against an unincorporated society, a representative order cannot be made under this *Rule* so as to enable a judgment recovered against some of the members to bind all: *Wolker* v. *Sur*, 1914, 2 K. B. 930; 109 L. T. 888.

In *Andrews* v. *Solmon*, W. N. 1888, 102 (see also *Ib.* 176), defendants were authorized to defend an action for tort on behalf of all the members of the committee of the club.

Voluntary unincorporated societies.

It has been held that there is jurisdiction under this *Rule* to make an order that some of the officers of a voluntary unincorporated association (*e.g.*, a trade union), may be sued as representing themselves and all other members of the association, to restrain torts by the members of the association, or to recover damages for torts committed by the association, or its servants, or agents; but in order to levy against the property of the association, it would appear to be necessary that the persons or trustees in whom such property is vested should also be made parties to the action: *Metallic Roofing Co.* v. *Local Union, etc.*, 5 O. L. R. 424; 9 O. L. R. 171; and see S. C. (*sub nom. Metallic Roofing Co.* v. *Jose*), 12 O. L. R. 200; 14 O. L. R. 156; 1908, A. C. 514; 99 L. T. 742; (*) and see *Taff Vale Ry.* v. *Amalgamated Society of Engineers*, 1901, A. C. 426; 85 L. T. 147; and *Wallace* v. *Railroad Telegraphers*, 5 O. W. R. 788; but such a society (not being registered anywhere by its name so as to constitute it a *quasi* corporation, such as was sued in the *Taff Vale* case) cannot be sued in its own name: see *Kingston* v. *Salvation Army*, 7 O. L. R. 681; *Metallic Roofing Co.* v. *Local Union*, 5 O. L. R. 424; 5 O. W. R. 95; *Small* v. *American Society of Associated Musicians*, 5 O. L. R. 456; *Sellars* v. *Dutton*, 7 O. L. R. 646; *Ward* v. *Lowthian*, 4 O. W. R. 502; *Logan* v. *Hurlburt*, 2 Unt. App. 623, but, after a trade union had appeared and pleaded in an apparently corporate capacity, it was held to be too late at the trial to raise the objection that it was not in fact incorporated, or liable to be sued. Such an objection must be specially pleaded: *Krug Furniture Company* v. *Berlin Union of Amalgamated Workers*, 5 O. L. R. 463.

Injunction.

Where the plaintiff sought an injunction against a musical protective association to restrain them from making a member of that body break a contract with the plaintiff and made the president and six other officers or leading members of the association defendants as representing the association, an order was granted directing that the defendants might be sued and authorized to defend on behalf of all the members of the association: *Small* v. *Hyttenrouch*, 6 O. L. R. 388.

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* On an application to enforce an order in this case by attachment of money in a bank at the credit of an account headed, "Amalgamated Sheet Metal Workers' Union, No. 30" (said to be the defendants, the Local Union), payable out on cheques signed by three officers of the Local Union, it was held that the members of the Union, other than those who had been made defendants to represent all members, though bound by the judgment, were not parties to the action; and that the money in the bank not being the property of the representative defendants, was not exigible under a judgment against them: see 10 O. L. R. 108. But see *per* Meredith, C.J., as to whether property of the Local Union might have been exigible under a judgment differently framed. In this case one of the persons to whose credit the money sought to be attached stood, was Alex. Kay, and he does not appear to have been a party defendant.

This *Rule* was acted on in a case where certain charitable bequests in a will, if held invalid, would go to the next of kin, and four of the next of kin besides the widow of the testator, and the Atty.-Gen. as representing the charities, had been served, and it appeared that there were a large number of next of kin, many of whom were unknown, and service upon others would be difficult and expensive. An order was made declaring that the next of kin were sufficiently represented by those before the Court: *Gillies* v. *McConochie*, 18 C. L. J. 179; see S. C., 3 Ont. 203. Rule 75. Charities.

The *Rule* applies only to persons who have, or claim, some proprietary right, which they are asserting or defending. It was therefore held not to authorize a plaintiff to sue in tort several presidents of defendant trades unions and societies as representing not only themselves, but all the members of their respective societies: *Temperton* v. *Russell*, 1893, 1 Q. B. 435; 4 R. 302.

Where an action is brought to establish a will, unless so ordered, one of the heirs or next of kin does not sufficiently represent the others. As a general rule all should be made parties: *Cornell* v. *Smith*, 14 P. R. 275; *O'Sullivan* v. *Phelan*, 14 P. R. 278; *Gunn* v. *Corson*, 11 C. L. T. 47; and see *Clifton* v. *Crawford*, 18 P. R. 318.

Effect of Representation of a Class.—In suits by one on behalf of all others of a particular class, the other members of the class, if fairly represented, are bound by the judgment: *Commissioners of Sewers* v. *Oelloty*, 3 Ch. D. 610; *Leothley* v. *McAndrew*, W. N. 1878, 38; 2 Ch. Ch. Ca. 24; *Burt* v. *British Nation Life Assurance Association*, 4 De G. & J. 158, 174; *Borker* v. *Walters*, 8 Beav. 97. But *semble* not so as to enable execution to be issued against any person not actually a party: *see supra*, p. 438. Effect of representation order.

An order authorizing a person to represent a class only binds those whose interests are identical with the rest of the class; persons belonging to the class, but having other interests, may however be bound by acquiescence; if any member of a class having notice of the proceedings conceives that his interests are not properly represented, he may apply to be made a defendant: see *Rule* 134; *Young* v. *Holloway*, 1895, P. 87; 72 L. T. 118; but if he lie by he may be bound by the judgment: see *Re Lort*, 1896, 2 Ch. 788; 75 L. T. 175.

The same rule holds good where one of the class, on behalf of which the plaintiff claims to sue, objects to the proceedings; he may on applying, be made a party defendant: *Wilson* v. *Church*, 8 Ch. D. 552; *Fraser* v. *Cooper, Hall & Co.*, 21 Ch. D. 718; and that is the proper course if he is really not represented by the plaintiff. He cannot otherwise appeal from an order obtained by the plaintiff: *Watson* v. *Cove*, 17 Ch. D. 19; unless perhaps in a case where a person has already been made a defendant in the same interest as the applicant, and appointed under this *Rule* to represent that interest: see *Fraser* v. *Cooper*, *etc.*, *supra*.

A person fairly represented will not be allowed to attend the proceedings unless he is joined as a party: *Conybeare* v. *Lewis*, 48 L. T. 327. And, as a rule, he will not be joined as a party where he is fairly represented: *Ib.* Party represented may not attend proceeding.

But where the object of the action was to fix the parties represented with liability, a party so represented on being brought in the Master's office, on appeal from the Master's certificate, succeeded practically in reversing the judgment so far as he was concerned,

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although he did not in terma appeal therefrom: *Wise* v. *Perpetual Trustee Co.*, 1903, A. C. 139; 87 L. T. 569.

Party represented not bound by consent judgment.

Peraons authorized by the Court to defend an action on behalf of othera having the aame interest, have no power to consent on behalf of such othera to judgment; the proper courae, in case there is no defencc, ia for the repreaentative to suhmit the righta of such other person to the judgment of tbe Court, and the judgment should he so drawn up: *Rees* v. *Richmond*, 62 L. T. 427.

Compromise.

In *Collingham* v. *Sloper*, 1901, 1 Ch. 769, the Court held that it had no juriadiction to ilmit a time within which unascertained bondholders muat come in, or be excluded from the benefit of n compromise. As to whether represented partles are bound by a compromise order: see S. C., 1904, A. C. 159, and Eng. Rule 131 A; and *Rule* 78, *post*.

Dominus litis.

Where an actlon is brought by a plaintiff on behalf of himself and other persons of the same class, he continues *dominus litis*, until judgment, and the other peraons interested are bound to see that it is prosecuted to judgment, otherwise it may be compromised, or dismissed, for want of prosecutlon: *Smith* v. *Doyle*, 4 Ont. App. 477; or on the settlement of the plaintiff's claim: *Driffill* v. *Ough*, 13 O. L. R. 8. Before judgment, one of the class on whose behalf the actlon is brought, has no right to intervene, and claim to prosecute the action: *Ib.* Tbis rule, however, probably does not apply in the case of actlons to enforce mechanics' liens: see *McPherson* v. *Gedge*, 4 Ont. 246. After a judgment for the plaintiff in a class action, any peraon of the aame class as the plaintiff may intervene and apply to prosecute the nctlon if the plaintiff declines to do so: *Canadian Bank of Commerce* v. *Tinning*, 29 C. L. J. 614; and after judgment in such suit a certificate of *lis pendens* will not be vacated on the plaintiff's consent: *Arnbery* v. *Thornton*, 6 P. R. 190; *In re Alpha Co.*, 1903, 1 Ch. 203. The Court refused, after payment of the plaintiff's claim before judgment, in an actlon by a creditor on behalf of himself and all other creditors, to set aside a chattel mortgage, to add another creditor as plaintiff: *Driffill* v. *Ough*, *supra*.

Where the judgment is not in favour of the plaintiff, the aame considerations do not apply, and another member of the class is not entitled to be substituted for the plaintiff in order to appeal from tbe judgment: *Macdonald* v. *Toronto*, 18 P. R. 17.

But where aeveral ratepnyers combined in taking proceedings to quash a hy-law which were prosecuted in the name of one of tbeir numher who was afterwards corruptly induced to countermand the notice of motion to quash given hy him; on the application of tbe others they were allowed to continue the proceedings in his name, upon indemnifying him as to costs: *Re Ritz* v. *New Hamburg*, 4 O. L. R. 639.

The general rule is that all persons intereated in the questions raised in an action should be made partiea; and resort should be had to representation only where some speciai reason exists for not bringing all proper partles before the Court: *Gunn* v. *Corson*, 11 C. L. T. 47, and, as a general rule, where an actlon is hrought to establish a will, all heirs or next of kin should be made partles, as well as the devisees, or legatees: *Cornell* v. *Smith*, 14 P. R. 275; *O'Sullivan* v. *Phelan*, *Ib.*, 278, note.

The Court may execute some only of several trusts.

The Court may under the *Rules* execute one or more of several specific trusts embraced in an instrument without making all the persons interested in the other trusts embraced therein parties: *Parnell* v. *Hingston*, 3 Sm. & G. 337. But aome of the partles interested

on both sides of the question involved must be before the Court: *Swallow* v. *Binns*, 9 Hare App. xlvii. The Court has refused to permit a plaintiff at the hearing to strike out the names of defendants whom he had improperly omitted to serve with a subpœna to hear judgment, and proceed in their absence although such parties had merely a nominal interest: *Lanham* v. *Paris*, 1 Jur. N. S. 1201, and see *Quantz* v. *Smelzer*, 6 P. R. 298; but where at the hearing it was discovered that an order *pro confesso* against certain defendants had been vacated by a subsequent amendment, the Court pronounced a decree saving the rights of such defendants: *Waddle* v. *McGinty*, 15 Gr. 261. Rule 76.

Formerly a decree for foreclosure could not be made against some only of the parties interested in the equity of redemption: *Caddick* v. *Cook*, 32 Beav. 70. But where the parties interested in the equity of redemption are numerous, the Court may, under *Rule* 490, award judgment and direct that parties so interested be made parties in the Master's Office, but such order can only be made when one or more parties interested in the equity of redemption are already parties to the action. Foreclosure.

The *Rules* as to parties apply to applications made under *The Trustee Act* (R. S. O. c. 121), and some out of several parties entitled to the equity of redemption were held entitled to apply under that Act for a reconveyance: *Re Sharpley's Trusts*, 1 W. R. 271. The *Rules* also apply to parties to special cases: *Swallow* v. *Binns*, 9 Hare App. xlvii.; *Re Brown*, 29 Beav. 401. Application under Trustee Act.

Where all persons interested in the questions raised in an action, or other proceeding, are not before the Court either as parties, or ordered to be represented by persons who are parties, the Court may, nevertheless, proceed in their absence, saving their rights: see *Rule* 89; or it may under this *Rule* authorize some person to sue or be sued on behalf of the absent parties, or it may in the case of deceased persons having no personal representatives: *Rule* 90; or in the case of unborn or unascertained persons: *Rule* 77; appoint some person to represent the absent parties. Saving rights of unrepresented parties.

When the Court proceeds under *Rule* 89 in the absence of any parties interested, the absent parties are not bound by the proceedings: *Doody* v. *Higgins*, 9 Hare App. xxxii., unless an order has been made for their representation by some person who is a party to the proceedings: *Re Richerson*, 1893, 3 Ch. 146.

And it would seem that no order made under this *Rule* authorizing one person to defend for another, could render such other person liable on the judgment recovered in the action; even though such person were a member of a numerous body, and it would be an impossibility to make them all parties: see *Walker* v. *Sur*, 1914, 2 K. B. 930; 109 L. T. 288.

76. Where the right of an heir-at-law or of the next of kin, or of a class, [or of an unborn person], depends upon the construction of an instrument, and it is not known or is difficult to ascertain who is such heir-at-law or next of kin or class, and the Court deems it convenient to have the question determined before the heir-at-law, next of kin or class in question is ascertained, Persons appointed to represent a class.

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[or before the birth of any unborn person], the Court may appoint some person to represent the heir-at-law, next of kin or class, [or unborn person], and the judgment of the Court shall be binding upon the person or class [or unborn person] so represented. C. R. 201.

Unborn persons.

The extension of this *Rule*, by the words in brackets, to the case of an unborn person, follows C. R. 1312 of 23rd June, 1894. In other respects the clause is substantially the same as Eng. (1883) R. 154.

The *Rule* is thus wider than the English *Rule*, under which the Court has no power to appoint a person to represent a class of which there is no member in existence, *e.g.*, unborn children: *Re Whiting's Settlement*, 1905, 1 Ch. 96.

The jurisdiction conferred by this *Rule* in reference to the construction of documents is extended to other cases by *Rule* 77.

As to the constitutionality of such an enactment: see *Ashbury* v. *Ellis*, 1893, A. C. 339.

To enable the Court to act under this *Rule*, an order must be obtained: see *Re Richerson*, 1893, 3 Ch. 146; 3 R. 643.

As to when the rights of unascertained persons may be determined, and as to their representation by trustees: see *Cardigan* v. *Curzon-Howe*, 1901, 2 Ch. 479; *Re Whiting's Settlement*, 1905, 1 Ch. 96.

Under former C. R. 201, on which *Rule* 76 is based, the Local Judges, the Master in Chambers and other judicial officers had no jurisdiction in Chambers to make orders: *Chisholm* v. *Herkimer*, 19 O. L. R. 600.

It might perhaps be argued that the combined effect of *Rules* 207 (4), 208 and 210 is now to give them jurisdiction to make orders under this *Rule*, but *semble*, a Judge having jurisdiction to adjudicate on the construction of the document in question is the proper tribunal to make an order under this *Rule*, and he may do so either in Court or in Chambers: see *Rule* 207 (4).

Examples.

Examples.—Where upon the construction of a will, questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, an order was made under this *Rule* appointing persons to represent the various classes of persons, some or one of which might be held to be entitled, before the questions of construction came on to be decided: *Re Peppitt's Estate, Chester* v. *Phillips*, 4 Ch. D. 230.

In *Re Hoke, Pownall* v. *Pryor*, W. N. 1895, 116, plaintiffs, the legal representatives of the last surviving executor or trustee under a will, were appointed to represent the next of kin for the purposes of the determination, on the construction of a will, whether, in the events which had occurred, the residuary estate was undisposed of.

Persons interested in an estate, the subject of an administration action to which they have not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by proceedings under that order, at any rate where they ought to be served, unless they are served with notice

of the order, or an order has been made appointing a member of their class to represent them: *May* v. *Newton*, 34 Ch. D. 347. Rules 77, 78.

In *Re Rees*, *Rees* v. *George*, 49 L. J., Chy. 568, persons who had not been parties, but had been served with notice of the decree, were directed to be served with notice of hearing on further consideration, where an order was asked against them personally: *sed quære*, whether relief can in any case be properly granted against persons who are not parties: see *Hooper* v. *Harrison*, and other cases cited in notes to *Rule* 404.

In *Re Pringle*, 17 Ch. D. 821, an action by legatees for construction of a will, the defendants the executors, two of the next of kin, were at the hearing authorized to represent the absent next of kin.

In *Cook* v. *Fearn*, 27 W. R. 212, representation of an unascertained class, viz., the next of kin of the plaintiff, was dispensed with.

See also *Lovesy* v. *Smith*, 15 Ch. D. 655; *Hobbs* v. *Reid*, W. N. 1876, 95; and *Beale* v. *Ruston*, W. N. 1878, 179; *Moore* v. *Sinkin*, 53 L. T. 815.

An order appointing a person to represent a class, such as next of kin, is not binding on one of the next of kin who has a distinct and independent interest in another capacity: *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175.

A person not a party to the action, nor technically bound by the judgment, but who was fully cognizant of the proceedings, and stood by and took the benefit of a decision on the construction of a will under which a particular fund was distributed, was held to be estopped by his conduct from re-opening any of the questions covered by the decision by means of a fresh action, relating to another fund under the same will: *Ib.*

77. The Court may appoint some person to represent, for the purposes of any action or proceeding, the interest of any person or class, who may be not ascertained or who may be unborn, and the judgment of the Court shall be binding upon the person or class so represented. C.R. 237. Court may appoint representative of unascertained, or unborn persons.

The reference to C. R. 237 at the end of this *Rule* appears to be erroneous, and should be C. R. 200 (2): see notes to *Rule* 76: *Rule* 76 is limited to cases where the construction of documents is in question, but the present *Rule* enables the Court to make an order for the representation of unascertained or unborn persons in any other action or proceeding where the interests of such persons may be involved. It is usually only where such representation is required for the purpose of adjudicating on the rights of persons *in esse* that orders under this *Rule* will be made.

78. Where in a proceeding concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceeding, but there are other persons in the same interest before the Court and assenting to the compromise, the Court Court may sanction compromise concerning trusts so as to bind absent persons.

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if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on them would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts. *New. See* Eng. Rule 13*a*.

The Court had always power in a properly constituted action to bind the members of a class represented in the action, though not actually parties, by an adjudication in due course of law, but it could not bind them by a compromise, though sanctioned by the Court. The power conferred by this *Rule* is new, and the Court is thereby empowered to bind absent parties by a compromise which it sanctions: *Saragossa & M. Ry. Co.* v. *Collingham*, 1904, A. C. 159; *Re Wrigglesworth*, 1901, N. W. 172. The *Rule* gives no power to bind dissentient parties, and provision must be made for satisfying the claims of dissentients in full before the Court will sanction the compromise: see *Collingham* v. *Sloper*, *supra*, p. 490.

The *Rule* it must be noted is confined to compromises concerning a trust.

Cases where one of a class may sue without joining others.

Residuary legatee, etc.

79. A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the other residuary legatees or next of kin. C.R. 202.

The reference to C. R. 202 at the end of this *Rule* is erroneous. It should be C. R. 203 (1) *a*.

The English (1888) RR. 155-160, are to the same effect as *Rules* 79-84.

Scope of Rule.

The object of *Rules* 78-85 is to save unnecessary expense, and where unnecessary parties are joined in the action, the Court will refuse to charge the estate with extra costs thereby occasioned: *Rodgers* v. *Rodgers*, 13 Gr. 457; *Bradley* v. *Wilson*, *Ib.* 645, and it would seem that the plaintiff may be ordered to pay such costs.

Persons interested in an estate the subject of administration proceedings to which they have not been made parties, and whose rights may be affected, are not bound by the proceedings, where a reference is ordered, unless they are served with notice of the judgment: see *Rule* 87; or an order has been made appointing a member of their class to represent them: see *Rules* 76-77; *May* v. *Newton*, 34 Ch. D. 347. But where no reference is ordered it does not appear to be required by any *Rule* that the copy of the judgment or order made on the application should be served on any of the persons interested, who, under *Rules* 78-85, need not be made parties.

Persons not parties must be served with judgment.

Although in the several cases mentioned in this *Rule* the action may be commenced and judgment obtained without making all persons interested parties to the action, yet the persons who but for this *Rule*, would be necessary parties to the proceedings must, under *Rule* 87, wherever a reference is directed, be served with a copy of the

judgment, unless the Court or Master, dispense with the service, and it is not until "after such service," that they are bound by the proceedings. Whether persons upon whom service of judgment is dispensed with, are bound by the proceedings as if they had been actually served, is not stated in the *Rule*, and it is possible that they would not be so bound: see *Doody* v. *Higgins*, 9 Hare App. xxxii. Rule 79.

Notwithstanding *Rules* 79-85, all persons from whom an account is sought, must be made parties in the first instance: *Latch* v. *Latch*, L. R. 10 Chy. 464; *Walker* v. *Seligmonn*, L. R. 12 Eq. 152; *Rolph* v. *C. C. Building Society*, 11 Gr. 275, 278-9; *Hopper* v. *Harrison*, 28 Gr. 22; *Re Par'* ', 66 L. T. 151; and the judgment cannot be varied under *Rule* 87, *post*, at the instance of persons served with the judgment so as to direct the taking of accounts for which no foundation is laid in the pleadings: *Foster* v. *Foster*, L. R. 3 Chy. 330, at all events not without giving the party from whom an account is sought an opportunity to adduce evidence to shew that the account should not be ordered; and persons served with the judgment have no greater right to call the original defendants to account, than they would have if such persons had been originally made co-defendants in an action; thus in an action by a remainderman for an account, it was held that a tenant for life served with the judgment could not claim an account of the income: *Whitney* v. *Smith*, L. R. 4 Chy. 513. Persons from whom an account is sought should be made parties.

All persons in the same interest with the plaintiff, necessary to be made parties, except perhaps infants, should be made co-plaintiffs; where they are made defendants in consequence of their refusal to join as plaintiffs, they will be refused their costs: *Ling* v. *Smith*, 25 Gr. 246.

Where the action is brought by one of several residuary legatees, the plaintiff sufficiently represents all the residuary legatees, and the others are not entitled, as of course, to appear in the Master's Office by a separate solicitor, and if they do, they may be refused their costs; to entitle them to costs some sufficient reason should be stated in the Master's report, for their being represented by a separate solicitor: *Gorham* v. *Gorham*, 17 Gr. 386. Action by residuary legatee.

The legal personal representative is ordinarily a necessary party to an action for general administration, and it is necessary to allege that the person named as the legal personal representative has proved the will, or obtained letters of administration, as the case may be: *Penny* v. *Watts*, 2 Ph. 149; *Re Marshall*, *Fowler* v. *Morshall*, 1 Chy. Ch. 29; *Kelly* v. *Ardell*, 11 Gr. 579; *Simons* v. *Millmon*, 2 Sim. 241; *Lowry* v. *Fulton*, 9 Sim. 104; *Zimmermon* v. *O'Reilly*, 14 Gr. 646; *Groves* v. *Lane*, 16 Jur. 1061; *Cooke* v. *Gittings*, 21 Beav. 497; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Cary* v. *Hills*, L. R. 15 Eq. 79; *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; *Rowsell* v. *Morris*, L. R. 17 Eq. 20. But probate, or administration, obtained by the alleged personal representative *pendente lite* before the trial of the action, will be sufficient to bind the estate: *Bateman* v. *Margerison*, 6 Hare, 496; *Trice* v. *Robinson*, 16 Ont. 433; *Doyle* v. *Diamond Flint Glass Co.*, 8 O. L. R. 499; and *semble*, will relate back to the commencement of the action so as to bar the running of the Statute of Limitations: *Dini* v. *Fauguier*, 8 O. L. A. 712 (casting doubt upon, if not overruling, *Chord* v. *Rae*, 18 Ont. 371); *Johnston* v. *Dominion of C. G. & A. Co.*, 17 O. L. R. 462; and this was held even though the objection was taken by defendant in his answer: *Edinburgh Life Assurance Co.* v. *Allen*, 19 Gr. 593; and see *Stump* v. *Bradley*, 15 Gr. 30; *McDonold* v. *McDonald*, 14 Gr. 133

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(where probate was not obtained until after judgment); but where the executor had applied for, and had obtained an order for the grant of probate, but it had never actually obtained probate: after his death, a judgment recovered against him as executor was held not to bind the estate: *Mohomidu* v. *Pitchey*, 1894, A. C. 437; 71 L. T. 99. Judgment for the general administration of a deceased person's estate cannot be granted against an executor *de son tort* without a legal personal representative being a party: *Rowsell* v. *Morris*, L. R. 17 Eq. 30; *Outrom* v. *Wyckhoff*, 6 P. R. 150; *Re Kirkpatrick*, 10 P. R. 4; but see *Re Lovett*, 3 Ch. D. 198; formerly it was otherwise: see former C. R. 196. Neither can judgment for administration be granted against one of several executors who have proved, even though the absent executor be out of the jurisdiction: *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R. 188; *Latch* v. *Lotch*, L. R. 10 Chy. 464. All the executors who have proved, and all who have acted, even though they have not proved, are necessary parties: *Vickers* v. *Bell*, 4 D. J. & S. 274; *Hump* v. *Robinson*, 3 D. J. & S. 97; *Lotch* v. *Lotch*, *supra*; but an executor who has renounced, or who has neither proved nor acted, need not be made a party: *Forsyth* v. *Droke*, 1 Gr. 228; *Wittis* v. *Walker*, 1 Vern. 90 (*n*) 2; *Stinson* v. *Stinson*, 2 Gr. 508. Where the plaintiff brought a suit for administration against one of three executors and trustees, alleging in the bill that the others had never acted, and the bill having been served by publication, on a hearing *pro confesso* the Court refused to make a decree in the absence of the other two executors and trustees as parties, or of proof of the facts alleged accounting for their not being made parties: *Lane* v. *Young*, 17 Gr. 100. The renunciation of an executor under *The Surrogate Courts Act* (R. S. O. c. 62), s. 59, is peremptory and cannot be recalled on the death of the acting executor: *Aitcn* v. *Porke*, 17 C. P. 105; and see *Foxwell* v. *Kennedy*, 24 O. L. R. 189; and after renunciation he cannot execute a power of sale given to him, *quo* executor: *Trovers* v. *Gustin*, 20 Gr. 106; and see *Re Delaronde*, 19 Gr. 119. As to the acts which will render an executor liable, notwithstanding his renunciation of probate: see *Vonnatto* v. *Mitchett*, 13 Gr. 665.

Personal representative a necessary party to action for administration.

Real representatives, when necessary parties.

Where an action relates to the realty as well as the personalty, unless the executor is also trustee, or devisee, of the realty, or of some part of it: *Stewort* v. *Hunter*, 14 Gr. 132, or entitled thereto under *The Devolution of Estates Act* (R. S. O. c. 119), s. 4, it is necessary to join the heir, or if the lands be devised, then the devisee, or one or more of the devisees: Calvert, 151, 153. But execution against the lands of a deceased person might, prior to *The Devolution of Estates Act*, be issued upon a judgment against his personal representative, although those interested in the realty were not parties to the action: *The Execution Act* (R. S. O. c. 80), s. 36, and see *McEroy* v. *Clune*, 21 Gr. 515.

Representatives of deceased executors.

The representative of a deceased executor who fully accounted to the surviving executor, need not be made a party: *Webster* v. *Leys*, 28 Gr. 471; and in an action for a general account against surviving trustees, the representatives of a deceased trustee were held not to be necessary parties to the writ, but they may be added at any time under *Rule* 134 if necessary: *Re Harrison*, 64 L. T. 442.

An executor proving the will, after judgment has been obtained, against another executor who has previously proved, might formerly have been added as a party by a supplemental order: *Guthrie* v. *Wolrond*, 22 W. R. 723; and it would seem he might under the present

practice be brought before the Court under an order to continue proceedings: see *Rules* 300, 301. A general decree for administration was granted in a creditor's suit against an administrator *ad litem*, it being alleged in the bill that there was no personal estate, and the parties interested in the realty having allowed the bill to be taken *pro confesso* against them: *Dey* v. *Dey*, 2 Gr. 149, but see remarks of Spragge, C., in *Gorrow* v. *McDonald*, 20 Gr. 130; and *The Devolution of Estates Act* (R. S. O. c. 119), s. 4. Rule 79.

An action for protecting the estate until probate cannot be joined with an action for administration; formerly a bill so framed was demurrable for want of parties: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Word*, 34 Beav. 175; and see *Tempest* v. *Camoys*, 35 Beav. 201; and *Cole* v. *Glover*, 16 Gr. 392; but now any objection to an action on the ground of the absence of necessary parties, can not, under The Judicature Act, be taken by demurrer; the question must be raised on motion to add the necessary parties: *Werderman* v. *Société Générale D'Electricité*, 45 L. T. 514, 18 C. L. J. 18; 19 Ch. D. 246; *Young* v. *Robertson*, 2 Ont. 439; *Carter* v. *Clarkson*, 15 P. R. 379; *Smith* v. *London*, 19 O. L. R. 139; and see *Rule* 134. Action for protection of estate until probate.

The removal of the assets out of the jurisdiction will be restrained by injunction even though the deceased's domicil was out of the Province: *Shaver* v. *Gray*, 18 Gr. 419. Removal of assets may be restrained.

No action can be brought by a legatee, or next of kin, against a personal representative before a year has elapsed from the death of the testator, or intestate: *The Devolution of Estates Act* (R. S. O. c. 119), s. 32; *Slater* v. *Slater*, 3 Chy. Ch. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461; but see *Wollis* v. *Wallis*, 9 Ir. Chy. 511; *Prosser* v. *Mossop*, 29 W. R. 439. But an action for the protection of the estate simply, may be brought by a legatee, or next of kin, against an executor *de son tort* before the lapse of the year: *Beardmore* v. *Gregory*, 2 H. & M. 491; but not for administration as well: *Rawlings* v. *Lambert*, 1 J. & H. 458; *Overington* v. *Ward*, 34 Beav. 175. Formerly the High Court had no power to appoint an executor, in place of executors who had become incompetent to act through bodily infirmity, that could only be done by the Surrogate Court; nor would the High Court appoint a trustee in place of such executors: *Corrigal* v. *Henry*, 2 Gr. 310; but in *Re Moore*, 21 Ch. D. 778, under *The Trustee Act* (R. S. O. c. 121), a trustee was appointed to discharge the duties of an executrix who retired: and see *Re Murphy*, before Boyd, C., 9th April, 1887; *Re Bush*, 19 Ont. 1. But where an executor had become insolvent, a receiver was appointed: *Harrold* v. *Wallis*, 9 Gr. 443; and see *Meachom* v. *Draper*, 2 Gr. 316; and now jurisdiction to remove executors and appoint others in their stead has been conferred on the Supreme Court: see *The Trustee Act* (R. S. O. c. 121), s. 40: see p. 25 *supra*. No action for administration lies by legatee, or next of kin, within a year of death. Formerly High Court could not appoint trustee in place of executor.

Where the personal representative has duly advertised for creditors under *The Trustee Act* (R. S. O. c. 121), s. 56, and has distributed the estate, that is an answer to a subsequent action against him for administration, by a legatee: see *Newton* v. *Sherry*, 1 C. P. D. 246; or by a creditor: *Clegg* v. *Rowland*, L. R. 3 Eq. 368; or by an alleged *cestui que trust* of the deceased: *Re Bracken*, 43 Ch. D. 1; 61 L. T. 531; even though he have retained money in his hands to answer legacies, because from the time he sets apart moneys to answer legacies, he ceases to hold them as executor, and becomes then a trustee thereof for the legacies: *Ib.*; *Cameron* v. *Campbell*, 27 Gr. 307; *Ballard* v. *Marsden*, 42 L. T. 763; *Galbraith* v. *Duncombe* 28 Gr. 27; but see When personal representative has distributed estate after advertising under statute, administration refused.

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Noble v. *Brett*, 24 Beav. 499. But if he has notice of a creditor's claim, he is not discharged because it was not sent in: *Wood* v. *Wood*, *Markwell's Case*, 21 W. R. 135; *Re Land Credit Co. of Ireland*, W. N. 1872, 210; and if the advertisement is insufficient he is not protected: *Wood* v. *Weightman*, L. R. 13 Eq. 434.

Account in Surrogate Court.

Where also there had been an accounting in the Surrogate Court by the personal representative, and no objection made for eight years, the right to a further account in the High Court of Justice was held to be barred: *Bell* v. *Landon*, 18 C. L. J. 178.

Personal representative distributing estate without advertising under statute, remains liable to creditors.

Personal representatives distributing an estate without advertising under *The Trustee Act* (R. S. O. c. 121), s. 56, or without the authority of the Court, remain liable to a creditor, though they had no notice of his claim: *Knatchbull* v. *Fearnhead*, 3 My. & Cr. 122; *Noble* v. *Brett*, 24 Beav. 499; *Jeffreys* v. *Jeffreys*, 19 W. R. 464; and also to legatees; and where the executor has distributed under a mistaken construction of the will he is liable to the parties injured: *Hilliard* v. *Fulford*, 4 Ch. D. 389; *Boulton* v. *Peard*, 3 D. M. & G. 608; *Doyle* v. *Bloke*, 2 Sch. & L. 243; but he would have a right to recoup himself out of any further payments due to those who had been overpaid: *Dibbs* v. *Goren*, 11 Beav. 483; and would also seem entitled to call on them to refund the money overpaid them, but not any interest thereon: *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Boys' Home* v. *Lewis*, 3 O. L. R. 208.

Publication of the advertisement in the Ontario Gazette is not necessary: *Re Comeron*, 15 P. R. 272.

Infant not liable to account.

An infant executor or administrator is not liable to account for assets received by him whilst a minor: *Nosh* v. *McKoy*, 15 Gr. 247; *Hindmarsh* v. *Southgate*, 3 Russ. 324; *Merchants' Bank* v. *Monteith*, 10 P. R. 334; 20 C. L. J. 377. But a judgment for an account against a trustee who has received moneys while an infant ought to be general in its terms, and not confined merely to his receipts after he comes of age: *In re Garnes*, 31 Ch. D. 147.

Payment of legacy is admission of assets.

Payment of a legacy in full, is *primâ facie* an admission of assets to pay all legacies in full, but it is open to explanation: *Coleman* v. *Whitehead*, 3 Gr. 227. Where an executor in a residuary account stated that he retained £500 to meet outstanding legacies he was held to be precluded from afterwards showing that the statement was a mistake: *Brewster* v. *Pryor*, 55 L. T. 771.

Administration refused when estate small.

Administration has been refused, where the estate was sworn by the executors not to have exceeded $50: *Foster* v. *Foster*, 19 Gr. 463; but see *Re Falconer*, 1 Chy. Ch. 273; and where the plaintiff's claim as legatee only amounted to $28, notwithstanding it was alleged that there were other legacies for a considerable sum remaining unpaid, administration was refused, though the suit was unopposed: *Reynolds* v. *Coppin*, 19 Gr. 627. Administration has also been refused where the applicant was a partnership creditor of the deceased whose separate estate proved to be insufficient to pay his separate creditors: *Re Barnard, Edwards* v. *Barnard*, 32 Ch. D. 447; 55 L. T. 40.

This *Rule* applies to applications for administration on summary applications in Chambers, under *Rules* 608, 610; but it is to be noted that this *Rule* is confined to actions by a residuary legatee, or next of kin, and *Rule* 80 is confined to actions by a legatee interested in a legacy charged upon real estate, and therefore neither of these extends to actions by specific legatees, or pecuniary legatees whose legacies are not charged on real estate.

Rules 80-82.

Legatee whose legacy is charged on realty.

80. A legatee interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person without serving any other legatee or person interested in the proceeds. C.R. 202.

The reference to C. R. 202 is erroneous, it should be C. R. 203 (1) *b*.

See notes to *Rule* 79.

Residuary devisee or heir.

81. A residuary devisee, or heir, may have the like judgment, without serving any other residuary devisee, or heir. C.R. 202.

The reference to C. R. 202 is erroneous, it should be C. R. 203 (1) *c*.

See notes to *Rule* 79.

One of several c. q. t. may sue.

82. One *cestui que trust*, under an instrument, may have a judgment for the execution of the trusts of the instrument, without serving the other *cestuis que trustent*. C.R. 202.

The reference to C. R. 202 is erroneous, it should be C. R. 203 (1) *d*.

A new trustee may be appointed in an action by one of several *cestuis que trustent*: *Jones* v. *James*, 9 Hare, App. lxxx.

A suit by one of two *cestuis que trustent* to recover an annuity charged upon land devised to the defendant, was held maintainable without making another *cestui que trust* interested in another annuity charged on the same land, a party: *Rees* v. *Engleback*, L. R. 12 Eq. 225.

But parties who claim adversely to the trust could not formerly be made parties to a suit for the execution of the trust: *Attorney-General* v. *Avon Corporation*, 3 De G. J. & S. 637, where it is said that *Talbot* v. *Earl of Radnor*, 3 My. & K. 252, to the contrary had been constantly disapproved of, and never followed; but see now *Rules* 67, 68.

Persons from whom account required, must notwithstanding be parties.

All persons from whom an account is required must be made original parties to the action: see note, p. 445; thus a *cestui que trust* who has been party to a breach of trust, is a proper party: *Jesse* v. *Bennett*, 6 D. M. & G. 609; and a stranger or a creditor who has joined in the breach of trust may be joined: *Lund* v. *Blanshard*, 4 Hare, 9; *Bank of Toronto* v. *Beaver & Toronto Mutual Fire Insurance Co.*, 26 Gr. 102; *Consett* v. *Bell*, 1 Y. & C., C. C. 569; *Stainton* v. *The Carron Co.*, 18 Beav. 146. But if a trustee commits a breach of trust, the person participating is not a necessary party to an action for the general administration of the trust estate: *Tiffany* v. *Thompson*, 9 Gr. 244.

Where a trustee held shares for several persons in specified shares, but no provision was made for sale or division of the proceeds, an action by one of the *c. q. t.* for transfer to him of his alleged portion of the shares was held to be not properly constituted: *Bechtel* v. *Zinkann*, 16 O. L. R. 72.

Rules 83, 84.

Where a suit was brought by a remaindsrman for an account against trustees, tho tenants for lifs who wers served with the decree, were held not entitled to call the trustees to account as to the income: *Whitney* v. *Smith*, L. R. 4 Chy. 513.

Execution of trust in foreign country.

Ths Court will decree ths execution of a trust of lands in n foreign country when ths trustee is resident within the jurisdiction: *Smith* v. *Henderson*, 17 Gr. 6; and see *Re Robertson R.* v. *R.*, 22 Gr. 449; but see *Burns* v. *Davidson*, 21 Ont. 547; 94 L. T. Jour. 30; *Mercantile Inv. Co.* v. *River Plate Co.*, 1892, 2 Ch. 303; *Gunn* v. *Harper*, 30 Ont. 650.

See notes to *Rule* 79.

In actions for protection of property.

83. In actions for the protection of property, and in cases in the nature of waste, one person may sue on behalf of himself, and of all persons having the same interest. C.R. 202.

The references to C. R. 202 is erroneous, it should hs C. R. 203 (1) *e*.

Sale by trustee restrained in suit by one of several c. q. t.

Where property was offered for sals hy a trustee under depreciatory conditions of sale as to title, the snle was restrained in a suit instituted hy one of several *cestuis que trustent*: *Donce* v. *Goldinghom*, L. R. 8 Chy. 902; hut see *The Trustee Act* (R. S. O. c. 121), s. 21.

Where the action is necessary and proper, and has resulted in benefit to the co-owners, they may be compelled to hear their proportion of the expense of ths action, according to the advantage they are shown respectively to bave derived from the proceedings: *Gage* v. *Mulholland*, 16 Gr. 145.

One tenant in common is entitled to maintain an action for injury to the reversion without joining his co-tenants. The only question would bs whether non-joinder of the co-tenants is a reason for staying proceedings till they ars joined: *Roberts* v. *Holland*, 1893, 1 Q. B. 665.

See notes to *Rule* 79.

Administration against one c. q. t.

84. An exeeutor, administrator, or trustee, may obtain a judgment against any one legatee, next of kin or *cestui que trust*, for the administration of the estate or the execution of the trusts. C.R. 202.

The refcrence to C. R. 202 is erroneous, it ought to be C. R. 203 (1) *f*.

In action for administration by personal representative, special circumstances must be shewn.

Whers an action for administration is hrought hy the personal representative, soms epecial circumstances requiring the intervention of the Court must be shown: *Cole* v. *Glover*, 16 Gr. 392; *Barry* v. *Barry*, 19 Gr. 458; *Grant* v. *Grant*, 10 P. R. 211; 18 C. L. J. 99. It seems that hs hss no right to institute an action merely to ohtain nn indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392. As to whether a deficiency of assets to pay debts in full is alone a sufficient reason, seems douhtful: *Sweetnam* v. *Sweetnam*, 6 P. R. 149; *Re Ette*, 6 P. R. 159; *Re Shipman, Wallace* v. *Shipman*, 24 Or. 177; *Marsh* v. *Marsh*, 7 P. R. 129; *Re Jock, Jack* v. *Jock*, 13 C. L. J. 358; *Re Bromley* (Blake, V.C., 28th Jan., 1878); and see further, *Rule* 610. Where there were leaseholds it was held that the executor was entitled to bring an action in order to obtain indemnity against liability on the covenants in the lesse: *Re Bosworth, Howard* v. *Easton*,

45 L. T. 136; *Dodson* v. *Sammell*, 1 Dr. & Sm. 575; 4 L. T. 44; but see *The Trustee Act* (R. S. O. c. 121), s. 54; *In re Lawley, Jackson* v. *Leighton*, 1911, 2 Ch. 530. The absence of a legatee beyond the jurisdiction, whom the executors are unable to discover, was held to be a sufficient ground for the executors coming to the Court: *Re Wade, Dee* v. *Wade*, 18 Gr. 485. Rule 85.

Where the action is unnecessarily brought by the personal representative, he may be ordered to pay costs, or may be refused his costs: see cases cited in note to *Rule* 611. He may be ordered to pay costs.

An executor may begin an action before obtaining probate, but he must obtain probate before trial: *Newton* v. *Metropolitan Railway Co.*, 1 Dr. & Sm. 583; *Trice* v. *Robinson*, 16 Ont. 433; or before a defence is filed that he is not executor: *Simons* v. *Millman*, 2 Sm. 241; but see *Edinburgh Life Insurance Co.* v. *Allen*, 19 Gr. 593; and the same rule applies to administrators: *Humphreys* v. *Humphreys*, 3 P. Wms. 350; see also *supra* pp. 445-6. Executor may begin suit before probate.

Where an executor, before probate, brought an action to recover an asset of the estate, which the defendant had refused to deliver up until probate should be obtained, the action was stayed as being frivolous and vexatious: *Tarn* v. *Commercial Banking Company*, 12 Q. B. D. 294; 50 L. T. 365; and an executor intermeddling with the estate before probate may be restrained from so doing, and a receiver may be appointed at the suit of a co-executor: *In re Moore*, 13 P. D. 36; 58 L. T. 386.

An executor cannot, under this *Rule*, bring an action against one of two co-executors who have proved, without making the other a party: *Latch* v. *Latch*, L. R. 10 Chy. 464. Executor suing one of several co-executors.

An action may be brought by a trustee against his co-trustee to recover and secure the trust fund, without joining any of the *cestuis que trustent* as parties: *Horsley* v. *Fawcett*, 11 Beav. 565; *Baynard* v. *Wooley*, 20 Beav. 583; *May* v. *Selby*, 1 Y. & C. C. C. 235; *Peok* v. *Ledger*, 4 De G. & S. 137; *Franco* v. *Franco*, 3 Ves. 75; and an action may also be brought by the trustee against one *cestui que trust* to recover the trust fund, without making the other *cestuis que trustent* parties: *Bridget* v. *Hames*, 1 Coll. 72. But e. q. t. need not be joined.

An executor who advanced money to pay the price of certain land held by his testator as lessee with a right of purchase, was held entitled to enforce his claim against the land, for the advances so made, the personal estate being exhausted: *Lannin* v. *Jermyn*, 9 Gr. 160. Action by personal representatives to enforce claim against realty.

A personal representative who is a creditor of the estate may, where the personalty is exhausted, obtain judgment against a devisee for administration of the realty devised. To such an action the heir-at-law was a proper party; but where the devisee made no objection in his answer to his not being joined, and the plaintiff alleged by his bill that there were no lands descended, a decree was made in the absence of the heir, for the administration of the realty: *Tiffany* v. *Tiffany*, 8 Gr. 158; but see now *The Devolution of Estates Act* (R. S. O. c. 119), s. 3.

85. An assignee of a chose in action may sue in respect thereof without making the assignor a party. C.R. 202. Assignee of chose in action may sue without joining.

The reference to C. R. 202 is erroneous, it should be C. R. 203 (1) *g*.

A chose in action, though assignable in equity, was not assignable at common law. Where such an assignment was made, any action to

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recover it had to be brought at common law in the name of the assignor, and any defence which the defendant had as against the assignor, even though accruing after the assignment, might be set up in the action; but in equity the assignee might sue in his own name, and the defendant could not successfully set up any defence arising after he had notice of the assignment as against the assignor in answer to the claim. *Rule* 85 and the enactments hereafter mentioned are a partial adoption of the equity doctrine concerning assignments of choses in action.

By *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 49, it is enacted as follows:—

Assignment of debt and choses in action.

"S. 49.—(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this section had * been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal or other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor.

Where several claimants under assignment.

(2) In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he thinks fit, pay the same into the Supreme Court under and in conformity with the provisions of law for the relief of trustees, 1 Geo. V. c. 25, s. 45."

This section is taken from 60 Vict. c. 15, s. 5, whereby the law of Ontario on this point was assimilated with that of England under the English Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (6).

For a discussion of the English cases bearing on this section: see 108 L. T. Jour. 436.

Scope of enactment.

Scope of the Enactment.—This section is not retrospective in which respect it differs from the Eng. Act: see *Dibb* v. *Walker*, 1893, 2 Ch. 429. Assignments of choses in action made prior to 31st December, 1897, are probably still governed by R. S. O. 1897, c. 122: see (R. S. O. c. 1), s. 14 (c).

The effect of the clause is to give the assignee of a chose in action a legal, where he formerly had a merely equitable, title. In other respects the enactment does not give new rights, but only affords a new mode of enforcing old rights: *Walker* v. *Bradford Bank*, 12 Q. B. D. 511, 515. It does not make anything an assignment which was not theretofore an assignment either at Law or in Equity: *Schroeder* v. *The Central Bank*, 24 W. R. 710; as, for instance, a claim, the

*It would seem that the word "not" has been erroneously omitted here: see R. S. O. 1897, c. 51, s. 58 (5); and see 4 Geo. 5, c. 2, Sched. (23).

assignment of which is against public policy, such as a bond to secure alimony payable to a married woman: *Reiffenstein* v. *Hooper*, 36 U. C. Q. B. 295; *Re Robinson*, 27 Ch. D. 160; and see *Watkins* v. *Watkins*, 74 L. T. 636. It only enables an action to be brought by the assignee in his own name where previously he would have sued in the assignor's name: *Torkington* v. *Magee*, 1902, 2 K. B. 427. Rule 85.

The enactment transfers the legal remedies, as well as the legal rights, of the assignor; thus, the assignee of a judgment debt is enabled to garnish debts due to the judgment debtor: *Goodman* v. *Robinson*, 18 Q. B. D. 332. The assignee does not, however, acquire any greater right than his assignor had, and therefore the assignment of an agreement to advance money by way of loan does not create a debt, and confers no right on the assignee to compel the specific performance of the agreement, or to recover damages for its breach, unless some specific fund is bound by the agreement: *Western Wagon Co.* v. *West*, 1892, 1 Ch. 271; *South African Territories* v. *Wallington*, 1898, A. C. 309; 78 L. T. 426; *May* v. *Lane*, 43 W. R. 58, 193; 71 L. T. 869; *Roxburghe* v. *Cox*, 17 Ch. D. 520; *Webb* v. *Smith*, 30 Ch. D. 199. Act transfers legal remedies

A cheque is a mere order to pay and a revocable request, and does not purport to be an absolute assignment: *Schroeder* v. *The Central Bank*, *supra*, p. 52. After a cheque has been marked good by the bank, however, the drawer is discharged and the bank becomes the principal debtor: *Boyd* v. *Nasmith*, 17 Ont. 40; see further as to payment by cheque: *Day* v. *McLea*, 22 Q. B. D. 610; *Mason* v. *Johnston*, 20 Ont. App. 412; and see *post*, p. 458. Cheque not an assignment.

The Act is held not to apply to assignments of part of a chose in action: *Forster* v. *Baker*, 1910, 2 K. B. 636; 102 L. T. 29, 522; *Seaman* v. *Canadian Sicicart Co.*, 2 O. W. N. 576; *sed vide*, *Shipper* v. *Holloway*, 1910, 2 K. B. 630. Assignment of part.

An assignment of an indefinite and unascertained part is, therefore, not within the Act, and the assignee cannot sue in his own name: *Jones* v. *Humphreys*, 1902, 1 K. B. 10.

The assignee of a chose in action is in no better position than his assignor: *Re Rhodesia*, *Partridge* v. *Rhodesia*, 1910, 1 Ch. 239; 102 L. T. 126. The enactment does not affect the principle of equitable assignments: *Sovereign Bank* v. *International Portland Cement Co.*, 14 O. L. R. 511. Assignee in no better position than assignor.

The provisions of this enactment are not binding on the Crown: *Re Powell* v. *The King*, 9 Can. Ex. 364. On grounds of public policy the salary of a Dominion official is not assignable: *Ib.*

"Debt or other Legal Chose in Action."—These words include "all rights, the assignment of which a Court of Law or Equity would before the Act have held to be lawful": *King* v. *Victoria Ins. Co.*, 1896, A. C., pp. 254, 256; see also *Colonial Bank* v. *Whinney*, 30 Ch. D., pp. 285, 286; 11 App. Cas. p. 438, as to what are "choses in action." See also Warren's Choses in Action, Bk. I., c. II. The former Act, R. S. O. 1887, c. 116, s. 7, was confined to choses in action "arising out of contract": see *Blair* v. *Assclstine*, 15 P. R. 211. What choses in action are within Act.

If the contract is not itself assignable, then a claim for damages for its breach is not assignable: *Cohen* v. *Webber*, *infra*.

Contracts involving a personal element are not, as a rule, assignable, thus claims for breach of contract for personal services, *e.g.*, for singing, are not assignable: *Cohen* v. *W*[illegible] O. L. R. 171; nor contracts

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where the ability of a buyer to pay is the subject of personal confidence: see *Cooper* v. *Micklefield Coal Co.*, 107 L. T. 457; and see *Kemp* v. *Baerselman*, 1906, 2 K. B. 604; *Robson* v. *Drummond*, 2 B. & Ad. 303.

Torts.

Damages for injury to a horse is not assignable: *McCormack* v. *Toronto Ry.*, 8 O. W. R. 467; 13 O. L. R. 656; but the prospective fruits of an action for tort may be assigned: *Glegg* v. *Bromley*, 106 L. T. 825.

Equitable choses in action.

The enactment does not appear to extend to all *choses in action*, but only to debts or other legal choses in action. A claim for damages for a tort is a legal chose in action, but it is not within the section, not being *ejusdem generis* as a "debt": see *supra;* and equitable choses in action do not appear to be within the section, but the former equitable right of the assignee to enforce such choses in action in his own name is not taken away, and continues. In *Dawson* v. *Great Northern Ry.*, 1904, 1 K. B. 277, reversed, 1905, 1 K. B. 260, it was held that a claim for compensation for damages done to land by a railway company is not in the nature of damages for a tort, and is assignable within this section. In *King* v. *Victoria Ins. Co.*, 1896, A. C. 250, the Supreme Court of Queensland held that a claim for unliquidated damages arising out of a tort is a chose in action within the corresponding section of the Queensland Jud. Act, which is in the same terms as the English Act, but the Jud. Committee of the Privy Council, on appeal, while not dissenting from that construction of the Act, affirmed the judgment on other grounds. See article in 20 Law Quarterly Review, p. 113.

Matters assignable.

The subjects capable of assignment within section 49 *supra*, therefore, include debts due: *Comfort* v. *Betts*, 1891, 1 Q. B. 737; judgment debts: *Goodman* v. *Robinson*, 18 Q. B. D. 332; moneys due under a building contract: *Drew* v. *Josolyne*, 18 Q. B. D. 590; *Ex p. Moss*, 14 Q. B. D. 310; 52 L. T. 188; money accruing due but not yet due: *Brice* v. *Bonnister*, 3 Q. B. D. 569; *Buck* v. *Robson*, *Ib.* 686; *British Woggon Co.* v. *Leo*, 5 Q. B. D. 149, 154; *Walker* v. *Bradford Bank*, 12 Q. B. D. 511, 516; *May* v. *Lane*, 43 W. R. 58, 193; 71 L. T. 869; *Ex p. Hall*, 10 Ch. D. 621; future book debts during a limited time: *Tailby* v. *Official Receiver*, 13 App. Cas. 523; moneys accruing due to the assignor as legatee under a will: *Re Coleman*, 39 Ch. D. 433; a beneficial interest under a policy of insurance: *Re Turcan*, 40 Ch. D. 5; a future balance at a banker's: *Walker* v. *Bradford Bank*, *supra*; rent accruing: *Knill* v. *Prowse*, 33 W. R. 163; or in trustees' hands: *Harding* v. *Harding*, 17 Q. B. D. 442; a solicitor's bill of costs: *Ingle* v. *McCutchan*, 12 Q. B. D. 518; *Ibberson* v. *Neck*, 2 T. L. R. 427; a claim on a policy of insurance of goods before loss, even though the goods are not transferred to the assignee: *McPhillips* v. *London M. F. Ins. Co.*, 23 Ont. App. 524; a covenant to indemnify against liability under a covenant: *Re Perkins*, 1898, 2 Ch. 182; 78 L. T. 216, 666; a claim against a purchaser of an equity of redemption for indemnification against the mortgage debt: *British Canadian L. Co.* v. *Tear*, 23 Ont. 664; *Scarlett* v. *Nattress*, 23 Ont. App. 297; *Maloney* v. *Campbell*, 28 S. C. R. 228; *Smoll* v. *Thompson*, *Ib.*, 211; *Irving* v. *Boyd*, 15 Gr. 162; *Glenn* v. *Scott*, 18 C. L. T. 162; *McCuaig* v. *Barber*, 29 S. C. R. 126 (in which it was held that the mortgagee had so dealt with the covenant assigned to him that he had disentitled himself to sue at that time upon it); an executory contract for the purchase of a reversionary interest, is assignable under this section as a "legal chose in action"; *Torkington* v. *Magee*, 1902, 2 K. B. 427, 431, 435; *sed vide S. C.* 1903, 1 K. B. 644; 88 L. T. 443. And so

executory contract for the purchase of materials for the purposes of a trade is assignable, so as to enable the assignee to sue thereon in his own name: *Tolhurst* v. *Associated Portland Cement Mfrs.*, 1903, A. C. 414; and see *King* v. *Victoria Ins. Co.*, *supra*, p. 454. Rule 85.

"**Absolute Assignment.**"—A deed by which debts are assigned to a trustee to receive them and thereout pay himself a sum due from the assignor, and pay the surplus to the assignor, is an absolute assignment (not purporting to be by way of charge only): *Burkinson* v. *Hall*, 12 Q. B. D. 347; *Comfort* v. *Betts*, 1891, 1 Q. B. 737; so is an assignment made merely to enable the assignee to sue in his own name: *Wiesener* v. *Rackow*, 76 L. T. 449; so is a mortgage of debts due, in the ordinary form with proviso for redemption and reconveyance: *Tancred* v. *Delagoa Bay Ry.*, 23 Q. B. D. 239, in which *Nat. Provincial Bank of England* v. *Harle*, 6 Q. B. D. 626, was disapproved of, and not followed; see also *Durham* v. *Robertson*, 1898, 1 Q. B. 765; 78 L. T. 438. Requisites of assignment within the Act.

An assignment of a debt, though coupled with a covenant by assignee to pay over the assignor the amount of such debt when recovered, less the assignee's costs, is one that may be enforced by the assignee in his own name, and is not open to objection on the ground that it savours of maintenance: *Fitzroy* v. *Cave*, 1905, 2 K. B. 364; 93 L. T. 499: *sed vide contra*, *Mills* v. *Small*, 14 O. L. R. 105, and observations on *Fitzroy* v. *Cave* in *Colville* v. *Small*, *infra*.

Where an assignment was absolute in form though in trust for the assignee and assignor, it was held that the assignee might sue in his own name, and could not, at the instance of the defendant, be compelled to join the assignor as a party: *Colville* v. *Small*, 22 O. L. R. 1; but the assignment in question in that case was subsequently held to be void for maintenance: S. C. 22 O. L. R. 33, 426.

An assignment in these terms: "We hereby charge the sum of £1,080, which will become due to us from J. R. on the completion of the above building, as security for the advances, and we hereby assign our interest in the above mentioned sum until the money, with interest added, be repaid to you," was held not to be an absolute assignment: *Durham* v. *Robertson*, *supra*. So an assignment though in general terms of the whole rights and interests of the assignor, where it appeared from the instrument of assignment that it was "as security for the repayment on demand" of a sum advanced and really an assignment only of sufficient to make the repayment, is not an absolute assignment within the section: *Mercantile Bank, etc.* v. *Evans*, 1899, 2 Q. B. 613; 81 L. T. 376. Charge not within Act.

But where the intention to be gathered from the whole instrument is not to assign merely so much of the debt or chose in action as will provide security, but to pass the whole interest of the assignor though subject to an equity of redemption, the assignment will be an absolute one within the section: *Hughes* v. *Pump House Hotel Co.*, 1902, 2 K. B. 190.

In order to entitle an assignee to sue in his own name the assignment must be explicit in its terms, and free from ambiguity: *McMillan* v. *Orillia E. L. Co.*, 6 O. L. R. 126.

An antecedent debt due by the assignor to the assignee coupled with forbearance and further advances, were held to constitute a good consideration for the assignment of the fruits of a pending action by Consideration,—antecedent debt.

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ths assignor for a tort: *Glegg* v. *Bromley*, 106 L. T. 825; but n pre-existing debt, alone, is not "a valuable considsration": see *Wigon* v. *English & S. L. L. Assce, Co.*, 1909, 1 Ch. 291; 100 L. T. 34.

Form of assignment.

Modo of Assignment.—"In Writing."—Section 49 *supro* only appiies to an assignment in writing: *Re Sutton's Trusts*, 12 Ch. D. 175; a written order on trustees of a fund notified to them is a good assignment witbin tbe sub-section: *Harding* v. *Hording*, 17 Q. B.. D. 442; so is a lstter from a landiord to a tsnant directing him to psy rent to another person till further order: *Knill* v. *Prowse*, 33 W. R. 163; but a direction by A. to pay a debt to B., without referring to a specific fund out of which the payment is to he mads, is not an assignment: *Percivol* v. *Dunn*, 29 Ch. D. 132; ses *Webb* v. *Smith*, 30 Ch. D. 192; *Western Wagon Co.* v. *West* (1892), 1 Ch. 271; 66 L. T. 402; *Brandts* v. *Dunlop*, 1904, 1 K. B. 387; 90 L. T. 106; *Thomson* v. *Huggins*, 23 Ont. App. 191; and *Quick* v. *Colchester South*, 30 Ont. 645; *Greenwoy* v. *Atkinson*, W. N. 1881, 47; *Southwell* v. *Scottor*, 49 L. J. Q. B. 356; and a discussion in 78 L. T. Jour. 439.

Assignments not within the Act.

Equitable Assignment.—Although, to bring a case within section 49, it is necessary that the assignment shouid be in writing, yet tbe statuts does not invalidate parol assignments of *choses in action*: see *Trusts Corporotion* v. *Rider*, 27 Ont. 593; 24 Ont. App. 157; *McMoster* v. *Canoda Paper Co.*, 21 C. L. J. 16; which may take priority over a subsequent written assignment: *Heyd* v. *Millor*, 29 Ont. 735. Neither a writing nor any particuiar form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest is all that is required: *Re McRoe Estate*, 6 O. L. R. 238; but where there is only a parol assignment ths action to recover ths *chose in action* must be brougbt in the name of the assignor, or he must be joined as defendant if he refuses an offer of a proper indemnity to allow his name to be used as plaintiff: see *Turquond* v. *Fearon*, 4 Q. B. D. 280; 40 L. T. 141; *Trusts Corporation* v. *Rider*, 27 Ont. 593; 24 Ont. App. 157. Ths indorsement and delivery to a third party as a gift of a banker's deposit receipt expressed on its face to be unassignabie, was heid to bs a good eqnitable assignment: *Re Griffin*, 1899, 1 Ch. 408; 79 L. T. 442.

Equitable assignments.

An assignment which may not come within the section. 49 *supra*, by reason of the absence of writing, notice or otherwise, may be enforceable as an equitable assignment, or cbarge: see *Gorringe* v. *Irwell*, 34 Ch. D. 128; *Christie* v. *Tounton*, 1893, 2 Ch. 175, 181; *Webb* v. *Smith*, 30 Ch. D. 192; *Re Patrick*, 1891, 1 Cb. 82, 87; *Sovereign Bonk* v. *International Portiond Cement Co.*, 14 O. L. R. 511.

A present appropriation by order of a particuiar fund not yet realized operates as nn equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity: *Heyd* v. *Millar*, 29 Ont. 735; and see *Quick* v. *Colchester South*, 30 Ont. 645; *Polmer* v. *Culverwell*, 85 L. T. 758; *Re McRoe*, 6 O. L. R. 238.

A letter indicating an intention to make an equitable assignment of a fund written to the holder of tbe fund, is operative upon tbe posting of the letter: *Alexonder* v. *Steinhardt Wolker & Co.*, 1903, 2 K. B. 208; but a request by a creditor to his debtor to agree to pay his debt to a third party, though a good equitable assignment of the debt to such third party, is not an assignment within the meaning of

section 49 *supra*, but it may be nevertheless enforced in the assignee's own name making the assignor a party either as plaintiff or defendant: *Brandts* v. *Dunlop*, 1904, 1 K. B. 387; 90 L. T. 106; 1905, A. C. 454; 93 L. T. 495; see the sequel of this case: *Kleinwort* v. *Dunlop*, 97 L. T. 263. Rule 85.

A declaration in writing by a debtor that he had for collateral security placed and assigned to his creditor a policy of life insurance, was held to constitute a good equitable assignment: *Thomson* v. *Macdonell*, 13 O. L. R. 653.

In all cases where it is alleged that a defaulting trustee has appropriated securities to make good his breaches of trust, and a declaration of trust, or equitable assignment is relied on, the Court must be satisfied that a present irrevocable declaration has been made—mere pencil jottings which the trustee was at liberty to alter from time to time were rejected: *Re Cozens Green* v. *Brisley*, 1913, 2 Ch. 478.

Notice in Writing.—The notice may be given after the death of the assignor: *Wotker* v. *Bradford Bonk*, 12 Q. B. D. 511; or of the assignee: *Botemon* v. *Hunt*, 1904, 2 K. B. 530; 91 L. T. 331. It is in some cases necessary, in order to make the assignment effectual as regards third person, e.g., in the case of book debts to bind the debtor: *Tolby* v. *Official Receiver*, 13 App. Cas. 534; but is not necessary as between the assignor and the assignee: *Newman* v. *Newman*, 28 Ch. D. 678; *Gorringe* v. *Irwell*, 34 Ch. D. 128. Notice of assignment.

The notice must be clear and unequivocal: *McMitton* v. *Orillia E. L. Co.*, 6 O. L. R. 126.

Where a debt was assigned for the benefit of the creditors of the assignor, a letter of the assignee to the debtor claiming payment was held to be sufficient notice of the assignment: *Denney* v. *Conklin*, 1913, 3 K. B. 177; 109 L. T. 444.

Notice of an assignment of funds, in the hands of a trustee, is necessary to be given to the trustees in order to preserve priority as against other chargees or assignees of the same fund.

Notice should be given to all of the trustees; where notice was given to one only of several trustees, and he died, a subsequent assignee of the fund without notice of the prior assignment, who first gave notice to the surviving trustees, was held entitled to priority: *Re Phillips*, 1903, 1 Ch. 183; 88 L. T. 9.

A subsequent assignee of a chose in action may, by being first to give notice of his assignment to the debtor, obtain priority over a prior assignment, of which he had no notice when he took his assignment: see *Marchant* v. *Morton*, *infra*, p. 458.

An assignee of a reversionary fund who has given notice to the existing trustees is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken an assignment after the death of all the old trustees, and has given notice to the new trustees: *Re Wasdale*, *Brittin* v. *Partridge*, 1899, 1 Ch. 163.

As to the effect of omitting to give notice: see *English and Scottish, etc., Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1, 700; *West* v. *Williams*, 46 W. R. 362; *Re Phillips*, 1903, 1 Ch. 183; *Lloyd's Bank* v. *Pearson*, 1901, 1 Ch. 865; *McMillan* v. *Orillia E. L. Co.*, *supra*. Effect of omission to give notice.

The omission to give notice in writing to the debtor will not enable an execution creditor of the debtor to acquire priority over the as-

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signee: *Rennie* v. *Quebec Bank*, 1 O. L. R. 303; nor *semble*, a subsequent assignee for creditors: *In re Wallis*, 1902, 1 K. B. 719; but see *Re Neal* (1914), 2 K. B. 910.

After notice of the assignment no valid agreement can be made between the debtor and the assignor to the prejudice of the assignee with reference to the chose in action assigned: *Quick* v. *Colchester South*, 30 Ont. 645.

Payment by debtor before notice.

The absence of notice in writing to the debtor, is immaterial where the debtor has paid the debt by cheque to the agent of the assignee, and a third person having notice of the assignment cannot acquire any right to such cheque by execution, or by assignment from the creditor: *Eby-Blain* v. *Montreal Packing Co.*, 17 O. L. R. 292; but a judgment creditor serving an order attaching the debt on the debtor, before the debtor has received notice of any assignment thereof, or paid the debt, is entitled to priority over the assignee: *Vacuum Oil Co.* v. *Ellis*, 1914, 1 K. B. 693.

Where a debtor gives a negotiable cheque in payment of his debt before notice of its assignment, he is not bound to stop payment and take steps to get back the cheque on subsequently receiving notice, but before payment of the cheque. He may properly pay the assignor, who still holds the cheque: *Bence* v. *Shermon*, 1898, 2 Ch. 582; 78 L. T. 804.

Priority.

An assignee for creditors cannot by first giving notice acquire priority over a prior assignee for value, or a prior assignment for creditors: *Re Anderson*, 1911, 1 K. B. 896; nor can priority by giving notice to a debtor be gained by a person having actual notice of a prior assignment: *Re Ind. Coope & Co., Fisher* v. *The Compony*, 1911, 2 Ch. 223.

Notice must be given to the person having legal dominion of the fund. A notice given by an assignee to the person who is himself the assignor is not an effectual notice to alter priorities: *Re Dallas*, 1904, 2 Ch. 385.

The doctrine of obtaining priority by notice does not apply between successive equitable sub-mortgagees of land: *Hopkins* v. *Hemsworth*, 1898, 2 Ch. 347.

A debt due to a firm was assigned by one partner to defendant in writing, and subsequently, by the other partner to plaintiff by deed. The plaintiff gave notice of his assignment to the debtor before the defendant did, and it was held that there was a valid equitable assignment, and that the plaintiff having given notice first was entitled to priority: *Marchant* v. *Morton & Co.*, 1901, 2 K. B. 829; 85 L. T. 169; following *Ward* v. *Duncombe*, 1893, A. C. 369; 68 L. T. 129.

Action by assignee.

Action by Assignee.—When an assignment within section 49 *supra* is made and notice given, the legal right, and legal remedies, are transferred, and the assignee may sue in his own name: see *Read* v. *Brown*, 22 Q. B. D. 132; including the right to set off the debt assigned against a debt due by the assignee to the debtor: *Bennett* v. *White*, 1910, 2 K. B. 643; 103 L. T. 52; and see *infra*.

And since the right is transferred to him he must probably so sue, as was necessary under the repealed Act, R. S. O. 1887, c. 122, s. 7: (see *Dawson* v. *Grahom*, 41 U. C. Q. B. 532; *Ward* v. *Hughes*, 8 Ont. 138), where the assignee took the beneficial interest: *Wood* v. *McAlpine*, 1 Ont. App. 234.

Any equitable right remaining in the assignor may doubtless be enforced by him in the same way as in the case of any other equitable right. Rule 85.

Formerly under R. S. O. 1887, c. 122, the assignee in order to sue alone must have taken the beneficial interest in the claim assigned: *Wood* v. *McAlpine*, 1 Ont. App. 234; *Scarlett* v. *Nattress*, 23 Ont. App. 297; and where the assignment was by way of security only, the assignor might sue in his own name: *Hostrawser* v. *Robinson*, 23 C. P. 350; *Dawson* v. *Graham*, 41 U. C. Q. B. 532; *Prittie* v. *Connecticut F. Ins.*, 23 Ont. App. 449; and see *McPhillips* v. *London M. F. Ins. Co.*, 23 Ont. App. 524; but under the present section 49 it is only necessary that there be an assignment in writing, absolute in form. It may be an assignment with a trust declared for the benefit of the assignor or others: *Burlinson* v. *Hall*, 12 Q. B. D. 347; *Comfort* v. *Betts*, 1891, 1 Q. B. 737; or with a proviso for redemption, and reconveyance: *Tancred* v. *Delagoa Bay*, 23 Q. B. D. 239; or it may have been made to the assignee as agent of the assignor, and merely to enable the assignee to sue in his own name: *Wiesener* v. *Rackow*, 102 L. T. Jour. 577. There is nothing in section 49 to prevent the making of an equitable assignment, or the enforcement of it as it might have been enforced in equity prior to the Jud. Act. Such an assignment, the assignee, quite independently of s. 49, may still enforce in his own name, but there is this distinction, the assignor must be a party to the action as plaintiff, or defendant: *Brandts* v. *Dunlop*, 1905, A. C. 454; 93 L. T. 495; *Kleinwort* v. *Dunlop*, 97 L. T. 263. Former law. Present law.

In *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313, the payee of a promissory note not negotiable, and not then payable, indorsed it as follows: "I indorse the within promissory note for £100 to my sister L.," and delivered it to L. There was no consideration for the indorsement and delivery, but it was found as a fact that the intention was to vest in L. the beneficial interest. The payee died before the note was due, and bequeathed to one of the makers all moneys he should die possessed of, and appointed the legatee executor. Express notice in writing of the indorsement was given to the maker after the payee's death and before action. It was held that as the appointment of the maker of the note executor of the payee, extinguished the debt prior to service of notice of the indorsement, there had been no legal transfer of the debt to L. within this section 49 so as to enable her to bring an action thereon.

Where the assignment is not an "absolute assignment," but purports to be by way of charge, the assignor is a necessary party: see *Turquand* v. *Fearon*, 4 Q. B. D. 280; 40 L. T. 141; and may sue in his own name: *Walls* v. *Sault Ste. Marie Paper, etc., Co.*, 18 C. L. T. 117; 34 C. L. J. 196: see *Prittie* v. *Connecticut F. Ins. Co.*, 23 Ont. App. 449; *Western Waggon Co.* v. *West*, 1892, 1 Ch. 271. Where assignment not absolute.

Where the plaintiff had only a partial assignment, the objection that the assignor should be made a party when taken at the hearing was cured by the assignor appearing by counsel and submitting to be added as a party plaintiff, and to be bound by the proceedings: *Yates* v. *Great Western Railway Company*, 24 Gr. 495; his consent in writing to be added as a plaintiff is now necessary: see *Rule* 134 (2).

Where the assignee sued in his own name, and afterwards desired to amend by adding the assignor as a co-plaintiff, the amendment

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was refused, the Statute of Limitations having in the meantime run out as against the assignor: *Hudson* v. *Fernyhough*, 61 L. T. 722.

Equities.

Equities, and Set-off, Against Assignee.—It has been said that the Act does not affect the rule that the assignee of a chose in action takes subject to all equities; and the assignor can give no greater right in equity than he himself possesses: *West of England Banking Co.* v. *Batchelor*, W. N. 1882, 11; *Roxburghe* v. *Cox*, 17 Ch. D. 520; *Webb* v. *Smith*, 30 Ch. D. 199. That rule, however, does not apply to choses in action assignable at Common Law, and therefore does not apply to an assignee of a negotiable security: *Taylor* v. *Blakelock*, 32 Ch. D. 560; 55 L. T. 8.

Where a mortgagor gave his solicitor money to pay off a mortgage which he misapplied, but subsequently obtained a transfer of the mortgage to himself and then assigned it for value to a third party without notice, it was held the assignee could not hold the mortgage against the mortgagor as a subsisting security: *Turner* v. *Smith*, 1901, 1 Ch. 213; 83 L. T. 704; but see *The Registry Act* (R. S. O. c. 124), s. 73.

A licensee of a patentee takes subject to an equitable assignment of which he has express notice: *New Ixion Tyre Co.* v. *Spilsbury*, 1898, 2 Ch. 137, 484.

The fact that the debtor before notice of the assignment has given a negotiable instrument in payment of the debt, is a defence to any claim by the assignee: *Bence* v. *Sheorman*, 1898, 2 Ch. 582, *supra*, p. 458.

Where an assignment is absolute in form, a subsequent assignee for value is not affected by an equity between the original assignor and assignee of which he had no notice: *Quebec Bank* v. *Taggart*, 27 Ont. 162.

Set-off of Debts.

Set off.—Where the debt sought to be set off by the debtor is a debt due to him by the assignor, it seems to be clear that the debtor may set off as against the assignee a debt which accrued prior to the time notice of the assignment was received by the debtor: see *Christie* v. *Taunton*, 1893, 2 Ch. 175; and payment to the assignor after the assignment but before the notice is good, and may be set off against the assignee: *Crawford* v. *Canada Life Ass. Co.*, 24 Ont. App. 643. It has also been held that the debtor cannot act off as against the assignee a debt which accrues subsequently to the notice, even though the debt arises out of a liability which existed at and previously to the notice: see *Christie* v. *Taunton*, 1893, 2 Ch. 175; unless it flows out of and is inseparably connected with the dealings and transactions which gave rise to the subject of assignment: *Ib.*, and *Newfoundland* v. *Newfoundland Ry. Co.*, 13 App. Cas. 200, 213. See also *Quick* v. *Colchester S.*, 30 Ont. 645.

In such cases the debt sought to be set off must arise out of the debt assigned, *e.g.*, in an action by the assignee of a policy of insurance, claims against the assignor on other policies cannot be set off against the assignee: *Baker* v. *Adam*, 102 L. T. 248. And a mere cross claim arising out of other transactions between the debtor and the assignee cannot be set off against the assignee: *Sovereign Bank* v. *Parsons*, 24 O. L. R. 387; but damages in respect of the breach of the contract assigned may be set off against the assignee: *Parsons* v. *Sovereign Bank*, 1913, A. C. 160; 107 L. T. 572.

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Of unliquidated damages.

In regard to unliquidated damages, some change seems to have been made by the repeal of R. S. O., 1887, c. 122, s. 11. Under the present enactment unliquidated damages, under a right of action, accrued before the notice, and also unliquidated damages under a right of action accruing after the notice, if flowing out of and inseparably connected with the dealings and transactions which gave rise to the subject of assignment, may be set off as against the assignee to the extent of his claim: *Newfoundland* v. *Newfoundland Ry. Co.*, 13 App. Cas. 213; but damages beyond the amount claimed by the assignee cannot be recovered from him.

Thus where the statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract, and the defendant pleaded by way of set-off and counter-claim that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time, whereby the defendant lost the use of them, it was held, on demurrer, that the defendant was not entitled to recover any damages against the plaintiff; but was entitled by way of set-off or deduction from the plaintiff's claim, to the damages which he had sustained by the non-performance of the contract by the assignor: *Young* v. *Kitchin*, 3 Ex. D. 127; and see *Forquhar* v. *Toronto*, 26 Ont. 356. For cases under R. S. O., 1887, c. 122, s. 11: see *Exchange Bank* v. *Stinson*, 32 C. P. 158; *Seyfong* v. *Monn*, 27 Ont. 631; 25 Ont. App. 179.

Debts due in another capacity.

The debtor has the right also to set off against the assignee any debt due by the assignee personally to the debtor: *Bennett* v. *White*, 1910, 2 K. B. 693; and see Jud. Act, ss. 126-128, *supra*; but not a debt due by the assignee to the debtor in another capacity: *Nelson* v. *Roberts*, 69 L. T. 352.

Fraud as a defence by debtor.

Fraud.—The debtor may also set up fraud, or misrepresentation, on the part of the assignor in reference to the contract, or debt, assigned; but such defence will not be available to him when he has so acted in reference to the subject matter of the contract, or debt, assigned, that he cannot put things back in *statu quo*: *Stoddart* v. *Union Trust*, 1912, 1 K. B. 181; 105 L. T. 806.

The non-disclosure of material facts by a party insured was held to be a defence available to the insurer in an action on the policy by the assignee of the insured: *Pickersgill* v. *London & P. M. & G. Ins. Co.*, 1912, 3 K. B. 614.

Where several claimants under assignment of debts or choses in action.

Several Claimants.—Sub-section (2) of s. 49, corresponds with the latter part of s.-s. 6 of the English J. A., 1873, s. 25 (6).

A broker to whom shares had been transferred for the purpose of sale may, when rival claims are set up to them by a third party, call on the latter and the transferor, to interplead: *Robinson* v. *Jenkins*, 24 Q. B. D. 167.

A debtor, against whom an action has been brought for a debt of which notice of assignment has been given, may call on the claimants to interplead in respect of part of the debt, and dispute the remainder: *Reading* v. *School Board for London*, 16 Q. B. D. 686. The application may be made in a pending action, or by a separate proceeding under s. 49: *Ib.*, and *McElheran* v. *London Masonic, etc.*, 11 P. R. 181. On a separate application under s. 49, s.-s. 2, an action

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commenced against the debtor cannot be stayed: *Reading* v. *School Board*, *supra*, p. 461, otherwise, if a summary application is made in the action: *McElheran* v. *London Masonic*, *supra*, p. 461.

To entitle the debtor, trustee, etc., to interplead, sufficient notice of the assignment must be shewn: see *Re New Hamburg, etc., Co.*, W. N., 1875, 239.

Payment into Court.

The provisions of sub-section (2) were held to entitle an insurance company to pay insurance money into Court, where it was claimed by different parties: *Re Bajus*, 24 Ont. 397.

A banking company, having received notice in writing of conflicting claims to moneys placed with them on deposit, paid such moneys into Court under the Trustee Relief Acts after first deducting therefrom their costs of payment in. Upon petition by one of the claimants for payment out, it was held that the corresponding subsection in the Eng. Act applied only to debts of which there had been an absolute assignment in writing, and that the banking company, not being trustees within the Trustee Relief Acts, were not entitled to pay the deposit moneys into Court thereunder; but it was also held that the petitioner must be taken to have submitted to the jurisdiction under the Trustee Relief Acts by petitioning the Court; and that the bank was entitled to taxed costs of paying in the money, and of the petition: *In re Sutton's Trusts*, 12 Ch. D. 175: see *In re Haycock's Policy*, 1 Ch. D. 611; but it is to be noticed that this sub-section, unlike the corresponding Eng. sub-sec., is not in terms confined to an absolute assignment in writing. The provisions of the Trustee Relief Acts are now to be found in *The Trustee Act* (R. S. O. c. 121), s. 38.

Court may require other persons to be joined as parties.

86. The Court may require any other person to be made a party to an action to which Rules 79 to 84 apply, and may give the conduct of the action to such party as it deems proper; and may make such order as it deems just for placing the plaintiff on the record on the same footing in regard to costs as other persons having a common interest with him in the matter in question. C.R. 202.

The reference to C. R. 202 is erroneous; it should be C. R. 203 (2).

See Chy. O. 59.

Where proceedings are necessary against persons who have had dealings with the testator whose estate is being administered, the executor has a right to the conduct of the cause unless misconduct has been proved: *Longbourne* v. *Fisher*, 40 L. T. 124.

Where trustees were accounting parties they were not given the conduct of proceedings: *Allen* v. *Norris*, W. N. 1884, 118.

Conduct of a sale was given to the party most interested in getting a good price, in *Woolley* v. *Colman*, 30 W. R. 769; and *Davies* v. *Wright*, 32 Ch. D. 221.

Where the conduct of an administration action is given to a creditor he is entitled to costs as between solicitor and client: *Re Richardson*, *Richardson* v. *Richardson*, 14 Ch. D. 611; 43 L. T. 279.

As a general rule, where two actions for administration have been commenced, the conduct will be given to the plaintiff in the first, even though a judgment may have been first obtained in the second. This rule is not however inflexible. There may be special circumstances which the Court will take into account, such as the object of the first plaintiff in commencing his action, the amount of his interest, and the nature of his claim: *Re Swire, Mellor* v. *Swire*, 21 Ch. D. 647; *Townsend* v. *Townsend*, 23 Ch. D. 100; *Re McRae, Forster* v. *Davis*, 25 Ch. D. 16; or the fact of one of the applicants being an accounting party: *Re Curry, Curry* v. *Curry*, 17 P. R. 69. See also *Perrin* v. *Perrin*, 3 Chy. Ch. 452, and *Re Droggon*, 8 P. R. 330. Rule 87.

Where the conduct of the cause was refused to a party, and he appealed, it was held that all parties were interested and should be served with notice: *Sephton* v. *Quillam*, 71 L. T. Jour. 264.

87. Where a reference is directed the persons who, but for Rules 79 to 84, would have been necessary parties, shall be served with an office-copy of the judgment (unless the Court or Master dispenses with such service) indorsed with a notice according to Form No. 41, and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties; and upon notice to the plaintiff they may at their own risk as to costs require notice to be given them to enable them to attend the proceedings under the judgment. Any person so served may apply to the Court to add to, vary, or set aside the judgment within ten days from the date of such service. C.R. 202. Persons who would be necessary parties except for Rules 79-84 when to be served with judgment.

The reference to C. R. 202 is erroneous, it should be C. R. 203 (3).

The Eng. (1883) R. 162, makes the service of such persons necessary only if directed by the Court or a Judge: see *Moy* v. *Newton*, in note, *supra*, p. 444.

The former *Rule* 208 (3) required service of an office copy of the judgment as a condition precedent to the absent persons being bound thereby, unless such service was expressly dispensed with. This *Rule* only requires the judgment to be served where a reference is ordered, and not then, if dispensed with.

For form of indorsement on office copy of judgment to be served: see Form No. 41; H. & L. Forms, No. 967.

Office Copy to be Served.—An office copy of the judgment must be served. As to the making and certifying of office copies of judgments: see *Rule* 192. Office copy to be served.

Who is to be Served.—All parties, who, but for *Rules* 79-84 would have been necessary parties to the action, who have not been made parties by writ, must be served with the judgment unless service is dispensed with. Infants and persons of unsound mind not so found who are interested must be served: *Clarke* v. *Clarke*, 20 L. T. O. S. 88. Before proceedings can be validly carried on against an infant or a person of unsound mind not so found, a guardian *ad litem* must be All persons who but for Rules 78-84 would have been necessary parties to action, must be serv-

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Infants.

appointed for such person: see *Rules* 95, 96. Service of the office copy of the judgment on the Official Guardian *ad litem* seems of itself sufficient to constitute him guardian *ad litem* for the infant parties requiring to be served under *Rule* 87; *Rules* 16, 3 (*j*). The procedure to obtain the appointment of a guardian *ad litem* for persons of unsound mind by order is prescribed by *Rule* 96. Where a guardian *ad litem* is appointed by order, he must be served with the order appointing him guardian, and with the office copy of the judgment The Official Guardian is usually appointed guardian *ad litem*: *Rule* 95 (3).

Lunatics.

Where parties who should be served are not served, and no proper order is made dispensing with service on them, they will not be bound by the proceedings, and they may be opened up on their application, and moneys distributed to their prejudice may be ordered to be refunded with interest: *Uffner* v. *Lewis*, 27 Ont. App. 242; *S. C.*, 3 O. L. R. 206; 5 O. L. R. 664. But if a party who should have been served, lie by after notice of the proceedings, and take no step until after the estate is distributed, he may be precluded by laches from thereafter disputing the validity of the proceedings: *Mohan* v. *Broughton*, 1900, P. 56; 62 L. T. 29.

Service out of Ontario.

Service out of the jurisdiction may be directed: *Rule* 25 and 3 (*j*): see *Chambers* v. *Laurie*, 10 Ha. App. xxvii.; *Strong* v. *Moore*, 22 L. J. Chy. 917; or substituted service: *Rule* 16; Dan. Pr., 6th ed., 999; *Re Hynes, Hodgins* v. *Andrews*, 19 P. R. 217.

Substituted service.

Service of infant, or lunatic, with judgment, how effected.

Service of Office Copy of Judgment.—Infants.—Service on the Official Guardian of an office copy of a judgment required to be served on an infant, is sufficient service on the infant, and the Official Guardian thereby *ipso facto* becomes his guardian *ad litem*: *Rule* 18 (see *Rule* 2), and *Re Murray*, 13 P. R. 367.

A guardian *ad litem* must be appointed for an infant whether he is made a party in his own right, or in a representative capacity, *e.g.*, as executor or trustee, or the proceedings will be void as against such infant: *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475, and see *infra*, *Rules* 91-94, and notes.

Lunatics.

Lunatics so Found.—Where a person who has been judicially declared a lunatic is required to be served with a judgment, the office copy should be directed to be served on his committee, who should be also made a co-defendant; the service should also be made on the lunatic as well, unless it is shewn that for any reason it is dangerous to serve him personally: *Re Miller*, 1 Chy. Ch. 215. See note to *Rule* 96, *sed vide*, *Re Hagar*, 12 P. R. 645.

Not so found.

Lunatics not so Found.—Where the person required to be served is of unsound mind, but has not been judicially declared to be a lunatic, the direction of the Master before whom the reference is pending should be obtained under this *Rule* as to the mode in which he is to be served. By analogy to *Rule* 21 (see *Rule* 2) it would appear that the person with whom, or under whose care he is, should be directed to be served; and, unless it is shewn that service on the person of unsound mind would be attended with danger, it would seem that he should be directed to be personally served as well: see *Re Miller*, 1 Chy. Ch. 215; *Re Newman*, 2 Chy. Ch. 390; *Re Mein*, 2 Chy. Ch. 429; *Re Webb*, 12 O. L. R. 194. No proceedings can be validly taken against a person of unsound mind who has no committee until a guardian *ad litem* has been appointed: *Rule* 96: *Warnock* v. *Prieur*, 12 P. R. 264.

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it is therefore necessary not only to obtain the Master's direction for service of the office copy of judgment on the person of unsound mind under this *Rule*, but it is also necessary to obtain an order appointing a guardian *ad litem* to such person. This is to be done by order to be obtained in Chambers on motion, supported by affidavits. By analogy to *Rule* 95 it would seem that the notice of the motion should be served in the manner mentioned in that *Rule*, and that it must be a six clear days' notice instead of the ordinary two clear days' notice.

Inspector of Prisons and Pub. Charities.

Where the Inspector of Prisons and Public Charities is *ex officio* committee of the lunatic (see *The Hospitals for the Insane Act*, (R. S. O. c. 295), s. 40, it is nevertheless necessary in proceedings against the lunatic, not so found, where no defence is delivered, that a guardian should be appointed of such lunatic: see *Rule* 95.

Lunacy pendente lite.

Where a defendant in an action becomes of unsound mind after judgment, a guardian *ad litem* must be appointed for him before proceedings can be validly continued against him: *Wolff* v. *Ogilvy*, 12 P. R. 645. This must be done by order, upon motion, and cannot be effected by merely serving the Official Guardian on his behalf: *ib.*; *sed vide*, *Re Hagar*, 12 P. R. 645, where it was held that this might be done where the defendant had been judicially declared insane, *sed quære:* see *Warnock* v. *Prieur*, *supra*, p. 464.

Effect of Service.—The person served is not liable to account, nor can a motion for an injunction be made against him: *Walker* v. *Seligmann*, L. R. 12 Eq. 152; *Hooper* v. *Horrison*, 28 Gr. 22; *Rolph* v. *U. C. Building Society*, 11 Gr. 275, 278-9; *Re Porkes*, 68 L. T. 151; see, however, *In re Rees*, 15 Ch. D. 490; *Re Rolfe*, 70 L. T. 624. Neither can he require the defendant to account any farther than if he had been himself an original defendant in the action: *Whitney* v. *Smith*, L. R. 4 Chy. 513. A party served, however, may impeach in the Master's Office an instrument set up in answer to his claim as a legatee, on the ground of fraud: *Darling* v. *Darling, Rossa's claim*, 15 C. L. J. 112.

Whether the party served attend the proceedings or not, he is bound by the proceedings. Unless he gives notice to the plaintiff of his intention to attend the proceedings under the judgment he is not entitled to service of notice of the proceedings in the Master's office: *English* v. *English*, 12 Gr. 441.

Persons who have been improperly served may move to set aside the service: *Re Symons*, 54 L. T. 501.

Parties served may move against judgment.

Motion to Vary Judgment.—The motion to vary, or set aside the judgment, must be made on notice to the plaintiff. The motion is to be made before a Judge in Court. Two clear days' notice of the motion must be given: see *Rule* 215; and it must be set down at least the day before the day named for hearing the motion: see *Rule* 234 (6).

On the motion to vary the judgment by any person served with a copy, the Court will not direct the taking of accounts for which no foundation was laid in the pleadings or proceedings in the action, except perhaps on the terms of first allowing the party from whom such account is sought, an opportunity to adduce evidence, to shew why it should not be granted: *Foster* v. *Foster*, L. R. 3 Chy. 330; and see

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Murgatroyd v. *Caldwell*, 10 L. T. 410. Additional accounts and inquiries have been directed after the report, at the instance of a party subsequently served with the decree: *Reeve* v. *Reeve*, W. N. 1871, 52. Under the former practice in Chancery, any person served with the decree might rehear the cause: *Ellison* v. *Thomas*, 1 D. J. & S. 18.

A person improperly made a party under this *Rule* is not limited to moving against the order, but may appeal from the Master's report. *Cowan* v. *Allen*, 23 Ont. App. 457; 26 S. C. R. 292; *McLaughlin* v. *Stewart*, 1 O. L. R. 295.

Where the question intended to be raised does not appear on the pleadings or previous proceedings in the action, it may be necessary to present a petition in the nature of a bill of review under the former Chancery practice. No application for leave to file this petition is necessary: *Kidd* v. *Cheyne*, 18 Jur. 348; *Duggan* v. *McKay*, 1 Chy. Ch. 380; and see *Rule* 523; but whether the application should be by petition or notice of motion *quære*: see *Rule* 10.

Purchaser bound to see that all necessary parties are bound by the proceedings.

It would seem that a purchaser under a judgment pronounced in an action constituted under *Rules* 74 to 84, is bound to see that it has been served on all necessary parties, so as to bind them by the proceedings, in the same way that a purchaser is bound to see that all necessary parties are made parties to any other action in which a sale is directed by the Court. *Primâ facie*, only the persons who are actually named as parties to the record are bound: *Rules* 74 to 84 form an exception to this rule: see *Reeve* v. *Reeve*, W. N. 1871, 52, and *Russell* v. *Romaines*, 3 Ont. App. 635.

A purchaser, however, is not bound to inquire into the regularity of the proceedings antecedent to the judgment: *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Ont. App. 371; *Collins* v. *Denison*, 2 Chy. Ch. 465, and see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 56; but a purchaser buying, pending legal proceedings, whose rights are made expressly subject to a termination of the proceedings in a regular way, is in a different position: *Foresters* v. *Pegg*, 19 P. R. 254.

Parties served may on notice to plaintiff attend the proceedings.

Attending Proceedings.—A person served is entitled, on giving notice to the plaintiff, to attend the proceedings. A party so attending, although entitled to notice of the future proceedings in the action, does not thereby become a party to the action: *English* v. *English*, 12 Gr. 441; *Walker* v. *Seligmann*, L. R. 12 Eq. 152; but see *Re Rees*, 15 Ch. D. 490.

Costs where attending unnecessary.

Under *Rule* 409 the Master has power, among other things, to give special directions as to the parties who are to attend on the several accounts and inquiries: and see also *Rule* 88. A person served under *Rule* 87, and attending the proceedings without special leave, may be ordered to pay all the extra costs occasioned by his so attending, if it appear that his attendance was unnecessary: *Sharp* v. *Lush*, 10 Ch. D. 463; and see *Daubney* v. *Leake*, L. R. 1 Eq. 495; *Re Marshall*, W. N. 1879, 12.

Persons not attending proceedings not entitled to notice.

Persons served with the judgment, and not attending the proceedings, are not entitled to service of the warrant to settle the report: *Green* v. *Measures*, W. N. 1866, 122; nor of the notice of hearing on further directions: *Lee* v. *Sturrock*, W. N. 1876, 226. If any relief is intended to be asked against them they are entitled to notice, even though they have not attended the proceedings before the Master: *Re Rees*, 15 Ch. D. 490; *Re Rolfe*, *supra*, p. 465.

The Court will not authorize persons, not parties, to attend proceedings, even at their own expense, even though they have large interests at stake, unless there is some special reason shewn for so doing: *Re Schwabacher, Stern* v. *Schwabacher*, 1907, 1 Ch. 719; 96 L. T. 564. Rule 88.

Dispensing with Service.—No service appears to be necessary unless a reference is ordered. Where a reference is ordered the Master, to whom the action is referred, as well as the Court, has under this *Rule* power to dispense with the service of a copy of the judgment: *Re Hynes, Hodgins* v. *Andrews*, 19 P. R. 217. Formerly, where the Master dispensed with service he was required to state the reasons therefor in his report: see Chy. O. 587; but that provision has not been embodied in these *Rules*, though it seems a practice it would be well to follow: Dispensing with service of judgment.

An advertisement may be published for persons who cannot be found to be served, as a condition of dispensing with service on them: see *Rule* 412. Advertisement.

Service on some of the next of kin, who were resident out of the jurisdiction, was dispensed with: *English* v. *English*, 12 Gr. 441. An application to the Court to dispense with service may be made *ex parte*: *Ib.*

Absence from the jurisdiction is not of itself sufficient reason for dispensing with service: *Chalmers* v. *Lourie*, 10 Hars. App. xxvii.; *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Strong* v. *Moore*, 22 L. J. Chy. 917. Absence from jurisdiction.

Whether parties on whom service of the judgment is dispensed with, either by the Court, or Master, are nevertheless bound by the proceedings, is nowhere stated; it would seem that they are in the same position as parties in whose absence judgment is pronounced and that they are not bound: see *Doody* v. *Higgins*, 9 Hare, App. xxxii.; *May* v. *Newton*, 34 Ch. D. 347; unless by acquiescence: see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175; and see *Bunnett* v. *Foster*, 7 Beav. 540; *Saragossa Ry. Co.* v. *Collingham*, 1904, A. C. 159; and Eng. Rule 131 A. How far persons not served are bound.

Persons not having an interest at the date of the judgment cannot be brought before the Court under this *Rule*: *Colyer* v. *Colyer*, 11 W. R. 355; but see *Rule* 404.

As to the effect of omitting to serve, or dispense with service: see *Ufner* v. *Lewis*, *supra*, p. 464.

88. In administration proceedings no person other than the executor or administrator shall, unless by leave, be entitled to appear on the claim of any person against the estate of the deceased. C.R. 204. Parties to administration proceedings.

Compare Eng. (1883) R. 169, which is in substance the same.

Mere liberty to attend proceedings does not necessarily entitle the party to costs of attendance. The order should so provide if it is the intention that costs should be allowed: *Day* v. *Beatty*, 21 Ch. D. 830; and see *Re Schwabacher, Stern* v. *Schwabacher*, p. 467, *supra*.

Only one party, generally speaking the executor or administrator, should in general attend to oppose a contested claim in an administration action: *Re Smith* v. *Watts*, 52 L. J. Chy. 209.

Rules 89, 90.

Judgment saving rights of absentees.

89. The Court, if it thinks fit, may pronounce a judgment saving the rights of all persons not parties. C.R. 205.

See Chy. O. 65.

When the Court acts under this *Rule* the absent parties will not, as a general rule, be bound by the judgment pronounced, unless after knowledge thereof, they accept any benefit thereunder, or otherwise acquiesce therein: see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175; but the Court instead of pronouncing a judgment saving the rights of an absent party, may make an order adding him as a defendant, and adjourn the hearing or trial to enable him to be served: *Rule* 134; see *Clifton* v. *Crawford*, 18 P. R. 316.

The Court will only act under *Rule* 89, where justice can be done to all parties notwithstanding the defective constitution of the action: *Lambert* v. *Hutchinson*, 1 Beav. 277, 286.

Cases in which Rule acted on.

Where in a suit to set aside an alleged fraudulent conveyance by a debtor, it appeared at the hearing that a note *pro confesso* entered against one of the defendants, the original debtor, had been waived by a subsequent amendment of the bill, the Court dismissed the bill as against that defendant, on the application of the plaintiff, without the dismissal being equivalent to a dismissal on the merits, and made a decree, saving the rights of that defendant: *Waddie* v. *McGinty*, 15 Gr. 261.

A decree was made under Chy. O. 65, from which this *Rule* is taken, in the absence of the assignee of a bankrupt: *Maybery* v. *Brooking*, 7 D. M. & G. 673; of a mortgagee: *Felthom* v. *Clark*, 1 De G. & Sm. 307; of a person entitled in a remote contingency: *Daubuz* v. *Peel*, 1 Coop. *temp.* Cott. 365; of the heir-at-law of the last surviving trustee, and of the personal representative of a testator: *Faulkner* v. *Daniel*, 3 Hare, 199.

Objections for want of parties must be taken promptly.

An objection for want of parties should be taken as soon as possible, and not postponed until the trial, or motion for judgment: *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121; *Sheehon* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59; 29 W. R. 69; the objection should be taken by motion, and not merely raised by statement of defence: *Ib.*, and see notes to *Rule* 134 *infra*; and see *Vallance* v. *Birminghom*, 24 W. R. 454; *Roberts* v. *Evons*, 7 Ch. D. 830; 26 W. R. 280, where no costs of pleadings were allowed to plaintiff from the time the objection was taken.

The Court directed a special case to be set down for hearing on the application of an executrix, the first tenant for life and the trustees being defendants, the persons interested in remainder, who were absent in New Zealand, being omitted as parties: *Bogley* v. *Miles*, 21 L. T. 784.

If a deceased person has no personal representative, proceedings may go on, or the Court may appoint a representative.

90. Where it appears that a deceased person who was interested in the matters in question has no personal representative, the Court may either proceed in the absence of any person representing his estate or may appoint some person to represent the estate for all the purposes of the action or other proceeding, on such notice as may seem proper, [notwithstanding that the estate in question

may have a substantial interest in the matters, or that there may be active duties to be performed by the person so appointed, or that he may represent interests adverse to the plaintiff, or that administration of the estate whereof representation is sought] is claimed, and the order so made and any orders consequent thereon, shall bind the estate of such deceased person, in the same manner as if a duly appointed personal representative of such person had been a party to the action or proceeding. C.R. 194. Rule 90.

See Eng. (1883) R. 168.

The words in brackets in this *Rule* were intended to meet the various cases decided under Chy. O. 56 (see Morgan's Chy. Orders, 201), and the *Rule* as now framed may have rendered some of those cases obsolete: see, however, *Fairfield* v. *Ross*, 4 O. L. R. 534. As to the constitutionality of such provisions: see *Ashbury* v. *Ellis*, 1893, A. C. 339.

The *Rule* has still a comparatively limited scope, as the representation which may be ordered under it is only of a deceased person "who was interested in the matters in question." A person, the administration of whose estate is the subject of the action, is not a deceased person "interested in the matters in question," within the meaning of the *Rule*. He must in his lifetime have been interested in the matters in question: *Hughes* v. *Hughes*, 6 Ont. App. 373; *Fairfield* v. *Ross*, 4 O. L. R. 534; *sed vide*, *Webster* v. *The British Empire Ins. Co.*, 15 Ch. D. 169. The legal personal representative of deceased must in such case be a party to properly constitute the action: see *Id.* and *Roscell* v. *Morris*, L. R. 17 Eq. 20; *Outram* v. *Wyckoff*, 6 P. R. 150; *Leonard* v. *Clydesdale*, 6 P. R. 142; *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 13 Gr. 171; a judgment against an executor *de son tort* does not bind the deceased person's estate: see *Mohamidu* v. *Pitchey*, 1894, A. C. 437; 71 L. T. 99.

The *Rule* enables the Court to take one of two courses, either (1) to proceed without a representative of the estate of a deceased person who may have been interested in the matters in question; or, (2) to appoint some person to represent such deceased person's estate for the purposes of the action.

Where the Court makes an order adopting either of these courses, the estate in question is bound and concluded by the proceedings as though it had been represented in the litigation by a duly appointed legal personal representative.

In order to bind the estate, however, an order under this *Rule* must be made: it is not enough that the Court should proceed to adjudicate on the matters before it in the absence of a representative of the estate: *Re Richerson*, 1893, 3 Ch. 146; 3 R. 643; and see *Mohamidu* v. *Pitchey*, 1894. A. C. 437; 71 L. T. 99.

Originally the Chy. O. only applied to the representation of the personal estate, and whenever it was necessary that the real estate of a deceased person should be represented in any action or proceeding, the Court had no power, before *The Devolution of Estates Act*, under this *Rule* to proceed in the absence of the real representative, or to

Formerly no authority to appoint any one to represent realty.

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appoint any person to represent such estate, so as to bind it by the proceedings. But in the case of the estates of persons dying after the 1st of July, 1886, the personal representative is also the representative of the realty, unless his powers are expressly limited to the personal estate, or have expired as to realty by reason of his omitting to register a caveat: *Romus* v. *Dow*, 15 P. R. 219; *The Devolution of Estates Act* (R. S. O. 1914, c. 119), ss. 3, 4, 13; and see *Re Williams & McKinnon*, 14 P. R. 338; *sed vide*, *The Surrogate Courts Act* (R. S. O. c. 62), s. 57.

A person appointed to represent an estate under this *Rule* is not entitled to the assets of the deceased, or to administer the same; his authority is purely representative, and upon the subsequent grant of general administration to another his authority, even as a representative of the deceased's estate, is entirely superseded: see *McLean* v. *Allen*, 18 P. R. 255.

Judgment against personal representative how far binding on real representative.

Although a judgment in an action to which the personal representative was a party was conclusive as regards the personal estate, and those beneficially interested therein, whether as legatees, or next of kin; it was formerly only *primâ facie* evidence of liability of the estate as against those interested in the realty, whether as devisees, or heirs-at-law, and the latter were at liberty to rebut it: *Eccles* v. *Lowry*, 23 Gr. 167; *Lovell* v. *Gibson*, 19 Gr. 280; *Willis* v. *Willis*, 19 Gr. 573; *Harvey* v. *Wilde*, L. R. 14 Eq. 488; *Steel* v. *Lineberger*, 58 Penn. St. Rep. 308; *Story* v. *Fry*, 1 Y. & C. C. C. 603, and see *Anderson* v. *Poine*, 14 Gr. 110; and it is therefore only to this extent that an order under the *Rule* will bind those interested in the real estate, except in cases coming under *The Devolution of Estates Act* (R. S. O. c. 119), ss. 3, 4, in which the personal representative also represents the realty: but see *Ib.*, s. 13. But even before *The Devolution of Estates Act* the lands of a deceased person could be sold under execution against his personal representative, without making the persons interested in the realty parties: R. S. O. 1877, c. 66, ss. 35, 36, 40; and the persons interested in the realty were *primâ facie* bound by the sale: *McEvoy* v. *Clune*, 21 Gr. 515. But where the claim for which the judgment was recovered was one that was not properly enforceable against the realty, the execution might be stayed in an action by heirs-at-law: *Anderson* v. *Poine*, 14 Gr. 110; and if a sale took place it might be successfully impeached by the heir-at-law: *Freed* v. *Orr*, 6 Ont. App. 690; *Mohomidu* v. *Pitchey*, 1894, A. C. 437; 71 L. T. 99. Where the judgment against the personal representative was successfully impeached on the ground of fraud and collusion, the beneficiaries were entitled to set up the Statute of Limitations against the claim of the creditor which the personal representative had omitted or neglected to plead: *Jardine* v. *Wood*, 19 Gr. 617.

Rule does not supersede jurisdiction of Surrogate Courts.

This *Rule* does not authorize the High Court to grant letters probate of wills, or letters of administration. It merely enables the Court to proceed with an action so as to bind the personal estate of a deceased person even though no letters probate, or letters of administration, have been granted by the Surrogate Court. In the absence of some such power the Court would have no jurisdiction to bind the estate of a deceased person unless some duly appointed personal representative was before the Court; even an executor who had applied for but not actually obtained probate, would not represent the deceased's estate so as to bind it by a judgment recovered against him: *Mohamidu* v. *Pitchey*, *supra*, p. 469. The representative authorized to

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be appointed by this *Rule* is not an administrator, but merely represents the estate for the purpose of the action in which the order is made, and he is not entitled to act as an administrator of the estate except so far only as it is necessary for him to do so for the purposes of the action in which he is so appointed. It has not been usual to require any security to be given by a person appointed under this *Rule* to represent an estate; and he has no authority to receive any moneys belonging to the estate he is appointed to represent, except according to the express order of the Court in that behalf. The Court, under the Chy. O. 58, refused to appoint a person to receive a sum of money payable out of Court to a deceased person: *Rowlins* v. *McMahon*, 1 Drew. 225; *Williams* v. *Allen*, 2 Beav. 650; and refused to order payment to a person who had been appointed in the suit to represent the estate: *Byam* v. *Sutton*, 19 Beav. 646.

Administrator ad litem.

An administrator *ad litem*, however, may be appointed by the Surrogate Court: *The Surrogate Courts Act* (R. S. O. c. 62), s. 53; and see s. 54 (2), and a judgment against him binds the general administrator: *Dovis* v. *Chanter*, 2 Ph. 545; *Croft* v. *Waterton*, 13 Sim. 653; *Ellice* v. *Goodson*, 2 Coll. 4; *Williams* v. *Allen*, 32 Beav. 650; *Woodhouse* v. *Woodhouse*, L. R. 8 Eq. 514; *Collas* v. *Hesse*, 12 W. R. 565.

An administrator *ad litem* does not, under *The Trustee Act* (R. S. O. c. 121), s. 41 (2), sufficiently represent the estate of a person sued for a *tort* who dies *pendente lite*: *Hunter* v. *Boyd*, 3 O. L. R. 183.

Dispensing with personal representative.

Where an estate had been administered, and pending the suit for administration the personal representative died, and all that remained to be done was for the Master to make his report, and it appeared that the estate was insolvent, an order was made appointing the solicitor of the deceased administratrix to represent the estate: *Re Tobin, Cook* v. *Tobin*, 6 P. R. 40; and see *Sherwood* v. *Frcelond*, 6 Gr. 305; *Toronto Savings Bank* v. *Canada Life Assnce. Co.*, 13 Gr. 171.

Cases where Rule applies.

The *Rule* has been held to apply though the deceased person was never a party to the action: *Webster* v. *British Empire Ins. Co.*, 15 Ch. D. 169; but see *Hughes* v. *Hughes*, 6 Ont. App. 373, and to an action for administration where the estate is small: *Re Colton Fisher* v. *Cotton*, 8 P. R. 542, and to actions for the construction of wills: *Gairdner* v. *Gairdner*, 1 Ont. 186; see also *Mendes* v. *Guedalla*, 10 W. R. 485, where an order was made at the trial; and *McCarthy* v. *Arbuckle*, 31 C. P. 48, where a defendant died after the trial. It also applies to proceedings on a special case: *Swallow* v. *Binns*, 17 Jur. 29; and to proceedings by petition: *Re Ranking*, L. R. 6 Eq. 601-5; *Ex parte Cramer*, 9 Hars. App. xivii.; and see *Magnay* v. *Davidson*, *Ib.* lxxxii., but is generally applicable only where from any cause there is difficulty in obtaining representation of the estate: *Long* v. *Storie*, Kay App. xii.; *Davies* v. *Boulcott*, 1 Dr. & Sm. 2; *Bliss* v. *Putnam*, 29 Beav. 20.

In an action to make several defendants liable for a breach of trust, where one died before decree having made a will appointing executors who had not proved the will (the liability of the surviving defendants being the same as that of the deceased defendant), the Court made an order allowing the suit to proceed in the absence of a personal representative, reserving leave to the executors to intervene, if so advised when they had proved the will: *Heberman Joint Stock Co.* v. *Fottrill*, 13 L. R. Ir. 335.

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It was held that an appointment should not be made where an administrator *ad litem* appointed by the Probate Court would not enffice. and that an administrator *ad litem* did not sufficiently represent the estate where a general administration of the estate is necessary: *Dowdeswell* v. *Dowdeswell*, 9 Ch. D. 294; see also Dan. Pr., 5th ed., 181; 6th ed., 208, Morgan's Chy. Orders, 201; *Webster* v. *British Empire Co.*, 15 Ch. D. 169; *Curtius* v. *Caledonian, etc., Ins. Co.*, 19 Ch. D. 534.

Where a mortgagor died pending a foreclosure action, it was held that a finsl order could not properly he made eo as to hind the mortgagor's estate agsinst a person appointed to represent his estate under this *Rule*: *Aylward* v. *Lewis*, 1891, 2 Ch. 81; 64 L. T. 250.

See *Wingrove* v. *Thompson*, 11 Ch. D. 419, cited in note to *Rule* 305.

Consent of person appointed necessary.

A person cannot be appointed to repreeent an estnte under this *Rule* without his consent: *Prince of Wales Co.* v. *Palmer*, 25 Beav. 605; *Hill* v. *Bonner*, 26 Beav. 372. The proper person to he appointed is the person who would be appointed administrator *ad litem*: *Dean of Ely* v. *Stafford*, 16 Beav. 561; where the deceased had left a will which was disputed, the person named as executor therein was appointed: *Hele* v. *Lord Bexley*, 15 Beav. 340.

Removal of personal representatives.

Removal of Personal Representatives, and Trustees.—By *The Trustee Act* (R. S. O. c. 121) s. 40, the Supreme Court may remove a personal representative on the same grounds that it may remove a trustee, and appoint some other person to act in the place of such personal representative so removed.

The Court has jurisdiction at any time during the proceedings in an action respecting the estate to remove a trustee or personal representative, if it considers such removal necessary for the preservation of the trust estate, or the welfare of the c. *q. t.* and that, notwithstanding such removal has not been originally asked for: *Re Wrightson Wrightson* v. *Cooke*, 1908, 1 Ch. 789; 98 L. T. 799.

Cases where order is unnecessary.

In an action to enforce a lien for an annuity charged upon real estate, it is not necessary to make the personal representative of a deceased person who was liahle for its payment a party, unless an account of the personal estate of the deceased is asked: *Paine* v. *Chapman*, 7 Gr. 179, and see *Burns* v. *Conada Co.*, 7 Gr. 587.

In an action for a general account against a surviving trustee or executor it is not, in the absence of special circumstances, necessary that the representatives of a deceased truetee or executor should he made parties where no reiief le sought as againet the decessed's estate. The defendant may have such representstives added under *Rules* 134 or 165, if the circumetances render it ndvisahle: *Re Harrison*, 1891, 2 Ch. 349.

An application for an order under this *Rule* would appear to be within the matters which may he dealt with in Chambers ss being a matter relating to the conduct of an action or matter: see *Rule* 207; and it is not one of those matters expressly excluded from the jurisdiction of Local Judges, and judicial officers: see *Rules* 208-210. The jurisdiction therefore may be exercised hy a Judge in Chambers snd also hy Local Judges and judicial officers; hut it would seem desirable that such orders should only he made hy a Local Judge, or judicial officer, where he is also competent to dispose of the action

or matter in which the representation is desired; it would be manifestly inconvenient if such an order were made in an action by a Local Judge or judicial officer and then on the case coming on for trial or hearing it should be found by the Judge that the order ought not to have been made. The proper rule regarding such applications would appear to be that they should only be made to a Judge or officer competent to dispose of the action or matter in which the representation is sought. As to the jurisdiction of the Master in Chambers on such applications: see *Collver* v. *Swayzie*, 8 P. R. 12. Rule 90.

The application under the *Rule* is usually made by *ex parte* motion in Chambers, but the order may be made at the trial of the action: *Mendes* v. *Guedalla*, 10 W. R. 485; *Hewitson* v. *Todhunter*, 22 L. J. Chy. 76; *Re Peppitt's Estate, Chester* v. *Phillips*, 4 Ch. D. 230; 35 L. T. 902; 25 W. R. 211; or on a motion for judgment: *Gairdner* v. *Gairdner*, 1 Ont. 184, and see *Curtius* v. *Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; or at a subsequent stage of the action where the party whose estate is to be represented, dies after the trial: *McCarthy* v. *Arbuckle*, 31 C. P. 48. Before the order is made notice is sometimes required to be given to the person, if any, who would be entitled to letters of administration: *Curtius* v. *Caledonian Fire and Life Ins. Co.*, *supra*. Application under Rule 90, how made.

The Court has a wide discretion either to appoint a representative, or to order that the action may proceed without any representation if it considers the estate in question sufficiently protected: see *Joint Discount Co.* v. *Brown*, L. R. 8 Eq. 380; *Tarrott* v. *Lloyd*, 2 Jur. N. S. 371; *Hewitson* v. *Todhunter*, 22 L. J. Chy. 76. Discretion of Court.

Representation of the estate has been dispensed with, where the deceased person was in the same interest as the plaintiff: *Cox* v. *Taylor*, 22 L. J. Chy. 910; or where other persons of the same class were before the Court: *Abrey* v. *Newman*, 17 Jur. 153; and a representative of the estate of one of two executors who had died insolvent, and to which representation could not be obtained, was also dispensed with: *Moore* v. *Morris*, L. R. 13 Eq. 139; *Bond* v. *Randle*, 2 W. R. 331; *Rogers* v. *Jones*, 1 Sm. & G. 17; and where the deceased person's interest was very small: *Montgomery* v. *Douglas*, 14 Gr. 268; and where his estate was insolvent and his next of kin refused to take out letters of administration, and the estate appeared to have no substantial interest in the fund sought to be recovered by the plaintiff, representation was dispensed with: *Curtius* v. *Caledonian Fire and Life Ins. Co.*, 19 Ch. D. 534; *Webster* v. *The British Empire Ins. Co.*, 15 Ch. D. 169; and even where the deceased party was sole plaintiff and tenant for life, and an arrear of income remained due to him, an administration suit instituted by him was, on the application of the defendants, revived without any representative of the original plaintiff, whose executor had died without proving his will, but without prejudice to the right of the personal representative of the original plaintiff to intervene: *Hayward* v. *Pile*, L. R. 7 Chy. 634, but see *Bank of Montreal* v. *Wallace*, 1 Chy. Ch. 261. Cases when representative dispensed with.

Where a deceased person had by an instrument *inter vivos* made over his property to the defendant, who became bound to pay his grandchildren $400 each after the death of the settlor, the Court dispensed with a personal representative of the settlor, in a suit by one of the grandchildren to enforce payment of the $400: *Mulholland* v. *Merriam*, 19 Gr. 288; S. C., 20 Gr. 152.

Where a mortgage or an obligation for payment of money is made to two or more persons and one of them dies, the survivor is entitled without any order, to enforce payment by action without joining the Joint debts enforceable by surviving creditor.

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representatives of the deceased mortgagee or joint creditor, and this though the mortgagees are trustees: see *The Mercantile Law Amendment Act* (R. S. O. c. 133), s. 4; *Plenderleith* v. *Smith*, 10 O. L. R. 188.

Further provisions are made by *Rules* 76, 77, 184, to enable actions to be prosecuted in the absence of persons who, according to the ordinary practice, should be joined as parties.

(ii) *Infants and Lunatics.*

Infants.

91. An infant may sue by his next friend; (*a*) and may defend by his guardian appointed for that purpose, [or by the Official Guardian, as the case may be]. C.R. 197.

The original J. A. Rule 96 had at (*a*) the words "in the manner practised in the Court of Chancery," following Eng. R. 1875, O. 16, r. 8 (1883, R. 138). The words in brackets are not in the Eng. Rules, which, as respects infants, correspond otherwise, with the above. For a history of the practice of an infant suing by next friend at law, and in equity, before the Jud. Act, and as to the legal status, powers and responsibilities of a next friend: see *Vano* v. *Canadian Colored Cotton Mills Co.*, 21 O. L. R. 144.

It is irregular for an infant to sue without a next friend, but such an irregularity was allowed to be amended at the trial by adding a next friend: *Durie* v. *Toronto Ry.*, 5 O. W. N. 829; but in order to make such an amendment, the written consent of the proposed next friend must be filed: see *Rule* 99.

Next friend of infant.

Infants as Plaintiffs.—By the practice of the Court of Chancery, every suit or application: *Cox* v. *Wright*, 9 Jur. N. S. 981, on behalf of an infant must be by next friend, who properly will be the father if he is not adverse in interest: *Woolf* v. *Pemberton*, 6 Ch. D. 19; but who need not be a relation: *Cross* v. *Cross*, 8 Beav. 455; nor a solvent person: *Re McConnell*, 3 Chy. Ch. 423; *Moran* v. *Kellogg*, 10 C. L. T. 184; and therefore need not give security for costs: *Fellows* v. *Barrett*, 1 Keen, 119; but see *Swain* v. *Follows*, 18 Q. B. D. 585; but may not be a married woman: *Thynne* v. *St. Maur*, 34 Ch. D. 465; nor a defendant: *Anon.*, 11 Jur. 258; *Payne* v. *Little*, 13 Beav. 114; *Re Burgess, Burgess* v. *Bottomley*, 25 Ch. D. 243, unless merely a formal defendant: *Taylor* v. *Taylor*, 16 L. J. Notes of Cases; 66 W. N. 181.

In *Nalder* v. *Hawkins*, 2 M. & K. 248, it was said that the Court always expected next friends to be substantial persons, and that they should be relations, connections or friends of the family, not mere volunteers: see also *Foster* v. *Cautley*, 10 Ha. App. 24, and *Woolf* v. *Pemberton*, *supra*; but see cases *supra* and *infra*.

The primary object of requiring the infant to sue by next friend is not, however, that defendants shall have security for costs, but that there may be some one before the Court to answer for the propriety of the action, and through whom the Court may compel the obedience of its orders. Thus even where the natural guardian and next friend is not a resident of Ontario, infants having a *bonâ fide* cause of action are privileged suitors, and the same rule as to security for costs should not be applied as in the case of adults: *Roberts* v. *Coughlin*, 18 P. R. 94; *Scott* v. *Niagara, etc., Co.*, 15 P. R. 409. In the latter case the infant and the next friend were within Ontario, but that would not.

however, seem to affect the question: see *Roberts* v. *Coughlin*, *supra*, p. 475, and *Rule* 373 (b). Rule 91.

Circumstances connecting a next friend too closely with parties adverse in interest may render him an improper person, and liable to be removed, though nothing is alleged against his character, circumstances or conduct: *Re Burgess*, *Burgess* v. *Bottomley*, 25 Ch. D. 243.

Consent of next friend.

The consent of the next friend should be obtained before using his name, though the infant's consent is unnecessary: *Worthan* v. *Pemberton*, 9 Jur. 291, and the written authority of the next friend for the use of his name in the proceedings must be filed: see *Rule* 99.

If no next friend named.

If no next friend is named a motion may be made to dismiss the action, with costs to be paid by the solicitor: *Flight* v. *Bolland*, 4 Russ. 298; Dan. Pr. 6th ed., 105; but an amendment may be allowed even at the trial: *Duric* v. *Toronto Ry.*, *supra*, p. 474.

Where a suit was prosecuted by an infant without a next friend, an application made by him more than twelve months after he became of age to set aside the proceedings was refused: *Millson* v. *Smale*, 25 Ont. 144.

If an action is brought in the name of an infant by a married woman as next friend, the course is, to apply to have her removed, and to stay proceedings until a proper next friend is appointed: *Martin* v. *Martin*, 15 P. R. 177.

Where an infant plaintiff and his next friend both reside out of the jurisdiction, the defendant may move to have the action stayed until either security for costs is given, or a next friend within the jurisdiction is appointed: *McBain* v. *Waterloo*, &c., 8 O. L. R. 620.

Inquiry whether suit for benefit of infant.

Notwithstanding that generally anyone may sue as next friend of an infant, the Court will, on the application of the defendant, or of any person acting as next friend of the infant for the purpose of the application: *Guy* v. *Guy*, 2 Beav. 460, institute an inquiry as to whether the suit is for the benefit of the infant, and if the result shows that the proceedings are not for the benefit of the infant, the suit may be stayed: *Anderton* v. *Yates*, 5 DeG. & S. 202, or dismissed with costs, to be paid by the next friend: *Fox* v. *Suwerkrop*, 1 Beav. 583; *Golds* v. *Kerr*, W. N. 1884, 46; *Huxley* v. *Wooton*, 134 L. T. Jour. 178; and see *Re Elsom*, *Thomas* v. *Elsom*, W. N. 1877, 177; *Mill* v. *Mill*, 20 C. L. J. 252.

Costs, liability of next friend for.

In general a next friend is as to costs in the same position as any other litigant, and receives or pays costs personally as between himself and defendant: *Smith* v. *Mason*, 17 P. R. 444; unless otherwise ordered: *Coley* v. *Coley*, 25 W. R. 528.

As to whether a next friend is entitled to solicitor and client costs: see *Damont* v. *Hennell*, 33 Ch. D. 224.

The costs of an unsuccessful action by infants by their next friend claiming a share of a testator's estate, by the alleged forfeiture of the share by the legatee thereof after the testator's death, were ordered to be paid by the next friend, and not out of the testator's estate, without prejudice to the claim of the next friend to be indemnified out of the shares of the infants when they should come into possession: *Smith* v. *Mason*, 17 P. R. 444.

The next friend of an infant was indemnified against the costs of an appeal to the Supreme Court out of the infant's estate, where the appeal was advised by more than one counsel, and the Court

Rule 92.

proposed to be appealed from was not unanimous: *Cottingham* v. *Cottingham*, 11 P. R. 13; and this though the proceeding is unsuccessful: *Steeden* v. *Walden*, 1910, 2 Ch. 393; 103 L. T. 135.

Death of next friend.

When the next friend of an infant dies pending the action, a new next friend may be appointed on an *ex parte* motion: *Daly* v. *Daly*, 9 L. R. Ir. 383: Dan. Forms, 34.

In an action on behalf of an infant by a next friend acting with the father's authority, the father died and the mother, the testamentary guardian, was held entitled to be substituted as next friend, though no charge of improper conduct had been made against the actual next friend: *Hutchinson* v. *Norwood*, 31 Ch. D. 237.

Authority ceases on infant's attaining 21.

The next friend should not take any step in the cause in the name of the infant after he attains twenty-one, for the infant may abandon the suit: *Brown* v. *Weatherhead*, 4 Ha. 122. If the infant adopts the proceedings after he becomes of age, he becomes liable for all the costs of the suit.

Removal of next friend.

A next friend who refuses to appeal may be removed: *Depuy* v. *Welsford*, W. N. 1880, 121.

Withdrawal.

The next friend of an infant plaintiff may obtain leave to withdraw upon such terms as the circumstances of the case and the welfare of the infant may require, and subject amongst other things to liability to the opposite party for costs theretofore incurred in case the Court should so order: *Taylor* v. *Wood*, 14 P. R. 449. Where a next friend desires to withdraw, the defendant may move to stay proceedings until a new next friend is named, though the normal practice is for the next friend to move: *Ib.* A solicitor should not continue an action in the name of a next friend who has notified him of his desire to withdraw: *Ib.* *Semble*, if a next friend cannot be found to prosecute an action for an infant, the Court in a proper case may appoint the Official Guardian to act as next friend: *Ib.*

Compromise.

A compromise cannot be forced upon infants if it is of no benefit to them, even though agreed to by their counsel: *Rhodes* v. *Swithinbank*, 22 Q. B. D. 577; or if it is contrary to the opinion of their legal adviser: *Re Bircholl*, *Wilson* v. *Birchall*, 16 Ch. D. 41; 44 L. T. 113. A compromise of an action brought by a next friend of an infant will not be binding on the infant, unless the Court shall find that it was for his benefit: *Vono* v. *Conodion Colored Cotton Mills*, 21 O. L. R. 144; *Mottet* v. *Voutro*, 78 L. T. 682.

Infants as defendants.

Infants as Defendants.—Defendants when known to be infants should be represented by a guardian, who, in an action in respect of an estate in which the infant is interested (see *Rule* 18), or for recovery of lands, goods or chattels, of which he is personally in possession (see *Rule* 19), will be the Official Guardian. In other cases (see *Rules* 20, 92), a guardian should be appointed, but the appointment of a guardian is not imperative, so that the want of one will not necessarily invalidate the proceedings after judgment, where the interests of the infant appear to have been sufficiently protected: see *Furnivol* v. *Brooke*, 49 L. T. 134; *Stroughon* v. *Smith*, 19 Ont. 558.

Guardian other than official guardian.

92. Where an infant defendant is not represented by the Official Guardian, a guardian may be appointed for him by the Court. C.R. 155.

The English practice is different: see *White* v. *DuVernoy*, 1891, P. 291.

See note to *Rule* 18.

Rule 93.

Under this *Rule* the defendant may himself before appearance make an application in Chambers to appoint a guardian *ad litem* by whom he may appear and defend the action, or in case he does not, the plaintiff may, after the time for appearance has elapsed and defendant has not appeared by guardian, move, on notice to the defendant, for the appointment of a guardian *ad litem* for him, and if the defendant fails to nominate a guardian, the plaintiff may probably be allowed to do so; the consent of the person nominated, and an affidavit of his fitness, and that he has no adverse interest, should be filed: see *Hyne* v. *Brown*, 13 P. R. 17, and the proposed guardian should attend before the Judge with the infant: *Rule* 93.

Where a plaintiff knows that the defendant is a minor he should not proceed with his action until a guardian has been appointed, or his proceedings may be invalid: but in *Straughan* v. *Smith*, 19 Ont. 558 (an action of tort), the appointment of a guardian was held not to be imperative, so that the want of one would necessarily invalidate the proceedings after judgment, where the defendant was not quite of age, but his interests appeared to the Court to have been sufficiently protected, and the fact of his infancy was well known to his parents and solicitors, and no objection to the want of a guardian had been taken until the case was in the Divisional Court.

93. A person desirous of appointing a guardian for himself other than the Official Guardian to defend an action or matter, may go before a Judge with the proposed guardian. He must satisfy the Judge by affidavit that the proposed guardian is a fit person, and has no adverse interest; and the Judge may examine the proposed guardian, or the person making the affidavit, *vivâ voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. C.R. 221.

Person desiring to have a guardian ad litem appointed to himself, may attend Judge with proposed guardian.

Evidence required on application.

Based on Chy. O. 526.

This *Rule* would appear to apply to all cases of disability where the appointment of a guardian is necessary.

The Official Guardian *ad litem* is now to be appointed in all cases, unless some special reason exists for the appointment of some other persons: see *Rule* 95 (3).

Official guardian to be appointed.

Where a guardian was irregularly appointed upon insufficient notice to the infant, the appointment was set aside on the application of the infant after decree: *Hamilton* v. *Hamilton*, 2 Chy. Ch. 160; and see *Re Jackson, Massey* v. *Crookshanks*, 12 P. R. 475.

Proceedings set aside where guardian ad litem irregularly appointed.

On an application at the instance of an infant of 18 who was considered capable of exercising a sound discretion in managing his own affairs, and applied with the approbation of his father, a guardian nominated by the infant was appointed under the above clause in the place of the Official Guardian: *McKenzie* v. *Dwight*, 2 C. L. T. 359.

The Court would appear to have inherent jurisdiction to substitute another guardian for a guardian appointed under *Rule* 92.

Rule 94.

Insane persons.

94. A person of unsound mind (not so found by inquisition or judicial declaration) may sue by his next friend, and may defend by his guardian. C.R. 217.

The words "or judicial declaration" are not in the English *Rules*; in other respects this is to the same effect as Eng. (1883) R. 139.

The practice adopted by this *Rule* is that of the Court of Chancery. This *Rule* applies only to lunatics "not so found." The *Rule* applicable to persons found to be lunatics is *Rule* 97.

Lunatics as plaintiffs.

Lunatics—As Plaintiffs.—A lunatic so found by inquisition, or judicial declaration under *The Lunacy Act* (R. S. O. c. 68), s. 6, and having a committee, must sue by him: *Rule* 97; and his committee must be made a co-plaintiff: *Re Townshend, Townshend* v. *Robins*, 1908, 1 Ch. 201. If he has no committee, or if the committee has an interest in the subject matter of the action adverse to the lunatic, the suit in certain cases may be brought by the Attorney-General: *Atty.-Gen.* v. *Panther*, 2 Dick. 748. The ordinary procedure is under this *Rule* to sue by next friend: *Light* v. *Light*, 25 Beav. 248; *Porter* v. *Porter*, 37 Ch. D. 420; who may be any person who chooses to act, just as in the case of an infant: *Skinner* v. *White*, 19 C. L. J. 115; and need not be a solvent person: *Sharp* v. *Sharp*, 2 Chy. Ch. 244; *Crumley* v. *Kingston*, 3 C. L. T. 311.

As in the case of an infant the next friend may not be a married woman. If an action is so framed the defendant may move to remove her, and stay the action till a proper next friend is named: *Mostin* v. *Mostin*, 15 P. R. 177.

The consent of the next friend to act must be filed: *Rule* 99.

A committee before instituting a suit on behalf of a lunatic or his estate must obtain the sanction of the Court: Den. Prac., 5th ed., 82; 6th ed., 118.

If an action is brought in the name of a person, who was at the time in a state of mental incapacity, without either a committee or next friend, the defendant may move to dismiss the action, but not if the plaintiff becomes imbecile after commencing an action in the ordinary way: Dan. Pr., 5th ed., 81, 83; 6th ed., 118; *Wortnoby* v. *Wartnoby*, Jac. 377; *Bloke* v. *Smith*, You. 594.

Where an action has been commenced in the name of a person of unsound mind by next friend, an inquiry may be directed at the instance of the person alleged to be of unsound mind as to his competency: *Powell* v. *Lewis*, 40 W. R. 88; 65 L. T. 672.

An action which can be shewn to be not beneficial to a lunatic plaintiff will be stayed on application, as in the case of an infant: *Waterhouse* v. *Worsnop*, 59 L. T. 140.

Plaintiff improperly described as lunatic.

Where an action is brought by a next friend on behalf of a person alleged to be of unsound mind, but who is really of sound mind, the action will on his application, shewing by affidavit his sanity and ability to manage his own affairs, be ordered to be dismissed with costs against the next friend: *Palmer* v. *Wolesby*, L. R. 3 Chy. 732; and the defendant may make a similar application: *Skinner* v. *White*, 19 C. L. J. 115; and see *Borrie* v. *Weymouth*, 15 P. R. 95; and *Richmond* v. *Bronson* in note to *Rule* 124, *supra*, p. 543; *sed vide Quantz* v. *Smeltzer*, 6 P. R. 126.

The application must be to a Judge in Chambers, since if the affidavit is contradicted or doubtful, an inquisition in lunacy might be directed and the Master in Chambers has no jurisdiction to entertain such a question: *Skinner* v. *White*, *supra*, p. 478. Rule 94.

If a plaintiff is found a lunatic, and a committee appointed after the commencement of an action, an order should be obtained for the committee to carry on the proceedings: *Green* v. *Pratt*, 41 L. T. 30, and see *Beall* v. *Smith*, L. R. 9 Chy. 85, where the effect of the appointment of a committee was said to paralyze a preceding action by a next friend. If during the action the committee dies or is removed, and a new committee is appointed, a similar order should be obtained. If the plaintiff's solicitor neglects to obtain an order in either of such cases, to carry on the proceedings, the defendant may, before judgment, move to dismiss the action, unless the order is obtained within a limited time; after judgment the defendant may obtain the order himself. See Dan. Forms, 3rd ed., 55. Plaintiff becoming insane pendente lite.

The Court has no jurisdiction over the property of a person of unsound mind, except to protect it, so that where more is desired the proper course is to apply for the appointment of a committee to prosecute the suit: *Skinner* v. *White*, *supra*; see *Jones* v. *Lloyd*, L. R. 18 Eq. 265; *Beall* v. *Smith*, L. R. 9 Chy. 85.

By *The Hospitals for the Insane Act* (R. S. O. c. 295), the Inspector of Prisons and Public Charities is *ex officio* committee of lunatics detained in any public asylum or place of safe custody, and having no other committee. But the Court may appoint a committee of any such lunatic, and upon its so doing, so long as the committee appointed by the Court exercises such office, the Inspector ceases to be the committee. Inspector as Committee.

Lunatics—As Defendants.—A lunatic defends by the committee of his estate, if he has one: *Rule* 97. If he has none, or his committee has an adverse interest, or the lunatic has not been so found by inquisition or judicial declaration, he defends by guardian *ad litem* under this *Rule*: see also *Howlett* v. *Wilbraham*, 5 Mad. 423; *Worth* v. *McKenzie*, 13 M. & G. 363. Lunatics as defendants.

The committee of a lunatic's estate is a necessary party defendant with the lunatic in an action relating to that estate, and may defend without obtaining leave: Dan. Pr., 5th ed., 82.

As to the mode in which a lunatic defendant in an action is to be served: see *Rule* 21, and *Wolff* v. *Ogilvy*, 12 P. R. 645.

After service under *Rule* 21, no further proceedings are to be taken against a lunatic who has no committee, until a guardian *ad litem* is appointed: *Rule* 22. If the friends of a lunatic desire to defend for him, they should cause an appearance to be entered for him: see *Rule* 95 (2), and then apply in Chambers: *Crawford* v. *Crawford*, 9 P. R. 178, to have a guardian *ad litem* appointed: see *Rule* 93, 221. Notice of such a motion should be served on the alleged lunatic, unless it be shewn to be dangerous to do so: *Bank of Ottawa* v. *Bradfield*, 2 O. W. N. 1014; and see *Re Mein*, 2 Chy. Ch. 429. Any fit person who has no adverse interest may be such guardian: Dan. Pr., 5th ed., 180, but in general the Official Guardian will be appointed: *Rule* 95 (3). Guardian must be appointed.

If no application is made on the lunatic's part the plaintiff may, after the time for appearance has expired, apply for the appointment

Rule 95.

of a guardian *ad litem* by motion on notice; in which case the Official Guardian will be appointed, unless he be already acting as solicitor for the plaintiff, or for some other parties having an interest in the subject matter of the action adverse to the lunatic, or unless the friends of the lunatic ask for the appointment of some other person, in which case some other proper person may be appointed: see *Rule* 95 (3), though some good reason is now required for appointing some one other than the Official Guardian: see *Rule* 95, and notes.

Where proceedings are carried on without the due appointment of a guardian to a lunatic defendant, they are not merely irregular but void: see *Warnock* v. *Prieur*, 12 P. R. 264.

The defence of a lunatic or person of unsound mind should be expressed to be by his committee or guardian; Arch. Pr., 13th ed., 1048.

Added after judgment.

Where a person of unsound mind, not so found, has to be made a party in the Master's office, after judgment, or to be served with notice of motion for an administration order, a guardian *ad litem* must be appointed "in like manner as before judgment," that is to say by analogy to the practice (see *Rule* 2) in an action before judgment: see *Rule* 96, and *Wolff* v. *Ogilvy*, 12 P. R. 645. The procedure will therefore be by special motion in Chambers; in the latter case, before the application for the administration order is made: *Wolff* v. *Ogilvy, supra; Berry* v. *Brazil*, 1 Chy. Ch. 237.

Service of persons of unsound mind with an office copy of a judgment, pursuant to *Rule* 87 or otherwise, is effected as the officer before whom the reference is pending directs.

A guardian *ad litem* to a defendant, who became of unsound mind after judgment, was appointed at the instance of a co-defendant who wished to obtain indemnity from the insane defendant: *Re Dawson. Johnston* v. *Hill*, 41 Ch. D. 415.

No appearance by persons of unsound mind.

95.—(1) Where no appearance has been entered to a writ of summons for a defendant who is a person of unsound mind not so found, the plaintiff may apply for an order that a guardian of such defendant be appointed, by whom he may appear and defend.

(2) No such order shall be made unless it appears that the writ was duly served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in the notice named for hearing the application, served upon, or left at the dwelling-house of, the person with whom the defendant resides, or under whose care he is at the time of serving such notice.

(3) The Official Guardian shall be appointed, unless for good reason it is otherwise directed. C.R. 218.

Eng. (1883) R. 101 does not speak of an Official Guardian, and includes the case of an infant which is provided for by *Rule* 18.

This *Rule* is based upon the English Chancery Order 7, Rule 3, as to which, see H. & L. Jnd. Act, 2nd ed., p. 390, and Morgan's Chy. Orders, 4th ed., p. 400; Seton, 4th ed., 706. Rule se.

It will be seen, from the terme of *Rule* 22, that the practice in Ontario is the same as under the Eng. Rula of 1883, and that even though an appearance should be entered for a lunatic, if he has no committee or guardian *ad litem*, the plaintiff cannot proceed until a guardian *ad litem* is appointed. It is apprehended that the intention of the *Rules* is, that application may be made on behalf of a lunatic for the appointment of a committee or guardian *ad litem* by whom he may appear and defend; but that if no such appointment is made, the plaintiff may under this *Rule* apply to have a guardian appointed. Guardian must be appointed to lunatic defendant.

By *The Hospitals for the Insane Act* (R. S. O. c. 23) s. 40, the Inspector of Prisons and Public Charities is *ex officio* committee of lunatics detained in any public asylum who have no other committee, and, in the case of a defendant for whom the Inspector is thus committee, service of a writ or other paper on the Inspector is sufficient if he is named therein as committee: *Ib.*, sec. 42; see also notes to *Rules* 94, 97.

Applications under this *Rule* should be made to the Master or other officer having jurisdiction in Chambers, not to a Judge: *Crawford* v. *Crawford*, 9 P. R. 178. If the lunatic defendant has been found to be of unsound mind by inquisition, or judicial declaration, the *Rule* does not apply, and he should defend by his committee; but where he has not been so found lunatic the *Rule* applies, and it should be shewn, on the application to appoint a guardian, that the defendant has not been found lunatic by inquisition or judicial declaration: *Crawford* v. *Birdsall*, 1 Chy. Cham. 70; and facts must also be shewn upon which the Court may judge for itself that the person is of unsound mind: *McIntyre* v. *Kingsley*, 1 Chy. Ch. 281. The Official Guardian is to be appointed, unless a case is made for appointing another proper person. It will have to be shewn that such other person has no conflicting interest: see *Rule* 93, and *James* v. *Robertson*, 1 Chy. Ch. 197. Motion in Chambers. Official Guardian generally appointed.

Service of notice of the application is necessary though the person to be served is out of the jurisdiction: *O'Brien* v. *Maitland*, 10 W. R. 275.

An appointment of a guardian without notice served as directed by this *Rule* was held to be void, and not to be a mere irregularity, and to be a defect not capable of being waived by the fact that the Official Guardian who was appointed, acted as such, and made all the inquiries usual in such cases in the interests of the lunatic: *Warnock* v. *Prieur*, 12 P. R. 264. It would seem that Sunday is reckoned in computing the six clear days: see *Brewster* v. *Thorpe*, 11 Jur. 6; unless it is the last day: see *Rule* 179; see also *Rules* 172, 173. Notice of application.

96. Where a person of unsound mind not so found by inquisition or judicial declaration is served with an office copy of a judgment or order or is made a party after judgment, a guardian *ad litem* shall be appointed for him after the like notice. C.R. 219. Appointment of guardian ad litem to infants or lunatics added after judgment.

Based upon Chy. Orders 522, 525.

Rules 97, 98. Ths former C. R. 219 applied not only to persons of unsound mind but also to infants. No express provision is now made for the appointment of guardians to infants after judgmsnt; hut hy analogy to this *Rule* it may possihly be held that where an infant is made a party after judgment, or is served with an office copy of a judgment or order, a guardian shall he appointed for him as prescrihed hy this *Rule* in the case of persons of unsound mind.

Infants added after judgment, guardian for, how appointed.

Infants.—Ths appointment of guardians *ad litem* to infants before judgment, is now governsd hy *Rules* 18, 92, 93. Under those *Rules* service of the writ on the Official Guardian *ad litem*, *ipso facto* constitutes him the guardian of ths infant on whose behalf hs is served, where ths infant is served in respect of his intsrest in an estate, but not in actions for personal torts, or for the mere recovery of land, goods or money: ses *Rules* 19-20. Where an infant is required to be served with an office copy of judgment it is ordinarily in that class of cases in which service of a writ on ths Official Guardian is sufficient service on the infant if an original defendant, and hy analogy to *Rule* 18 (see *Rule* 2), in such cases, servlce of the office copy of ths judgment on ths Official Guardian would be snfficient service on ths infant, and the Official Guardian would thereby hecome *ipso facto* his guardian *ad litem*. Where there are ssveral infant defendants to be served, by analogy to *Rule* 18, only ons copy of ths judgment nesd be served on the Official Guardian.

Lunatics added after judgment, guardian for, how appointed.

Lunatics.—This *Rule* refers to persons of unsound mind not so found hy an inquisition or order of the Court. The appointment of guardians *ad litem* to such persons hefore judgment is regulated by *Rules* 93, 95. Where the person is found lunatic hy inquisition or order, it is not necessary to appoint a guardian *ad litem* for him, his committee having power to act for him.

The appointment is made on an application in Chambers, notice of which motion may be served along with the office copy of ths judgment—or afterwards, hut no further proceedings affecting ths person of unsound mind can properly be taken until a guardian *ad litem* bas been appointed for him: see *Rule* 22 and *Rule* 3 *j*; *Wolff* v. *Ogilvy*, 12 P. R. 645. Where the Master before whom the reference is pending has also jurisdiction in Chambers, it would seem that he would have power to entertain such applications: see *Rules* 209, 433.

Where a person has been judicially declared a lunatic, ssrvice is effected on his committee, who should hs made a co-defendant: Sm. Pr., 7th ed., p. 311, and it would seem not to be necssary in such a case to appoint a guardian *ad litem*: *Ib.*, but where ths lunatic bas no committee within ths jurisdiction, it has besn hsld proper to serve the Official Guardian *ad litem* on behalf of such lunatic: see *Re Hagar*, 12 P. R. 645, *sed quære*; see *Warnock* v. *Prieur*, *supra*, p. 481, and in case of lunatics detained in any public asylum: see R. S. O. c. 295, *supra*, p. 481.

Lunatic so found, how to sue or defend.

97. A lunatic who has been so found may sue or defend by his committee. C.R. 217.

See notes to *Rule* 94.

Persons declared incompetent.

98. A person who has been declared incompetent under *The Lunacy Act* shall be represented by any person who may be authorized under the provisions of that Act. *New.*

The Lunacy Act (R. S. O. c. 68), does not appear to make any provision for declaring a person "incompetent." The Court has power, by s. 6, to declare a person a "lunatic." See, however, s. 37 of the Act. Rule 99.

99. Unless otherwise ordered, before the name of any person is used, as next friend or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the office in which the cause or matter is commenced. C.R. 198. Consent of next friend, or relator, to be filed.

Married Women as Plaintiffs and Defendants.—Married women prior to the Married Women's Property Act were not considered to be *sui juris* and could not sue without a next friend, or be sued without joining their husbands. They may now sue and be sued in their own names, and without a next friend and without joining their husbands as co-plaintiffs or co-defendants, either in contract, in tort, or otherwise, or as a trustee or representative of a deceased person: see *The Married Women's Property Act* (R. S. O. c. 149), ss. 3, 4 (2), 16. Married women as plaintiffs, and defendants.

Section 16 of the Act is as follows:—

16. Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort: 3-4 Geo. V. c. 29, s. 16. Remedies of married woman for protection and security of property.

Notwithstanding the concluding words of this section, a wife could always formerly sue her husband for alimony; and might compromise the suit and deal with it just as any other suitor can: *Vardon* v. *Vardon*, 6 Ont. 719, and the Act has not been considered to have made any change in that respect, although an alimony action is founded in tort.

She may sue her husband to recover possession of her real estate: *Till* v. *Till*, 15 Ont. 133; or for the return of her personal property detained by him: *Larner* v. *Larner*, 1905, 2 K. B. 539.

A married woman in sole occupation of a house bought by her out of her own earnings may sue alone, without her husband, in an action for trespass: *Weldon* v. *De Bathe*, 14 Q. B. D. 339.

Costs.—Where a married woman sues as a *feme sole*, *semble*, she assumes a liability to be ordered to pay personally the defendant's costs of the action: such liability does not depend on contract and apparently is not one, the enforcement of which should be limited to her separate property. Costs.

Contracts.—*The Married Women's Property Act* (R. S. O. c. 149), s. 5 is as follows:— Contracts.

5.—(1) Every contract into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent Contracts of married women to bind all their separate estate.

(*a*) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she was or was not in fact possessed of or entitled to any separate property at the time when she entered into such contract,;

(*b*) Shall bind all separate property which she may at the time or thereafter possess or be entitled to: and

Rule 99.

Except where restraint on anticipation exists.

(c) Shall also be enforceable by process of law against all property which she may thereafter while discovert possess or be entitled to.

Post nuptial contracts.

(2) Nothing in this section shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating: 3-4 Geo. V. c. 29, s. 5.

Post-nuptial Contracts.—Where a married woman enters into a contract for necessaries as agent for her husband she cannot be sued thereon—and the Act does not apply to such contracts. She was held to have so acted where she gave evidence (uncontradicted) that she had her husband's express authority for dealing with the plaintiff, and that the dresses purchased by her from the plaintiff, which were the subject of the action, were worn in his presence; and if no evidence is given beyond the fact that the goods were such as are usually required in the department of domestic life, which the wife usually manages, and the lady gave her name and address as that of a married woman living with her husband, the presumption is that she acted as his agent, unless such presumption is rebutted by other evidence; and it is immaterial whether the plaintiff knew that the wife had her husband's authority: see *Paquin* v. *Beauclerk*, 1906, A. C. 148.

A husband may bring an action against his wife for money lent and for money paid at her request after marriage: *Butler* v. *Butler*, 14 Q. B. D. 831; affirmed in appeal, 16 Q. B. D. 374; see *McGregor* v. *McGregor*, 20 Q. B. D. 529.

Since R. S. O. 1897.

As to contracts made since 13th April, 1897, by a married woman, it is no longer necessary to allege or prove the existence of separate property, either at the date of the contract or subsequently: see *Gibson* v. *Le Temps*, 8 O. L. R. 707.

A judgment against a married woman in default of appearance or defence must follow form No. 110; H. & L. Forms Nos. 923 or 924, or it will be void; and a personal judgment against her on a post-nuptial contract was held to be void though she had consented thereto: *Re Hamilton* v. *Perry*, 24 O. L. R. 38.

The separate estate of a married woman is liable for her funeral expenses: *Re Gibbons*, 31 Ont. 252.

In an action on a contract made before marriage.

Ante-nuptial Contracts.—Where a wife is sued on a contract made before marriage (whether before or after 13th April, 1897), there is no need to shew the possession of separate estate at the time of entering into the contract or at the time of judgment: *Downe* v. *Fletcher*, 21 Q. B. D. 11; more fully reported, 59 L. T. 180. Judgment in such a case will not be restricted to property not subject to any restraint on anticipation, as in *Scott* v. *Morley*, *infra*, p. 485; *Robinson* v. *Lynes*, 1894, 2 Q. B. D. 577; see also *Downe* v. *Fletcher*, 59 L. T. 181, *per* Lord Coleridge; and *Axford* v. *Reid*, 22 Q. B. D. 548, (decided under the English M. W. Act of 1870, and as to which, see *Birmingham* v. *Lane*, 1904, 1 K. B. 35; 89 L. T. 656); *Re Teasdall* v. *Brady*, 18 P. R. 104; but even, though the judgment be in a personal form, it would seem that *The Married Women's Property Act* (R. S. O. c. 149), s. 21, will still have the effect of protecting property from execution which the defendant is restrained from anticipating, unless the restraint is imposed by the married woman herself: *Birmingham* v. *Lane*, 1904, 1 K. B. 35; 89 L. T. 656.

Enforcement of Judgments against a Married Woman.—Although married women may now be sued as *femes soles* a judgment recovered against them is only recoverable out of their separate property not subject to restraint against anticipation, unless such restraint was imposed by themselves. In the case of a contract entered into before 13th April, 1897, both separate property at the date of the contract, and all separate property thereafter acquired, will be liable to satisfy any judgment recovered, provided it is not subject to any restraint against anticipation not imposed by herself: *The Married Women's Property Act* (R. S. O. c. 149), ss. 4 (5), 21. Rule 99. Before 13th April, 1897.

In the case of a contract entered into by a married woman on or after 13th April, 1897, otherwise than as an agent, all separate property which she may at the time, or thereafter, possess, or be entitled to, is bound, and the contract is also enforceable by process of law against all property which she may thereafter while discovert possess or be entitled to: *Ib.*, sec. 5 (1 *b. c.*), provided it has not been subject to a restraint against anticipation not imposed by herself: ss. 5 (2), 21, After 13th April, 1897.

The form of judgment against a married woman was settled in *Scott* v. *Morley*, 20 Q. B. D. 132, but that form was settled prior to the statute of 1897; for the form now in use, see Form No. 110; H. & L. Forms Nos. 923, 924; and see *Brown* v. *Dimbleby*, 1904, 1 K. B. 28; 89 L. T. 424; *Doull* v. *Doelle*, 5 O. W. R. 414; *Quebec Bank* v. *Rodford*, 10 P. R. 619; *Turnbull* v. *Forman*, 15 Q. B. D. 234; *Kinnear* v. *Blue*, 10 P. R. 465; *Cameron* v. *Rutherford*, *Ib.* 620. Form of judgment under present Act.

Where the married woman after the contract has become a widow, such verbal alterations should be made in the form of judgment as are necessary to adapt the form to that state of facts: see *Softlaw* v. *Welch*, 1899, 2 Q. B. 419; 81 L. T. 64.

The judgment has been said not to subject the married woman to a "personal" liability, but only to a "proprietary" liability; *per* Bowen, L. J., in *Scott* v. *Morley*, 20 Q. B. D. at p. 128; and see *In re Hewett*, 1895, 1 Q. B. 328; 72 L. T. 60; but in *Holtby* v. *Hodgson*, 24 Q. B. D. 105, it was said that this was only a short and compendious way of saying that the judgment must be executed against her property, not her person: see also *Van Wart* v. *Burland*, 17 C. L. T. 68, and *McLeod* v. *Emigh*, 12 P. R. 45, doubted in *Re Teasdale* v. *Brady*, 18 P. R. 104. The judgment is, in other words, a personal judgment though it can only be enforced against her property: *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; 65 L. T. 845.

But *semble*, a married woman plaintiff being before the Court as a *feme sole* is liable, like any other suitor, to be ordered to pay costs, and a judgment therefor ought to be against her generally, and not limited to her separate property: see *Morris* v. *Freeman* and other cases, *supra*, p. 250. As a defendant, the costs may, and generally are, ordered to be levied only out of her separate property.

Where a married woman administratrix was ordered to pay into Court money admitted to be in her hands and to belong to the estate of the intestate, it was held that in the absence of any evidence that she had committed a *devastavit*, the order should be in the ordinary form, and should not be restricted to payment out of her separate estate; and if she failed to comply with the order the Court had jurisdiction to make an order for attachment against her; but, *semble*, if the object of the order be to make her make good a loss occasioned by her *devastavit*, the order should be as in *Scott* v. *Morley*; *Re Turnbull*,

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Turnbull v. *Nicholas*, 1900, 1 Ch. 180, subject to modification as above, where the liability has arisen after 13th April, 1897.

An order for arrest should not be made under *The Fraudulent Debtors Act* (R. S. O. c. 83), s. 3, in the case of a married woman against whom a judgment leviable only out of her separate property has been recovered: *Doull* v. *Doelle*, 4 O. W. R. 525.

As to how far a married woman is subject to the provisions of *The Division Courts Act* (R. S. O. c. 63), ss. 191, 192, relating to judgment summonses: see *McLeod* v. *Emigh*, *supra*, p. 485; *Aylesford* v. *O. W. R.*, 1892, 2 Q. B. D. 626; *Re Teasdall* v. *Brady*, 18 P. R. 104; *sed vide*, 116 L. T. Jour. 467-70; and *Re Stewart* v. *Edwards*, 11 O. L. R. 378. There is no power to commit a married woman for refusing to attend to be examined upon a judgment summons, even though her refusal amounts to wilful misconduct: *Ib.*

Property not subject to restraint on anticipation.

With regard to all her property, other than that settled to her separate use with a restraint on anticipation not imposed by herself, a judgment against a married woman is said to operate against her just as it would against an unmarried woman: *Holtby* v. *Hodgson*, 24 Q. B. D., at p. 107; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177; see also *Cox* v. *Bennett*, 1891, 1 Ch. 617; but it does not even after her husband's death bind her personally to pay the debt, as if she were a *feme sole* at the time of its recovery: *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *In re Hewett*, 1895, 1 Q. B. 328.

Property subject to restraint.

As has been already mentioned, separate property which is subject to a restraint on anticipation, is not separate property upon which a judgment can operate (unless such restraint exists under any settlement of her own property made by herself): *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Myles* v. *Burton*, 14 L. R. Ir. 258; *Scott* v. *Morley*, 20 Q. B. D. 120; *Beckett* v. *Tasker*, 19 Q. B. D. 7; see also *Pike* v. *Fitzgibbon*, 17 Ch. D. 454; *Smith* v. *Lucas*, 18 Ch. D. 531; *Re Hedgely*, 34 Ch. D. 385; *Re Dixon*, 35 Ch. D. 4; *Smith* v. *Whitlock*, 34 W. R. 414; *Roberts* v. *Watkins*, 46 L. J. Q. B. 552; *Re Glanville*, 31 Ch. D. 532; *Re Andrews*, 30 Ch. D. 159; even after the removal, by the death of the husband, of the restraint on anticipation: *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Softlaw* v. *Welch*, 1899, 2 Q. B. 419; 81 L. T. 64; *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby*, 1904, 1 K. B. 28; 89 L. T. 424; in the case of a judgment on an ante-nuptial contract: see cases *supra*; and *Birmingham* v. *Lane*, 89 L. T. 656; and the judgment cannot be enforced by any kind of process (receiver, sequestration, or otherwise), against income of property subject to a restraint on anticipation, accruing due *after* the date of the judgment: *Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559; *Loftus* v. *Heriot*, 1895, 2 Q. B. 212; 73 L. T. 167; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177; *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; 74 L. T. 720; *Colyer* v. *Isaacs*, 77 L. T. 198; *Bolitho* v. *Gidley*, 1905, A. C. 98; 92 L. T. 369. Thus income, which is subject to a restraint on anticipation, accrued *before* the date of the judgment, but not paid over to the married woman, can be reached by the appointment of a receiver (but not income accrued *after* the judgment): *Loftus* v. *Heriot*, *supra*; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177; but this distinction was denied in *Wood* v. *Lewis*, 110 L. T. 934, where it was in effect held, that any income which is the subject of a restraint against anticipation is not attachable either before, or after, it has become payable.

A plaintiff cannot, by postponing the entry of his judgment, make available income not accrued due before the time when he became entitled to enter judgment: *Colyer* v. *Isaacs*, 77 L. T. 198.

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Effect of Act as to conveyances to husband and wife and third party.

The Act, in enlarging the capacity of a married woman to take property, as her separate property, has changed the former rule in respect to a gift to a husband, his wife, and a third party, so that now the husband and wife do not take one moiety, and the third party the other moiety, but each takes one-third: *Re March*, 24 Ch. D. 222; *Re Dixon*, 42 Ch. D. 306; *Re Wilson & Incandescent Light Co.*, 20 Ont. 397; *Thornley* v. *Thornley*, 1893, 2 Ch. 229; 68 L. T. 199; *Re Jeffery, Nussey* v. *Jeffery*, 136 L. T. Jour. 143; but see *Re Jupp*, 39 Ch. D. 148; 59 L. T. 129, and 11 C. L. T. 97, 153, 157; 13 C. L. T. 177.

Form of judgment against married woman.

Judgment against a widow on a contract entered into by her during coverture must be according to the form settled in *Scott* v. *Morley*, as modified in Form No. 110, and not in the ordinary form as though she were a *feme sole; Softlaw* v. *Welch*, 1899, 2 Q. B. 429; but it may be enforced against property acquired after the death of her husband: *Doull* v. *Docile*, 10 O. L. R. 411, provided it was not during coverture subject to a restraint against anticipation, which during coverture would have exempted it from liability: *Brown* v. *Dimbleby, supra*, p. 486.

The restraint on anticipation though suspended on a married women becoming discovert: *In re Wheeler's Settlement*, 1899, 2 Ch. 717; revives on her subsequent re-marriage: *Stroud* v. *Edwards*, 77 L. T. 280.

The execution by a married woman of a general power of appointment by will makes the property appointed liable to meet her debts: *The Married Women's Property Act* (R. S. O. c. 149) s. 9; *Re Ann*, 1894, 1 Ch. 549; 70 L. T. 273.

Execution.

A writ of sequestration against the "estate and effects" was held to be in proper form, but it only operates on separate property, not subject to any restraint on anticipation as above mentioned: *Hyde* v. *Hyde*, 59 L. T. 529; 36 W. R. 708; *Hood-Barrs* v. *Cathcart, etc., supra*, p. 486.

The property liable may be reached in execution in the usual way, as in the case of any other judgment debtor: *Barker* v. *Westover*, 5 Ont. 121-2; *Lowson* v. *Laidlaw*, 3 Ont. App. 77; and see *Perks* v. *Mylrea*, W. N. 1884, 64; *Re Peace* v. *Waller*, 24 Ch. D. 405; and a direction in a judgment that an inquiry be made as to separate estate exigible, does not authorize the examination of any person other than the debtor or other person examinable under *Rule* 580, *et seq.*: *Hood-Barrs* v. *Heriot, Ex p. Blyth*, 1896, 2 Q. B. 338.

Ante-nuptial Torts.—A married woman is liable to the extent of her separate property not subject to any restraint against anticipation as above mentioned for her ante-nuptial torts; and her husband is also liable for such torts to the extent of all property whatsoever belonging to his wife, which he shall have acquired and become entitled to, from or through his wife, after deducting any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any legal proceedings in respect of any of his wife's ante-nuptial debts, contracts or torts, or post-nuptial torts: *The Married Women's Property Act* (R. S. O. c. 149), s. 13 (1); as to whether he is liable to any greater extent; see *Ib.* s. 4 (2); Holmested's *Married Women's Property Act*, pp. 4, 47, 48.

Actions of tort.

Post-nuptial Torts of Married Women.—A married woman is liable to the extent of her separate property as aforesaid for her

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post-nuptial torts; and her husband is also liable therefor to the same extent as he is also liable for her ante-nuptial torts: see R. S. O. c. 149, sec. 18 (1), but it was held, under the Act of 1872, that the husband was not a proper party to the action, but that the wife was to be sued alone, and that her liability was not dependent upon her possession of separate estate: *Amer* v. *Rogers*, 31 C. P. 195; *Barker* v. *Westover*, *supra*; but see *Lee* v. *Hopkins*, 20 Ont. 686. This seems to be in accordance with the opinions expressed by Hagarty, C.J., in *Stone* v. *Knapp*, 29 C. P. 809, Spragge, C., in *McFarlane* v. *Murphy*, 21 Gr. 80; and Wilson, J., in *Wagner* v. *Jefferson*, 37 Q. B. 577, 578; but under the present Act the husband and wife may be sued jointly, or the wife may be sued alone, for torts committed by her after marriage: *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; see *Scott* v. *Morley*, 20 Q. B. D. at p. 125; *Bohin* v. *Hughes*, 31 Ch. D. 390; *Earle* v. *Kingscote*, 1900, 2 Ch. 585, followed in *Travis* v. *Hales*, 6 O. L. R. 574, approving of *Lee* v. *Hopkins*, 20 Ont. 666, and overruling *Amer* v. *Rogers*, 31 C. P. 195.

Where the action is against both husband and wife, they cannot put in inconsistent defences. The defence of the husband is to be considered the one on the record: *Beaumont* v. *Kaye*, 1904, 1 K. B. 292; 90 L. T. 51, though what was regarded as an inconsistent defence in that case might probably not be so regarded under the Ontario *Rules*.

In actions by a married woman for a tort suffered by her, unconnected with her separate estate, her husband was, even after the Act of 1872, required to be a party plaintiff: see *Amer* v. *Rogers*, 31 C. P. 199; but under the present Act it would seem that the wife may sue alone: *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Spahr* v. *Bean*, 18 Ont. 70; *The Married Women's Property Act* (R. S. O. c. 149), s. 4 (2).

(iii) *Partners, etc.*

Scope of the Rules.—The following *Rules*, 105-108, form a code and must, in construing them, be read together: *per* Lord Esher in *Worcester, etc., Banking Co.* v. *Firbank*, 1894, 1 Q. B. 787-8, adopting the view of Fry, L.J., in *Heinemann* v. *Hale*, 1891, 2 Q. B. 90.

What are firms within the Rule.

These *Rules* in effect merely furnish a convenient way of proceeding by, or against, the individuals who constitute a firm, by enabling them to sue, or be sued, in the name which they have adopted for business purposes. A plaintiff is thereby enabled to reach in the first instance the property of the firm, and also under certain circumstances (see *Rules* 105-106), the property of the individuals: see *Re Frances Handford*, 1899, 1 Q. B. 566.

The partners may still be sued individually if the plaintiff so desires. In such case, if he does not sue all the partners, those sued may be entitled to have the others added as defendants: see note to *Rule* 134, p. 569; and a judgment obtained against some only of the partners will be a bar to an action for the debt against the others not sued: see note to *Rule* 106, p. 500.

A proprietary club would appear to be a partnership in which the proprietors are the partners, and may be sued in the club name: *Firmin* v. *International Club*, 5 T. L. R. 612, 694. As to a member's club, see *Overton* v. *Hewett*, 3 T. L. R. 656; *The Granville Club*, 28 Sol. Jour. 513; *Stansfield* v. *Ridout*, 5 T. L. R. 656.

As to whether trades unions can be sued: see *Taff Vale Ry.* v. *Amalgamated Society of Railway Servants*, 1901, A. C. 426; 85 L. T. 147; and other cases noted under *Rule* 75. Rule 100.

See also as to general scope of the *Rules*: *Law Quarterly Mag.*, vol. (1896), p. 53.

100. Any two or more persons (whether British subjects or not and whether residing within or without Ontario) claiming or being liable as partners, and carrying on business within Ontario, may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action. C.R. 222. Partnership firms, how may sue, and be sued.

Follows in substance Eng. R. 1891, O. 48*a*, r. 1.

The words in brackets are not in the English Rule, and have been inserted to make clear what seems also to be established by decision to be the meaning of the Eng. Rule: see *Grant* v. *Anderson*, 1892, 1 Q. B. 108; *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784; *Shepherd* v. *Hirsch & Co.*, 45 Ch. D. 231.

If a firm is sued as such, service may be effected either upon any one or more of the partners, or, at the principal place of business of the partnership, upon any person having control or management of the business. The partners are to appear individually in their own names, but all subsequent proceedings go on in the name of the firm: *Rule* 102. Scope of Rule.

After judgment against the firm, execution may issue as provided in *Rules* 105, 106.

The *Rule* only covers the case of two or more persons trading as a firm, it does not authorize a single person carrying on business in the name of a firm to sue in the firm name: see *Lang* v. *Thompson*, 16 P. R. 516; *St. Gobain* v. *Hoyermann*, 1893, 2 Q. B. D. 96; *Russell* v. *Cambefort*, 23 Q. B. D. 526. He may be sued in the name or style under which he carries on business, under *Rule* 108, but must sue in his own name: *Lancashire* v. *Spectator*, 29 O. L. R. 293. Individual carrying on business as a firm.

Infant Partner.—This *Rule* applies though one of the partners is an infant: *Harris* v. *Beauchamp*, 1893, 2 Q. B. 534; see *Re Beauchamp*, 1894, 1 Q. B. 1; but the judgment should be expressed to be either against the firm "other than A. B., an infant," or possibly against the other partners by name: *Ib.*; and *Lovell* v. *Beauchamp*, 1894, A. C. 607; see pp. 612, 613; but see *Rule* 102, and notes to *Rule* 20. Infant partner.

"Carrying on Business Within Ontario."—Under the present *Rules* the test of the power to sue a firm by its firm name is whether or not it "carries on business within Ontario": per Lord Davey in *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. p. 790, so that the *Rule* has no application to actions by, or against, a foreign firm not carrying on business within Ontario, the members of which are domiciled and resident out of Ontario, even though a partner be temporarily within and served within Ontario: *Agar* v. *Kaufman*, 39 Sol. Jour. 181; *Grant* v. *Anderson*, 1892, 1 Q. B. Carrying on business.

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108; but it applies to a firm carrying on business within Ontario, though it be a foreign, or a British, or a colonial firm, the members of which are resident out of Ontario: *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784.

As to the difference between "carrying on business" and "transacting business": see *Nelson* v. *Lenz*, 9 O. L. R. 50, 52, and *Rule* 23.

A place of business held in the name of the firm in charge of a partner, or employee, would seem to be necessary to bring the firm within the meaning of this *Rule*. Regular visits to Ontario to purchase goods to be sent to the firm is not "carrying on business" within the *Rule*; see *Singleton* v. *Roberts*, 10 R. 223; 70 L. T. 687; *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784; *sed quære* whether a place of business is necessary except to effect substitutional service on a manager provided for by *Rule* 101.

A partner may perhaps be considered as carrying on business of the firm at his regular office, though the name of the firm does not appear there: see *Heinemann* v. *Hale*, 1891, 2 Q. B. 83, where some such circumstances existed, but the former *Rules* were held not to apply.

A foreign corporation having agencies within the jurisdiction, and conducting a trade therein by means of steamships, was held to be "carrying on business" within the jurisdiction: *La Bourgogne*, 1899, A. C. 431; 79 L. T. 310, 331: *Thames & M. M. Ins. Co.* v. *Societa di Navigazione, etc.*, 111 L. T. 97. So a foreign corporation having "a stand" at the Crystal Palace for exhibition of their manufactures at a "cycle show," and for explaining their cycles, taking orders, and pressing the sale of their goods: *Dunlop Pneumatic Tire Co.* v. *Action Gesellschaft, etc.*, 1902, 1 K. B. 342; see also *Nelson* v. *Lenz*, *supra*.

The mere employment of an agent within the jurisdiction to solicit orders, but not to make contracts, is not "carrying on business within Ontario" within the meaning of the *Rule*, notwithstanding that the name of the firm is painted on the door of the agent's office: *Grant* v. *Anderson*, 1892, 1 Q. B. 108. See also *Baillie* v. *Goodwin*, 33 Ch. D. 604.

See also notes to *Rules* 23, 24, 101.

Foreign firm as plaintiff.

Foreign Firm as Plaintiff.—If not "carrying on business within Ontario," a foreign firm cannot sue by its firm name. An action may, of course, as formerly, be brought by all the partners in their individual names, and in such an action a counter-claim may be made against the firm even though an action respecting the subject of the counter-claim could not have been brought within Ontario against the plaintiffs: *Grieudtoveen* v. *Hamlyn*, 8 T. L. R. 231.

Defendants.

Foreign Firms as Defendants.—The individual members of a foreign firm may still, it is presumed, be sued jointly, in any case within *Rule* 25; but, unless carrying on business within Ontario, the firm cannot be sued *in the firm name*, even by leave, under *Rule* 25. *Dobson* v. *Festi*, 1891, 2 Q. B. 92; *Von Hellfeld* v. *Rechnitzer*, 1914, 1 Ch. 748; 110 L. T. 877; where the members of the firm (or any of them: *Indigo Co.* v. *Ogilvy*, 1891, 2 Ch. 31), reside abroad: see *per* Lord Davey in *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 790; and see *Western, etc.*, v. *Perez*, 1891, 1 Q. B. 304, under the former Rules.

The correspondents in New York of an Ontario firm of brokers, who, in certain transactions, share profits with the Ontario firm, are not thereby partners of that firm: *Ryckman* v. *Randolph*, 20 O. L. R. 1. Rule 101.

Where a foreign firm carries on business within Ontario, that circumstance makes it under the *Rules* subject to the jurisdiction of the Court, apparently, whatever the cause of action may be, and it will not be necessary to bring the case within *Rule* 25, or to obtain leave to issue the writ against the firm: *Rule* 101; *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784.

The writ when issued however must be served according to some one of the modes prescribed by *Rule* 101, otherwise the service will not be sufficient to bind the firm and support a judgment against it, which is the only form of judgment obtainable in such an action: see *Rules* 102, 104, 105. Substitutional service in modes not prescribed by *Rule* 101 cannot be ordered: *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 788.

From the reference to the time of the accruing of the cause of action in this *Rule*, and from the clause as to dissolved firms in *Rule* 101, it would seem that a firm dissolved before action may, nevertheless, sue or be sued in the firm name, but in the case of defendants, if the dissolution was known to the plaintiff at the time of the issue of the writ all of the partners within the jurisdiction sought to be made liable must be individually served: see *Rule* 101; *Fisher* v. *Linton*, 28 Ont. 322.

Disclosure of Names and Addresses. — If partners are suing in the name of the firm they must, on the demand of the defendant, disclose the names and place of residence of the partners: *Rule* 14; see notes to that *Rule*. Disclosure by partners.

The names, surnames, additions and residences of the partners composing firms for trading, manufacturing or mining purposes in Ontario, and the name in which they carry on, or intend to carry on business, are required to be registered in the registry office of the registry division in which they carry on business: see *The Partnership Registration Act* (R. S. O. c. 139), ss. 2, 4.

For a form of notice of motion for a statement of the partners under this *Rule* and a form of order: see H. & L. Forms, Nos. 103, 104.

The order for the statement cannot be enforced by attachment under *Rule* 353: *Pike* v. *Keene*, 24 W. R. 322; 35 L. T. 341.

101. Where persons are sued as partners in the name of the firm the writ shall be served either upon any one or more of the partners, or at the principal place within Ontario of the business of the partnership, upon any person having the control or management of the partnership business there; and such service shall be deemed good service upon the firm whether any of the members thereof are without Ontario or not, but in the case of a partnership which has been dissolved to the knowledge of the plaintiff before action, the writ of summons shall be served upon every person within Ontario sought to Service of firms, how to be effected.

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Notice of capacity in which a person is served.

be made liable. Every person so served shall be informed by notice in writing given at the time of service whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In default of such notice the person served shall be deemed to be served as a partner. C.R. 223 and 224.

The Eng. O. 48*a*, rr. 3, 4, is to the same effect.

The service provided for by this *Rule* is of a writ issued against a firm by its firm name under *Rule* 100, *i.e.*, of a firm "carrying on business within Ontario."

Foreign firms.

Foreign Firm.—This *Rule* applies to foreign firms carrying on business within the jurisdiction—but not to foreign firms not so carrying on business. Foreign firms not carrying on business within the jurisdiction must be sued in the names of the partners, each of whom must be served: see H. & L. Jud. Act, 2nd ed., 397; and *Russell* v. *Combefort*, 23 Q. B. D. 526; *Western* v. *Perez*, 1891, 1 Q. B. 304; *Nutter & Co.* v. *Messageries Maritimes*, 54 L. J. Q. B. 527; and *Lysaght* v. *Clark*, 1891, 1 Q. B. 552.

Firm dissolved before action.

Firms Dissolved Before Action.—Notwithstanding the dissolution of a firm, it may still be sued in the firm name: *In re Wenham*, 1900, 2 Q. B. 698.

But the clause of the *Rule* relating to dissolved firms seems practically to render it useless to sue partners in the firm name if the firm has been dissolved; for notwithstanding that a firm existing at the date of the accrual of the cause of action may be sued in the firm name, although it has been dissolved before action, yet every individual member of the firm, resident in Ontario, and sought to be made liable, must also be personally served with the writ; and in such a case partners resident out of Ontario are not personally bound by service on those within Ontario, and cannot be made individually liable unless they are individually made parties and served under *Rule* 25: see *Rule* 105; *Wigram* v. *Cox*, 1894, 1 Q. B. 792; 70 L. T. 656; *Shepherd* v. *Hirsch & Co.*, 45 Ch. D. 231, and "*Service on a partner*," *infra*.

When a partner dies before action brought against the firm, a judgment against the firm can only be enforced against the surviving partners, and the partnership assets: *Ellis* v. *Wadeson*, 1899, 1 Q. B. p. 718; 80 L. T. 508; and the same result will follow where a partner dies between the service of the writ and the trial of the action and judgment: *Ib.*, pp. 718-19.

Where a partnership, unregistered, existed between A., B. and C., under the style A. & Co., and A. absconded, and three days later C. made a secret assignment of his interest in the business to B., and two days thereafter, before the announcement was made public, C. was served with a writ in an action against the firm by its firm name, of which proceedings B. was aware, it was held that the service was good: *Bank of Hamilton* v. *Blakeslee*, 9 P. R. 130.

Mode of service of firms.

Service.—The service provided for is of a writ issued against a firm by its firm name under *Rule* 100, *i.e.*, of a firm "carrying on business within Ontario."

In the case of an action against a foreign firm *as a firm*, or against a firm, some members of which do not reside within Ontario, service must be effected as in this *Rule* mentioned, and in the case of a firm, none of whose members resids within Ontario, no other mode of substitutional service than upon the manager as mentioned in this *Rule* is authorized: *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 788; 70 L. T. 443. Rule 101.

It does not seem to be clear whether a partner within Ontario may be served for the firm under this *Rule*, by serving him, not personally, but substitutionally: see *Shillito* v. *Child*, W. N. 1883, 208; *Croyden* v. *Jackson*, 3 T. L. R. 650; *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B., at pp. 792 and 790; and 70 L. T. p. 445. Where a partner is only substitutionally served, it is doubtful whether execution could issue against him, without leave, if he does not appear in the action: see *Jackson* v. *Litchfield*, in note to *Rule* 105.

Service on a Partner.—A service *within Ontario* only is what is contemplated: see last clause of *Rule* 106. Service on a partner temporarily within Ontario will probably suffice: see *Pollexfen* v. *Sibson*, 16 Q. B. D. 792; *Shepherd* v. *Hirsch & Co.*, 45 Ch. D. 231. These cases are probably again authorities on this point though decided under the repealed *Rules* and overruled in *Western* v. *Perez*, 1891, 1 Q. B. 304, for reasons not applicable under the new *Rules*. Service on a partner in Ontario.

The words used in this *Rule* are "be served on any one or more of the partners," without any express qualification that the partners served must be within the jurisdiction, but as under the old *Rules* it was held that words equally unqualified must be confined to persons within the jurisdiction of the Court, the same rule of construction will probably be applied to this *Rule*: see *Russell* v. *Cambefort*, 23 Q. B. D. 520; *St. Gobain, etc.*, v. *Hoyermann's Agency*, 1893, 2 Q. B. 102; *Rule* 105.

Furthermore, service out of Ontario is regulated by *Rule* 25; see notes to that *Rule*, and by the terms of *Rule* 101, leave to issue a writ is not necessary as against the members of the firm who are out of Ontario, which may point to a service not requiring to be scrutinized under *Rule* 25, by reason of the service being within Ontario: see also the last clause of *Rule* 106.

In a case within *Rule* 25 an order may be made for service of any individual partner so as to reach assets of his in Ontario under *Rule* 105 (see last clause of that *Rule*); but such service will probably only bind the partner served: see *Russell* v. *Cambefort*, and other cases *supra;* and it would seem that such an order can only be made against partners individually defendants: see *Rule* 105 (2), and *Dobson* v. *Festi*, 1891, 2 Q. B. 92; and *quære* whether any order binding *upon the firm* can be made other than for service of all the partners: *Ib.* If all partners are to be served out of the jurisdiction, no object is gained by suing the firm by its name rather than the partners individually: see *per Lindley*, L.J., in *Western* v. *Perez*, 1891, 1 Q. B., at p. 314.

If the person served as a partner is not a partner, the service may be set aside with costs on the application of the firm: *Nelson* v. *Pastorino*, 49 L. T. 564.

Service on Manager.—Service otherwise than on a partner, must be made upon some person having the control or management of the partnership business at its principal place of business in On a manager of a business in Ontario.

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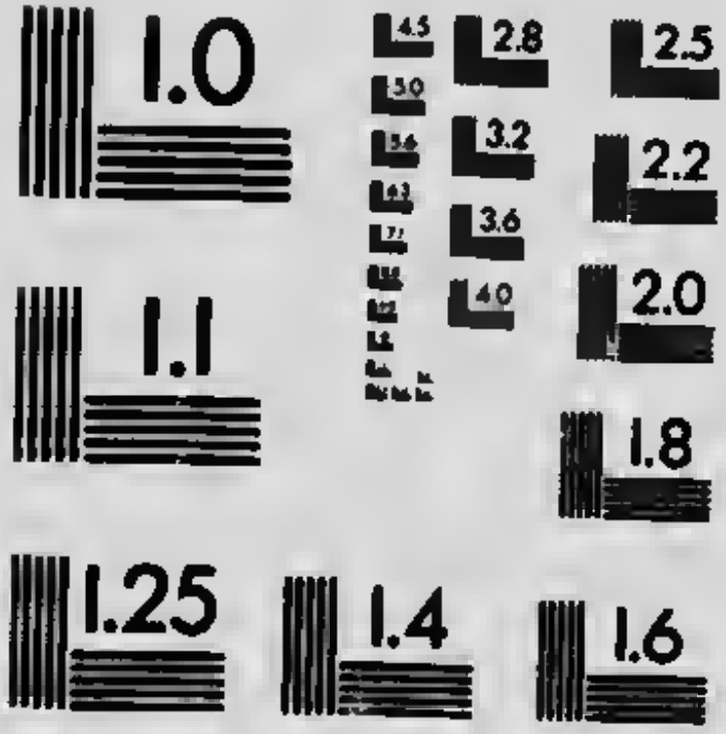

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Rule 102.

Ontario. The Eng. Rule adds "at the time of such service" and that must be the meaning of this *Rule*.

The substitutional service on a manager, thus authorized, is good service upon which to obtain judgment and execution against the firm.

As to what constitutes "having the control or management of the partnership business": see *Baillie* v. *Goodwin*, 33 Ch. D. 604; *Heinemann* v. *Hale*, 1891, 2 Q. B. 83; *Grant* v. *Anderson*, 1892, 1 Q. B. 108; *Worcester Banking Co.* v. *Firbank*, 1894, 1 Q. B. 784, in notes to *Rule* 100. Service on a receiver or manager appointed by the Court of the business of a firm in liquidation, will not bind the firm: *Re Flowers*, 1897, 1 Q. B. 14. Where a manager is served, notice in writing that he is served as manager must be given: *Rule* 101.

As to when execution may be issued against partners individually, see *Rule* 105.

Notice.

The notice required by this *Rule* is for the purpose of enabling the person served to konw whether it is intended to charge him as a partner under *Rule* 105, and to enable him, or the firm, to dispute that he is a partner. If he is only manager, and not a partner, he need not appear where the notice informs him that he is served only as having control or management of the business: *Rule* 103.

Form of notice.

For a form of notice: see H. & L. Forms, No. 74.

If served as a partner the delivery of a notice to that effect is not necessary; the *Rule* provides that in default of notice the person served is to be deemed to be served as a partner: see *Telfer* v. *Dun*, 2 O. W. N. 1146.

Where the notice is that he is served as a partner, or where no notice is given, and the person is therefore deemed to be served as a partner, he may, and probably, if not a partner, should, appear under protest denying that he is a partner: *Rule* 104. If he does not appear under protest, or otherwise, it may be that execution may be issued against him under *Rule* 105 (*c*). Probably a motion may be made by the firm, at any rate, to set aside service effected upon a person as a partner, where he is not a partner: *Nelson* v. *Pastorino*, 49 L. T. 564; and see *Gibson* v. *Le Temps*, *infra*.

It may not always be possible to ascertain before service the name of the person in charge of the business, and the notice though required to be delivered at the time of service need not be directed to any one, and need not contain anything but the notification of the capacity in which the person is being served with the writ.

Omission of notice.

Where no such notice is given, and the person served is not a partner, the service is defective, and may be set aside on the application of the firm: *Gibson* v. *Le Temps*, 6 O. L. R. 690; but not after judgment has been obtained after appearance by the firm: *Ib.*

A person served as a partner who denies that he is a partner may be examined generally for discovery. If it turns out that he is not a partner his examination cannot be used as evidence except against himself: *Telfer* v. *Dun*, *supra*.

Appearance of partners.

102. Persons sued as partners in the name of the firm shall appear individually in their own names, but all

subsequent proceedings (*a*) shall continue in the name of the firm. C.R. 225. Rule 102.

Same as Eng. (1891) O. 48c, r. 5.

(*a*) These words should be confined to "subsequent proceedings" by the plaintiff: *Longmon* v. *Hudson*, 14 P. R. 215; in that case it was held that a defence and counter-claim by the defendant, individually, is regular, at any rate in an action against a firm after its dissolution; but see *Ellis* v. *Wodeson*, *infra*, p. 496.

Appearance.—No appearance is to be entered for the firm. Partners, whether served personally or not, must appear individually within the time limited for appearance computed from the time of a valid service of the firm under *Rule* 101; and the appearance of a partner is an appearance on behalf of the firm so as to found proceedings against the firm under *Rule* 57; *Lysoght* v. *Clork*, 1891, 1 Q. B. 556. Probably an appearance under protest under *Rule* 104 will not be sufficient for that purpose. Appearance.

Semble, an appearance not under protest is an admission that the person appearing is a partner: see *Dovies* v. *André*, 24 Q. B. D. 598; 63 L. T. 151; *Zuccato* v. *Young*, 38 W. R. 474, under the former practice.

Semble, also, that a person claiming to be a partner may, after a service of the firm under *Rule* 101, appear, notwithstanding that his claim to be a partner is disputed: see *Robinson* v. *Ward & Son*, 36 Sol. Jour. 415.

Where defendants were carrying on business in the name of a non-existent limited company styled "Liberal Opinion Limited," and were sued in that name, it was held that under this *Rule* the defendants were bound to appear in their individual names, and that an appearance entered for "Liberal Opinion Limited" was a nullity, and the solicitor so entering the appearance was held to be personally liable, to be ordered to pay to the plaintiff all costs lost by reason of his so doing: *Simmons* v. *Liberal Opinion*, 1911, 1 K. B. 966; 104 L. T. 264; but an appearance entered in the name of a company which had been chartered, but had not qualified itself to do business, was held not to involve the solicitor in such a liability: *Campbell* v. *Taxicabs Ferralls Ltd.*, 27 O. L. R. 111.

Time for Appearance.—The time for appearance, where the writ is served on the manager, and also on a partner personally, runs from the date of the last of such services: see *Alden* v. *Beckley*, 25 Q. B. D. 543. Time for.

Solicitor's Authority to Enter Appearance.—Where a partner has not been served, but an appearance is entered for him by the instructions of a co-partner, who has been served on behalf of the firm, such appearance, if unauthorized, will be set aside on the prompt application of the partner in whose name it was entered: *Mason* v. *Cooper*, 15 P. R. 418; but ordinarily instructions from a managing partner to defend the action for the price of goods supplied to the firm in the ordinary course of business is good authority to a solicitor to enter an appearance for all the partners: *Tomlinson* v. *Broadsmith*, 1896, 1 Q. B. 386; *Court* v. *Berlin*, 46 W. R. 55; 1897, 2 Q. B. 396. Solicitor's authority.

Rules 103, 104.

Infant partner.

Where one partner is an infant, and appears by a guardian *ad litem*, the appearance is proper: *Harris* v. *Beauchamp*, 1893, 2 Q. B. 534; 69 L. T. 373; but as to the form of the judgment: see note to *Rule* 104.

Signing judgment.

After appearance by any partner the plaintiff cannot sign judgment against the firm until the defence of every partner appearing is disposed of: *Adam* v. *Townend*, 14 Q. B. 103; *Jackson* v. *Litchfield*, 8 Q. B. D. 474; *Munster* v. *Cox*, 10 App. Cas. 680.

Defence.

Defence.—As to the effect of partners severing in their defence, and not raising the same defence: see *Cropper* v. *Smith*, 26 Ch. D. 700; 51 L. T. 733; and *Smith* v. *Cropper*, 10 App. Cas. 249.

Each partner appearing is entitled to put in a defence for the firm: *Taylor* v. *Collier*, 30 W. R. 701; *Ellis* v. *Wadeson*, 1899, 1 Q. B. p. 171; 80 L. T. 508, though they should endeavour by agreement to put in but one statement of defence: *Ellis* v. *Wadeson*, *supra*; *Arnoldi* v. *Dawes*, 2 O. W. N. 1019; and the defence must be in the name of the firm, even though, pending the action, the firm is dissolved by the death of one of the partners, and the defence is delivered by the surviving partner: *Ib.*; but see *Langman* v. *Hudson*, 14 P. R. 215.

No appearance except by partners.

103. Where a writ is served upon a person as the person having the control or management of the partnership business an appearance by him shall not be necessary unless he is a member of the firm. C.R. 226.

Same as Eng. (1891) O. 48*a*, r. 6.

An appearance by a person describing himself as manager should be refused by the officer unless it is under protest pursuant to *Rule* 104.

This *Rule* assumes that the person served will be notified as provided by *Rule* 101 that he is served, not as a partner, but as a person having the control or management of the business. If such notice is not given, then the person served, although he be in fact only a manager, is to be deemed to have been served as a partner: *Rule* 101, and, as such, may be found liable to execution under *Rule* 105 (1) *c*., and therefore in such a case an appearance under protest under *Rule* 104 is necessary.

Appearance under protest of person served as partner.

104. A person served as a partner may (1) enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form; or (2) enter an appearance not only denying that he is a partner, but also disputing the plaintiff's claim. C.R. 227.

Same as in Eng. (1891) O. 48*a*, r. 7.

Form.—For a form of appearance under protest: see H. & L. Rule 104. Forms No. 107.

Contesting Denial of Partnership.—If the plaintiff insists that the person served is a partner, he may, it would seem, move in Chambers to strike out the appearance, shewing that the person so appearing is a partner; upon such a motion probably an issue may be directed to determine the question: see *Worcester Banking Co.* v. *Trotter*, 3 T. L. R. 709; and *Davis* v. *Morris*, 10 Q. B. D. 436 (cases of an issue directed under *Rule* 105). This course will probably be expedient where there is no other means of serving the firm pursuant to *Rule* 101. Denial of partnership.

Re-service of Firm.—The plaintiff may leave for decision in the action (probably under *Rule* 105 (2), when execution is sought) the question whether the person served is a partner, and may serve the writ in some other way pursuant to *Rule* 101, so as to bind the firm. Re-service of firm.

Where an action was brought against a firm, and one of the partners individually, and the partner alone appeared, but separate defences were afterwards delivered by the partner, and the firm, it was held that the defence of the firm could not be struck out: *Taylor* v. *Collier & Co.*, 30 W. R. 791; W. N. 1882, 83; 51 L. J. Chy. 853. The firm is sued, though appearance must be by the partners individually, and, as regards any claim against the firm, the defence to be filed must be for the firm, and in the firm's name: *Ellis* v. *Wadeson*, 1899, 1 Q. B. 714, 720. Defence.

Judgment.—If one of several partners does not appear, judgment cannot be entered against him individually. Judgment if recovered must follow the writ and be against the firm: *Jackson* v. *Litchfield*, 8 Q. B. D. 474; *Adam* v. *Townend*, 14 Q. B. D. 103; (see the discussion of this case in 17 L. J. 324); *Firmin* v. *International Club*, 5 T. L. R. 612. But where one of the partners is an infant, and the action is on contract, the judgment given against the firm should expressly except the infant: *Harris* v. *Beauchamp*, 1893, 2 Q. B. 534; 69 L. J. 373; *Re Beauchamp*, 1894, 1 Q. B. 1; *S. C., sub nom. Lovell* v. *Beauchamp*, 1894, A. C. 607. Judgment against firm.

In *Munster* v. *Railton*, 10 Q. B. D. 475, 11 Q. B. D. 435 (affirmed in the House of Lords, 10 App. Cas. 680) an action was brought against a firm, "R. & Co."; R. appeared individually, and the plaintiff then delivered a statement of claim against "R. sued as R. & Co." and obtained judgment. Afterwards discovering that C. was a member of the firm of "R. & Co.," plaintiff was not allowed to amend his judgment to make it conform to the writ and be a judgment against the firm, as he had chosen to sue R. individually.

Where a partner is served, after a service on a manager or other person under *Rule* 101, judgment by default of appearance cannot be signed until the requisite time has expired after the second service: *Alden* v. *Beckley*, 25 Q. B. D. 543.

The right to issue execution against individual partners is regulated by *Rule* 105. Execution.

Rule 105.

Execution of judgment against a firm.

105.—(1) Where a judgment or order is obtained against a firm, execution may issue against the property of

(*a*) The partnership;

(*b*) Any person who has by his appearance or notice, under Rule 14 or pleading, admitted that he is, or who has been adjudged, to be a partner;

(*c*) Any person who has been served as a partner with the writ of summons and has failed to appear.

Leave to issue execution.

(2) If the party who has obtained the judgment or order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply for leave so to do; and the Court may give such leave if the liability be not disputed, or, if disputed, after such liability has been determined in such manner as the Court may direct. C.R. 228.

To same effect as Eng. (1891) O. 48*a*, r. 8.

Execution of judgment against a firm and the partners.

This *Rule* provides the mode of realizing a judgment against a firm. Where a partner has been made a party individually, any judgment awarded against him may of course be enforced against him in the ordinary way.

Where the writ is issued against partners, not individually, but in the name of the firm, service of the writ on one or more will be sufficient: *Rule* 101; but the judgment must follow the writ and be against the firm: *Rule* 102. Therefore, if no appearance is entered judgment cannot be entered against any of the individual partner even though they may have been served with the writ. Execution may, however, under this *Rule*, be issued, without leave, in the cases mentioned, against individual partners, upon the judgment against the firm: *Jackson* v. *Litchfield*, 8 Q. B. D. 474.

Infant partner.

Where one of the partners is an infant, under a judgment for debt against the firm, execution may be issued against the firm so as to bind all the partnership assets, and the assets of the adult partners, but the infant partner is not personally bound by the judgment, and execution cannot issue against him individually, although he may have been personally served with the writ: *Harris* v. *Beauchamp*, 1893, 2 Q. B. 534; whether this is so in case of a judgment for a tort has not been decided.

Any appropriate form of execution may be issued to reach the property liable under this *Rule*, and it is presumed that where the property can only be reached by a receiver or other proceedings by way of equitable execution, the necessary order may be made; and see *Rule* 545.

Married woman.

Where a married woman is a partner, execution as against her individually can only be against her separate estate as in the case

of a judgment against her individually: see *re Frances Handford*, 1899, 1 Q. B. 566; *Gibson* v. *Le Temps*, 8 O. L. R. 707, and *supra*, p. 483 *et seq.* Rule 105.

The plaintiff is not confined to his remedy against the individuals by execution under this *Rule*, but may bring fresh actions against the partners individually upon the judgment obtained against the firm: *Clark* v. *Cullen*, 9 Q. B. D. 355, and a judgment against a firm is no bar to an action against the partners individually on a promissory note given as a collateral security for the same debt: *Banque Provinciale* v. *Arnoldi*, 2 O. L. R. 624. Action on judgment.

Under an execution against an individual partner the sheriff cannot sell the interest of the partner in the partnership assets. He can seize the partnership goods and sell the execution debtor's share, whatever may be the difficulties that arise thereafter; and the Judicature Act has made no difference in this respect: *Harrison* v. *Harrison*, 14 P. R. 436; but it is only the partner's interest in the tangible property of the partnership that can thus be sold: *Rennie* v. *Quebec Bank*, 1 O. L. R. 303; 3 O. L. R. 541; the partner's interest in the goodwill or book-debts or anything else which cannot be seized by the sheriff cannot be reached in that way: *Helmore* v. *Smith*, 35 Ch. D. 436; 56 L. T. 72; but see *The Execution Act* (R. S. O. c. 89), s. 20. Exigible property.

Clause 1 (c).—Person Served as Partner and Failing to Appear.—The service contemplated is such service as is provided for by *Rule* 101; and "who has been served" would appear to mean "personally" or otherwise as an individual may be served under the *Rules*: *Jackson* v. *Litchfield*, 8 Q. B. D. 478; 46 L. T. 519. Clause 1 (c).

A person so served, if he is served otherwise than as a partner, must be so notified, and if no notice is given he is deemed to be served as a partner (*Rule* 101) and must govern himself accordingly. If where so served, or deemed to be served, as a partner, he fails to appear, it would seem that he may be proceeded against under this *Rule* (clause *c*). Under the present *Rules* the doubt referred to in *Davies* v. *André*, 24 Q. B. D. 598, as to whether a person was served as a partner or only as manager, will not arise.

Execution by Leave.—This clause (2), only applies where there is in truth a partnership, which is bound by the judgment, in consequence of service upon one of its members, or its manager: see *Standard Bank* v. *Frind*, 15 P. R. 438. It does not apply where the plaintiff seeks to obtain, on a judgment against a firm, execution against a person not actually a partner whom he has not served as a partner with the writ, but whom he claims to treat as a partner by estoppel: see *per* Osler, J.A., in *Ray* v. *Isbister*, 22 Ont. App. 16. Clause (2). Execution against partners by leave.

Where the action is between a firm and one or more of its members, or between firms having one or more members in common, execution cannot issue at all without leave: see *Rule* 107.

A judgment against a firm is not conclusive of the liability of a person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner, nor has been served with the writ. Execution in such case will not be allowed to issue without a trial of the liability under the last clause of the *Rule*: *Ex parte Young*, 19 Ch. D. 124; 18 C. L. J. 119.

The Master in Chambers cannot under *Rule* 222, determine that a person was a partner without directing the trial of an issue if

Rule 106.

dealred: *Standard Bank* v. *Frind*, 14 P. R. 355, overruling *Tennant* v. *Monhard*, 12 P. R. 619.

Form of issue.

An issue in wbicb tbe question was whetber the person alleged to be a partner "was, or bad beid bimself out as, a partner in tbe defendant firm" was beld to bave been rigbtly ordered: *Davis* v. *Hyman & Co.*, 1903, 1 K. B. 854; 88 L. T. 284.

Tbe issue will only ba as to tbe question of tbe partners in the firm against which judgment bas been recovered; tbe validity of the judgment will not be allowed to be put in issue by a person who disputes his liability as a partner: *Gibson* v. *Le Temps*, 6 O. L. R. 690.

A statutory declaration of partnersbip registered under *The Partnerships Registration Act* (R. S. O. c. 139), is incontrovertible: *S. C.*, 8 O. L. R. 707.

Tbe execution is not limited to partners at tbe date of tha writ, but it is a question of fact in each case wbethe.· tbe persons against wbom it is desired to issue execution are partnera in tha firm against wbicb tbe judgment bas been obtained and liable to execution having regard to *Rules* 101, 106: see *Davis* v. *Morris*, 10 Q. B. D. 436.

Wbere an individual bas entered an appearance in an action against a firm, tbera must be a novation to render bim liable for a debt contracted befora be was a member, tbe fact that tbe individual bad undertaken to indemnify the firm is not enough: *Cripps* v. *Tappin*, 1 Cab. & El. 13. See *Scarf* v. *Jardine*, 7 App. Cas. 345.

Leave must also be obtained to issua execution wbenever a partner sues, or is sued, by a firm of whicb be is a partner, or wherever a plaintiff and defendant firm bave common partnera: sea *Rule* 107.

Judgment against firm, effect of.

106. A judgment against a firm in the firm name shall not release, render liable or affect any member thereof who was out of Ontario when the writ was issued and who has not appeared thereto, unless he has been sued either within Ontario or in accordance with the Rules respecting service out of Ontario, but this provision shall not prevent the enforcement of the judgment against partnership property. C.R. 228, *part*.

Under tbis *Rule* a judgment against a firm altbough it binds tbe firm and its property, and to that extent binds all tbe partners: see *Heinemann* v. *Hole*, 1891, 2 Q. B. at p. 91, citing Lindley, L. J., in *Western, etc.*, v. *Perez*, 1891, 1 Q. B. 304, does not release or render liable any member tbereof in bis individual capacity, wbo was out of Ontario when tha writ issued, and wbo has not appeared thereto, unless be bas been personally sued. The object of tbe *Rule* is to prevent tbe application of tbe rule of law bereafter mentioned.

Action against joint contractors.

Joint Contractors.—A judgment obtained against some joint contractors is ordinarily a bar to an action for the debt against others not sued: *King* v. *Hoare*, 13 M. & W. 494, and partners are sucb joint contractors: *Kendall* v. *Hamilton*, 4 App. Cas. 504. See *Re Hodgson, Beckett* v. *Romsdale*, 31 Ch. D. 177; 34 W. R. 127; 55 L. J. Chy. 241; *Cambefort* v. *Chapmon*, 19 Q. B. D. 229. In *Hoore* v. *Niblett*, 1891, 1

Q. B. 751, it was held that the fact that one of the joint contractors was a married woman contracting in respect of her separate property, made no difference in the application of the rule; but the rule does not apply in the case where the judgment against one joint contractor is on a contract by him alone for payment of the joint debt, such as a cheque given by him alone: *Wegg Prosser* v. *Evans*, 1894, 2 Q. B. 101; 1895, 1 Q. B. 108, overruling *Cambefort* v. *Chapmon*, *supra*: see *Hough Lithographing Co.* v. *Morley*, 20 O. L. R. 484. Rule 106.

So also a judgment against one of two tortfeasors is a bar to an action against the other, but an interim injunction followed by a compromise whereby the action is stayed against him is not a bar to an action against the other: *Kelly* v. *Hammond*, 2 T. L. R. 804; and a judgment against one of two joint debtors under former C. RR. 587, 603 and 609, was held not to be a bar to the action as against the other joint debtor who had obtained leave to defend: *Dueber Watch Case Manfg. Co.* v. *Taggart*, 26 Ont. App. 295; 30 S. C. R. 373; *Weoll* v. *James*, 68 L. T. 515; and the same rule would probably be applied to a judgment against a defendant on a specially indorsed writ under these *Rules*: see *Rule* 59; but where two joint contractors were sued, and judgment was entered, by consent, against one, it was held that the plaintiff could not subsequently bring on the action for trial, and obtain judgment against the other: *McLeod* v. *Power*, 1898, 2 Ch. 295; 79 L. T. 67. A defendant who relies on the recovery of judgment against another joint contractor as a defence should plead it: *Ib.* Joint tort-feasors.

The release of one of two joint debtors under a joint, or joint and several obligation operates as a release of his co-debtors: *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15; *Bogart* v. *Anderson*, 8 O. L. R. 261; and this rule of law applies as much to a judgment debt as to any other obligation: *Re E. W. A., a Debtor*, 1901, 2 K. B. 642. Where judgments were signed by default of appearance against some defendants, joint contractors, but judgments by default were not warranted by the practice, and the action was proceeded with to trial against other defendants only, it was held that, by proceeding against such other defendants without taking any warranted proceedings against the defendant who failed to appear, the plaintiff must be considered as having abandoned his action against him: *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15; and a compromise having been made with some of the defendants who did not appear in respect of a debt for which judgment had been obtained against others of the defendants, further proceedings on the judgment were stayed: *Ib.*; but see *Edwards* v. *Hood-Barrs*, 1905, 1 Ch. 20; 91 L. T. 766. Release of one of two joint debtors.

Where a judgment has been recovered against one of two joint contractors in ignorance of the liability of the other of them, and without joining him as a party in the action: *Hammond* v. *Schofield*, 1891, 1 Q. B. 453, or against an agent in ignorance of his having acted as agent for an undisclosed principal: *Toronto Dental Mfg. Co.* v. *McLaren*, 14 P. R. 89, the judgment will not be vacated on the application of the plaintiff in order to enable him to join the other joint debtor, or undisclosed principal, as a defendant, even on the consent of the defendant against whom the judgment has been entered: *Hammond* v. *Schofield*, *supra*. Effect of judgment against one of several joint debtors.

The above rules of law would, however, seem to be modified by *Rules* 101 and 106, so far as those members of a partnership are concerned who are out of the jurisdiction.

Rules 107, 108.

Application of Rules to actions between co-partners.

107. Rules 100 to 106 shall apply to actions between a firm and one or more of the members and to actions between firms having one or more members in common, if the firm or firms carry on business within Ontario, but execution shall not issue in such actions without leave, and, on application for leave, all such accounts and inquiries may be ordered and directions given as may seem just. C.R. 230.

Same as the Eng. O. 48*a*, r. 10.

Although *Rule* 106 is made applicable to the class of actions mentioned in this *Rule*, yet this *Rule* shews that in no case coming within it is execution to issue without leave.

The *Rule* aplies to cases where a firm sues a partner of the firm; or a partner sues a firm of which he is himself a member; or where a plaintiff and defendant firm have common partners.

Party carrying on a business under a name not his own, how to be sued.

108.—(1) Any person (whether a British subject or not, and whether residing within or without Ontario) carrying on business within Ontario in a name or style other than his own name, may be sued in such name or style.

Service.

(2) The writ may be served upon the person so carrying on the business if he be within Ontario, or at the place of business within Ontario (or if there are several such places, at the place within the county in which the cause of action arose), upon any person having the control or management of the business there.

Notice required.

(3) The person upon whom the writ is served shall be informed by notice in writing, given at the time of service, whether he is served as the person carrying on the business or as a person having the control or management of it, and in default of such notice he shall be deemed to be served as the person carrying on the business.

Appearance.

(4) The person so sued shall appear in his own name, but all subsequent proceedings shall continue in such name or style.

Appearance under protest, when necessary.

(5) A person served as the person carrying on the business may enter an appearance under protest denying that he is the person so carrying on the business, but such appearance shall not preclude the plaintiff from otherwise serving the person sued or from obtaining judgment in default of appearance in the ordinary form by the person so sued.

Rule 108.

Judgment, how enforced.

(6) Any judgment or order in the action may be enforced by execution against

(*a*) The property of the person so sued, used or employed in or in connection with the business.

(*b*) Any property of a person who by his appearance or by notice under Rule 14, has admitted that he is or has been adjudged to be the person carrying on the business, or has been served with the writ as the person carrying on the business and has failed to appear.

Leave to issue execution, when necessary.

(7) When judgment has been signed for default of appearance and the writ has not been personally served upon the person whom the plaintiff alleges to be carrying on the business, the Court may give leave to issue execution against such person if his liability be not disputed, or, if disputed, after it has been determined in such manner as the Court may direct. C.R. 231, *amended*.

See Eng. (1891) O. 48a, r. 11.

Scope of Rule.

The present *Rule* is an adaptation of the procedure provided by *Rules* 101-105 in the case of a partnership firm, to the case of a business carried on by an individual in some name or style other than his own. It only authorizes an action against a person in his trade name in connection with the business carried on under that name: *McIver* v. *Burns*, 1895, 2 Ch. 630; 73 L. T. 39.

The *Rule* by its express terms applies to a person not a British subject residing out of the jurisdiction, but carrying on business within the jurisdiction in a name or style other than his own name. To such a case the Eng. R. has been held not to apply: *St. Gobain Co.* v. *Hoyermann's Agency*, 1893, 2 Q. B. 96; 69 L. T. 329; 4 R. 441; see also *De Bernales* v. *N. Y. Herald*, 68 L. T. 658; 1893, 2 Q. B. 96 (*n*).

Person carrying on business under name not his own.

A business carried on under such names as "Madame Louise" or "Waukenpbast," and not being the title of a corporation, will therefore be within the present *Rule*; so also will probably a business carried on under such circumstances as existed in *Standard Bank* v. *Frind*, 15 P. R. 438; *St. Gobain* v. *Hoyermann*, *supra*. In *De Bernales* v. *New York Herald*, 1893, 2 Q. B. 96 (*n*); 68 L. T. 658, it was held that "*The New York Herald*" was not a firm name, and that it was the name of the thing sold and not the name under which the proprietor trades. The *Rule* probably does not affect that decision. The *Rule* would also seem not to include the case of an ecclesiastical order, some of whose members reside within Ontario, as in *Golding* v. *Order of La Sainte Union, etc.*, 67 L. T. 605; 4 R. 93.

This *Rule* does not apply where the person so carrying on business has become a lunatic: *Rule* 21, in such case applies: *Fore Street Warehouse Co.* v. *Durrant & Co.*, 10 Q. B. D. 471.

Rule 106.

it will be noticed that a person carrying on business in the manner described, may be sued in the name or style adopted by him in his business, but he cannot sue in that name; he must sue in his own name: see *Mason* v. *Mogridge*, 8 T. L. R. 505; but where a plaintiff named "J. W. Lang," carried on business alone as "J. W. Lang & Co.," and sued by that name it was held that he was suing in his own name, as "and Co." was surplusage and might be struck out: *Lang* v. *Thompson*, 16 P. R. 516.

As to what is meant by "carrying on business": see notes to *Rule* 100.

The *Rule* constitutes an exception to *Rule* 25.

Service of writ.

Service of Writ.—The *Rule* (clause (2)) prescribes the method of service of a person sued under any name or style other than his own name. (1) The writ may be served in Ontario upon the person sued, or (2) it may be served upon any person having the control or management of the business in Ontario of the person sued. Where the latter mode of service is adopted the person served must be notified in writing that he is served as being the person having the control or management of the business: clause (3). Where the person sued is resident abroad, it would seem that if he is to be personally served with the writ or notice of the writ, the provisions of *Rules* 28, 29, would have to be observed; but not the provisions of *Rules* 25-27; C. R. 231 (2), expressly dispensed with leave to issue the writ, but the omission of that provision does not appear to render leave necessary. In such a case it would seem that the time for appearance should be more than the ordinary 10 days allowed in the case of service within the jurisdiction, and application should be made for an order regulating the time for appearance in such a case.

Notice requisite.

On service of the writ notice is to be given whether the person served is so served as the person carrying on the business, or as a person having the control or management thereof; and where no notice is given, the person served is to be deemed to be served merely as a person having control, and no personal liability will attach to him, and no judgment or execution can be signed or issued against him if he does not appear. If he appear, otherwise than under protest, he admits he is the person carrying on the business, and, if judgment goes against him, is liable to have execution issued against him in his own name, as well as in the name in which he is sued. In this respect this *Rule* varies from *Rule* 101, where, in the absence of such notice, the person served is to be deemed to be served as a partner.

Appearance.

Appearance.—Appearance must be entered by the person sued in his individual name: see clause (4), and *Taylor* v. *Collier*, 30 W. R. 701. C. R. 231 (3), provided that a person served merely as having the control or management of the business need not appear; but that provision has been omitted as unnecessary.

Protest.

An appearance under protest by a person served (see clause 5) denying that he is the person carrying on the business, will of course be entered by him in his own name.

C. R. 231 (5) authorized an application to compel disclosure of the person who at the time of the accruing of the cause of action was the person carrying on the business; this provision has been omitted in these *Rules*: see, however, *Rule* 14, and *Rule* 2.

See also notes to *Rules* 103-106.

Judgment.—Judgment must follow the writ and be against the defendant by the name or style by which he is described in the style of the action. Rule 100. Judgment.

Execution.—Execution may be enforced against the property employed in the business, wherever there has been a valid service under clause (2), i.e., either upon the person carrying on the business within Ontario), or at the place of business within Ontario upon some person having the control or management of the business there. To enforce the execution against other property as being that of the owner of the business, it would seem that there must either be proof, or what amounts to an admission, that the owner of the property is the owner of the business, or proof that the owner of the property has had an opporunity of disputing that he is the owner of the business, he therefore (1) must have been adjudged to be the owner of the business; or (2) must have appeared in his own name (not under protest), and so have admitted the fact, or (3) must have been personally served and failed to appear. Execution.

Where judgment has been obtained by default on a service not on the owner personally, an application under clause (7) will be necessary where it is desired to reach property not used or employed in, or in connection with, the business: see also *Standard Bank* v. *Frind*, 15 P. R. 438, under the former Rules.

CHAPTER VII.

PLEADINGS.

General Provisions.

Statement of claim.

109.—(1) The plaintiff shall state the nature of his claim and the relief sought in a pleading to be called the Statement of Claim, and may therein alter, modify, or extend his claim as endorsed upon the writ. C.R. 242 and 244.

(2) When a defendant has not appeared and the statement of claim alters, modifies, or extends the relief claimed, the plaintiff shall not be entitled to judgment on default of defence unless the statement of claim is served personally in pursuance of an order for substitutional service. *New.*

Former C. R. 171 enabled a defendant to dispense with a statement of claim, but there is no such provision in these *Rules*.

Statement of claim, when necessary.

A statement of claim is necessary even where no appearance is entered, whenever the case is one in which the plaintiff can only obtain judgment by motion for judgment: see *Rules* 44, 110; *Minton* v. *Metcolfe*, 46 L. J. Chy. 584; *Hunter* v. *Wilcockson*, 9 P. R. 305.

It is not necessary where a writ is specially indorsed: see *Rules* 111, 37; or where a defendant only disputes the amount claimed: see *Rule* 50; or the plaintiff in default of appearance is entitled to a final judgment: *e.g.*, see *Rule* 40.

Special indorsement.

Where the writ is specially indorsed, the indorsement becomes the only pleading necessary; and it stands as and for a statement of claim, and becomes amendable as a statement of claim would be under *Rule* 127: *Confederation Life* v. *Moore*, 6 O. L. R. 648. In ordinary cases the statement of claim will be framed in accordance with the Form No. 10, and see H. & L. Forms, No. 123.

Enlarging, or varying, claim.

The latter part of clause (1) is to the same effect as Eng. (1883) R. 228, passed in affirmance of *Lorge* v. *Large*, W. N. 1877, 198. See also *Smith* v. *Richardson*, 4 C. P. D. 112; *Johnson* v. *Palmer*, *Ib.* 258; *Eyre* v. *Cox*, 24 W. R. 317; *Wilmott* v. *Freehold*, 51 L. T. 551.

The construction placed upon the corresponding Eng. Rule has been that it applies only where a statement of claim is actually delivered, not where it is constructively delivered, under Eng. (1883) R. 206 (see *Rules* 199, 200), in case of non-appearance, by filing with the proper officer.

And this is the effect of clause (2) of this *Rule*, viz., that if a statement of claim is served under *Rules* 199 or 200, by posting up a copy in the proper office, where a defendant does not appear, or give an address for service, the plaintiff cannot in his statement of claim

enlarge his claim as indorsed on the writ: *Law* v. *Philby* (2), 35 W. R. 450; *Gee* v. *Bell*, 35 Ch. D. 160; see also *Foord* v. *Brown*, 20 L. R. Ir. 185; *Stone* v. *Smith*, 35 Ch. D. 188. Rule 109.

Probably this *Rule* only expresses with a modification what was formerly decided, viz., that the plaintiff will not be strictly confined to the particulars mentioned in the writ: see before the Jud. Act, *Sowden* v. *Sowden*, 4 P. R. 276; *Huggins* v. *Guelph Borrel Co.*, 8 P. R. 110; and after the Jud. Act in *Johnson* v. *Palmer*, 4 C. P. D. 258; *Large* v. *Large*, W. N. 1877, 198; *Loinchberry* v. *Dunn*, 9 C. L. T. 412.

An absolutely distinct and different cause of action from any mentioned in the indorsement on the writ may not be set up in the statement of claim: *United Telephone Co.* v. *Tosker*, 59 L. T. 852; *Cave* v. *Crew*, 68 L. T. 254; 41 W. R. 359; W. N. 1893, 42; 3 R. 401; *Ker* v. *Williams*, W. N. 1886, 16; 30 Sol. Jour. 238; nor a claim arising *pendente lite*: *McLean* v. *McLeon*, 17 P. R. 440.

The added claim must have some direct relation to the original claim, but, being so related, the claim may be substantially different from that indorsed on the writ, thus, where the claim on the writ was for specific performance, a statement of claim for cancellation of the agreement and recovery of possession of the land in question was held to be a legitimate extension: *Gibson* v. *Hieb*, 1 O. L. R. 247; and see *Alexander* v. *Alexander*, 1 O. L. R. 639; *Chapman* v. *McWhinney*, 4 O. W. N. 35; but see *Snider* v. *Snider*, 30 O. L. R. 105; 5 O. W. N. 254; so a claim that is supplementary to the original claim will be proper, as where the writ was by a mortgagee against a mortgagor, indorsed for an injunction to restrain waste, and the statement of claim claimed also possession of the land by reason of default in the mortgage: *Smythe* v. *Martin*, 18 P. R. 227.

An objection that the statement of the claim goes beyond the writ should be taken promptly; if not made till the trial, it is too late: *Bugbee* v. *Clerque*, 27 Ont. App. 96, 717; *Gibson* v. *Hieb*, *supra*.

Form of Statement of Claim.—A statement of claim should follow the writ as to the names of the parties, and the character in which they are suing, or sued. Subject to what is said above a plaintiff will not be strictly confined to the particulars of his cause of action indorsed on the writ. Form.

The plaintiff need not ask relief against all the defendants named in the writ, but may claim against some only, if he abandons proceedings against the rest, but not otherwise: Arch. Prac., 13th ed., 215, unless the claim is of an equitable nature and the presence of the defendant is necessary as a party though no relief be asked against him.

As to printing the statement of claim: see *Rule* 139. As to the causes of action which may be joined: see *Rule* 69. As to the form in which material facts should be set out: see *Rule* 141.

In a statement of claim, the date of the issue of the writ of summons was formerly required to be stated, as shewn in Form 10 of C. RR., and was held to be essential. Where it was omitted, leave to amend was given on a motion to set aside the statement of claim: *Scott* v. *Creighton*, 9 P. R. 253. The present Form 10 is not complete: see *Rule* 140, it omits to indicate that the date of the writ is requisite; and it is advisable that the former practice on this point should be continued in order that the date of the commencement of the action may appear on the record. Date of writ.

Rule 110.

Under the English Rules it has been said that, in general, a defence should not be anticipated and answered: *Holl* v. *Eve*, 4 Ch. D. 341; *Clarke* v. *Callow*, 46 L. J. Q. B. 53; and see *Snider* v. *Snider*, *supra*, p. 507. The relief desired must be asked for: *Rule* 145.

Place of trial.

The place where the plaintiff proposes to try the action is to be mentioned in the statement of claim: *Rule* 245, and (subject to exceptions mentioned in that *Rule*), the plaintiff has a *prima facie* right to have the trial at any place he names; unless otherwise ordered: see notes to *Rule* 245.

Indorsements and service.

Attention should be given to the matters mentioned in *Rule* 110 to be marked on the pleading. For the time for delivery: see *Rules* 110, 178 and 204; and as to the mode of delivery: see *Rule* 199. A copy should be filed as well as served: *Rule* 140.

Time within which to be delivered.

110. The plaintiff shall deliver his statement of claim within one month from the entering of appearance or at any time before appearance and where there is more than one defendant the statement of claim shall be delivered within a month from the last appearance or from the time when the last appearance should have been entered. C.R. 243.

This *Rule* shortens the time allowed by C. R. 243, for the delivery of a statement of claim from three months to one month.

The Eng. (1883) R. 225 is somewhat different.

Where writ specially indorsed.

A specially indorsed writ is in effect the statement of claim: *Rule* 111, and if not sufficient may be amended like an ordinary statement of claim: see *Rule* 127: *Confederation Life* v. *Moore*, 6 O. L. R. 648.

The plaintiff may if he choose deliver a statement of claim with the writ, or after service of the writ and before appearance; in such cases it would have to be delivered to the defendant in person or in such other manner as might be specially ordered.

Where the writ is specially indorsed, however, no further, or other statement of claim can be delivered without leave; and as to delivery of defence where the special indorsement constitutes the statement of claim: see *Rule* 112; and *Dunn* v. *Dominion Bank*, 5 O. W. N. 103.

The plaintiff may be disallowed the costs of the statement of claim if it was unnecessary: see *Rule* 670.

A guardian *ad litem* of an infant, and a married woman, may waive delivery of a statement of claim: see *Knotchbull* v. *Fowle*, W. N. 1876, 2; *Fryer* v. *Wiseman*, W. N. 1876, 3.

C. R. 342 provided that "a month" should in C. RR. mean a calendar month. This provision is not contained in these *Rules*: see, however, *The Interpretation Act* (R. S. O. c. 1), ss. 29 (*a*), 30, and p. 309, *supra*. In computing the month vacation is not reckoned: *Rule* 170. For the mode of delivery: see *Rules* 140, 199, and 200. If a statement of claim is not delivered within the time allowed, the action may be dismissed for want of prosecution: *Rule* 323.

Although a special indorsement is in effect a pleading: see *Rule* 111, yet it is only a *quasi* pleading; and the *Rules* applicable to ordinary

pleadings do not necessarily apply to it; *e.g.*, a specially indorsed writ may be served in vacation notwithstanding *Rule* 178, and *semble*, the affidavit required to be filed by a defendant under *Rule* 56, though also a *quasi* pleading: see *Rule* 112 (3); yet it would seem not to be a pleading within *Rule* 178. Rule 110.

Extending Time for Delivery.—As to the extension of time: see *Higginbottom* v. *Aynsley*, 3 Ch. D. 288. Extension of time.

An order extending the time will not be made *ex parte*: *Wigle* v. *Harris*, 9 P. R. 276.

A statement of claim filed after the time for doing so has expired, without leave, has been held under the Irish Act to be not irregular, unless the defendant has served a notice of motion to dismiss: *O'Connell* v. *O'Connell* and *Sampson* v. *O'Donnell*, 6 L. R. Ir. 470, 471; but in Ontario, under C. R. 243, it was decided that a statement so filed is irregular, and might be struck out on motion in Chambers unless circumstances were shewn justifying an extension of time: *Clarke* v. *McEwing*, 9 P. R. 281; see clause (*b*) of that Rule, and *Anon.*, 26 Sol. Jour. 511; but this *Rule* contains no prohibition against filing a statement of claim after the month; and a statement so filed might be held not to be irregular any more than a defence delivered after time, and before any other proceeding was taken. It cannot be treated as a nullity: *Gill* v. *Woodfin*, 25 Ch. D. 707; see also *Groves* v. *Terry*, in notes to *Rules* 112, 118. Filed after time.

On a motion to strike out as irregular a statement of claim delivered after the proper time under C. R. 243, an order might be made allowing it to stand, and any proper terms might be imposed as a condition of its being validated: *Toronto* v. *Romsden*, 5 O. W. R. 381, 413.

An application to enlarge the time will, in general, be by motion in Chambers. Or the time may be enlarged by consent: *Rule* 175. The consent should be in writing, and no order is then necessary: *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

Where, by mistake of a clerk of the plaintiff's solicitor, the statement of claim was served too late by two days, further time was given. The Court thought it immaterial that plaintiff had delayed bringing the action till shortly before the Statute of Limitations would have barred the claim: *Canadian Oil Works* v. *Hoy*, 38 L. T. 549; W. N. 1878, 107; but the Court has refused to renew a writ of summons after the time for effecting the renewal has expired, where the claim, in the absence of such renewal, would be barred by the Statute of Limitations: *Doyle* v. *Kaufman*, 3 Q. B. D. 7, 340; *Hewett* v. *Barr*, 1891, 1 Q. B. 98.

Where a statement of claim was delivered after the time limited by an order, and an order afterwards was made extending the time for delivery on payment of $20 costs, and the costs were paid, but no new statement delivered, it was held under C. R. 243 that though the delivery was irregular, it was waived by retaining the copy served and the costs: *Pierce* v. *Palmer*, 12 P. R. 275.

Where an order was made giving a further limited time to file a pleading, and providing that, in default, judgment might be signed, a judgment signed without serving a copy of the order was held to be regular: see *Fardon* v. *Richter*, 23 Q. B. D. 124; *sed quære*, if an

Rule 111.

order of dismissal can he made under these *Rules* until after default: see *Rule* 323 and *Armstrong* v. *Toronto & Richmond Hill St. Ry.*, *infra*.

After nine years' delay in proceeding to deliver a statement of claim in an action hy solicitors on a hill of costs, the delay being owing to the fact that defendant was impecunious, the plaintiffs were allowed to deliver a statement of claim, on terms of not charging interest, and a set-off of the costs of the motion, and the plaintiffs submitting to a taxation of the hill sued on: *Finkle* v. *Lutz*, 14 P. R. 446.

Where further time for a month "peremptory" was given, this was held to mean that the pleading must he delivered within the specified time, unless the order itself he expressly altered hy any subsequent order: *Falck* v. *Axhelm*, 38 W. R. 196.

See also notes to *Rules* 112, 118, 323.

Shortening Time.—Where plaintiff has obtained an injunction, or registered a *lis pendens*, or for other reasons justice so requires, the plaintiff may be ordered under *Rule* 176 to file a statement of claim before the month above mentioned: see *Armstrong* v. *Toronto & Richmond Hill St. Ry.*, 15 P. R. 449; *Hall* v. *Forteye*, 9 C. L. T. 231; *Jameson* v. *Laing*, 7 P. R. 404; *Sheppard* v. *Kennedy*, 10 P. R. 242.

The plaintiff becomes in such case "hound to deliver a statement of claim" (see *Rule* 323) within such shortened time, hut the order should not provide that on default the action he dismissed; such an order is under *Rule* 323 only to he made "after the expiration of such time": *Armstrong* v. *Toronto*, *etc.*, *supra*, and *semble* on application in Chambers for that purpose, on notice to the plaintiff, and proof of default.

Indosement to be statement of claim.

111. Where the writ is specially indorsed such indorsement shall be treated as a statement of claim and no other statement of claim shall be necessary. C.R. 245, *amended*.

To the same effect as Eng. R. 225 (*a*).

A "specially indorsed" writ would seem to he one indorsed within the meaning of *Rule* 33: see notes to that *Rule*.

The plaintiff ought to indorse his writ for money claims, in such a way that the indorsement may furnish all necessary information to the defendant in regard to the claim: see *Anon.*, W. N. 1875, 202, *per* Lush, J. If the indorsement is considered hy the defendant to be insufficient his course is to apply for delivery of a further statement of claim or better particulars: see *Rule* 138: *Fawcus* v. *Charlton*, 10 Q. B. D. 516. Where the indorsement is not sufficiently explicit, particulars may he ordered, and further time to put in a defence given, if necessary: see *Cotton* v. *Housemon*, W. N. 1876, 22; 2 Charl. Ch. Ca. 36; hut the proper form of application in such case would seem to he for a further statement of claim: *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 1 Charl. Ch. Ca. 36. Particulars of lump sums, for which credit was given, were ordered in *Godden* v. *Corsten*, 5 C. P. D. 17.

For further information with regard to particulars: see notes to *Rule* 33, 138.

In an action for money alleged to have been obtained by fraudulent misrepresentation, the nature of the misrepresentation, and the particulars of the sums sued for being set out in the indorsement of the writ, it was held that the indorsement was sufficient, and a motion to compel the delivery of a better statement of claim was refused: *Young* v. *Beattie*, 16 L. R. Ir. 192. Rule 112.

The *Rule* appears to be imperative, and it was held in *Dominion Bank* v. *Dunne*, 5 O. W. N. 103, that where a plaintiff has served a specially indorsed writ, he cannot without leave deliver another statement of claim in the action.

112.—(1) Where the writ is specially indorsed and the plaintiff does not elect under Rule 56 to serve a notice of trial the defendant may deliver a defence or counter-claim at any time within 10 days after his appearance. When defence must be delivered.

(2) Where the writ is not specially indorsed the defendant may deliver his defence and counter-claim within 10 days from the delivery of the statement of claim or from the time limited for appearance, whichever shall be last. C.R. 246 and 247, *amended*.

(3) Where a defendant who has appeared to a writ which is specially indorsed and filed the affidavit required by Rule 56, does not file a statement of defence within the time limited, his affidavit shall stand as his defence, and notice of trial may be at once served. [*As amended by Rule passed 24th December, 1913*].

See Eng. (1883) RR. 239, 240. Under clause (1) the 10 days are to be reckoned from the entry of appearance; under clause (2) the 10 days will be counted from the last day for appearance, where a statement of claim has been delivered with the writ, or before appearance: see *Rule* 110, and not from the actual entry of appearance where it has been entered before the time for appearance has expired: *McCulloch* v. *Hamilton*, 32 C. L. J. 364; *Lovell* v. *Taylor*, 5 O. W. R. 525, 527. Vacation is not reckoned in the 10 days: *Rule* 178.

A "defence" and a "counter-claim" cannot be delivered separately, but must be included in one pleading: see Form 13; H. & L. Forms No. 127, and *Holloway* v. *York*, 25 W. R. 627; also *Bogot* v. *Easton*, 11 Ch. D. 392. It would seem, however, that a "reply" to the statement of defence, and a "defence" to the counter-claim may, where necessary, be delivered separately: see notes to *Rule* 114.

The time may be extended by consent in writing: *Rule* 175; *Ambroise* v. *Evelyn*, 11 Ch. D. 759. No order is then necessary; but if a consent cannot be obtained, the Court is liberal in granting further time. The motion for further time is made in Chambers on notice: *Wigle* v. *Harris*, 9 P. R. 276.

If a defence is not put in, the pleadings may be noted as closed, after which no defence may be received or filed without an order: *Rule* 121, or, it is presumed, a consent: see *Rule* 175. Where proceedings are not taken to note the pleadings as closed, a defence

Rule 112.

put in without leave, after the proper time but before judgment, cannot be treated as a nullity: *Gill* v. *Woodfin*, 25 Ch. D. 707; see also *Harding* v. *Lyons*, 13 L. R. Ir. 302; *Gibbings* v. *Strong*, 26 Ch. D. 66; 50 L. T. 578; and notes to *Rules* 110, 118, and 121.

An action should not now be set down on motion for judgment by default of pleading until the pleadings are noted as closed: see notes to *Rule* 121, but if a defence be filed after such noting: *Jackson* v. *Gardiner*, 19 P. R. 137, or even after the action has been set down on motion for judgment, the defence, though irregular, cannot be treated as a nullity and ignored: see *Gill* v. *Woodfin*, and other cases *supra*, and notes to *Rule* 121.

A defence delivered after the time, and after a motion for leave to deliver it had been refused, was set aside with costs: *Meehan* v. *Meehon*, 14 L. R. Ir. 301.

A defence delivered after the time, and upon the day when the case was to be heard on a motion for judgment, was held to be irregular, and ordered to be struck out, unless the defendant paid the costs of setting down the action on motion for judgment, within a limited time: *Snider* v. *Snider*, 11 P. R. 34.

Where an order is made giving a further limited time for filing defence, and providing that in default judgment may be signed, a judgment signed after default is regular, though no copy of the order is served: *Forden* v. *Richter*, 23 Q. B. D. 124.

A counter-claim has been allowed to be filed after issue joined: *Evans* v. *Gonn*, W. N. 1875, 199; but it may be too late after the case is entered for trial: *Wore* v. *Gwynne*, W. N. 1875, 240.

See also notes to *Rules* 110, 115, and 118.

Defence and Counterclaim:—

When to be delivered.

The defendant must deliver his statement of defence within 10 days from appearance, if the writ is specially indorsed: *Rule* 112 (1); and if not, then within 10 days from the delivery of the statement of claim, or the time for entry of appearance, whichever is last. *Rule* 112 (2). A defence delivered after the time, but before judgment, is not a nullity, nor is it irregular: *Munn* v. *Young*, 5 O. W. N. 426.

Form.

The facts relating to the defence must be stated in the same manner as is provided in respect to other pleadings: *Rules* 141 *et seq.* If the defendant has no facts to set up he may simply "take issue," or deny the statement of claim. Such a pleading will prevent an implied admission, and put the plaintiff to the proof of his claim: *Rule* 144; *Hore* v. *Cowthrope*, 11 P. R. 355; *Molcolm* v. *Race*, 16 P. R. 330; and see *Irwin* v. *Turner*, *Ib.* 349. All facts not in the statement of claim on which the defendant means to rely should be set out: *Rule* 143. Though a defendant is not taken to have admitted what he does not deny (see Rule 144), he should nevertheless make all proper admissions: *Rule* 142; otherwise he may have to bear the costs rendered necessary by the failure to admit: *Rule* 671. The character in which the plaintiff sues (*Rule* 152), the incorporation of a corporate party (*Rule* 153), and the legality or sufficiency of a contract in point of law, if intended to be disputed, must be expressly traversed (*Rule* 154). In an action for the recovery of land the defendant need only state that he is in possession, unless he has some equitable ground to set up: *Rule* 155.

Where the authority of the plaintiff's solicitor to bring the action is disputed, that is not a proper subject to raise by way of defence; that can only be raised by a motion to stay the proceedings; *e.g.*, where an action was brought by a person alleged to be of unsound mind, a denial of the plaintiff being of unsound mind in the defence was struck out as being no defence to the action: *Richmond* v. *Bronson*, 1914, 1 Ch. 968; 110 L. T. 751. Rule 113.

In an action of libel or slander where a defendant does not plead the truth of the alleged slander or libel, no evidence can be given of it in mitigation of damages: *Rule* 158.

There may be a plea to the jurisdiction: see *Rule* 48; *Dart* v. *Citizens Ins. Co.*, 11 P. R. 513.

Inconsistent pleas may still be used where applicable: *Re Morgon, Owen* v. *Morgon*, 35 Ch. D. 492; *e.g.*, in an action for money, a denial of the loan, and plea that, if lent, it has been repaid or release given: *Bornicott* v. *Hann*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39. A defence amounting to pleas of not guilty, and justification, may be properly pleaded: *Restell* v. *Steword*, W. N. 1875, 231; 1 Charl. Ch. Ca. 87. The offering of an apology, payment into Court, and a justification may be pleaded together in an action for libel: *Hawkesley* v. *Brodshow*, 5 Q. B. D. 302. This was not formerly allowed: see *Doyle* v. *Owen Sound Printing Co.*, 8 P. R. 69. But where payment into Court was pleaded together with a justification, in a libel action, and it was not clear from the pleading in respect of which particular part of the cause of action the payment was made, the defence was struck out as embarrassing: *Fleming* v. *Dollar*, 23 Q. B. D. 388; and see *Rule* 310.

As a general rule, the defendants may deny the plaintiff's causes of action, and plead payment into Court in respect to the whole or any part of them: *Rules* 307, 308; *Berdon* v. *Greenwood*, 3 Ex. D. 251, in which the decision in *Spurr* v. *Holl*, 2 Q. B. D. 615, was questioned. A defendant may plead "not guilty by statute" where that defence is applicable: *Rule* 156; also grounds of defence or counterclaim arising after action brought, but before delivery of defence: *Rules* 159 *et seq.*; but pleading in abatement was abolished by C. R. 283 and is not allowed by these *Rules*.

The *Rules* following, in relation to counter-claims, are made in order to give effect to the Jud. Act, s. 16 (*d*), *supra*.

As to counter-claims, see note to *Rule* 115.

Frivolous, vexatious, or scandalous defences, or defences tending to prejudice, embarrass, or delay the fair trial of the action, may be struck out on motion in Chambers: see *Rule* 137 and notes.

Where the writ is specially indorsed the delivery of a defence is 10 days "after his appearance," not "after the time limited for appearance," as in clause (2).

Where a plaintiff elects to proceed under *Rule* 56 no statement of defence other than the affidavit referred to in that *Rule* is necessary, or admissible without leave.

113. Where a defendant sets up a counter-claim which raises questions between himself and the plaintiff and any other person he shall add a second style of cause Where counter-claim affects third person.

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in which he shall be described as "Plaintiff by Counter-claim" and the plaintiff and such other person shall be described as "Defendants by Counter-claim," and shall deliver his counter-claim to such of them as are parties to the action within the period limited for the defence and shall serve the same without delay upon such of them as are not parties to the action together with a summons according to Form No. 25, issued from the proper office and a copy of the statement of claim. C.R. 248 and 249, *amended*.

See Eng. RR. (1883) 244-245.

For the form of the title required by this *Rule*: see Form 13; H. & L. Forms, No. 127.

The Eng. R. 244 reads, "questions between himself and the plaintiff along with any other person," and this does not authorize a counter-claim by defendant raising "questions between himself along with any other person and the plaintiff," so that where the defendant and a third party had a joint cause of action against the plaintiff, even though arising out of the same circumstances that gave rise to the plaintiff's cause of action, a counter-claim by the defendant against the plaintiff, making also the third party a defendant to it, was struck out: *Pender* v. *Toddei*, 1898. 1 Q. B. 708. Under the present *Rule* 113, such a counter-claim would also seem to be unauthorized. The variation in the language of the *Rule* would not seem to change its meaning in this respect. The intention would seem to be that relief by counter-claim is confined to a defendant, and that a third party (not being a defendant in the action) cannot be thus directly or indirectly introduced into an action so as to enable him to claim relief against the plaintiff. Thus, a claim by the defendant on behalf of himself and other parties, which as regards an action would be within *Rules* 79-87, cannot be set up by counter-claim: *Hume* v. *Hume*, 38 C. L. J. 204.

Where defendant in an action on a note shewed that the note had been transferred to the plaintiffs to secure a debt due to them by the payee, one T. N., which debt had been satisfied since the commencement of the action, and the defendant swore that he had a good defence on the merits against T. N., it was held that this *Rule* had no application, but that the plaintiffs admitting these facts were entitled to their costs under *Rule* 164, and the cause of action having devolved upon T. N., he was entitled to continue it by taking out an order under *Rule* 301: *Oshawa Cabinet Co.* v. *Note*, 18 C. L. J. 60.

A third person made a defendant to a counter-claim is not entitled to enter an appearance until he has been served with the counter-claim and summons; and if he appears without having been so served, the appearance may be discharged on motion by the plaintiff in the counter-claim: *Fraser* v. *Cooper*, 23 Ch. D. 685.

Where, in an action for the price of iron, the defendant set up a counter-claim for a deduction, which he had been obliged to allow a purchaser, owing to the inferiority of the quality of iron, it was held unnecessary to add the purchaser's name to the title of the action: see *Anon.*, 60 L. T. Jour. 66; 1 Charl. Ch. Ca. 85 *per* Lush, J., who

said Order 22, r. 5 (corresponding to the present *Rule*), does not apply to such a case: see also *Williams* v. *Wright*, W. N. 1875, 232. Rule 114.

For the rules in respect to service of writs of summons: see *Rules* 15, *et seq.*, and 25.

The *Rule* has made a change in the practice in requiring a third party added by counter-claim to be served with a writ of summons as well as the counter-claim.

114. Any defendant to a counter-claim shall within ten days after service thereof on him, deliver a defence thereto. C.R. 250. Defence to counter-claim.

The summons to be served on third persons added by counter-claim requires such third persons to enter an appearance, as well as to deliver his defence (if any) to the counter-claim, within 10 days after service.

A plaintiff made a defendant by counter-claim may counter-claim against the plaintiff by counter-claim, in respect of a cause of action accruing subsequent to the issue of the writ: *Toke* v. *Andrews*, 8 Q. B. D. 428; or in respect of a breach of the contract alleged in the counter-claim: *Renton* v. *Neville*, 1900, 2 Q. B. 181; 82 L. T. 446; but not in respect of independent matters arising before action: *Jones* v. *Page*, 85 L. T. Jour. 157, such matters can only be set up by amendment of the statement of claim: see *Rule* 157; and a third party made a defendant by counter-claim is limited to a defence, and is not entitled to counter-claim against the defendant who brought him in: *Street* v. *Gover*, 2 Q. B. D. 498; *General Electric Co.* v. *Victoria Electric Co.*, 16 P. R. 476, 529; *Alcoy Ry. Co.* v. *Greenhill*, 1896, 1 Ch. 19; 73 L. T. 452; but see *Green* v. *Thornton*, 9 C. L. T. 139, where a pleading, though called a counter-claim, was allowed as being in substance a defence: *General Electric, etc.*, v. *Victoria Electric, etc.*, *supra*, *per* Meredith, J., at p. 481, and *per* Street, J., ib., at p. 534; see also *Eden* v. *Weardale*, 28 Ch. D. at p. 338. How far a counter-claim may be pleaded to a counter-claim.

By this *Rule* a plaintiff has 10 days to deliver a "defence" to the counter-claim; and by *Rule* 118 the plaintiff has 10 days to "reply" to the statement of defence; the time for defence to a counter-claim and a reply, therefore, run concurrently under the present *Rules;* as to amending statement of claim after defence: see *Rule* 127. Plaintiff's pleading to a counter-claim.

A defence to a counter-claim was, in *Irwin* v. *Brown*, 12 P. R. 639, held to be technically a "reply" in the action, but that case was not followed in *Irwin* v. *Turner*, 16 P. R. 349, decided under C. RR. which gave a longer time for a reply than for a defence. Doubtless the plaintiff may combine in one pleading his "reply" to the statement of defence and his "defence" to the counter-claim, but such a pleading must, under this *Rule*, be delivered within 10 days.

The Eng. Rules are different. Under them the plaintiff has 21 days within which to reply to the counter-claim: *Rumley* v. *Winn*, 22 Q. B. D. 265.

In case of default being made by plaintiff in delivery of a defence, the defendant cannot sign judgment for default of pleading, but must move for judgment under *Rules* 222, 354, 356; *Jones* v. *Mocouloy*, 1891, 1 Q. B. 221. Such a judgment may be obtained even after the plaintiff's action has been dismissed for want of prosecution: *Roberts* v.

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Booth, 1893, 1 Q. B. 62; 3 R 161; see also *Higgins* v. *Scott*, 21 Q. B. D. 10. See notes to *Rule* 116.

A pleading in answer to a counter-claim which denies the allegations of the counter-claim, puts the counter-claiming defendant to proof of his counter-claim, and submits that it should be dismissed, is a "defence" to the counter-claim, and not a joinder of issue in the action: *Irwin* v. *Turner*, 16 P. R. 349.

Subsequent pleading by the counter-claiming defendant.

Whether "plaintiff" in *Rule* 118 includes a plaintiff by counter-claim, or whether, by virtue of *Rule* 2, *Rule* 118 applies by analogy, it would seem that a counter-claiming defendant has 10 days from the delivery of the defence to the counter-claim within which to reply to such defence, and therefore the pleadings in such an action cannot be closed until the expiry of that time, or until the delivery of a reply: *Irwin* v. *Turner*, 16 P. R. 349.

Semble, a counter-claim cannot for all purposes be regarded as a statement of claim, and would not be amendable under *Rule* 127: see Eng. Rule 311, which allows an amendment of a counter-claim without leave, but there is no such provision in these *Rules*. The only provision for amendment of a counter-claim without leave is *Rule* 128.

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115. A defendant (*b*) may set up by way of counter-claim (*a*), any right or claim whether the same sounds in damages or not. C.R. 251.

(*a*) C. R. 261 had here "to the claim of the plaintiff," but the omission of these words is immaterial, a counter-claim can only be filed to a claim of a plaintiff.

See notes before *Rule* 102.

This is a *Rule* made in furtherance of sec. 16 (*d*) of the Act.

"Defendant" in this *Rule* would seem not to include a third party made a defendant to a counter-claim: see notes to *Rule* 114.

Third party procedure, provided for by section 16 (*d*) of the Judicature Act, is discussed under *Rule* 165. In addition to the class of cases there mentioned, the defendant is by the above sub-section enabled (subject to the discretion of the Court) to set up in an action brought against him, any claims whatever which he may have against the plaintiff, and under certain restrictions claims against the plaintiff jointly with other persons: see *Naylor* v. *Farrer*, 26 W. R. 809; *Besant* v. *Wood*, 12 Ch. D. 605; *Gray* v. *Webb*, 21 Ch. D. 802; *Fried* v. *Galloway*, 4 C. L. T. 191

(*b*) The original *Rule* following Eng. R. 1875, O. 19, r. 3 (1883), R. 199, had here the words "set-off or." As to the difference in the scope of this *Rule* and Eng. Rule 199: see *Sovereign Bank* v. *Parsons*, 18 O. L. R. 665; a set-off of debts was, prior to the Judicature Act, a statutory right in Ontario: see R. S. O. (1897) c. 324, ss. 5-7; see now *The Judicature Act*, ss. 126-128, *supra*; and the effect of the original Rule seems to have been to extend this right of set-off to claims sounding in damages; but an alteration was made as shown in the present *Rule* in consequence of what was said in *Chamberlin* v. *Chamberlin*, 11 P. R. 501, where it was held that what was really a set-off was pleadable as a defence, and could be set up as a defence, if it arose before the commencement of the action, and that pleading it in the form of a counter-claim made no difference; on the other hand a counter-claim may set

up any matter properly pleadable in a cross-action, though arising after the commencement of the action: see *Rule* 159; and consequently a set-off, if arising after action, under the present *Rule* can only be set up by way of counter-claim. Rule 115.

Under the present *Rule* a claim of a defendant against a plaintiff sounding in damages must be set up by counter-claim: see *Grills* v. *Farah*, 21 O. L. R. 457.

A counter-claim properly so-called is therefore a claim by defendant for relief, which he cannot obtain by defence in the action: *Girardot* v. *Welton*, 19 P. R. 162, 201. By it a defendant may set up any cross-claim whether sounding in damages or not, subject, however, to *Rules* 124, 137.

What was before *The Judicature Act* a legal set-off, and pleadable as a defence, is still so pleadable, and should be so pleaded, and not as a counter-claim; and if the set-off exceeds the claim, the excess may be recovered without counter-claim for the same: *Girardot* v. *Welton*, *supra*; and see *The Judicature Act*, s. 128, *supra*; *Gates* v. *Seagram*, 19 O. L. R. 216; where, a set-off having been erroneously set up by counter-claim, the action, and the question of costs, were disposed of in accordance with the real character of the defence.

If a claim for liquidated damages is pleaded by defendant by way of counter-claim, the plaintiff may set up matters in defence arising subsequent to action brought: *McNamara* v. *Skain*, 23 Ont. 103; *Rule* 160; *secus* if the claim is pleaded by way of set-off; and see *Toke* v. *Andrews*, 8 Q. B. D. 428.

Other cases recognize that a set-off and counter-claim are quite distinct: see *Cutler* v. *Morse*, 12 P. R. 594; *Tagart* v. *Marcus*, 36 W. R. 469; *Winterfield* v. *Bradnum*, 3 Q. B. D. 326; *Stumore* v. *Campbell*, 1892, 1 Q. B. 314, 316; and cases *infra*, p. 523; and on the subject of costs, see the notes to Jud. Act, s. 74, *supra*, p. 260 *et seq.*

A counter-claim must be delivered within the time allowed for delivering a defence: *Rule* 112, and can only be delivered when a defence could be filed; it cannot be delivered after an action has been discontinued or dismissed: see note *post*, p. 520.

Set-off.—A most important change was made by *The Judicature Act* in the previously existing law relating to set-off, and cross-demands. Former practice as to set-off.

Set-off, like counter-claim, was created by statute. Prior to the Statutes of set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, ss. 4, 5—see now *The Judicature Act*, ss. 126-128, *supra*, p. 297 *et seq.*—where there were cross-demands unconnected with each other, the parties were put to their cross-actions. Sections 126, 127, *supra*, enabled "mutual debts" to be set-off against one another (see *Rees* v. *Watts*, 11 Ex. 410), though the mutual debts are of a different nature, that is, a bond debt can be set-off against a simple contract debt: see *Bennett* v. *White*, 1910, 2 K. B. 643, where a debt of plaintiff to a third party assigned to the defendant was held to be capable of being set-off.

In Equity, set-off has been allowed in many cases not within the Statutes of set-off: see Story's Eq. Jur., ss. 14, 38, *et seq.*; *Lundy* v. *McCulla*, 11 Gr. 368; *Macbeth* v. *Smart*, 13 Gr. 332. The Statutes of set-off applied only where the set-off was of a legal debt, and excluded equitable debts, and unliquidated damages.

The Judicature Act abolished the distinction between legal and equitable debts; and the present *Rule* expressly authorizes the setting

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up of unliquidated demands as an answer to either liquidated, or unliquidated demands, not merely by way of set-off, but so as to enable the defendant to obtain judgment in his favour for any balance, or for such other relief as he may be entitled to, on the merits of the case: see *Staples* v. *Young*, and *Horrocks* v. *Rigby*, *infra*, p. 532. The effect of *The Judicature Act* would seem to be to abolish any distinction, in effect, between set-off and cross-demands so far as the right to recover is concerned, though any cross-demand which could not formerly be pleaded as a set-off must now be pleaded by way of counter-claim.

A distinction has, however, been recognized which is still of importance in reference to the disposition of the costs where a counter-claim is set up, not by way of a defence against the plaintiff's cause of action. Mr Pitt Lewis, in his work on County Court Practice, quoted with approval by Cockburn, C.J., in *Stooke* v. *Taylor*, 5 Q. B. D. 577, says:—"A set-off would seem to be of a different nature from a defence (*qu.* counter-claim) inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." See also *Gathercole* v. *Smith*, 7 Q. B. D. 626; *Pellas* v. *Neptune Marine Ass. Co.*, 5 C. P. D. 34; and notes to *The Judicature Act*, s. 16 (*d*), *supra*, p. 41, and s. 74, *supra*, p. 261.

Under the Jud. Act.

As to striking out pleadings.

The terms of the present *Rule* are wide enough to allow a defendant to set up any cross-demand, whether connected with the plaintiff's claim or not, and whether it sounds in damages or not; but the *Rule* must be read in connection with *Rules* 124, 134, 136, 137, as to striking out pleadings: *Gray* v. *Webb*, 21 Ch. D. 802.

The *Rule* is only one of procedure, designed to prevent the necessity of bringing a cross-action where a cross-demand can conveniently be tried in the original action. It does not give rights as against third parties, or confer rights of set-off between the parties which did not exist before. Thus claims against a company held by a director and *bonâ fide* for value assigned to a third person, were held not subject to be set-off against damages payable under an order, afterwards obtained by the liquidator of the company against the director: *Re Milan Tramways Co., Ex p. Theys*, 22 Ch. D. 122; affirmed in appeal, 25 Ch. D. 387: see *Mersey Steel, etc., Co.* v. *Naylor*, 9 Q. B. D. 648; 9 App. Cas. 434. In an action for calls by the liquidator of a company, a claim by a shareholder against the company was not allowed to be set off: *Re Whitehouse*, 9 Ch. D. 595. A set-off claimed against arrears of pension, against which, by statute, no set-off was permissible, was disallowed: *Gathercole* v. *Smith*, 7 Q. B. D. 626.

In an action by a trustee for a debt due to him as such trustee, or as agent for another person, the defendant may set up as a defence to the extent of the claim that the *cestui que trust* is indebted to him in a greater sum for unliquidated damages: *Bankes* v. *Jarvis*, 1903, 1 K. B. 549; 88 L. T. 20. In that case the defence was set up in the form of a counter-claim, but *quære*, whether it should not have been set up as an equitable defence, as it might have been under the old practice: *Ib.*

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Debt set-off must be mutual.

The right of set-off only applies to mutual debts, viz., debts due and owing to and by the same parties: therefore a defendant cannot set-off a debt due by the plaintiff to him and another person in equal shares: *Bourcier* v. *Paxson*, 6 Q. B. D. 540; see also *Federal Bank* v. *Harrison*, 10 P. R. 271; 20 C. L. T. 194.

In an action by a receiver of a landlord's estate for rent due the landlord the defendant set up a set-off of money due by the landlord; it was held that the action by the receiver being in the interest of incumbrancers on the lands, the set-off could not be relied on: *Mullarkey* v. *O'Donohue*, 16 L. R. Ir. 365. So a receiver of an estate was held not entitled to set-off against a debt due by him as executor, a debt due to him as receiver, notwithstanding that both claims arose in respect of the same estate: *Nelson* v. *Roberts*, 69 L. T. 352.

Where a set-off is claimed or pleaded in defence to an action for debt, the debt sued on is not thereby extinguished to the extent of the debt sought to be set-off, but two separate and distinct debts remain until judgment: *Re Hirom Maxim Lamp Co.*, 1903, 1 Ch. 70.

A claim for freight cannot be set-off against a claim for damages for wrongfully taking possession of the goods in respect of which the freight is claimed: *Lord's Trustee* v. *Great Eastern Ry.*, 1908, 1 K. B. 195; 97 L. T. 760; 1908, 2 K. B. 54; 98 L. T. 910, such a demand would be the subject of a counter-claim.

A debt due by a firm to a deceased person's estate cannot be set-off against a legacy bequeathed by the deceased to members of the firm: *Turner* v. *Turner*, 1911, 1 Ch. 716; 104 L. T. 901.

On the other hand a cross-claim which is really a set-off, though set up in the pleadings as a counter-claim, will, nevertheless, be treated by the Court as a set-off—and if the defendant's set-off equals the plaintiff's claim, the action must be dismissed, and if it exceeds it, the defendant is entitled to judgment for the excess: Jud. Act, s. 128, *supra*; *Gotes* v. *Scogram*, 19 O. L. R. 216; *Girardot* v. *Welton*, 19 P. R. 162, 201.

A County Court judgment was allowed to be set off against a judgment of a Superior Court: *Sandys* v. *Louis*, W. N. 1875, 249; 1 Chsrl. Cb. Ca. 81.

Action of trover and for goods sold and delivered. Defendant was not allowed to set-off a claim against a third party, though such third party was the principal of the plaintiff: *Tagart* v. *Moreus*, 36 W. R. 469.

Counter-claim.

Counter-claim.—The mode in which a defendant proceeds to obtain the cross-relief contemplated by the *Rule* is by counter-claim, which has been defined as "a pleading where a defendant claims some remedy or relief either against the plaintiff alone, or against the plaintiff together with some other person or persons, whether already parties to the action or not": see Haynes' Chy. Pr. 77, and *per* Blackburn, J., in *Treleaven* v. *Bray*, 45 L. J. Chy. 115.

A defendant is not bound to make his cross-claims by counter-claim, but may assert them by cross-action: *Adamson* v. *Tuff*, 44 L. T. 420; see note to sec. 16 (*d*) of the Act, *supra*, p. 41; *Neale* v. *Clarke*, 4 Ex. D. 295; and a counter-claim can only be maintained where a cross-action might be brought: *Birmingham Estates* v. *Smith*, 13 Ch. D. 506.

But where an action and cross-action have been brought there is power, in a proper case, to stay one, and compel the plaintiff in it to

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proceed by way of counter-claim in the other action: see *Irwin* v. *Sperry*, 11 P. R. 229; *Conmee* v. *C. P. Ry.*, *Ib.* 149.

A counter-claim cannot set up two distinct causes of action, unless they arise out of the same transaction: *Parke* v. *Pain*, 15 O. L. R. 187; *Stroud* v. *Lawson*, 1898, 2 Q. B. 44.

The Courts should give a liberal interpretation to these *Rules*, which were no doubt passed with the intention of settling in one litigation all questions arising out of the subject matter of the dispute: *per* Brett, L.J., in *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 151.

Plaintiff must be party.

It is of the essence of a counter-claim that it claims relief against the plaintiff, either alone, or in conjunction with some other person. There can be no counter-claim against a co-defendant alone: *Cope* v. *Crichton*, 18 P. R. 462; *Warner* v. *Twining*, 24 W. R. 536; *McLay* v. *Sharp*, W. N. 1877, 216; *Benecke* v. *Craddock*, W. N. 1881, 54;—*Sheppard* v. *Beane*, 2 Ch. D. 223, is not to be considered an authority: see *Harris* v. *Gamble*, 6 Ch. D. 748; *Furness* v. *Booth*, 4 Ch. D. 586. So there can be no counter-claim against a third party, unless a claim is made against plaintiff along with such third party: *Dear* v. *Sworder*, 4 Ch. D. 476; *Romann* v. *Brodreckt*, 9 P. R. 2; *Barber* v. *Blaiberg*, 19 Ch. D. 473; and *Rule* 113. Relief against co-defendants and third parties alone can only be obtained under the third party procedure: see *Rules* 165, *et seq.*

A counter-claim irregularly filed, not including a claim against a plaintiff, may be struck out on motion: *Cope* v. *Crichton*, 18 P. R. 462.

The relator in an action in the nature of an information at the suit of the Attorney-General is not a plaintiff, and a counter-claim cannot be filed against him: *Atty.-Gen. Ex rel. Russell* v. *Vaughan Road Co.*, 14 P. R. 516.

A counter-claim may be set up by the Crown in a petition of right: *Thomas* v. *The Queen*, W. N. 1875, 218; 1 Charl. Ch. Ca. 71. But a claim against the Crown which would be the proper subject of a petition of right, cannot be set up by way of counter-claim in an action brought by the Attorney-General: *Attorney-General* v. *Hargrave*, 11 O. L. R. 550.

Where by a statute a particular mode of procedure is provided for obtaining a particular relief, that mode must be pursued, and procedure by a counter-claim will be improper: *Pinto* v. *Badman*, 7 T. L. R. 317.

It is not necessary that the amount claimed by the defendant should be equal to the claim of the plaintiff: *Mostyn* v. *West Mostyn Co.*, 1 C. P. D. 145.

A counter-claim can only be filed while the action is *in esse*; after dismissal, or discontinuance of the action a counter-claim can no longer be filed: *The Salybia*, 1910, P. 25; 101 L. T. 959; although the dismissal of an action after the filing of a counter-claim will not preclude the defendant from proceeding with it. In England R. 249 expressly so provides, but there is no similar provision in these *Rules*, but see *post*, p. 524.

Against plaintiff alone.

Counter-claim against Plaintiff Alone.—Where a counter-claim is brought against a plaintiff alone, it is not necessary that the claim of the defendant should be connected with the plaintiff's original cause of action; it may relate to any matter which might be the subject of an independent action: *Stooke* v. *Taylor*, 5 Q. B. D. 576;

and *Quinn* v. *Hession*, 40 L. T. 70, where it was held that the words, "relating to or connected with the original subject of the cause or matter," in sec. 16 (d), of the Act only qualify that portion of the section with which they are in immediate connection, viz.; a counter-claim which seeks relief against a third party as well as the plaintiff: see also *Beddall* v. *Maitland*, 17 Ch. D. 174; *Gray* v. *Webb*, 21 Ch. D. 802. But the defendant cannot set up by way of counter-claim against the claim of a plaintiff, suing only in his individual capacity, claims against him personally, and also as executor: *Macdonald* v. *Carington*, 4 C. P. D. 28: unless both plaintiff's and defendant's claims arise in reference to the estate of which the plaintiff is executor: see *Rule* 71. Rule 115.

The plaintiff may answer the defendant's counter-claim by a counter-claim: see *Renton* v. *Nevill*e, 1900, 2 Q. B. 181; 82 L. T. 446; *Toke* v. *Andrews*, *infra*; which may be in respect of a cause of action arising after the issue of the writ, but arising out of the same transaction as the counter-claim: *Toke* v. *Andrews*, 8 Q. B. D. 428; but not if the ground of claim is independent and arose before the issue of the writ: see *Rule* 157, and *James* v. *Page*, 85 L. T. Jour. 157. In such latter case the new claim may be raised by amendment of the statement of claim: *Ib.*

A counter-claim against a foreign plaintiff may be for a cause of action for which the defendant could not obtain leave to serve a writ of summons out of the jurisdiction: *Griendtoveen* v. *Hamlyn*, 8 T. L. R. 231; but *semble*, not in the case of a plaintiff a foreign sovereign, as *semble* a foreign sovereign only submits to the jurisdiction as to matters arising out of the claim: *S. African Republic* v. *Compagnie Franco Belge*, 1897, 2 Ch. at p. 490; 77 L. T. 555; *S. African Republic* v. *Transvaal Northern Ry.*, 67 L. J. Chy. 92.

There may be separate counter-claims against two plaintiffs severally, though they sue jointly: *Manchester, etc., Ry. Co.* v. *Brooks*, 2 Ex. D. 243.

Counter-claim against Plaintiff and Others.—Where a counter-claim is made against the plaintiff and another person it is subject to certain restrictions. Against the plaintiff and others.

(1) The relief sought to be obtained against him must relate specifically to, or be connected with, the subject matter of the action: *Padwick* v. *Scott*, 2 Ch. D. 736; see *Harris* v. *Gamble*, 6 Ch. D. 748; *Quin* v. *Hession*, and *Barber* v. *Blaiberg*, *supra*, p. 520.

(2) The counter-claim must, as before mentioned, claim relief against the plaintiff along with such other person: *Rule* 113; *Trelevaen* v. *Bray*, 45 L. J. Chy. 113; 1 Ch. D. 176; *Dear* v. *Sworder*, 1 Ch. D. 476; and *Harris* v. *Gamble*, *supra*; *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145.

Where the defendant and a third person have a joint cause of action against the plaintiff, even though arising out of the same circumstances that give rise to the plaintiff's cause of action, the defendant cannot set up his cause of action by counter-claim making the third person a defendant to it: *Pender* v. *Taddei*, 1898, 1 Q. B. 798. Where relief is not claimed against the third party along with the plaintiff, the proceedings must be under *Rule* 165: *Central African Trading Co.* v. *Grove*, 40 L. T. 540; 48 L. J. Ex. 510. It is not enough that the counter-claim be in form, if it be not in substance, for relief against the third person along with the plain ; thus where the matter of the counter-claim may be set up against the plaintiff as a

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defence without the third party, and the plaintiff is not interested in what is claimed from the third party, the counter-claim is improper: *Romann* v. *Brodrecht*, 9 P. R. 2; *Torrance* v. *Livingstone*, 10 P. R. 29.

Furthermore, it has been held, perhaps under the terms of C. R. 250 now *Rule* 114, that a third party cannot counterclaim against the defendant who brought him in: *Street* v. *Gover*, 2 Q. B. D. 498; *Alcoy* v. *Greenhill*, 1896, 1 Ch. 19; 73 L. T. 452; and such a pleading may be struck out on a summary application: *General Electric Co.* v. *Victoria Electric Light Co.*, 16 P. R. 476, 529, which distinguished *Green* v. *Thornton*, 9 C. L. T. 139, where a third party, made with the plaintiff a defendant to a counter-claim, was allowed to amend a reply to the defendant's counter-claim, by asserting another counter-claim against the defendant, but this was said to have been allowed because, although called a counter-claim, it was in substance a defence: see 16 P. R. 481, 584; see *Rule* 114, and notes. In *Evans* v. *Buck*, 4 Ch. D. 432, it was held that a person cannot be brought in, as a defendant to a counter-claim, against whom relief is claimed in one of two inconsistent alternatives: see note to *Rule* 67.

In an action by the assignee of a chose in action, it was held that the defendant could not counter-claim for damages for breach of the contract assigned, against plaintiff and his assignors, but that he must be limited to setting up by way of defence any claim for damages which he might have as against the assignors: *Sovereign Bank* v. *Parsons*, 18 O. L. R. 665, see S. C. at a subsequent stage *sub nom. Parsons* v. *Sovereign Bank*, 1913, A. C. 60; 107 L. T. 572.

The counter-claim need not be for the same cause of action against all the defendants to it: *Central African, etc., Co.* v. *Grove*, 27 W. R. 933; 40 L. T. 540;; *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145.

A defendant is not entitled to set up in his counter-claim a hypothetical case for relief against a third party: *Sackville* v. *Pocey*, 18 C. L. J. 14.

Semble. A defendant may serve a third party out of the jurisdiction with a counter-claim: see *Rule* 24, note, p. 347.

Where a defendant counter-claims against the plaintiff as liable alone, the plaintiff cannot have added another person who, he alleges, is also liable as to a part of the counter-claim: *Eyre* v. *Moreing*, W. N. 1884, 58.

Counter-claim only where separate action would lie.

Counter-claim only where a Separate Action would Lie.—In any case, a counter-claim can only be set up where an action might be brought: *Birminghom Estates* v. *Smith*, 13 Ch. D. 506, 508.

A counter-claim has therefore been disallowed where it set up a debt alleged to have been incurred by the plaintiff when an infant, and not ratified under Lord Tenderden's Act: *Rawley* v. *Rawley*, 1 Q. B. D. 460. So in an action by an administrator for the balance of an intestate's banking account, a debt due from the intestate on a note which became due after his death was not allowed to be set off, because an administration order had been before action obtained of which the defendants had notice; and under 23 & 24 Vict. c. 38, s. 14, equity would restrain the defendant from proceeding on the note, leaving him to prove for it in the administration proceedings: *Newoll* v. *National Provincial Bank of England*, 1 C. P. D. 496; 1 Charl. Ch. Ca. 82; see also *Montieth* v. *Wolsh*, 10 P. R. 162. So also, where the claim set up in the counter-claim had been extinguished by the obtaining of a judgment in another Division, which

judgment the defendant was not at liberty to enforce without leave, it was disallowed: *Birmingham Estates* v. *Smith*, 13 Ch. D. 506; see also *Beddall* v. *Maitland*, 17 Ch. D. 174, where a counter-claim for damagee for forcihle entry under the Statute of Richard 2 failed, because that Act gave no civil remedy. So also, where a counter-claim wae hy a eurety againet the plaintiff and third partiee (the dehtore), to require the plaintiff to firet proceed egainet the debtors (they heing ahle to pay), and for indemnity from the dehtors, it was disallowed: *Federal Bank* v. *Harrison*, 10 P. R. 271. Rule 115.

See also *Re Milan Tramways Co., ex parte Theys*, 22 Ch. D. 122, affirmed in appeal 25 Ch. D. 587; followed in *Re Gillespie*, 54 L. J. Q. B. 342; *Gathercole* v. *Smith*, 7 Q. B. D. 626; *Beatty* v. *Mair*, 10 L. R. Ir. 208.

Matter which would be the proper subject of n petition of right cannot be set up hy way of counter-claim in an action hy the Attorney-Generel: *Attorney-General* v. *Hargrave*, 11 O. L. R. 530. Counter-claim against Crown.

As to when a counter-claim is neceesary to enable a defendant to obtain an injunction or a receiver against the plaintiff: eee notes to sec. 17, *supra*, p. 62. Injunction by counter-claim.

Counter-claim when Regarded as a Separate Action. — Whether e counter-claim is to he considered merely ns a defence, or as something like a separnte action, has heen much discussed. It is not sn action: *Irwin* v. *Brown*, 12 P. R. 639; hut see *Irwin* v. *Turner*, 16 P. R. 349, though hy the terme of the *Rule* 116 it has the same effect as a statement of claim in a cross-action, to enehle judgment to be given on both claim, and counter-claim: eee *Lumsden* v. *Winter*, 8 Q. B. D. 650, and it wes early viewed as in the nature of en independent action in dealing with the question of the costs of it: see *Stooke* v. *Taylor*, 5 Q. B. D. 577; *Faines* v. *Bromley*, 6 Q. B. D. 695, and notes, *supra*, p. 519, and to Jud. Act, s. 74 *supra*, p. 260 *et seq.*; *Waring* v. *Pearman*, 32 W. R. 429; 35 L. T. 633; and now in England it has practically been decided that, though not a cross-action, everything done in respect of the proceedings upon it must be treated as if it were: *McGowan* v. *Middleton*, 11 Q. B. D. 469; *Sykes* v. *Sacerdoti*, 15 Q. B. D. 425; *Amon* v. *Bobett*, 22 Q. B. D. 548; *Neck* v. *Taylor*, 1893; 1 Q. B. 560. This result is pertly hesed upon the amended langusgs of Eng. (1883) R. 199, which says that a counter-claim "shell have the eame effect as a cross-nction, etc." The corresponding Ont. *Rule* 116 reeds, "a counter-claim shall be treated as an action so es to enahle the Court to pronounce a final judgment upon all matters set up therein"; but the Ontario *Rules* are in the direction of regarding proceedings on the counter-claim as independent of those in the action: see notes to *Rules* 114, 116, 117, 121. See also *Dominion Burglary Guarantee Co.* v. *Wood*, 3 O. L. R. 365.

In *Stumore* v. *Campbell*, 1892, 1 Q. B. 314, it was hcid that the judgments of plaintiff and defendant on claim and counter-claim respectively constitute two independent dehts, either of which may he garnished, notwithstanding that the other party's judgment may he for a larger sum. It would of course he otherwise where an order is made to set off one against the other.

A counter-claim has also been viewed as a cross-nction for other purposes. For instance, relief mey he given upon it in respect of a cause of action that nrose after the issue of the writ in the original

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action: *Rule* 159; *Beddall* v. *Maitland*, 17 Ch. D. 174; *McGowan* v. *Middleton*, 11 Q. B. D. 469; see also *Chamberlin* v. *Chamberlin*, 11 P. R. 501.

In accordance with the principle of *Beddoll* v. *Maitland*, it has further been now decided (and the decision was confirmed in England by an express Rule, Eng. (1883) R. 249), that the discontinuance of an action by the plaintiff does not put an end to the counterclaim: *McGowan* v. *Middleton*, 11 Q. B. D. 464, overruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474; *The Queen* v. *Judge of City of London Court*, 1891, 2 Q. B. 71; that a counter-claim may be revived on the death of the defendant, independently of the revivor of the action by the plaintiff: *Andrew* v. *Aitken*, 30 W. R. 701; 46 L. T. 689; and that a plaintiff may, in reply to a counter-claim, set up a counter-claim against defendant: *Toke* v. *Andrews*, 8 Q. B. D. 428; *Renton* v. *Neville*, 1900, 2 Q. B. 181; 82 L. T. 446; see also 19 C. L. J. 162; but a counter-claim cannot be filed after the action has been discontinued, or dismissed: *The Salybia*, 1910, P. 25; 101 L. T. 359.

Where the plaintiff's claim was dismissed for default in compliance with an order, after a counter-claim had been filed, the defendant was allowed to proceed with his counter-claim by motion for judgment as by default of pleading thereto by the plaintiff: *Higgins* v. *Scott*, 21 Q. B. D. 10, in note to *Rule* 121; *Roberts* v. *Booth*, 1893, 1 Ch. 52; 67 L. T. 646; these cases in England have the support of the express of Eng. (1883), R. 249 (not adopted in Ontario), provided that where the defendant sets up a counter-claim, and the plaintiff's action becomes stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with, but it is probable that in Ontario the decision would be the same without an express *Rule*. See also *Bildt* v. *Foy*, 9 T. L. R. 34, 83; *Jones* v. *Macaulay*, 1891, 1 Q. B. 221. But where the counter-claim is one which the defendant could only set up by reason of the plaintiff, a foreigner, having come within the jurisdiction and sued the defendant, if the plaintiff moves to discontinue his action the defendant is in the position of a plaintiff *quoad* the counter-claim, and will not be permitted to continue it, as a term of the plaintiff being allowed to discontinue: *Dominion Burglary Guarantee Co.* v. *Wood*, 3 O. L. R. 365.

Where a claim can properly be the subject of a set-off it should be set up as a defence, and not by way of counter-claim, and if set up by counter-claim, even though it is allowed, the defendant will not be entitled to any more costs than if it had been pleaded simply as a defence: *Girordot* v. *Welton*, 19 P. R. 162, 201.

In respect to security for costs also, a defendant who sets up a counter-claim becomes to some extent in the position of a plaintiff in a cross-action: *Winterfield* v. *Brodnum*, 3 Q. B. D. 324; and, when out of the jurisdiction, was in one case ordered to give security for costs: *The J. Fisher*, 2 P. D. 115; but a defendant will not be ordered to give security where his counter-claim is in respect of the same subject-matter as the plaintiff's claim: *Mapleson* v. *Masini*, 5 Q. B. D. 144; see also *Shepherd* v. *Hayball*, 13 Gr. 681; or is in effect a defence: *Neck* v. *Taylor*, 1893, 1 Q. B. 560; and where he admits the plaintiff's claim, and sets up a counter-claim founded on a distinct claim, he cannot demand security for costs from plaintiff if out of the jurisdiction: *quare*, however, where he sets up a counter-claim for an amount greater than the plaintiff's claim; see *Winterfield* v. *Brodnum*, *supra*; see also notes to *Rule* 382.

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Where the issues of fact in the claim and counter-claim were identical, it was held that the plaintiff was not entitled to adduce in reply to the counter-claim fresh evidence which would have been material to the original case: *Green* v. *Sevin*, 13 Ch. D. 589; see also, as to the evidence where claim and counter-claim are tried together: *Re Woodfine, Thompson* v. *Woodfine*, 38 L. T. 753.

Co-defendants to a counter-claim cannot examine one another for discovery: *Molloy* v. *Kilby*, 15 Ch. D. 162.

Form.

Form of Counter-claim.—A counter-claim and statement of defence must be included in the same pleading, and the same rules apply in many respects to a counter-claim as to a statement of claim: see *Holloway* v. *York*, 25 W. R. 627, and Form 13; H. & L. Forms, No. 127.

A counter-claim is subject to the same rules as a claim in respect to the causes of action which may be joined: see *Compton* v. *Preston*, 21 Ch. D. 188; *Hunter* v. *Stark*, 17 P. R. 47.

By the express terms of the *Rules*, the relief prayed for by way of counter-claim must be specifically stated: *Rule* 145; but a counter-claim under these *Rules* is not governed by as strict regulations as in England under Eng. Rule 243: see *Crowe* v. *Barnicot*, 6 Ch. D. 753; *Hillman* v. *Mayhew*, 24 W. R. 485; but see *Lees* v. *Patterson*, 26 W. R. 399; 7 Ch. D. 866.

Under these *Rules* it would seem that it is not necessary, by separate numbering of paragraphs, headings, or otherwise, to distinguish the defence from the counter-claim. It will be sufficient if the second style of cause when required by *Rule* 113 is added, and the facts on which the defendant relies, whether by way of defence or counter-claim, are concisely stated and without prolixity (*Rule* 141.) A prayer for the counter-relief desired should be added: *Rule* 145. Then, by analogy to the decision in *Watson* v. *Hawkins*, 24 W. R. 884, if the facts stated and proved show either a defence, or a right to any relief prayed for by way of counter-claim, the defendants will be entitled to the benefit of such defence, or to such relief: see also *Newell* v. *National P. Bank*, 1 C. P. D. 501. If relief, by way of counter-claim, whether general or otherwise, is not asked, it will be taken that it is not wanted: *Holloway* v. *York*, 25 W. R. 627.

Defence to counter-claim.

Defence to Counter-claim. — The defence to a counter-claim must be delivered within ten days after the service of the counter-claim: *Rule* 114.

Besides delivering a defence, the plaintiff in the action may set up a counter-claim arising out of the same transaction as the defendant's counter-claim: *Renton* v. *Neville*, 1900, 2 Q. B. 181; 82 L. T. 448; to which the same rules would apparently apply as to the original counter-claim. But the right to deliver a counter-claim to a counter-claim is confined to the plaintiff in the action, and does not extend to any co-defendant, or third person who is made defendant to a defendant's counter-claim.

The plaintiff in the action would also seem entitled to resort to the third party procedure in regard to any claim set up against him by counter-claim, and obtain leave to serve a third party against whom he claims indemnity, contribution, or relief over, in respect of the counter-claim: *Levi* v. *Anglo-Continental*, 1902, 2 K. B. 481; 86 L. T. 857.

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Counter-claims allowed.

Counter-claims Allowed.—Examples.—The following are examples of counter-claims allowed to be set up, as raising questions which can conveniently be tried with the plaintiff's claim in the action:

Action by a stock-broker for price of shares. Counter-claim for frauduient misrepresentationa ns to the values of the shares: *Anon.*, 1 Charl. Ch. Ch. 73; *Evans* v. *Gann*, W. N. 1875, 199; 1 Charl. Ch. Ca. 70; see also *Lee* v. *McMahon*, 2 Ont. 654.

Action for price of iron. Counter-claim for inferiority of iron. *Anon.*, 1 Charl. Ch. Ca. 73; or non-delivery of part: *Midland Ry. Co.* v. *Ontario Rolling Mills*, 2 Ont. 1.

Action for price of coals. Counter-claim for non-delivery of part of the coals: *Norton* v. *Merriman*, W. N. 1875, 219; 1 Charl. Ch. Ca. 80; aee *Fulton* v. *U. C. Furniture Co.*, 32 C. P. 422; 20 C. L. J. 11.

Action for negligent construction of ship. Counter-claim for extras due beyond the contract price: *Trinacria* v. *Richardson*, W. N. 1875, 219; 1 Charl. Ch. Ca. 74.

Action by builder. Counter-claim for breach of covenant in building contract: *Trevena* v. *Watts*, W. N. 1875, 250; 1 Charl. Ch. Ca. 79.

Action by lessor for rent. Counter-claim for an alleged debt, and damnges for non-performance of lessor's ngreement: *Atwood* v. *Miller*, W. N. 1876, 11; 1 Charl. Ch. Ca. 82; see *Atkinson* v. *Ellison*. W. N. 1875, 199; 1 Charl. Ch. Ca. 69.

Action of ejectment for non-payment of rent. Counter-claim for rectification of lease so as to atate terms by which no rent would be due: *Carew* v. *Christopher*, 10 L. R. Ir. 38.

Action for ejectment by heir against widow. Counter-claim for dower: *Glass* v. *Glass*, 9 P. R. 14.

Action for recovery of land and *mesne* profits. Counter-claim for damages for illegal distress against plaintiff and his bailiff: *Dockstoder* v. *Phipps*, 9 P. R. 204.

Action for specific performance. Counter-claim for damages and rectifiestion of agreement, and specific performance of the agreement as rectified: *Dunlop Tire Co.* v. *Ryckman*, 5 O. L. R. 249.

A counter-claim was allowed claiming against an nssignee a set-off of damagea due from the assignor: *Young* v. *Kitchin*, 3 Ex. D. 127; *Exchange Bank* v. *Stinson*, 32 C. P. 158; see *Pellas* v. *Neptune Marine Ass. Co.*, 5 C. P. D. 34.

Where A. sued B. on a bill nnd B. defended by alleging that A. was really trustee for C. who owed B. money; B. was allowed to bring in C. and claim set-off: *Macdonald* v. *Bode*, W. N. 1876, 23; hut this case was disapproved of in *Toggart* v. *Marcus*, 36 W. R. 469; see *supra*, p. 519.

Action to establish a will. Counter-claim propounding two earlier wills, under which defendant claimed in the event of the last in dste being invalid: *Appleman* v. *Appleman*, 12 P. R. 138.

Action by nn executor for detention of the goods of his testator. Counter-claim for funeral expenses paid by the defendant, and a debt due to him from the testator before his death: *Wotkin* v. *Newcomen*, 1 Cab. & El. 113.

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Action for the recovery of land. Counter-claim for damages in respect of a trespass by the plaintiff on the lands in question, and for an assault: *Goring* v. *Cameron*, 10 P. R. 496.

Action by lessor for ejectment, and forfeiture of lease. Counter-claim for relief from the forfeiture: *Wardens of Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254; 69 L. T. 118.

Action for money lent. Counter-claim for money paid by defendant, and for work done by him for the plaintiff and another, (without joining the other person): *Eyre* v. *Moreing*, W. N. 1884, 58.

Actions by executors to charge a married woman's estate with a debt to their testator. Counter-claim by her and her husband, also a defendant, for money belonging to the wife, not part of her separate estate, and for chattels in the possession of the testator at his death, and alleged to be the property of the husband: *Hodson* v. *Mochi*, 8 Ch. D. 569.

Action by *cestuis que trustent* against a surviving trustee to make good purchase money of testator's share of a partnership business, allowed to remain outstanding. Counter-claim to be indemnified by all *cestuis que trustent*, including the plaintiffs, as the retention of the money by the surviving partner was by their consent: *Re Holmes, Wright* v. *Weatherhead*, W. N. 1883, 110.

Action propounding will of defendant's wife, who had obtained a protection order. Counter-claim to set aside the protection order as fraudulent, pronounce against the will, and for letters of administration: *Mudge* v. *Adams*, 50 L. J. Pro. 49; 17 C. L. J. 369.

A mortgagor was allowed to set up, in a foreclosure suit, a claim to open signed accounts: *Eyre* v. *Hughes*, 2 Ch. D. 148.

Action by a trustee in bankruptcy for unpaid price of a chattel purchased from the bankrupt. Counter-claim for fraudulent representation made by the bankrupt on the sale: *Jack* v. *Kipping*, 9 Q. B. D. 113.

M. and C. are partners with B. in London and Honduras; the two firms are separate. Actions by M. and C. against the London firm as agents of the Honduras firm for an account. B. had a decree in Honduras for the taking of partnership accounts there, and the London firm asked by counter-claim for the accounts of the Honduras firm to be taken: *Mutrie* v. *Binney*, 35 Ch. D. 614; 36 W. R. 131.

Irregular counter-claim.

Striking Out Counter-claim.—Where a so-called counter-claim is irregular by not claiming relief against the plaintiff: *Cope* v. *Crichton*, 18 P. R. 462; or is otherwise not authorized by the *Rules*: *General Electric Co.* v. *Victoria Electric Light Co.*, 16 P. R. 476, 529, it may be struck out on motion, notwithstanding that the party moving to strike it out has pleaded to it and the case has come on for trial: *Cope* v. *Crichton*, *supra*. See also *Barber* v. *Blaiberg*, 19 Ch. D. 473.

Counter-claims inconvenient to be tried.

In order to prevent the abuse of the extensive powers of counter-claim given to defendants, the Court has a discretion under *Rule* 137 to consider whether the counter-claim should be proceeded with, or struck out, leaving the defendants to make it the subject of an independent action.

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There is jurisdiction to stay proceedings in a cross-action, and allow the claim to be set up by counter-claim in another action, yet it should only be done when the points at issue are the same: *Adamson* v. *Tuff*, 44 L. T. 420; see *Irwin* v. *Sperry*, 11 P. R. 229; *Conmee* v. *Can. Pac. Ry.*, 11 P. R. 149.

Scandalous counter-claim.

Where the Court was of opinion that a counter-claim was not *bona fide*, and it contained scandalous charges, it was struck out: *Lee* v. *Ashwin*, 1 T. L. R. 291; see *Rules* 136, 137.

Striking out counter-claims.

Striking Out.—For the principles upon which the Court acts in striking out counter-claims, see *Naylor* v. *Farrer*, *infra*, *Padwick* v. *Scott*, 2 Ch. D. 736; *Deer* v. *Sworder*, 4 Ch. D. 476; *Harris* v. *Gamble* 6 Ch. D. 748; *Birmingham Estates* v. *Smith*, 13 Ch. D. 506; *Rotheram* v. *Priest*, 28 W. R. 277; also the examplee *infra*.

An application to strika out a counter-claim: see *Rule* 137, may, in England, be made in Court: eee *Dear* v. *Sworder*, 4 Ch. D. 476; *Huggons* v. *Tweed*, 10 Ch. D. 359; hut, as a general thing, ehould be made in Chambers: eee *Naylor* v. *Farrer*, 26 W. R. 809; and Coe's Prac. in Cham. 78. In Ontario it may, and uenally should, be made before the Maeter in Chambers, or other officer having liks jurisdiction: see *Rules* 207 (4), 208. It should be made hefore trial. In *Lynch* v. *Macdonold*, 37 Ch. D. 227, it was soid that it was too late to apply after reply (the period fixed by the Eng. Rule), hut doubtless also at the trial the Judge has power to deal with the pleadinge and the action as he may deem proper: see *Barber* v. *Blaiberg*, 19 Ch. D. 473.

The decision of a Judge in suon a matter, if appealed from, will rarely be interfered with: *Huggons* v. *Tweed*, 10 Ch. D. 359.

In *Naylor* v. *Farrer*, Jessel, M.R., said that, in his opinion, uoder the Eoglish Rule, a defendant might eet up any number of cross-claims. There was no limit laid down in that *Rule* either to their number or nature; but it was left to the discretion of the Court or a Judge to limit them, otherwise fifty causes of action of the most diverse nature might be joined together and eet up, and witnesses of all kinde called in support of each. How would it be possible for ths Court to try all those in one action? There muet also bs some limit to the character of the claim set up. Suppoee, for instaoce, an action for account brought by a surviving partner againet the widow, who wae also ths executrix of the other, to which the widow set up a counter-claim for damages for breach of promiee of marriage, could that hs said to be a counter-claim which could he conveniently disposed of in the pending action? It was impossible. The Judge must exercise the diecretion given to him hy the *Rule* in allowing or rejecting a counter-claim.

In *Bartholomew* v. *Rawlings*, W. N. 1876, 56; 2 Charl. Ch. Ca. 32. Archibald, J., said: "There ie no doubt whatever that a defendaot entitled to set up any counter-claim that is not so incongruous as t be incapable of being cooveniently tried with ths original claim." The question of the convenience of trial depends greatly upon whether the subject of the counter-claim is germane to the subject of the actioo. But though a couoter-claim he not in relation to matters foreign to the subject of the action, still the fact that it will oecessitate a long account, and thus unduly delay the action, may furnish grounds for excluding it: *Gray* v. *Webb*, 21 Ch. D. 802. See also *Delobbel-Flipo* v. *Varty*, 1893, 1 Q. B. 663; *Hawkins* v. *Mybrea*, 3 T. L. R. 91.

In *Canadian Securities Co.* v. *Prentice*, 9 P. R. 324, Cameron, J., said: "I have assumed that allowing or disallowing a counterclaim, where third parties are to be brought in, is matter of discretion, not a course to be exercised arbitrarily, but upon consideration of all the circumstances, including rights involved in the counter-claim, and the question of delay, and convenience of trial. In jury cases there can be no question that much difficulty may arise by the mixing up of different claims—if I may use the term "mixing" in such connection—and cross or counter-claims in the same action; and unless the clear legal rights of the defendant for his protection against the plaintiff's action would seem to require it, counter-claims ought not to be favoured." Rule 115.

A counter-claim for damages arising out of the same subject matter or contract as the plaintiff is proceeding upon, is therefore in general, proper. So also a counter-claim in the nature of a cross-demand, pecuniary or otherwise, unconnected with the subject matter of the plaintiff's claim, provided there is no inconvenience in having a trial of both in the same action.

A counter-claim, like any other pleading, may be struck out for scandal, or if it tend to prejudice or embarrass the fair trial of the action, or if it be frivolous or vexatious: *Rules* 136, 137; also *Lee* v. *Ashwin*, 1 T. L. R. 291.

See *Monteith* v. *Walsh*, 10 P. R. 162, in note to *Rule* 608.

Where the counter-claim is in form against both plaintiff and third parties a Judge cannot properly strike it out on a preliminary motion, or of his own motion, because he considers the plaintiff is not properly made a party to it: *Thompson* v. *Big Cities Realty Co.*, 21 O. L. R. 394; unless the counter-claim on its face is open to objection under *Rule* 124; if he considers it cannot be conveniently tried with the original action, *semble*, he may order it to be tried separately: see *Rules* 66, 67, 73 and *Rule* 2; and where a counter-claim is struck out as not being conveniently triable with the original action, execution on the judgment in the original action may be stayed until the question raised by the counter-claim shall have been otherwise tried or disposed of: *Thompson* v. *Big Cities Realty Co.*, *supra*; *Auerbach* v. *Hamilton*, 19 O. L. R. 570; and see *Rule* 117.

Counter-claims Disallowed—Examples:—Counter-claims will not be allowed to be set up which cannot be the subject of an action: see *Rawley* v. *Rawley*, and other cases, pp. 522-3, or which raise questions not capable of being conveniently tried in the action. Counter-claims not allowed.

The following are examples of counter-claims held not capable of being conveniently tried in the action:

Action of assault and battery. Counter-claim for seduction of the defendant's daughter: *Coppeleus* v. *Brown*, W. N. 1875, 231; 1 Charl. Ch. Ca. 77.

Action for assault. A counter-claim for breach of agreement to repair a house was struck out, though an endeavour was made to connect the causes of action by showing that the parties were talking about the state of the house at the time of the assault: *Lee* v. *Colyer*, W. N. 1876, 8; 1 Charl. Ch. Ca. 86.

Action for libel consisting in the circulation of a letter by defendant among the shareholders of a colliery company. The plaintiff was

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one of the directors in the company, who was charged in the letter with conspiracy and fraud. Counterclaim for damages for loss sustained in respect of shares bought on false representations. Liodley, J., said: "This is one of those cases where it would be very difficult to keep the jury from mixing up the two claims." The counter-claim was therefore struck out without prejudice to any action defendant might bring, and the plaintiff was put on terms not to issue execution on any judgment he might obtain without leave of the Court or a Judge: *Nicholson* v. *Jackson*, W. N. 1876, 38; 2 Charl. Ch. Ca. 37.

Action for slander. Counter-claim for assault which was also pleaded in mitigation of damages for the slander: *Greer* v. *Hunter*, 11 C. L. T. 281.

Action for the specific performance by S. of an agreement for purchase by him of certain patent rights. H. & N., who were made co-defendants as claiming some interest in the subject-matter of the contract, alleged that the plaintiff had agreed to sell to them, and not to S., and that they had afterwards agreed to sell to S. By counter-claim H. & N. asked for specific performance by the plaintiff of his agreement with them, and by S. of his subsequent agreement with them. The counter-claim was excluded: *McLoy* v. *Sharp*, W. N. 1877, 216.

Action for specific performance. Counter-claim for conspiracy against the plaintiff, and others, all but one resident out of Ontario: *Dunlop* v. *Ryckman*, 5 O. L. R. 249.

Action against trustees of a settlement for breach of trust. Counter-claim against the husband of a plaintiff (also a plaintiff) for £45, due on a bill of exchange: *Fendall* v. *O'Connell*, 52 L. T. 538.

Action for protection of a trust fund. Counter-claim for libel: *S. African Republic* v. *Compagnie Franco-Belge*, 1897, 2 Ch. 487; followed in *Dunlop* v. *Ryckmon*, *supra*.

Action against an indorser on a promissory note. Defence, that it was to be paid out of a certain agency in which the defendant and the maker of the note were engaged, and that the plaintiff by libel and slander of the defendant had prevented that business from going on. Counter-claim for damages for the libel and slander: *Central Bank* v. *Osborne*, 12 P. R. 160; for the converse of this case: see *Sill* v. *Alexander*, 2 O. W. N. 23, 401.

Action for foreclosure. Counter-claim for damages by reason of false and depreciative statements in regard to the value of the mortgaged premises: *Odell* v. *Bennett*, 13 P. R. 10; see also *Lynch* v. *Macdonald*, 37 Ch. D. 227.

Action to recover land for non-payment of rent. Counter-claim not connected with plaintiff's demand, in the absence of special circumstances disallowed: *Hilldige* v. *O'Farrell*, 8 L. R. Ir. 158.

Action by A. against B. for trover of goods which C. assigned by bill of sale to A., and which B. had seized. Counter-claim by B. alleging a bill of sale from C. to him, and claiming relief against C. upon it. So far as the claim against C. was concerned, it was held not sufficiently connected with the original cause of action: *Barber* v. *Blaiberg*, 19 Ch. D. 473.

Action by liquidator for calls against a newspaper proprietor. Counter-claim for price of advertisements and damages: *Government Security Invest. Co.* v. *Dempsey*, 50 L. J. Q. B. 199.

Action for damages for negligence. Counter-claim for libel: *Mc-Lean* v. *Hamilton Street Ry. Co.*, 11 P. R. 193. Rule 116.

Action by a trustee in bankruptcy of L. & Co. Counter-claim not against the firm but against L. only: *Baker* v. *Gent*, 9 T. L. R. 159.

Action by judgment creditor of a joint stock company against a shareholder in the nature of a *sci. fa.* Counter-claim for damages against the company only: *Grills* v. *Farah*, 21 O. L. R. 457; such a claim being held to be pleadable under *The Ontario Companies Act* by way of defence: *Ib.*

Action on promissory note. Counter-claim that plaintiff had conspired with third persons, added as defendants by counter-claim, to keep certain moneys instead of applying them on the note, and praying that the new defendants might be ordered to account therefor: *General Electric Co.* v. *Victoria E. L. Co.*, 16 P. R. 529.

Action for specific performance by vendor against purchaser. Counter-claim for a comparatively small amount of money owing, as the result of an account, by plaintiff to defendant, and which the latter claimed to set-off against the purchase money. Counter-claim excluded as irrelevant to original claim, and because it would be inexpedient to try the two claims together, and would unduly delay the action to investigate the account: *Gray* v. *Webb*, 21 Ch. D. 802. Cases of set-off.

Separate Trial of Counter-claim.—Where a counter-claim is not excluded, it is still a question of convenience and in the discretion of the Court, whether the action and counter-claim should be tried together, or separately: *Re Woodfine, Thompson* v. *Woodfine*, 47 L. J. Chy. 832; 38 L. T. 753: see *Rules* 66, 67, 73, and *Rule* 2.

Staying Proceedings on Claim, or Counter-claim.—The Court refused to make an order upon the counter-claim until the original claim was dealt with: *Aitkin* v. *Dunbar*, 46 L. J. Chy. 489; but whether issues raised by the claim and counter-claim shall be tried together is a matter of convenience: *Re Woodfine, Thompson* v. *Woodfine*, 38 L. T. 753; 47 L. J. Chy. 832; and under *Rule* 117 the Court may stay proceedings on either a claim, or counter-claim, until the other is disposed of.

116. A counter-claim shall be treated as an action, so as to enable the Court to pronounce a final judgment upon all matters set up therein. C.R. 252. Judgment on counter-claim.

To same effect as Eng. (1883) R. 199.

See notes to *Rule* 115.

Judgment on Counter-claim.—A judgment on a counter-claim may be obtained in like manner as a judgment for a like claim may be obtained in an action. If the counter-claim is for a claim for which a final judgment might be signed for default of appearance, then a final judgment may also be signed for default of defence to such a counter-claim: *Rule* 355; *e.g.*, a final judgment may be signed where the counter-claim is one that might be specially indorsed: *Rule* 56 and see *Rules* 35-43; where, however, the claim is one for which a final judgment cannot be signed for default, then the pleadings must be noted closed: *Rule* 121, and a motion for judgment

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is necessary: *Rule* 356 (1). This motion may be made in the Weekly Court or at the trial, if any, of the action: *Rule* 358. The defendants by counter-claim are entitled to notice of the motion: *Rules* 213, 215.

See notes to *Rule* 256.

Judgment for balance of counter-claim.

Balance in Favour of the Defendant.—Judgment upon the counter-claim may give the defendant complete relief as in an independent action, by ordering payment of any balance found in his favour: *Staples* v. *Young*, 2 Ex. D. 324; or by awarding to him such other relief as he may be entitled to; and the judgment may provide that the amount recovered on the counter-claim for damages and costs shall, notwithstanding any claim of lien on the part of the defendant's solicitors, be set off *pro tanto* against the sum awarded to the plaintiff for a debt and costs: *Blumenstiel* v. *Edwards*, 5 O. W. R. 796. In *Horrocks* v. *Rigby*, 26 W. R. 714, a defendant, who had purchased the entirety of a leasehold, resisted a claim against him for a specific performance of a contract for sale of a moiety of the leasehold: he was also mortgagee, and in the latter capacity, as alternative relief by way of counter-claim, he called upon the plaintiff to redeem him, and it was held that he was so entitled, with costs as of a foreclosure suit.

Where the plaintiff claimed £49 12s., and defendant admitted the claim, and counter-claimed for £75, and judgment was given for the plaintiff on his claim, and for defendant for £40 on his counter-claim, it was ordered that the plaintiff should have costs of his claim, and the defendant the costs of his counter-claim, which was interpreted to mean that the plaintiff should have costs up to the delivery of the defence, and the defendant his costs after that time: *Bowker* v. *Kesteven*, 47 L. T. 545.

Judgment will usually be entered for the balance: see *Shropnel* v. *Laing*, 20 Q. B. D. 338; *Griffiths* v. *Potterson*, 22 L. R. Ir. 656; but the judgment may be for the plaintiff upon the claim, and for defendant upon the counter-claim: *Ib.* The form in which the judgment is entered does not affect the mode of taxing the costs, which will depend upon whether the counter-claim could, or could not, be pleaded as a set-off: see *Shrapnel* v. *Laing*, *supra*, and other cases in note to sect. 74, *supra*; it probably would affect the right of a third person to garnish either debt separately, as to which: see *Stumore* v. *Campbell*, 1892, 1 Q. B. 314.

Costs.

As to costs, where a balance is found in favour of the defendant, and in other cases of claims and counter-claims tried together, see *Staples* v. *Young*, *supra*; *Blake* v. *Appleyard*, 3 Ex. D. 195; *Parker* v. *Chambers*, 4 C. P. D. 68 and 457; *Chatfield* v. *Sedgewick*, Ib., p. 459; *Baines* v. *Bromley*, 6 Q. B. D. 197, 691, and notes to sec. 74, *supra*, p. 260.

As to the effect of a solicitor's lien upon the right to a set-off: see notes to *Rule* 666.

A charging order in favour of a solicitor under *Rule* 689 will be limited to the balance actually recovered: *Westcott* v. *Bevan*, 1891, 1 Q. B. 774.

Stay of proceedings on undisputed claim, pending disputed counter-claim.

117.—(1) Where a defendant does not dispute the plaintiff's claim, but sets up a counter-claim, the Court may stay proceedings respecting the claim until the counter-claim is disposed of. C.R. 255.

(2) Where a plaintiff does not dispute the defendant's counter-claim the Court may stay proceedings upon the counter-claim until the claim is disposed of. *New.* Rule 117.

This *Rule* is intended to prevent the obvious injustice of permitting the plaintiff to sign judgment and enforce payment from a defendant, who might establish a counter-claim entitling him to a balance upon the claim and counter-claim taken together.

Where a counter-claim is struck out as not being conveniently triable with the original action, a similar course may be pursued: see *Thompson* v. *Big Cities Realty Co.*, 21 O. L. R. 394; *Auerbach* v. *Hamilton*, 19 O. L. R. 570.

Reply and Subsequent Pleadings.—Under the Ontario *Rules* of pleading the plaintiff may either reply or amend his statement of claim: which course he shall pursue depends on circumstances. If he desires to strengthen his case made in the statement of claim, either by setting up new facts, or correcting mistakes therein, he should amend. If on the other hand he wishes merely to set up an answer to facts alleged by the defence, without in any way altering his statement of claim, or merely takes issue on the defence, then he should reply. Reply, and subsequent pleadings.

A reply must not set up new claims: or refer to an independent document as containing facts on which the pleader relies, without properly setting out such document as part of the reply; and, like other pleadings, it must not state evidence, arguments or conclusions of law: see *Rule* 141, and *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 790, and *Collambell* v. *Flight*, W. N. 1877, 125.

A reply is to be delivered within 10 days after the last of the defences: *Rule* 118.

As to reply, and a defence to a counter-claim: see *Rules* 114, and 160.

As to [illegible] further defence to a counter-claim founded on matter arising after the defence: see *Rule* 162.

If the plaintiff amends, the defendant has further time to plead to the amended pleading: see *Rule* 128.

Where the time to deliver reply would have expired on 25th July, but was extended to 22nd August, and afterwards to 19th September, and on 26th September, no reply having been filed, the defendant took proceedings to obtain judgment as on admissions by reason of the default, and on the same day the plaintiff, by leave, served notice for leave to deliver a reply, leave was refused by the Judge of first instance, on the ground of unexplained delay, but was granted, on payment of costs, by the Court of Appeal: *Eaton* v. *Storer*, 22 Ch. D. 91.

Leave to deliver a reply after the regular time for doing so had expired was granted, though the reply only sought to put in issue what was already in issue by the defence, the object of filing it being to enable the plaintiff to file a jury notice, the case being one in which a jury notice would be proper; and so it would be left to the discretion of the Judge at the trial to decide whether the trial should be had with, or without, a jury: *Qua* v. *Canadian Order of Woodmen*, 5 O. L. R. 51.

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Close of pleadings.

Close of Pleadings by Reply.—The pleadings are not closed until a reply has been delivered, or the time for delivering one has expired: *Rule* 120, and until then a defendant cannot give notice of trial: see *Robinson* v. *Caldwell*, 1893, 1 Q. B. 519; 68 L. T. 218; 5 R. 320.

Form of Reply.—See H. & L. Forms, Nos. 126, 128. The reply must not raise a new ground of claim not made by the writ or statement of claim: *Rule* 157; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; *Kingston* v. *Corker*, 29 L. R. Ir. 364; and must not contradict the statement of claim: *Breslauer* v. *Barwick*, 36 L. T. 52; *Collett* v. *Dickinson*, 26 W. R. 403; *Hancock* v. *De Nieeville*, W. N. 1875, 230; but it may either traverse the allegations made in the defence, or confess, and avoid them, or both: *Hall* v. *Eve*, 4 Ch. D. 341; 46 L. J. Chy. 145; 35 L. T. 926; 25 W. R. 177. In an action of ejectment where the defendant set up a claim as assignee of a mortgage, the plaintiff was held entitled to reply that the alleged assignment was made without consideration, and that the assignor was a lunatic at the time of the assignment, to defendant's knowledge: *Smith* v. *Smith*, 2 O. L. R. 410.

Defence to Counter-claim, and Reply Thereto.—*Quære*, whether the word "plaintiff" in this *Rule* includes a plaintiff by counter-claim: *semble*, it does: see *Irwin* v. *Turner*, 16 P. R. 349: *Rule* 114 and notes; it does not in the Act: see Jud. Act, s. 2 (*r*).

Delivery of reply.

118. A plaintiff shall deliver his reply, if any, within 10 days after the defence or the last of the defences has been delivered. C.R. 256.

Eng. (1883) R. 276 allows 21 days.

The last of the defences means the last defence of all the defences: see *Collett* v. *Preston*, 3 Mac. & G. 432; *Arnold* v. *Arnold*, 9 Beav. 206; *Bertolacci* v. *Johnstone*, 2 Ha. 633; Chy. O. 152; and *Ambroise* v. *Evelyn*, 11 Ch. D., at p. 762.

Vacations are not reckoned in computing the time: *Rule* 179. As to extending the time: see notes to *Rules* 110, 112, and 176.

Delivery after Time.—Under the English practice a reply delivered after three weeks, and without an extension of time, is irregular, and may be set aside, the pleadings having become closed. (see *Rule* 120): *Webb* v. *Kerr*, 14 L. R. Ir. 294; and where a reply was delivered *without leave* after the time, and before notice of motion for judgment, it was held to have the effect of preventing notice of motion for judgment from being given under the English Rules, on admission of the defence by default of reply: *Graves* v. *Terry*, 9 Q. B. D. 170; see also notes to *Rules* 110, 112.

In Ontario, however, it has been held that the delivery of a reply after the time prescribed, does not in itself entitle the opposite party to move to set it aside, and even if strictly the right to move exists, the pleading should not in general be set aside, but the time should be extended: *Wright* v. *Wright*, 13 P. R. 268, see also notes to *Rules* 110, 112.

Leave for subsequent pleadings.

119. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave. C.R. 257.

Same as Eng. (1883) R. 277.

Pleadings cannot go beyond reply without leave, except that the defendant may join issue, if he chooses. That, however, would not seem to be necessary, as the pleadings are deemed to be closed without joinder of issue, at the expiration of the time within which the delivery of subsequent pleadings is necessary: *Rule* 120. If the plaintiff replies specially, it may be necessary for a defendant either to amend his statement of defence, or to rejoin, so as to set up some new feature in the case, in the nature perhaps of a confession and avoidance, or something destroying the effect of the reply: see *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 792-3; but this cannot now be done in any case without leave: *Rules* 134 and 119. Rule 120.

In *Norris* v. *Beazley*, 35 L. T. 845, leave to rejoin was refused, the proposed rejoinder being regarded as unnecessary, and only amounting to a statement of matters contained in the statement of defence in a more detailed way.

In *Evans* v. *Gann*, W. N. 1875, 199, leave was granted to plead a counter-claim after issue joined.

As to pleading grounds of defence to a counter-claim arising after delivery of defence thereto: see *Rule* 162.

120. As soon as either party has joined issue upon any pleading of the opposite party, or as soon as the time for delivering a reply or subsequent pleading has expired, the pleadings shall be deemed to be closed. C.R. 262. When pleadings closed.

See Eng. (1883), R. 280.

Where a defence and counter-claim are delivered, and the defendant does not note the pleadings closed as to the counter-claim under *Rule* 121, the pleadings as to the counter-claim do not become closed under this *Rule* by lapse of time: *Nixon* v. *Mundell*, 14 O. L. R. 343.

Under this *Rule* if there is no counter-claim, it is not necessary to deliver any pleading to the defence: *Lockington* v. *King*, 7 C. L. T. 47; *Robinson* v. *Caldwell*, 1893, 1 Q. B. 519; 5 R. 320, and the pleadings become closed when the plaintiff has delivered a joinder of issue, or reply, or where, without joinder, or reply, ten days have elapsed from the delivery of the defence: *Schneider* v. *Proctor*, 9 P. R. 11. Where there is no counter-claim.

Where there is no counter-claim, and a reply has been delivered, the pleadings become closed without the delivery of any other pleading, or of a joinder of issue: *Qua* v. *Canadian Order of Woodmen*, 5 O. L. R. 51; *Weller* v. *Proctor*, 10 P. R. 323; and *Piper* v. *Benjamin*, 17 P. R. 267.

A joinder of issue may, however, properly be delivered either to a defence, or a reply, and sometimes materially saves expense and delay: see *Robinson* v. *Caldwell*, and *Qua* v. *Can. Order of Woodmen*, *supra*. Joinder of issue.

By delivery by the plaintiff of a simple joinder of issue upon the statement of defence and counter-claim, the pleadings are closed, and notice of trial may be given: *Hare* v. *Cauthrope*, 11 P. R. 353; *Malcolm* v. *Race*, 16 P. R. 330; but a pleading which denies the allegations in a counter-claim, puts the counter-claiming defendant

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to the proof thereof, and submits that the counter-claim should be dismissed, is not a joinder of issue, but a defence, to which the counter-claiming defendant has 10 days to reply, so that the pleadings are not closed until he replies, or joins issue, or the 10 days expire: *Irwin* v. *Turner*, 16 P. R. 349.

A reply joining issue on the statement of defence, and further alleging that the facts set forth in the defence are no answer to the claim, is a joinder of issue only, within *Rule* 120, and closes the pleadings: *Gibson* v. *Nelson*, 19 P. R. 265.

In *Webb* v. *Kerr*, 14 L. R. Ir. 294, it was held that when the pleadings were closed by expiry of time under this *Rule*, neither party could re-open them without the leave of the Court; but see *contra* *Wright* v. *Wright*, 13 P. R. 268, where the delivery of a reply after the time had expired was held to be not necessarily open to objection. A reply was allowed to be delivered after time, to enable the plaintiff to give a jury notice, the case being one *primâ facie* proper to be tried by jury: *Qua* v. *Canadian Order of Woodmen*, *supra*, p. 535.

Amendment.

Where a pleading is amended under an order giving leave to amend, or the time limited by the order for making the amendment has expired, the pleadings are in the same position as to their being closed as they were when the order was made: *Thompson* v. *Howson*, 16 P. R. 378.

Where a plaintiff issued a writ against several defendants, but only served one, and proceeded against him to the close of the pleadings, it was held that he must be assumed to have abandoned as to the others, and the pleadings in the action were closed, and notice of trial could be regularly given: *Vondusen* v. *Johnson*, 3 C. L. T. 505.

Where there is a counter-claim.

Where there is a counter-claim, the delivery of a pleading by the plaintiff which is more than a joinder of issue, and constitutes a reply to the defence proper, and a defence to the counter-claim, will not close the pleadings, as the counter-claiming defendant has further time to reply: *Irwin* v. *Turner*, *supra*.

Where a third party has been made a defendant to a counter-claim, the action is not at issue till the counterclaim has been struck out, or the third party has pleaded, or become in default: *Canadian Securities Co.* v. *Prentiss*, 2 C. L. T. 90.

A counter-claim must be by defence, and therefore a joinder of issue on the defence, not mentioning the counter-claim, closes the pleadings, and notice of trial thereafter is therefore regular: *Macara* v. *Snow*, 12 P. R. 616.

See also notes to *Rules* 246, 325.

Note may be entered of default.

121. Where any party makes default in delivering a statement of defence to the statement of claim or to the counter-claim within the time limited therefor, in cases where judgment cannot be signed, the opposite party may, upon proof of the default, by *praecipe* to the officer with whom the pleadings are filed, require him to note the default, and thereafter no pleading by the party in default shall be received or filed. Until default is so

noted the party in default may file his pleading. C.R. 263, *amended*. Rule 122.

There is no similar English Rule. This *Rule* also covers, in part, the provisions of C. R. 593.

Where interlocutory judgment cannot be signed, and an assessment of damages is necessary, or a motion for judgment, after the delivery of a statement of claim to which no defence is filed, the pleadings must be first closed by the entry of a note under this *Rule* before the case is set down for assessment of damages, or on motion for judgment: *Alexander* v. *Alexander*, 1 O. L. R. 639. Interlocutory judgment.

Where more than a year elapses after a party becomes entitled to note pleadings closed, by analogy to *Rule* 357, the note should not be made without leave, and *semble*, leave should not be granted without notice to the opposite party: *Radford* v. *Barwick*, 10 O. L. R. 720; *Rule* 213; and *semble*, on notice to defendant: *Ib.*, *Morison* v. *Telfer*, 120 L. T. Jour. 383; but see *Rule* 35. Motion for judgment.

In *Lloyd* v. *Ward*, 13 P. R. 238, Saturday being the last day to deliver a defence, the plaintiff caused a note under this *Rule* to be entered at 2.25 p.m., conceiving that no defence could be validly delivered on that day, none having been served by 2 o'clock; but it was held that under *Rule* 140, filing was part of the delivery, and the defendant had under former C. R. 7, (see now sec. 83, *supra*, p. 273), up to 3 o'clock to file the defence, whether it had been delivered or not. The offices now close at 1 p.m. on Saturday: see s. 83.

An action should not be set down on motion for judgment by default of pleading until the pleadings are noted as closed: see *Rule* 121; directions to officers in note to *Rule* 249, and *Alexander* v. *Alexander*, 1 O. L. R. 639. A defence filed after the pleadings have been so noted as closed is irregular, but is not a nullity, and, if filed before notice of motion for judgment is given, entitles the defendant to notice of the motion: *Jackson* v. *Gardiner*, 19 P. R. 137.

If a defence be delivered after service of a notice of motion for judgment, it should be brought to the attention of the Court by the plaintiff, if he is aware of it; or the defendant may do so, and the Court will exercise its discretion under all the circumstances: *Gibbings* v. *Strong*, 26 Ch. D. 66; *Montagu* v. *Land Corporation*, 56 L. T. 730; or the defendant may move to stay the motion for judgment, and for leave to deliver the defence: *Potts* v. *Deane*, 11 L. R. Ir. 396. See also *Wilson* v. *Noble*, 11 L. R. Ir. 546; *Munn* v. *Young*, 5 O. W. N. 426. Delivery of defence after time.

See also notes to *Rules* 112 and 120.

A defendant may note the pleadings closed, on default of defence to a counter-claim; but under former C. R. 263, it was held that until the pleadings were noted closed, the plaintiff might deliver a subsequent pleading to the counter-claim: *Nixon* v. *Mundell*, 14 O. L. R. 343.

Where a counter-claim is in substance a part of the defence, though pleaded as a counter-claim, it is not proper to note the pleadings closed as to the counter-claim, but it should be treated as a defence: *Smith* v. *Ransom*, 2 O. W. N. 921.

122. Either party shall be entitled to raise by his pleading any point of law, and by consent of the parties, Questions of law, how to be determined.

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or by leave of a judge, the same may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial. C.R. 259.

To same effect as Eng. (1883) RR. 285, 286; and see C. R. 373.

Scope of Rule.—Though demurrers are, in effect, abolished, the object of this, and the succeeding *Rules*, is to preserve a procedure for determining substantial questions of law as expeditiously as by the former demurrer, while rendering it no longer possible to raise objections which would lead to nothing but an amendment: see *Burstall* v. *Beyfus*, 26 Ch. D. 35; *Brophy* v. *Royal Victoria, etc., Co.*, 2 O. L. R. 651.

A motion to strike out the name of one of several plaintiffs, on the ground that he has no title to maintain the action, should not be made under *Rule* 66, but the objection should be raised under this *Rule*: *Morang* v *Rose*, 3 O. L. R. 354.

Three methods of proceeding are provided by *Rules* 122-124 (see *Burstall* v. *Beyfus*, 26 Ch. D. at p. 38, and *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 91), namely:—

(1) By raising on the pleadings a question of law, so that the parties may have it quickly decided: *Rules* 122-123.

(2) By raising on a pleading (see *Lever* v. *Land Securities*, 70 L. T. 323), the question whether it discloses any reasonable cause of action, or answer. If it does not, the Court or Judge may order the pleading to be struck out, not necessarily disposing of the action: *Rule* 124, first part.

(3) In a case where an action, or defence, is shewn by the pleading, or by undisputed facts, to be frivolous and vexatious, then the Court or Judge can dismiss the action, or order it to be stayed, or judgment to be entered, as may seem just: *Rule* 124.

Rule 126 enables the parties to state a case by consent: and this *Rule* enables the Court to direct that a question of law be decided before the issues of fact are decided: *Metropolitan Board* v. *New River Co.*, 1 Q. B. D. 727; affirmed 2 Q. B. D. 67.

Rule 73 enables a Judge to direct the trial of one or more questions of fact before others, and by analogy to that *Rule* the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it appears that the decision of such question may render it unnecessary to try the question of fact: *Pooley* v. *Driver*, 5 Ch. D. 460.

Ordinarily pleadings are only required to state the material facts: *Rule* 141. Questions of law may arise on the facts alleged. Under this *Rule*, however, it will be proper to raise and state a point of law in a pleading.

A point of law will always be based upon a certain state of facts, which must be assumed or proved to be true before the point of law can be disposed of. The facts in the opposite pleading may be expressly admitted, and *Rule* 222 may then apply; or a pleading may allege that the pleading of the opposite party discloses no cause of action or defence, and a point of law within this *Rule* will thus be raised: *Salaman* v. *Warner*, 1891, 1 Q. B. 734; *Thioden* v. *Tindall*, 7

T. L. R. 581; and the facts in the pleading will in such case be taken to be admitted: *Hollender* v. *Ffoulkes*, 26 Ont. 61; *Bank of Ottawa* v. *Roxborough*, 18 O. L. R. 511. Rule 122.

The facts raising the point of law were, in *O'Brien* v. *Tyssen*, 28 Ch. D. 372, assumed to be true, though denied by the pleading of the opposite party, where the case was set down by consent under the corresponding Eng Rule for argument: see also *Shafto* v. *Bolkcow*, 34 Ch. D. 725. The facts were verified by affidavit in *Re Bracken*, 43 Ch. D. 3, where the case was set down pursuant to an order. Probably on motion to set down a point of law raised under this *Rule* for argument, an investigation on affidavit or otherwise may take place to ascertain whether, notwithstanding the pleadings, there is any real dispute as to the facts necessary for the determination of the point of law: see *Blaydes* v. *Selby*, 35 Sol. Jour. 528, where admissions of fact were made.

Where the decision of the point of law will not, owing to there being material facts in dispute, dispose of the case, it is undesirable to set down the point of law for argument before the trial: see *Western S. S. Co.* v. *Amaral*, 1914, 3 K. B. 55.

Procedure.—The question of law raised will be determined at the trial, unless, by consent, or by order, under the latter part of the *Rule*, the case is set down for argument at the Weekly Court. Procedure.

Motion to set down for Argument.—The motion to set the matter down for argument must be made before a Judge in Chambers: see *Rules* 207 (4), 208 (13), and *Bank of Montreal* v. *Morrison*, 3 O. W. R. 303; *Smith* v. *Smith*, 5 O. W. R. 518, 673.

An order may be made where the decision of the point of law will materially affect and have an important bearing upon the action, and probably cause a saving of expense: *London, Chatham & Dover Ry.* v. *S. E. Ry.*, 53 L. T. 109; *Chatenay* v. *Brazilian, etc.*, 1891, 1 Q. B. 79; and see *Leyman* v. *Latimer*, 3 Ex. D. 352; 26 W. R. 305; 37 L. T. 819; but probably not, unless the action, or a distinct cause of action, or some considerable question in the action, can be disposed of (see *Rule* 123); nor where the question of law may not arise if the issues of fact are tried: *Parr* v. *London, Edinburgh & Glasgow Assce. Co.*, 8 T. L. R. 88; particularly where evidence may be lost by delaying the trial of the issues of fact: *Scott* v. *Mercantile, etc., Ins. Co.*, 8 T. L. R. 431, (see S. C. 66, L. T. 811); and se *Re Palmer*, 22 Ch. D. 88; *Owners, etc., of Maori King* v. *Hughes*, 73 L. T. 141, in note to *Rule* 73.

Where the writ of summons was indorsed, "the plaintiffs claim damages from the defendants for refusing to supply them with water by meter, under sec. 41 of the New River Act, 1852"; after appearance the plaintiffs, on an affidavit (uncontradicted by the defendant), that the sole question between the parties was, whether the defendants were bound to supply water by meter for road use, obtained an order to try that question first: *Metropolitan Board* v. *New River*, 1 Q. B. D. 727; 2 Q. B. D. 67; but whether that procedure would be warranted by this *Rule*, *quære*: *sed vide Rule* 73.

Where a point of law is raised on a pleading under this *Rule*, the party raising it is, for the purpose of the argument, taken to admit the pleadings as true in fact: *Bank of Ottawa* v. *Roxborough*, 18 O. L. R. 516.

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Argument.

Party to Begin.—The party entitled to begin is the party who raised the point of law in his pleading: *Richards* v. *Butcher*, 62 L. T. 867; *Stevens* v. *Choron*, 1901, 1 Ch. 894.

Stay of Trial Pending Appeal on Question of Law.—The trial of the issues of fact will not in general be stayed pending an appeal respecting questions of law: *Re Palmer*, 22 Ch. D. 88; and see *Arnold* v. *Toronto Ry. Co.*, 16 P. R. 394; *Hockley* v. *Grand Trunk Ry. Co.*, 7 O. L. R. 186.

Examples.—On a motion to strike out a pleading as bad in law, the Court will not look at the pleading with the same strictness as upon a demurrer under the former practice: *Bank of Hamilton* v. *George*, 16 P. R. 418.

Examples of cases disposed of under Rule 122.

Under this *Rule* an objection in the nature of the former general demurrer for want of equity was entertained: see *Salaman* v. *Warner*, 1891, 1 Q. B. 734; *Thioden* v. *Tindall*, 65 L. T. 343; *Cobb* v. *Great Western Ry.*, 37 Sol. Jour. 196; also a question of law depending on the construction of a will: *Re Ball*, 36 Ch. D. 508 (though that case was brought on under *Rule* 124); *Chatenay* v. *Brazilian, etc.*, 1891, 1 Q. B. 79; or any other instrument such as a debenture: *Page* v. *International*, 68 L. T. 435; the effect of a disentailing deed: *Millbank* v. *Vane*, 1893, 3 Ch. 79; the validity of an admitted instrument imposing a fetter on a mortgagor's right of redemption: *Salt* v. *Northampton*, 45 Ch. D. 194; 1892, A. C. 8; in an action of libel whether statements by solicitors in objections to taxation while acting as solicitors were absolutely privileged: *Pedley* v. *Morris*, 65 L. T. 526; 40 W. R. 42; a question of estoppel: *Priestman* v. *Thomas*, 9 P. D. 210; of *res judicata*: *Caird* v. *Moss*, 33 Ch. D. 22; *Boswell* v. *Coaks*, 6 R. 167; a question preliminary to the right to sue, *e.g.*, a defence that an action would lie only after adjustment of insurance by arbitration: *Viney* v. *Bignold*, 20 Q. B. D. 172; or that the action would not lie, owing to the omission to give notice of the intention to bring the action, where one is necessary, *e.g.*, in libel against a newspaper, under *The Libel & Slander Act* (R. S. O. c. 71), s. 8: *Benner* v. *Mail Printing Co.*, 24 O. L. R. 507; whether notice of action was necessary: *McCarthy* v. *Vespra*, 16 P. R. 416; whether a corporation can maintain an action for libel: *Mayor of Manchester* v. *Williams*, 1891, 1 Q. B. 94; whether the Atty.-Gen. or Local Board could sue for a nuisance: *Atty.-Gen.* v. *Logan*, 1891, 2 Q. B. 100; whether an action of tort survived to an executor suing: *Oakey* v. *Dalton*, 35 Ch. D. 700; whether plaintiffs who had assigned their business to defendants in trust for creditors had a right to sue for an account: *Cooke* v. *Smith*, 45 Ch. D. 38; whether the purchaser, from the proprietors of a trade mark, of goods having that mark, could sue alleged infringers of the trade mark: *Richards* v. *Butcher*, 62 L. T. 867; whether a Statute of Limitations applied to bar the plaintiff's claim: *Parker* v. *London County Council*, 1904, 2 K. B. 501; whether the Court has jurisdiction: *Companhia de Mocambique* v. *British S. A. Co.*, 1892, 2 Q. B. 358; 1893, A. C. 602; a question under the Statute of Frauds: *Stokell* v. *Niven*, 61 L. T. 18; whether an assignment of a chose in action under which the plaintiff claimed was void for champerty; both parties assenting: *Colville* v. *Small*, 22 O. L. R. 23, 426; and where an action was to recover a bet on the result of a Parliamentary Election, it was suggested that the question whether the action was maintainable might be determined under this *Rule*: *Harris* v. *Elliott*, 28 O. L. R. 349.

Where defendants contended that, assuming questions of fact to be found against them, they were, as a matter of law, liable for a small

sum, which they would pay into Court rather than go to the expense of evidence, an order was made under this *Rule* for determination of the questions of law first: *Tattersoll* v. *National Steamship Co.*, W. N. 1884, 32. Rules 123, 124.

On the other hand in *Scott* v. *Mercantile Accident Insurance Co.*, 8 T. L. R. 431, an order for trial of a point of law first was refused, where issues of fact might be found at the trial which would render the question of law immaterial: see also *Grosvenor* v. *White*, 38 W. R. 201.

In *Preston* v. *Fullwood*, 2 T. L. R. 60, a question of law, which could not clearly be separated from the other questions in the action, was directed to be tried first at the trial upon admissions or evidence.

See also cases referred to under *Rule* 73.

123. Upon the determination of such point of law the Court may pronounce such judgment as may be deemed proper. C.R. 260. Judgment thereon.

See Eng. (1883) R. 287.

124. A Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly. C.R. 261. Pleading may be struck out.

See Eng. (1883) R. 288. The jurisdiction is exercisable only by a Judge in Court or in Chambers: see *Rules* 205, 207 (4), 208 (13).

Scope of Rule.—Two cases are provided for by this *Rule*: Two cases provided for

(1) Where a pleading discloses no reasonable cause of action or defence.

In such a case a claim, or defence, may be struck out, not necessarily disposing of the action, as leave may be given to amend; or the action may be dismissed, or judgment given for the plaintiff, or defendant.

(2) Where an action is shewn by the pleadings to be frivolous or vexatious.

This appears to apply to the case of a plaintiff's action appearing by the pleadings to be frivolous or vexatious, and in such case the action may be stayed or dismissed, or judgment may be given for defendant.

This *Rule* does not seem to apply where only part of a pleading is scandalous, defective, or embarrassing. *Rules* 136 and 137 then apply.

On an application under this *Rule*, the Court is strictly confined to a consideration of the pleadings: *Bornes* v. *Carter*, 2 O. W. N. 8.

A description of the cases in which this *Rule* is applicable has been expressed in various ways. In *Atty.-Gen.* v. *L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 27 L. J. N. C. 126, and *Parsons* v. *Burton*, W. N. 1883, 215; it was said that the *Rule* was not intended to take the place of a demurrer, but only to get rid of frivolous actions; but see *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 86.

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A pleading which sets up matter which has been held by an unreversed decision of the Court of Appeal to be bad in law, will be struck out, though the pleader disputes the correctness of the decision: *McCarthy* v. *Vespra*, 16 P. R. 416; *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162.

The question whether an action would lie, without an allegation of special damage, for falsely and maliciously and without reasonable or probable cause presenting a bankruptcy petition, was held not to be one to be determined on application to strike out a statement of claim as disclosing no reasonable cause of action: *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106. Nor the question whether one of several plaintiffs was entitled to maintain the action: see *Morang* v. *Rose*, *supra*, p. 538.

A statement of claim which discloses a reasonable cause of action which a notice of action is necessary, but omitting to allege that notice of action was given, cannot be struck out on that ground: *Conmee* v. *Weidmann*, 16 P. R. 239.

A statement of claim which discloses a reasonable cause of action cannot be struck out upon an application under this *Rule*, on a suggestion that the action cannot succeed for want of necessary parties: *Beardmore* v. *Toronto*, 19 O. L. R. 139.

This *Rule* only applies after a statement of claim is delivered; but the application need not be made until after the close of the pleadings, when the Court may look at the whole case upon the pleadings: *Tucker* v. *Collinson*, 34 W. R. 354. A motion before delivery of statement of claim may, however, be made by way of application for the exercise of the inherent jurisdiction of the Court: *Ker* v. *Williams*, 29 Sol. Jour. 681.

Jurisdiction under this *Rule* will only be exercised with caution: *Magrath* v. *Reichel*, 57 L. T. 850; 14 App. Cas. 667, and a doubtful question of law will not be decided: *Roberts* v. *Charing Cross Ry.*, 1903, W. N. 13; 87 L. T. 732; *Goodson* v. *Grierson*, 1908, 1 K. B. 761; 98 L. T. 740 (action to recover bets); but see *Harris* v. *Elliott*, 28 O. L. R. 349; nor will an action be dismissed brought *bonâ fide* to try a question of law: *Lea* v. *Thursby*, 89 L. T. 744; 90 L. T. 265. The improbability of the facts alleged is not material. However improbable, their truth will be assumed: see *Lawrance* v. *Lord Norreys*, 39 Ch. D. 236; *Langdale* v. *Knill*, 6 T. L. R. 236; *Johnston* v. *Johnston*, 33 W. R. 239; *Thompson* v. *Big Cities Realty Co.*, 21 O. L. R. 401; but if nevertheless the Court is satisfied that the action is frivolous or vexatious: *Kellaway* v. *Bury*, 66 L. T. 603; 8 T. L. R. 433, as for example, being plainly based upon some ground which, if proved, as it is assumed it will be, would not in law entitle plaintiff to judgment: *Johnston* v. *Johnston*, 33 W. R. 239; *Re Batthyany*, 32 W. R. 379; *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489; *Williams* v. *Earl Beauchamp*, 11 P. D. 60; *Weldon* v. *Maples*, 20 Q. B. D. 331; *Willis* v. *Earl Howe*, 1893, 2 Ch. 545; 2 R. 427; *Law* v. *Llewelyn*, *supra*, p. 46; or being a case where a plea of *res judicata* if raised must succeed: *Macdougall* v. *Knight*, 25 Q. B. D. 1, the action will be dismissed: see also *Reichel* v. *Magrath*, 14 App. Cas. 667; *Rio Tinto* v. *Société des Metaux*, 6 T. L. R. 408; *Stephenson* v. *Garnett*, 1898, 1 Q. B. 677. So where an action was brought against an official liquidator personally, in respect of property vested in him officially, so that no action was maintainable, except against him officially, and by leave of the Court, it was stayed: *Graham* v. *Edge*, 4 T. L. R. 442; so also an action brought under

The Fatal Accidents Act, by an infant who was not the personal representative of the deceased was dismissed: *Luciani* v. *Toronto Construction Co.*, 4 O. W. R. 1073; and see *Blayborough* v. *Brantford Gas Co.*, 18 O. L. R. 243; also an action for libel against a solicitor respecting statements made by him in an affidavit made in the action on an interlocutory motion: *Gompas* v. *White*, 6 T. L. R. 20; see also *Lilley* v. *Roney*, 61 L. J. Q. B. 727; *Lawrence* v. *Newberry*, 7 T. L. R. 588; *Salomons* v. *Knight*, 8 T. L. R. 472; *Guy* v. *Walker*, 8 T. L. R. 314. Rule 124.

This *Rule* would seem to contemplate that the frivolous or vexatious nature of the action or defence should appear *from the pleadings*: see also *Atty.-Gen.* v. *L. & N. W. Ry.*, 1892, 3 Ch. 278; but in *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489; affidavits, and in *Remmington* v. *Scoles*, 1897, 2 Ch. 1; 76 L. T. 667, the defendant's admissions under oath in another Court, were admitted: see also cases, *supra*, p. 45 *et seq.* Probably affidavits may also be used, as the application may be considered to be made to the Court both under this *Rule*, and under its inherent jurisdiction: *Fletcher* v. *Bethom*, 41 W. R. 621; *Chaffers* v. *Goldsmid*, 1894, 1 Q. B. 190; and see *Boswell* v. *Coaks*, 6 R. 167; *Thompson* v. *Big Cities Realty Co.*, *supra*, p. 542.

Where the defence set up an immaterial issue (*e.g.*, that the plaintiff, who was suing as a person of unsound mind, was not in fact insane), it was struck out: *Richmond* v. *Branson*, 1914, 1 Ch. 968; 110 L. T. 751.

A defendant may move notwithstanding that the action is brought by an infant: *Anon.*, 29 Sol. Jour. 638; and see *Luciani* v. *Toronto Construction Co.*, *supra*.

Leave to amend may be given in a proper case: *Richards* v. *Butcher*, 62 L. T. 867, on such terms as to costs as may be just: *Preston* v. *Fullwood*, 34 W. R. 200.

Where an action is dismissed because the statement of claim shews no cause of action, a fresh action may be brought: see *Jones* v. *Insole*, 64 L. T. 703; 39 W. R. 629.

In *Darlow* v. *Scratton*, 29 Sol. Jour. 131, Chitty, J., said, that the word "reasonable" is merely redundant, and the question is whether there is any question to be tried. In *Burstall* v. *Beyfus*, 26 Ch. D. 35, and *Dadswell* v. *Jacob*, 34 Ch. D. 278; 55 L. T. 751, 857; Cotton, L.J., thought that the *Rule* applied where a pleading is demurrable, but that the same strictness is not to be used in looking at the statements in the pleadings, as formerly on demurrer: see also *Bank of Hamilton* v. *George*, 16 P. R. 418; Lindley, L.J., in *Dadswell* v. *Jacob*, at p. 284; said that a pleading which discloses no reasonable cause of action "is demurrable at once, and it is something more, it is perfectly frivolous," and that is the thing which is struck at by the *Rule*.

The *Rule* only applies to pleadings which are obviously unsustainable, as where the Court is satisfied that a statement of claim discloses no cause of action: *Smith* v. *London*, 19 O. L. R. 139; *Scott* v. *Patterson*, 17 O. L. R. 270; *Atty.-Gen.* v. *L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 27 L. J. N. C. 126; as, for example, being in respect of a question decided by the Court of Appeal adversely to the plaintiff's alleged cause of action: *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162; or where a pleading is obviously bad: *Brophy* v. *Royal Victoria Life etc., Co.*, 2 O. L. R. 651; but does not apply where an arguable question of law is involved: see *Rodger* v. *Noxon Co.*, 19 P. R. 327; or at all events should

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not: *Kennedy* v. *Kennedy*, 2 O. W. N. 1173; nor where a lengthy argument and citation of numerous authorities is necessary to shew that the plaintiff should not succeed: *Anderson* v. *Gurrie*, 38 Sol. Jour. 256; *Booler* v. *Holder*, 37 L. T. 29?; *Mutrie* v. *Binney*, 35 Ch. D. 614; see also *Re Bulthyony*, 32 W. R. 379; *Shofta* v. *Bolckow*, 34 Ch. D. 725; and *Grosvenor* v. *White*, 81 L. T. 663; 38 W. R. 201; *Beardmore* v. *Toronto*, 19 O. L. R. 139; nor where questions of law, and matters of general importance are involved: *Dyson* v. *Attorney-General*, 1911, 1 K. B. 410; 103 L. T. 707; but only to very clear cases: *Christy* v. *Ion Specialty Co.*, 18 C. L. T. 85; 34 C. L. J, 163, nor where a defence is obviously frivolous and vexatious: *Solomons* v. *Knight*, 8 T. L. R. 472; *Reichel* v. *McGrath*, 14 App. Cas. 665; *Remmington* v. *Scoles*, 1897, 2 Ch. 1; 76 L. T. 667; *Mackellar* v. *Hornsey*, 49 W. R. 301; *Critchell* v. *London & S. W. Ry.*, 1907, 1 K. B. 860.

It is not convenient to act under the *Rule* where, assuming a defence to be true and to be no answer in law, the defendant may have another defence: *Grosvenor* v. *White*, 38 W. R. 201; 61 L. T. 663.

Again in *Ketlaway* v. *Bury*, 66 L. T. 602; 8 T. L. R. 434, Lindley, L.J., said: "It is not enough that the statement of claim should be demurrable, it is essential that the Court should see that the plaintiff has no case at all either on his statement of claim, or on such affidavits as he may file with a view to amendment": see also *Black* v. *Ellis*, 12 O. L. R. 403.

Though a pleading be struck out, the party pleading may be allowed to file an amended pleading: *David* v. *Ryan*, 2 O. W. N. 322.

Apart from this *Rule* the Court has jurisdiction to stay proceedings wherever necessary for the purposes of justice: see Jud. Act, s. 16 (*f*), and notes, *supra*, p. 42 *et seq.*; and it has moreover inherent jurisdiction to prevent an abuse of its process.

The bringing of an action, even though maliciously and without foundation, is no ground for an action, the only damage which the defendant suffers being compensated by costs: *Boxter* v. *Young*, 3 O. W. N. 413; following *Quartz Hill Mining Co.* v. *Eyre*, 11 Q. B. D. 674, 689. And no matter how scandalous or false statements in legal proceedings may be, it is essential for the administration of justice that they should be made with impunity: *Baxter* v. *Young*, *supra*, following *Munster Lamb*, 11 Q. B. D. 588.

Where the statement of claim disclosed the commission of a felony (rape) the action was stayed until the defendant had been prosecuted, or reasonable ground shown for not prosecuting: *Smith* v. *Selwyn*, 137 L. T. Jour. 7; but see *E.* v. *F.*, 11 O. L. R. 582.

No reasonable cause of action, or defence.

(1) No Reasonable Cause of Action or Defence.—In ascertaining whether there is a reasonable cause of action or answer, the Court does not try the action on the pleadings, but merely looks to see if a reasonable case is set up: *Louis* v. *Guardians of Marylebone*, 4 T. L. R. 442. The pleading complained of will not be looked upon with the same strictness as it used to be upon a demurrer; a party is not to be lightly deprived of a ground of substantial defence by the summary process of a judgment under this *Rule*: *Bank of Hamilton* v. *George*, 16 P. R. 418; *Dadswelt* v. *Jacobs*, 34 Ch. D. 278. A defence to a *sci. fa.* action which might have been pleaded as a defence to the original action was struck out: *Shaver* v. *Collon*, 16 P. R. 278; but the Court refused to strike out clauses of a statement of

claim because notice of action was not alleged to have been given, though notice appeared to be necessary: *Conmee* v. *Weidman*, 16 P. R. 239; also where a statement of claim set up an agreement required by the Statute of Frauds to be in writing, but not stating it to be in writing: *Fraser* v. *Pape*, 91 L. T. 340. Rule 124.

The principles formerly applicable to demurrers will, however, to some extent be applied. As a general rule the pleading alone will be looked at: *Boaler* v. *Holder*, 54 L. T. 299; *Salomons* v. *Knight*, 8 T. L. R. 473; *Willis* v. *Earl Beauchamp*, 11 P. D. 59; *Reichel* v. *McGrath*, 14 App. Cas. 667; *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 480; and perhaps the particulars if any: see *Davey* v. *Bentinck*, 1893, 1 Q. B. 185; but the admissions of the defendant may also be considered: *Remmington* v. *Scoles*, 1897, 2 Ch. 1; 76 L. T. 667; it is not enough to refer to a document in the pleadings and read the document on the motion; the part relied on must be set out in the pleading: *New Chile* v. *Lee*, 4 T. L. R. 444; *Howard* v. *Hill*, W. N. 1887, 193.

Where therefore a material fact is not pleaded, without which no cause of action or defence is disclosed, the pleading might formerly have been demurred to; now, objection in law may be taken to it under *Rule* 122; see *Griffiths* v. *London and St. Katharines Docks*, 12 Q. B. D. 493; 13 Q. B. D. 259 (*sed vide Conmee* v. *Weidman*, *supra*); or a motion to strike out may be made under this *Rule*, in a plain case, and perhaps also in a case where the possibility of amendment is doubted, so as to compel the party whose pleading is defective to shew by affidavit whether he can amend it.

A statement of claim was struck out where the Court was satisfied that the plaintiff could not succeed at the hearing: *South Hetton Coal Co.* v. *Haswell S. & E. Co.*, 1898, 1 Ch. 466; 78 L. T. 8; *Hodson* v. *Pare*, 1899, 1 Q. B. 455.

A statement of claim against a Justice of the Peace, for an alleged slander uttered in the course of proceedings pending before him, was struck out as shewing no reasonable cause of action: *Law* v. *Llewellyn*, 1906, 1 K. B. 487; 94 L. T. 359.

Where a plaintiff had no status to maintain the action (to interpret a will), the action was dismissed under this *Rule*: *Kennedy* v. *Kennedy*, 24 O. L. R. 183; or where an action under *The Fatal Accidents Act* was brought in respect of the death of an adopted son: *Blayborough* v. *Brantford Gas Co.*, 18 O. L. R. 243; and see *Luciani* v. *Toronto Construction Co.*, *supra*, p. 543.

Where, with a statement of defence, the defendant's solicitor sent a letter stating that they did not intend to insist on the defence, but that it was put in to prevent the plaintiff from taking money out of Court, except in satisfaction of his claim, it was ordered to be struck out: *Critchell* v. *London & S. W. Ry.*, 1907, 1 K. B. 860; 96 L. T. 603.

Liberty to Amend.—The Court will give leave to amend in a proper case, rather than give judgment in ignorance of facts which it ought to know before rights are decided: *Steeds* v. *Steeds*, 22 Q. B. D. 37; *Griffiths* v. *London & St. Katharines Docks*, *supra*; *Richards* v. *Butcher*, 62 L. T. 867; *Black* v. *Ellis*, 12 O. L. R. 403; on such terms as to costs as may be just; *Preston* v. *Fullwood*, 34 W. R. 200; leave to set up a new cause of action was refused: *Kennedy* v. *Kennedy*, *supra*; *sed vide David* v. *Ryan*, *supra*, p. 544. Leave to amend.

Rules, 125, 126.

Application.—An application to strike out a pleading should be made promptly. It may be made immediately after the delivery of the pleading, and before pleading in answer to it: *Atty.-Gen.* v. *L. & N. W. Ry. Co.*, 1892, 3 Ch. 274, or perhaps after the close of the pleadings: see *Tucker* v. *Collinson*, 34 W. R. 354; at any rate before the case is set down for trial: *Cross* v. *Howe*, 62 L. J. Ch. 342.

Frivolous and vexatious actions.

(2) Frivolous and Vexatious Actions.—Under the second branch of the *Rule* the action must be obviously frivolous or vexatious: see *per* Lindley, L.J., in *Atty.-Gen. L. & N. W. Ry. Co.*, 1892, 3 Ch. 277. An action appearing from the pleadings to be of that description comes within this *Rule*: see *Willis* v. *Earl Beauchamp*, 11 P. D. 59; *Reichel* v. *Magrath*, 14 App. Cas. 667; but, apart from the *Rule* altogether, the Court has inherent jurisdiction to prevent abuse of its process and to dismiss an action which can on motion be shewn to be frivolous or vexatious: see *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210; *Kellaway* v. *Bury*, 66 L. T. 603; *Brophy* v. *Victoria, etc., Co.*, 2 O. L. R. 651; *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162; *Ker* v. *Williams*, 29 Sol. Jour. 687; and notes to sec. 16 (*f*) of the Jud. Act, *supra*, p. 42 *et seq.*

Issue to be filed.

125. Where an issue is directed to be tried it shall, if the parties differ, be settled in chambers, and as soon as settled be filed in the office in which the proceedings are carried on, and thereafter the proceedings in the issue shall be carried on in the same manner as the proceedings in an action. C.R. 377, *amended*.

An issue is in the nature of a pleading, and besides being filed, must also be served: see *Rule* 140.

Semble, where an interpleader issue is ordered in an action, the issue should be filed where the action was commenced, even though the interpleader application be made elsewhere, *e.g.*, where in an action commenced in an outer county, the application for an interpleader issue is made in Toronto; "The proceedings" would mean "the proceedings in the action in which the application is made" and not "the interpleader proceedings."

Where proceedings are initiated in Toronto, the Central Office is the proper office to file the issue: *Rules* 625, 626.

Parties may concur in stating special case.

126.—(1) The parties to any cause may concur in stating questions of law arising, in the form of a special case for the opinion of the Court; and may agree that on the judgment of the Court being given in the affirmative or negative of the question or questions of law raised, certain specific relief may be awarded.

(2) Upon the argument of the case the whole contents of the documents referred to therein may be read, and the Court may draw from the facts and documents any inference, either of fact or law, as at a trial. C.R. 372.

See Eng. (1883), R. 389.

C. R. 372 provided for the statement of a special case "in any pending matter not commenced by writ": the present *Rule* may possibly have as wide an effect; see *Rule* 3 (*b*) (*j*). Rule 128.

The *Rule* provides for the statement of a special case "in any cause" which probably includes not only actions commenced by writ of summons, but also matters commenced in any other way authorized by the *Rules*. Where the case is stated in a proceeding not commenced by writ, *The Judicature Act*, s. 135, *supra*, protects persons acting under any judgment made on the special case, in like manner as if the judgment had been pronounced in an action commenced by writ. A special case, on its being filed, may be registered as a *lis pendens*, whether stated in an action commenced by writ or not: *Ib.*, s. 136. Special cases, how stated

The *Rule* does not appear to contemplate that proceedings may be commenced by filing a special case; but that the stating of a special case shall be ancillary to an action, or some other proceeding already commenced.

Stating Case.—Former C. R. 318 provided that a special case is to be stated concisely and in numbered paragraphs: *Bulkeley* v. *Hope*, 9 D. M. & G., 36; and by C. R. 374 it was to be signed by the parties or their solicitors, and filed by the plaintiff; but these provisions are not continued in the present *Rules*, but probably no alteration of practice is intended by the omission. Stating case.

As to stating special cases where infants, or other persons not *sui juris*, are interested, see Jud. Act, s. 3, and notes, *supra*, p. 24.

The *Rules* authorize the stating of a special case before statement of claim: *Metropolitan Board* v. *New River Co.*, 1 Q. B. D. 727; 2 Q. B. D. 67.

Where pleadings are delivered, and are admitted to state the facts, the case may come on as a motion for judgment under *Rule* 222: see *Till* v. *Till*, 15 Ont. 133.

A special case must be upon a real state of facts, not a hypothetical one: *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 361; *Bright* v. *Tyndall*, 4 Ch. D. 189; *Pryse* v. *Pryse*, L. R. 15 Eq. 86; *Smith* v. *Gibson*, 25 L. T. 559; 20 W. R. 88; *Savage* v. *Tyers*, 20 W. R. 817; *Bardwell* v. *Sheffield Water Works Co.*, L. R. 14 Eq. 517; and where stated in an action, only such questions of law can properly be raised as must necessarily arise in the action: *Republic of Bolivia* v. *Bolivian Navigation Co.*, 24 W. R. 361; *Toronto* v. *Toronto Ry. Co.*, 9 O. L. R. 33. The Court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings: *Taylor* v. *Compbell, Postmaster-General*, 33 U. C. Q. B. 264. The Court will not entertain a case in an action in which the Court has no jurisdiction: *Attorney-General* v. *Cameron*, 26 Ont. App. 103. Must be on real and not hypothetical facts.

The following are examples of special cases under *The Judicature Act*:—*Lysaght* v. *Edwards*, 2 Ch. D. 499 (a question arising in an action for specific performance): *Gen. Finance Co.* v. *Liberator, B. S.*, 19 Ch. D. 15 (a question of title, in an action for recovery of land): *Wilson* v. *Dundas*, W. N. 1875, 232 (a question as to the liability of a garnishee); *Morshall* v. *Aiglewood*, W. N. 1881, 3 (a question as to the construction of the power of appointment in a Examples.

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will); *Ashbury* v. *Watson*, 51 L. T. 766 (a question under the Companies Act); *Rosher* v. *Rosher*, 26 Ch. D. 801; 51 L. T. 785 (a question as to the validity of a condition annexed to a devise in fee).

A defence in the nature of a demurrer may be set up to a special case: *Johnston* v. *Consumers' Gas Co.*, 23 Ont. App. 566.

Amending special case.

Except by consent, a special case, after having been finally agreed to, cannot be reopened: *Hamilton* v. *Staley*, 28 Sol. Jour. 478; and see *Johnston* v. *Consumers' Gas Co.*, 23 Ont. App. 566. Affidavits cannot be received to alter or modify a special case stated by consent. The only relief open to the party complaining that a case has been mis-stated, is to apply to amend or vacate it, and *quære* whether it can be amended after judgment, except by consent: *Cousineau* v. *City of London F. Ins. Co.*, 15 Ont. 329: *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297.

Semble, in case of error, the Court may, at the hearing, order a special case to be amended: *Rule* 183, *The Immacolata Concezione*, 9 P. D. 37; and a special case was amended by leave, at the hearing, by adding a party in existence before the case was filed, but accidentally omitted, and the case, as amended, was ordered to be set down against the added defendant: *Barnaby* v. *Tassell*, L. R. 11 Eq. 363. Where new parties come into existence after a special case is set down they should be made parties to the proceeding: *Palmer* v. *Flower*, 18 W. R. 887; *Atty.* v. *Etough*, L. R. 13 Eq. 462; *Savoge* v. *Snell*, L. R. 11 Eq. 264. See *Peter* v. *Peter*, W. N. 1884, 45, 60; 32 W. R. 409, and 515, in note to *Rule* 301.

Amendment after judgment on a special case was refused in *Re Taylor, Tomlin* v. *Underhay*, 22 Ch. D. 495; *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297. But where a special case is stated in an action, and a decision given upon it, under a mistake of fact, the Court is not bound by the decision, unless it has been adopted by subsequent orders, but may disregard it and direct the action to go on to trial: *Re Taylor, Tomlin* v. *Underhay, supra*, and *East* v. *O'Connor*, 19 P. R. 301.

Setting down special case.

Setting Down, and Notice.—Under the present *Rules* a motion for judgment on a special case is to be set down, and notice thereof given, as upon motions for judgment in other cases: see *Rules* 215, 234 (*b*).

Upon the argument of a special case stated in replevin, the plaintiff has the right to begin: *Vigar* v. *Dudman*, 24 L. T. 734.

Judgment on special case.

Judgment.—The Court is not bound to answer every question the parties may think fit to put: *Viscount Barrington* v. *Liddell*, 2 DeG. M. & G. 480, 506; Seton 34. It will not in general declare future rights: *Savage* v. *Tyers*, 20 W. R. 817; *Lady Langdale* v. *Briggs*, 8 DeG. M. & G. 426, 427, 428: *Earl of Tyrone* v. *Waterford*, 6 Jur. N. S. 567; *Greenwood* v. *Sutherland*, 10 Ha. App. xii.; *Garlick* v. *Lawson*, *Ib.*, xiv.; but has occasionally done so: *Bogg* v. *Midland*, L. R. 4 Eq. 310; *Byam* v. *Byam*, 19 Beav. 58; nor will the Court make any order where the facts stated do not enable it to determine the rights of the parties: *Bulkeley* v. *Hope*, 8 DeG. M. & G. 36.

In a special case stated in an action only such questions will be answered as must necessarily arise in the action: *Toronto* v. *Toronto Ry. Co.*, *supra*, p. 547.

A very special order having, by consent, been made for the purpose of obtaining the judgment of the Court under Eng. R. 1875, O. 40, r. 8, the Master of the Rolls discharged the order, as the effect of it would be to make the Judge an arbitrator between the parties, who would thus, contrary to their intention, be deprived of the right of appeal: *Republic of Bolivia* v. *Bolivia Navigation Co.*, W. N. 1876, 77; 24 W. R. 361. Rule 127.

Where the answers to the special case dispose of the action, the proper course is, to take the decision as a judgment making declarations to the same effect; and the answers ought to be followed by the words: "and this Court doth adjudge and declare the same accordingly." In such a case the Registrar was directed to draw up the judgment as answering the special case, on motion for judgment: *Harrison* v. *Cornwall Minerals Railway Co.*, 16 Ch. D. 66.

Appeal.—An appeal lies from the judgment on a special case to the Appellate Division: *Re Taylor's Estate* 22 Ch. D. 495; see *Allum* v. *Dickinson*, 9 Q. B. D. 632, and Jud. Act, s. 26, *supra*. Appeal from judgment on special case.

Where a special case is calculated to raise for decision questions of fact only, the proceedings are *extra cursum curiæ*; the judgment is in the nature of an arbitrator's award, and an appeal cannot be entertained, if objected to (except, perhaps, where it could be had from the award of an arbitrator): *Burgess* v. *Morton*, 1896, A. C. 136; 73 L. T. 713.

127. A plaintiff may, without leave, amend his statement of claim, including a claim specially indorsed on the writ, once, either before the statement of defence has been delivered, or after it has been delivered and before the expiration of the time limited for reply, and before replying. C.R. 300 and 1247. Amendment by plaintiff without leave.

Differs from the Eng. (1883) R. 310.

This *Rule* applies to a statement of claim which has been served out of the jurisdiction, where the defendant has appeared, and where it is amended it will not be necessary to re-serve the writ: *Holland* v. *Leslie*, 1894, 2 Q. B. 346, the amended pleading must, of course, be delivered to a defendant who has appeared: see *Rule* 128; *sed quære*, where the defendant has not appeared: see *Rule* 35; but, notwithstanding that *Rule*, if the amendment enlarges, or is otherwise a substantial variation of, the plaintiff's claim as notified to the defendant either by indorsement on the writ, or statement of claim, *semble* he should be served with the amended statement of claim; especially having regard to *Rule* 354: see *Gee* v. *Bell*, *infra*, p. 550, and *Re Hartley*, 1891, 2 Ch. 121, and notes to *Rule* 183, *infra*, p. 643. Where an amended writ is served a second appearance is not necessary, the first appearance stands as an appearance to the amended writ: *Paxton* v. *Baird*, 1893, 1 Q. B. 139. Amendment of statement of claim.

Where leave to amend is necessary, and defendant is out of the jurisdiction, the plaintiff must shew that the claim as proposed to be amended is one for which he would have been entitled to leave to issue a writ for service out of Ontario under *Rule* 25: *Holland* v. *Leslie*, *supra*; *Hogaboom* v. *MacCulloch*, 17 P. R. 377. It would seem, therefore, that a claim introduced by amendment made under this *Rule* without Where defendant out of jurisdiction.

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leave, must be of the like character as that originally made, otherwise the defendant may apply to have it disallowed.

In *Malcolm* v. *Race*, 16 P. R. 331, it was held that a defendant who simply files a joinder of issue to the statement of claim, thereby closes the pleadings; and *semble*, in such a case a plaintiff would be precluded from amending under this *Rule*.

Chancery Practice.

The former Chancery practice which furnishes a guide to the procedure under this *Rule*, warranted the addition, under an order of course to amend, of a plaintiff: *Dunn* v. *McLean*, 6 P. R. 97, or defendant: *Attorney-General* v. *Nethercoat*, 2 M. & Cr. 604; but not the striking out of a defendant, or of a plaintiff, if any of defendants had answered: *Dunn* v. *McLean*, *supra*. As, however, this *Rule* relates to the amendment of a pleading only, and as an action is not now commenced by a pleading but by a writ, it would seem that no alteration in the frame of the action as to parties can be made by amendment under this *Rule*. It is to be observed also that *Rule* 134 (3) points to the service of added defendants with a writ.

It has been held under the similar provisions of the Irish Judicature Act, that a plaintiff amending without leave may not add a fresh cause of action not covered by the indorsement of the writ, and that such an amendment is liable to be moved against under *Rule* 137: *Moore* v. *Alwill*, 8 L. R. Ir. 245. Such an amendment may affect the costs of prior pleadings, and on a motion under *Rule* 137 such costs may be provided for, but under the English practice, and now in Ontario (see *Rule* 109), it is not the rule that the statement of claim must be no wider than the claim indorsed on the writ: see *Johnson* v. *Palmer*, 4 C. P. D. 258; and *Bourke* v. *Alexandra Hotel Co.*, W. N. 1877, 30 (except when a defendant has not appeared, and a statement of claim has to be delivered, in order to found a motion for judgment): *Gee* v. *Bell*, 35 Ch. D. 160; 56 L. T. 305; and see *Gibson* v. *Hieb*, 1 O. L. R. 247, where defendant, by appearance, waived objection; and there seems to be no reason why the plaintiffs should not, except as to parties, make under this *Rule* as large amendments as by the former Chancery practice might have been made under an order of course: as to which see *McGillivray* v. *McConkey*, 6 P. R. 56. The provisions of *Rule* 137 will enable the defendant to obtain the imposition of any terms that may be just.

Extension of claim by amendment.

Where the writ claimed damages for wrongful dismissal and slander, but the statement of claim was confined to the former cause of action only, an amendment, made under this *Rule*, setting up the second cause of action was held to be proper: *Rodger* v. *Noxon Co.*, 19 P. R. 327.

Where a plaintiff has obtained discovery, he cannot thereafter, by amendment, add a claim which, if it had been originally made, would have disentitled him to discovery, *e.g.*, a claim for penalties: *Rose* v. *Croden*, 3 O. L. R. 383.

Amendment as to place of trial.

The plaintiff may not change the place of trial by amendment under this *Rule*: *Bull* v. *North British, etc., Co.*, 10 P. R. 622; and it has also been held in England that he may not, by amendment under this *Rule*, supply an omission to name the place of trial in his statement of claim: *Locke* v. *White*, 33 Ch. D. 308. But this may not be so in Ontario, for it would not be known where the place of trial was to be; while in England the effect of omitting to name any place is that

the action is to be tried at the Middlesex Sittings. Such an amendment in England, therefore, would amount to changing the place of trial without order, but would not have that effect here. See also *Powell* v. *Cobb*, 52 L. T. 183. Rule 128.

Where the plaintiff amends after a statement of defence has been put in, the defendant may amend his statement of defence under *Rule* 128; or put in a new defence, or may proceed with his original defence: *Boddy* v. *Wall*, 7 Ch. D. 164 (not following *Darling* v. *Lawrence*, 46 L. J. Chy. 808; W. N. 1877, 182). Where the plaintiff amends by striking out claims to which certain paragraphs of the defence make an answer, so that they are no longer necessary, it would seem that the defendant need not amend by striking them out: *Christy* v. *Ion Specialty Co.*, 18 C. L. T. 85; 34 C. L. J. 103. If he neither amends nor puts in a new defence, the original defence will stand as a defence to the amended statement of claim: see *Rule* 128. Amendment by opposite party.

After an order which extended the time for delivery of the defence until after particulars of claim should be delivered, an amended statement of claim delivered without leave was held to be irregular: *Anthony* v. *Blain*, 5 O. L. R. 48. And see *Confederation Life* v. *Moore*, 6 O. L. R. 648. Time limited for amendment.

Where, after judgment, a defect in the pleadings is required to be amended, ordinarily the judgment will have to be vacated: *Wilgress* v. *Crawford*, 12 P. R. 658; *Clark* v. *Cooper*, 15 P. R. 54; after a final judgment in favour of defendant, an amendment by adding a party plaintiff so as to reconstitute the suit was refused: see *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297; 1898, A. C. 447; and *Rules* 183 and 521, and notes. Amendment after judgment.

Where a defendant is prejudiced, or embarrassed, by an amendment under this *Rule*, he may move to strike out, or disallow the amendment: see *Rule* 137. On such a motion, if the amendment is allowed to stand, terms may be imposed in a proper case.

See Eng. (1883) R. 312.

The giving of security for costs has been imposed as a term where a new case was raised by the amendment: *Northampton Coal, Iron & Waggon Co.* v. *Midland Waggon* Co., 7 Ch. D. 500. See also *Bourne* v. *Coulter*, 50 L. T. 321; 53 L. J. Chy. 699. Terms imposed.

Where the plaintiff issued a writ indorsed for the recovery of land, claiming as reversioner and under a surrender of a lease, and the defence was that the lease was in effect a mortgage, and the surrender was obtained by fraud; an amendment by the plaintiff asking, in the alternative, foreclosure of the land as mortgagee, was disallowed on motion: *McIlhargey* v. *McGinnis*, 9 P. R. 157.

Where a plaintiff strikes out allegations so as to make the answer of defendant useless, the defendant may apply for the costs unnecessarily incurred: see *McGillivray* v. *McConkey*, 6 P. R. 56; *Clarkson* v. *White*, 4 Ont. 663; *Strickland* v. *Strickland*, 3 Beav. 242; *Mavar* v. *Dry*, 2 S. & S. 113; *Mounsey* v. *Burnham*, 1 Ha. 22; Dan. Pr., 5th ed., 351-2; *Bourne* v. *Coulter*, 50 L. T. 321; 53 L. J. Chy. 699; *Sidebottom* v. *Hooton Park Club*, 18 T. L. R. 453. See also *Weldon* v. *Neal*, 19 Q. B. D. 394, in note to *Rule* 137. Costs.

128. Where a plaintiff has amended his statement of claim the opposite party shall plead thereto or amend his pleading within the time he then has to plead, or Pleading or amendment by the other party after amendment.

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within ten days from the delivery of the amendment, whichever shall last expire, and in case the opposite party has pleaded before the delivery of the amendment and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment. C.R. 302.

The Eng. (1883) R. 313 is similar.

For the reason for the latter provision, see *Boddy* v. *Wall*, 7 Ch. D. 164; *Powell* v. *Jewesbury*, 9 Ch. D. 34.

This *Rule* has been held not to apply where amendments are made under an order: *Thompson* v. *Howson*, 16 P. R. 378.

Amendment by consent.

129. Either party may amend his pleadings at any time on filing the written consent of the opposite party. C.R. 303.

Application for leave to amend.

130. An amendment may be made by leave of the Court, or of the Judge at the trial, and such amendment shall be at once made on the face of the record. C.R. 304.

The Eng. (1883) R. 314 is to the same effect.

Rule 127 provides for an amendment, without leave, of the statement of claim: *Rule* 128 provides for an amendment without leave of the statement of defence. This *Rule* empowers the Court to give leave to amend, either (*a*) as an interlocutory application or (*b*) at the trial. It is only where the amendment is made at the trial that the latter part of the *Rule* applies; in such a case the officer attending the trial should make the amendment allowed, on the record, and no formal order is necessary, but judgment ought not to be entered till the amendment is made. Where the amendment is granted on an interlocutory application a formal order is necessary.

Where *Rules* 127, 128, do not apply, or the time for making an amendment thereunder has expired, if an amendment is desired it must be applied for under this *Rule*.

A counter-claiming defendant must therefore now make special application if he desires to amend his counter-claim, unless the opposite party consents: *Rule* 129.

Principles on which amendment of pleadings allowed.

Amendment of Pleadings by Leave.—General Principles.—Amendments which justice requires are to be allowed: see *Rule* 183 and notes; but it is to be justice to both parties; therefore the allowance of amendments to pleadings is subject to limitations to meet the requirements of justice, and so that the whole nature of the action may not be changed by amendment: *Blenkhorne* v. *Penrose*, 29 W. R. 237; 43 L. T. 668; *Raleigh* v. *Goschen*, 1898, 1 Ch. 73; 77 L. T. 429; *Rose* v. *Croden*, *supra*, p. 550; and subject also to whether justice will be advanced, having regard to the nature of the proposed amendment: *McIlhargey* v. *McGinnis*, 9 P. R. 157; *Caughill* v. *Clark*, 9 P. R. 471; 3 Ont. 269; *Hendricks* v. *Montagu*, 17 Ch. D. 642; *Weldon* v. *Neal*, 19 Q. B. D. 394; and to the time when the

application is made: see *Cropper* v. *Smith*, 26 Ch. D. 700; 10 App. Cas. 249, and other cases, *infra*. Rule 130.

An action may, by amendment of the writ and statement of claim, be turned into an action by the Attorney-General at the suit of a relator, without prejudice to a pending motion in the action; the necessary sanction of the Attorney-General being obtained: *Coldwell* v. *Pagham Harbour, etc., Co.*, 2 Ch. D. 221; see *Mounsey* v. *Earl of Lonsdale*, L. R. 6 Chy. 141.

An action against a Minister of the Crown will not be allowed to be amended, so as to make it an action also against the defendant as a private individual: *Roleigh* v. *Goschen*, 1898, 1 Ch. 73; 77 L. T. 429; and see *Smith* v. *Boyd*, 18 P. R. 76, 296.

In *Corgill* v. *Bower*, 4 Ch. D. 78, a defendant, who had put in a joint defence with another, was allowed to amend by raising defences separately from his co-defendant, and an affidavit showing the nature of the new defence sought to be raised, or its materiality, was not required: see also *Long* v. *Crossley*, 13 Ch. D. 391; and *Chesterfield* v. *Block*, 25 W. R. 409. From subsequent cases, however, it is clear that, provided the position of the cause is such that the granting leave to amend will not work injustice to the opposite party, the materiality of the amendment is a matter for consideration on the motion, and it would seem that the Court or Judge has power to consider the amendment and refuse to allow an amendment which is immaterial, or does not appear to be true, or capable of being substantiated: see *McIlhargey* v. *McGinnis*, 9 P. R. 157, or which would set up an unmeritorious defence, where the time for raising it without leave has expired: see *Caughill* v. *Clark*, 9 P. R. 471; 3 Ont. 269; *Oates* v. *Foresters*, 4 Ont. 535; *Machado* v. *Fontes*, 45 W. R. 565; 1897, 2 Q. B. 231; *Holland* v. *Leslie*, 1894, 2 Q. B. 348. Materiality of amendment.

Where an amendment of a matter of account as stated in the pleadings would be allowed before judgment, a similar amendment in respect of accounts filed should be allowed in the Master's Office: *Court* v. *Holland*, 4 Ont. 688.

Stage of Proceedings.—Application should be made at as early a stage as possible. Delay will be a circumstance to be considered in forming an opinion as to the justice of allowing an amendment: *Clark* v. *Wray*, 31 Ch. D. 68. The *Rules* apply and confer power to allow an amendment so long as anything remains to be done in the case: *The Duke of Buccleuch*, 1892, P. 212. Stage of proceedings when amendments allowed.

It is not necessarily too late after reply or issue joined: *Chesterfield* v. *Black*, 25 W. R. 409; after the cause is entered for trial: *Roe* v. *Davies*, 2 Ch. D. 729; at the trial: *Budding* v. *Murdoch*, 1 Ch. D. 42; *King* v. *Corke*, *Ib.*, 57; *Long* v. *Crossley*, 13 Ch. D. 388; *Dallinger* v. *St. Albyn*, 41 L. T. 406; *Green* v. *Sevin*, *Ib.*, 589, 595; *Nobel's Explosives Co.* v. *Jones*, 17 Ch. D. 721, 724; *Laird* v. *Briggs*, 19 Ch. D. 22; *Russell* v. *Canada Life Ass. Co.*, 32 C. P. 256; *Blenkhorn* v. *Penrose*, 29 W. R. 237; *Nottage* v. *Jackson*, 11 Q. B. D. 627; *Riding* v. *Hawkins*, 14 P. D. 56; or after a new trial has been ordered (in which last case the action is in the same position as if it was at issue, and had not been tried): *Hunter* v. *Boyd*, 6 O. L. R. 639. (In such cases the opposite party may sometimes obtain costs incurred in respect to the old pleadings: see Dan. Prac., 5th ed., 351-52; or, if a plaintiff, he may have the opportunity given him to consider whether he will discontinue: see *Edison Telephone Co.* When allowed.

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v. *India Rubber Co.*, 17 Ch. D. 137). An amendment may also be allowed after interlocutory judgment, but before assessment of damages: *The Duke of Buccleuch*, *supra*, p. 553; after verdict, but before judgment: *Stillway* v. *Toronto*, 20 On. 98; *Noad* v. *Murrow*, 40 L. T. 100; or on application for a new trial: *Ecklin* v. *Little*, 34 Sol. Jour. 546; but an application after final judgment is too late, except upon the terms of vacating the judgment: *Wilgress* v. *Crawford*, 12 P. R. 658; *Clarke* v. *Cooper*, 15 P. R. 54. See also *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297; *Durham* v. *Robertson*, 1898, 1 Q. B. 774; and see notes to *Rule* 128, p. 552.

At the trial where all the evidence that could throw light on the case has been given, it is a mere matter of form to adapt the pleadings to the matters proved: *Gough* v. *Bench*, 6 Ont. 699; in order to determine the real matter intended to be tried: *Smith* v. *Boyd*, 18 P. R. 76 (but see 18 P. R. 296); *Stillway* v. *Toronto*, 20 Ont. 98; see also *The Dictator*, 1892, P. 64; *Wyatt* v. *Rosherville*, 2 T. L. R. 282, and *Modera* v. *Modera*, 10 T. L. R. 89, where a greatsr sum having been awarded than was claimed, amendments accordingly were made in the writ and pleadings.

Leave to amend should, as a rule, be asked before argument of the case as it stands has failed: *Cropper* v. *Smith*, 26 Ch. D. 700; *James* v. *Smith*, 1891, 1 Ch. 384; *Browne* v. *Dunn*, 6 R. 67; *Sales* v. *Lake Erie, etc., Ry. Co.*, 17 P. R. 224.

Amendments at trial.

Motion before Trial.—The Master in Chambers, or other officer having like jurisdiction, may entertain applications to amend: see *Rules* 205, 207 (4), 208; see notes to *Rule* 208.

The application should be made in Chambers before trial, as a general thing: *Marriott* v. *Marriott*, 26 W. R. 416. It should be made ordinarily to the Master in Chambers, or like officer, upon notice, and the amendments should be specified, or their nature stated, either in the notice of motion, or in the affidavits in support of it: see *Lawrance* v. *Lord Norreys*, 39 Ch. D. 218. The condition in which the action stands should also be shewn.

Amendments allowed.

Amendments Allowed.—In *Tildesley* v. *Harper*, 10 Ch. D. at p. 396; Bramwell, L.J., said his practice in Chambers had been to give leave to amend, unless satisfied that the party applying was acting *malâ fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise: followed in *Re Trufort*, *Trafford* v. *Blanc*, 34 W. R. 56; 53 L. T. 498; *Kurtz* v. *Spence*, 36 Ch. D. 770, 773; *Claparede* v. *Commercial Union*, 32 W. R. 151, 282. see also *Crapper* v. *Smith*, 26 Ch. D. 711; *Shickle* v. *Lawrence*, 2 T. L. R. 776; *Steward* v. *Metropolitan, etc.*, 18 Q. B. D. 180; *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297 (see S. C. in P. C., 1898, A. C. 447; 78 L. T. 270). For the similar rule in cases where an extension of time is applied for, see notes to *Rule* 491, *infra*.

The Court of Appeal in *Tildesley* v. *Harper*, *supra*, p. 553, applied, in respect of an amendment at the trial, the same principles as if the application had been made before trial on motion: see *Green* v. *Serin*, 13 Ch. D. 589, 595.

Where, by a slip in pleading, the legality of a will intended to be impeached was admitted, leave to amend was granted: *Smith* v. *Smith*, 5 Ont. 690, 898.

Leave to amend will generally be granted where there has been a slip in pleading, but not, in general, so as to raise a fresh cause of action: *Clarke* v. *Yorke*, 31 W. R. 62; 47 L. T. 381; see *Budding* v. *Murdoch*, 1 Ch. D. 42; *Roleigh* v. *Goschen*, 1898, 1 Ch. 73; 77 L. T. 429. Rule 130.

Leave to amend may be granted, though the proposed amendments set up a case not raised by the claim, and may require an adjournment to obtain fresh evidence: *Budding* v. *Murdoch*, 1 Ch. D. 42; see, however, the remarks as to the headnote to that case, *Re St. Nazaire Co.*, 12 Ch. D. at p. 92; *Betts* v. *Doughty*, 5 P. D. 26. And leave will in general be granted, on proper terms, so as to enable the real question between the parties to be tried: *Laird* v. *Briggs*, 19 Ch. D. 22; *Kurtz* v. *Spence*, 36 Ch. D. 770, 773; but see *Smith* v. *Boyd*, 18 P. R. 76, 296. See also notes to *Rule* 183.

Under this *Rule*, and *Rule* 183, a plaintiff was allowed to amend his statement of claim in an action on a building contract, by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court, the Court being satisfied that the plaintiff had made a mistake, and, on finding it out, had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant: *Chevalier* v. *Ross*, 3 O. L. R. 219.

An amendment was also allowed in an action for an account of certain securities, by setting up that the defendants had no right to the securities at all, having obtained them by undue means: *Stuart* v. *Bank of Montreal*, 14 O. L. R. 487.

Where leave is necessary and the defendant is out of the jurisdiction, the plaintiff must shew that the amended claim is in respect of a cause of action which would have entitled him, had it been preferred in the first instance, to leave to issue the writ for service out of the jurisdiction: *Holland* v. *Leslie*, 1894, 2 Q. B. 346; *Hogaboom* v. *McCulloch*, 17 P. R. 377.

A defendant was allowed to amend his defence by setting up the Statute of Limitations as an additional defence: *Patterson* v. *Central Canada L. & S. Co.*, 17 P. R. 470; and see *Williams* v. *Leonard*, 16 P. R. 544; 17 P. R. 73; and *Hogaboom* v. *McCulloch*, 17 P. R. 377; *Siven* v. *Temiskaming Mining Co.*, 2 O. W. N. 129.

As to setting up the Statute of Frauds: see *Elmsley* v. *Harrison*, 17 P. R. 425, 525.

Amendments Refused.—The Court has, however, a discretion as to the amendment: see *Ashley* v. *Taylor*, 10 Ch. D. 772; *Oates* v. *Foresters*, 4 Ont. 535; and leave was refused at the hearing, where no reason appeared why the bill was not amended when the answer came in: *Offord* v. *Offord*, 1 Charl. Ca. (Court) 102; see *Lowther* v. *Heaver*, 37 W. R. 55; 59 L. T. 631; and where the effect of allowing an amendment would be to compel the plaintiff to new assign, and adduce new evidence: *Edevain* v. *Cohen*, 41 Ch. D. 563; 43 Ch. D. 187; or where the added claim would take away a defence, such as of the Statute of Limitations, which had accrued, and would change the substantial rights of the parties: *Hudson* v. *Fernyhough*, 61 L. T. 722. When refused. Amendments refused.

Leave was refused, where the Judge thought the amendment would merely enable the defendants to raise to the plaintiff's title to sue,

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a technicnl objection which was not raised on the pleadings (as required by *Rule* 143), and which the defendant never intended to raise, till he adroitly sought to avail himself of it at the hearing: *Collette* v. *Goode*, 7 Ch. *D.* 842; see also *Caughill* v. *Clark*, 9 P. R. 471; *Oates* v. *Foresters*, 4 Ont. 535. So also where the proposed nmendments wsre irrelevant: *Lever* v. *Goodwin*, W. N. 1887, 107; *Wood* v. *Earl of Durham*, 21 Q. B. D. 501; *Marshall* v. *Langley*, W. N. 1889, 222; or inconsiatent and uselsaa: *Central Queenaland, etc.*, v. *Gallop*, 8 T. L. R. 225; or whers the effect would he to rnise a new cauae of action, nfter failurs of ths cauas of action eued on: *Kennedy* v. *Kennedy*, 24 O. L. R. 183; or a new queation which would involve an estate in further intricacies, and might mors conveniently he rsised in n separate action: *Re Blight, Blight* v. *Hartnoll*, 42 L. T. 531; or to convert a claim hased on a suhaisting leaae into one hssed on an evlction: *Newby* v. *Sharpe*, 8 Ch. D. 39; see also *Clarke* v. *Wray*, 31 Ch. D. 68; *Crowe* v. *Barnicot*, 6 Ch. D. 753; *McIlhargey* v. *McGinnis*, 9 P. R. 157; *Blockmore* v. *Edwards*, W. N. 1879, 175; 24 Sol. Jour. 67; and where ths plaintiff had elected to claim in a msnner inconeistent with the proposed amendment: *Corgill* v. *Bower*, 10 Ch. D. 502; *Hipgrave* v. *Caso*, 28 Ch. D. 356; *Lowther* v. *Heaver*, 41 Ch. D. 248; 59 L. T. 630; where a new defence would be raised, after failure of the defence on the record: *Sales* v. *Lake Erie, etc., Ry. Co.*, 17 P. R. 224; *Cropper* v. *Smith*, 26 Ch. D. 700; *Light* v. *Hawley*, 29 Ont. 25; and where the effect would he to raise s new issue merely to determine how the costs of the action should he horns: *Wehher* v. *Wedgewood*, W. N. 1883, 8; or to raise a charge of fraud when the case hsa besn launched independently of fraud: *Hendricks* v. *Montagu*, 17 Ch. D. 642; *Bentley* v. *Black*, 9 T. L. R. 580; *Symonds* v. *City Bank*, 34 W. R. 364; *Lever* v. *Goodwin, supra* (hut see *Riding* v. *Hawkins*, 14 P. D. 56); or *vice versa; Dunbor* v. *Meek*, 32 C. P. 195; or to raiae a defence under a section of the Statute of Frauds which had not heen pleaded: *James* v. *Smith*, 1891, 1 Ch. 884; or to require the addition of parties, and raiae a new case: *Nohel's Explosives Co.* v. *Jones*, 17 Ch. D. 721; *Edevain* v. *Cohen, supra; Raleigh* v. *Goschen*, 77 L. T. 429; 46 W. R. 92; and were made too late, as where the trini was approaching and ths amendment would have the effect of delaying ths trial: *Tottenham Local Board* v. *Lea Conservancy Board*, 80 L. T. Jour. 244; *James* v. *Smith, supra; Clark* v. *Wroy*, 31 Ch. D. 58.

Where a claim was for specific performance, or damages for breach of an agreement, and the plaintiff, pending the action, re-sold the subject of the contract, notifying the defendant of his intention to do so, hut went to trial without amending his claim, it waa hsld that, as he had diaahied himself from enforcing specific performance, the action must hs dismissed. Leave to amend at that stags hy atriking out the specific performance claim waa not conaidered proper: *Hipgrave* v. *Case*, 28 Ch. D. 356. Sec also *Cropper* v. *Smith*, 26 Ch. D. 700; 10 App. Cas. 249.

In an action for personal injuries, the defendanta denied the charge of negligence. After more than six mc..ths they proposed to amend hy alleging a contract that would transfer the liahility to a local body. An action against such local hody was required hy statute to be brought within six months from the accrual of the csuse of action. Leave to amend was accordingly refused, aa the plaintiff would be irremedisbly injured, and could not he restorsd to the same position ss before the defendants' mlatake in pisading: *Steward* v. *Metro-*

politan, etc., Co., 15 Q. B. D. 556. See also *Re Gaulard*, 57 L. J. Chy. 209.

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Though the Court will not allow an amendment for the purpose of setting up an unmeritorious claim, or defence, yet the defence of the Statute of Limitations is not considered unmeritorious: *Patterson* v. *Central Canada Loan Co.*, 17 P. R. 470. See also note to *Rule* 37.

In all cases where a plaintiff seeks to recover at the trial upon a different cause of action from that stated in his pleadings, a formal amendment of the pleadings should be made at the trial: *Hyams* v. *Stuart King*, 1908, 2 K. B. 696; 99 L. T. 424, and see *Rule* 186.

Terms on which amendment allowed.

Terms.—The terms on which an amendment is allowed are in the discretion of the Court or Judge, according to what the justice of the particular case requires: *Woolley* v. *Brood*, 1892, 2 Q. B. 317. The opposite party must not be allowed to be prejudiced: *Kurtz* v. *Spence*, 36 Ch. D. 774; and will be given all proper opportunity of meeting new matter: see *Budding* v. *Murdoch*, 1 Ch. D. 42, and other cases *supra*, in which application was made at the trial, or, if a plaintiff, he may have an opportunity given him to consider whether he will discontinue: see *Edison Telephone Co.* v. *India Rubber Co.*, 17 Ch. D. 137.

Where a plaintiff is allowed to amend at the trial by setting up a new case, the defendant is *ex debito justitiæ* entitled to put in a defence thereto: *Elmsley* v. *Harrison*, 17 P. R. 425, 525, where the Statute of Frauds was allowed to be set up.

Time for amending.

The time to amend, or deliver a new pleading, will vary with each case. Fourteen days was allowed in *Planet Building Society* v. *Part*, W. N. 1878, 204; a week in *Chesterfield* v. *Block*, 25 W. R. 409; a month in *Williamson* v. *L. & N. W. Railway Co.*, 12 Ch. D. 787. Where no time is limited by the order, *Rule* 131 applies.

Costs.

Costs.—Costs are in the discretion of the Court or Judge: Jud. Act, s. 74; and are generally awarded so that the opposite party shall not have to bear the expense, either of the motion to amend, if any, or of proceedings rendered unnecessary, such as costs of trial, if any: *Chesterfield* v. *Block*, 25 W. R. 409; *Corgill* v. *Bower*, 4 Ch. D. 78; *King* v. *Corke*, 1 Ch. D. 57; *Long* v. *Crossley*, 13 Ch. D. 392; *Kurtz* v. *Spence*, 36 Ch. D. 770; *Re Goulard*, 57 L. J. Chy. 209; or of pleadings, etc., rendered useless: Dan. Pr., 5th ed., 351-2; the costs may sometimes be reserved to be disposed of when the merits are tried: *Roe* v. *Davies*, 2 Ch. D. 729; and *Nobel's Explosives Co.* v. *Jones*, 17 Ch. D. 721, in which the costs given to the plaintiffs by the Judge at the trial appear to have included costs of amendments, which apparently were necessary in consequence of disclosures made by defendant's clerk.

Time limited for amendment.

131. A party who has obtained leave to amend shall make the amendment within the time limited by the order, or if no time is limited, within ten days from the date of the order. C.R. 305.

To same effect as the Eng. (1883) R. 315, and as Chy. G. O. 83; Morgan Chy. Orders, 4th ed., 415-17; Dan. Prac., 5th ed., 346.

C. R. 305 provided that if an order to amend was not acted on within the time limited it became *ipso facto* void. Probably no change in the practice was intended by the omission of that provision from this *Rule*: see *Rule* 530.

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How alterations to be made.

132. A pleading may be amended by written alterations in the copies filed and served and by additions on paper to be interleaved therewith if necessary; unless the amendments are so numerous or of such a nature that making them in the copies filed and served would render the same difficult or inconvenient to read; in either of which cases the amendment shall be made by delivering a re-print or fresh copy of the pleadings as amended. C.R. 306.

Substantially the same as the Eng. (1883) R. 316.

Under Eng. R., if amendment exceeds two folios, a fresh copy is required.

In *John* v. *Lloyd*, L. R. 1 Chy. 64, it was held that, though amendments to a bill did not in any place exceed two folios, the Clerk of Records and Writs had discretion to refuse to file the bill without a reprint, if the amendments were numerous and complicated.

Delivery includes filing, therefore, if a re-print or fresh copy of a pleading is delivered under this *Rule* it must also be filed: see *Rule* 140.

Marking of amended pleadings.

133. Where a pleading is amended a memorandum shall be made in the margin stating the date of and authority for the amendment, and the amendment shall be written or underlined in ink of a different colour from that used in the original pleading. C.R. 307.

See Eng. (1883) R. 317.

These directions apply to the copy filed, but an omission to similarly mark the copy of the amended pleading, delivered to the opposite party is unimportant: *Honmer* v. *Clifton*, 1894, 1 Q. B. 238; 10 R. 55.

C. R. 308 expressly provided that an amended pleading is to be delivered to the opposite party within the time allowed for amending the same. Under *Rule* 132 the amendment may be made in the copy served; and for that purpose a demand may be made of the copies served for the purpose of amending the same; or the amended pleading is to be filed and served: the time for making the amendment in the copies served, or serving the amended pleading would appear to be the time allowed for making the amendment, which is not effectually made until the copies served are amended, or the amended pleading is served.

Adding and striking out parties. Substitution and addition of plaintiffs.

134.—(1) The Court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined, be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action, be added; or where an action has

through a *bonâ fide* mistake been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may order any person to be substituted or added as plaintiff. Rule 134.

(2) No person shall be added or substituted as a plaintiff, or as the next friend of a plaintiff, without his own consent in writing thereto to be filed. Consent required.

(3) Parties added or substituted as defendants shall, unless otherwise ordered, be served with the amended writ of summons, and the proceedings as against them shall be deemed to have begun only at the time when they are added. C.R. 206 and 313. Parties added or substituted to be served with writ.

See Eng. Rules (1883) 124, 133.

See *Long* v. *Crossley*, 13 Ch. D. 391.

It seems to have been assumed that in some cases a person may be added as a plaintiff without his consent: *Murray* v. *Wurtele*, 19 P. R. 288; *sed quære* if that is correct, having regard to the explicit terms of this *Rule*: see *Winnifrith* v. *Finkelman*, 5 O. W. N. 781.

Clause (3) applies only to the defendants added, or substituted.

The *Rule* does not provide for serving the original defendants with the amended writ.

The Court of Chancery formerly under Chy. O. 65, exercised a similar power of dealing with the questions raised in a suit, wherever justice could be done to all parties, notwithstanding misjoinder, or nonjoinder: see *Lambert* v. *Hutchinson*, 1 Beav. 277, 286. Where necessary, the decree expressly saved the rights of absent parties.

Persons who might have been originally made parties under *Rule* 66, may be added under this *Rule*: *Liddiard* v. *Toronto Railway Co.*, 5 O. L. R. 371 (where, in an action for damages for injuries to the plaintiff occasioned by negligence of defendants, liberty was given to join, as a plaintiff, the plaintiff's infant son who was also injured, making him to sue by his father as next friend).

Misjoinder, though it cannot defeat an action, may affect the costs: *Roberts* v. *Evans*, 7 Ch. D. 830.

An application to substitute a plaintiff may be refused, if made so late that to grant it would be no saving of expense as compared with the bringing of a new action: *McNabb* v. *Toronto Construction Co.*, 2 O. W. N. 992.

Non-joinder.—The *Rule* extends to cases of non-joinder: *Beardmore* v. *Toronto*, 19 O. L. R. 139; *Kendall* v. *Hamilton*, 4 App. Cas. 516. Ordinarily a plaintiff is entitled to sue, or omit to sue, whomsoever he pleases, and a defendant cannot, except in special circumstances, apply to add parties. In the case of nonjoinder he must usually raise the point as a question of law, that in the absence of those whom he may think necessary parties, it is not competent for the Court to give the relief sought; and this point being determined in his favour, it is then Non-joinder

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for the plaintiff to apply to add the necessary parties. What is above said with regard to a plaintiff, does not apply to a plaintiff by counter-claim, so far as the counter-claim is concerned.

A defendant cannot obtain an order adding a party as plaintiff without his consent: *Winnifrith* v. *Finkelman*, 5 O. W. N. 781; and see clause (2), *supra*.

As a defendant cannot ordinarily move to add parties, so it is only in exceptional circumstances that third persons can apply to be added as parties. As Lord Justice Bowen humourously said: "'A suit is not like an omnibus in which anyone is entitled to find a place who hails it from the pavement in the course of its journey": see Life of Lord Bowen, p. 185.

Misjoinder.

Misjoinder.—In the case of misjoinder of parties, the case is different, and where a defendant contends that he, or another defendant, is improperly joined as a defendant, he may move to strike out his name as a defendant, or compel the plaintiff to elect against which of the defendants he will proceed, and strike out the name of the other. The defendant should raise any objection of this kind that he may have, at the earliest possible moment: *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59, where the objection was not allowed, though taken by the defence; see also *Ruston* v. *Tobin*, W. N. 1880, 19; *Roberts* v. *Evans*, 7 Ch. D. 830; *Scane* v. *Duckett*, 3 Ont. 370. Where the defendant's contention is that additional parties are necessary to enable the action to proceed at all, it would seem, however, that it is sufficient for him to take the objection by his defence, leaving the plaintiff to apply to add parties if so desired: see *Nobel's Explosives Co.* v. *Jones*, 28 W. R. 653; 42 L. T. 754; 49 L. J. Chy. 726; *Lydall* v. *Mortinson*, 5 Ch. D. 780; see also *Cornell* v. *Smith*, 14 P. R. 275, an action to establish a will.

If the plaintiff cannot proceed without the addition of parties, the action should not be dismissed, but the parties deemed necessary should be directed to be added by him: *VanGelder* v. *Sowerby Bridge, etc., Soc.*, 44 Ch. D. 374. If in such a case the trial has to stand over, the question as to how the costs thrown away should be borne will doubtless depend upon which party was in default.

It was held to be too late to raise objection for the first time in the Supreme Court, that the legal representatives of the person injured were not made parties, where a policy was sued on by the person in whose favour it was made: *Venner* v. *Sun Life*, 17 S. C. R. 394.

Where the plaintiffs are not persons entitled to bring the action, so that the objection is one of substance, and not merely that other parties should be joined, formerly a demurrer was proper, and now, probably, that objection may be raised by defence: see *McClenaghan* v. *Grey*, 4 Ont. 329.

Time of application.

Clause (1) provides a cure for misjoinder, and non-joinder, by striking out, or adding parties. Applications under it may be made by either party, or the Court may act *mero motu*: *Kino* v. *Rudkin*, 6 Ch. D. 160. The power given is very extensive, and may be exercised at any stage of the proceedings, before trial on motion, and at the trial: *Kino* v. *Rudkin*, 6 Ch. D. 160, in a summary way. An order was made after delivery of a statement of claim: *Anon.*, 2 Charl. Ch. Ca. 25; but was refused, as being asked for at an unreasonably late stage, where the case had come on for trial, and had been adjourned:

Williams v. *Andrews*, W. N. 1875, 237; 1 Charl. Ch. Ca. 60. It cannot be made after the trial, nr after final judgment: *Durham* v. *Robertson*, 1898, 1 Q. B. 765, per Chitty, J., at p. 974; *Attorney-General* v. *Corporation of Birmingham*, 15 Ch. D. 423. In that case new parties had succeeded to the rights and liabilities of the defendants, and it was held on appeal, that the pleadings could not be amended to introduce these parties after final judgment, and that when it became necessary to enforce such a judgment against persons who had acquired a title after it was made, an action must be brought for that purpose; and, after final judgment dismissing an action, it was held to be too late to add a party as plaintiff, in order to remedy an objection of want of proper parties: *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297. Where the judgment is not drawn up, however, and can therefore be recalled, the plaintiff may be allowed to amend, and add parties: *Keith* v. *Butcher*, 25 Ch. D. 750. Rule 134.

An application to add as a defendant a person who ought to be, but has not been joined, ought to be granted or refused upon the same principles on which a plea in abatement for the non-joinder of such person would have succeeded nr failed: *per* Lord Cairns in *Kendall* v. *Hamilton*, 4 App. Cas. 516.

Applications to add, or strike out.—An application to add, or strike out parties, should be made promptly: *Sheehan* v. *Great Eastern Ry. Co.*, 16 Ch. D. 59; *Williams* v. *Andrews*, W. N. 1875, 237; 1 Charl. Ch. Ca. 60; *Vallance* v *Birmingham*, etc., 2 Ch. D. 369. it may he after delivery of statement of claim: *Anon*, 2 Charl. Ch. Ca. 25; or at the trial, even during examination of witnesses: *Ruston* v. *Tobin*, W. N. 1880, 19; *King* v. *Rudkin*, 6 Ch. D. 160; *House Property Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190; *Gondy* v. *Gandy*, 30 Ch. D. 57; though it may under the circumstances be then too late: *Nobel's Explosives Co.* v. *Jones*, 28 W. R. 653; or in some cases after judgment, if the party to be added does not object: see *Re Mason, Turner* v. *Mason*, W. N. 1883, 134, 147; *sed quære*, see *Heard* v. *Borgwardt*, W. N. 1883, 173 and 194, and *Hurst* v. *Hurst*, 21 Ch. D. 278, 289; *Johnston* v. *Consumers' Gas Co.*, *supro*. Adding or striking out parties.

The order, whether for adding, striking out, or substituting parties, is in the discretion of the Judge; and after trial it was held too late to add new plaintiffs and make a new case: *New Westminster Brewing Co.* v. *Hannah*, 24 W. R. 899, and see *supra*, p. 535; and *Northern E. & M. Co.* v. *Cordova Mines*, 31 O. L. R. 221, per Riddell, J., at p. 247.

The Court, in ordering a new trial, may properly add as a party defendsat a person against whom relief is then for the first time claimed in the alternative: *Caslon* v. *Consolidoted Plate Glass Co.*, 26 Ont. App. 63. This case was reversed, hut nnt on this point: 29 S. C. R. 624.

A voluntary association of individuals forming an unincorporated society cannot be sued in the name of the association, and if so sued, may move to strike out its name as a party defendant: *Metallic Roofing Co.* v. *Local Union*, 5 O. L. R. 424. As to the proper way of suing such an association, see *Rule* 75 and notes.

Where it becomes necessary to enforce a judgment against persons who acquired title after it was made, an action must he brought: *Attorney-General* v. *Corporation of Birmingham*, 15 Ch. D. 423; but see *Young* v. *Huber*, 29 Gr. 49; and see *Morgon* v. *Day*, Dan. Pr. 5th

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ed., 463, note (o), *Campbell* v. *Holyland*, 7 Ch. D. 166; *Kennedy* v. *Forwell*, 11 O. L. R. 389, and *Re Parbola, Blackburn* v. *Porbola*, 1909, 2 Ch. 437; 101 L. T. 382.

The application is made in Chambers: see *Wilson* v. *Church*, 9 Ch. D. 552; and on notice: *Tildesley* v. *Harper*, 3 Ch. D. 277; *Re Colbeck, Hall* v. *Colbeck*. 36 W. R. 259; but an order *nisi* has under peculiar circumstances heen made *ex parte*, to become absolute unless moved against within a time named in the order: *Re Wortley, Culley* v. *Wortley*, 4 Ch. D. 180; *Wilson* v. *Church*, *supro*.

A motion on behalf of some of several plaintiffs, when all should join, will not be entertained: *Re Wright*, 1895, 2 Ch. 747.

In *Roberts* v. *Holland*, 1893, 1 Q. B. 665, the objection that the plaintiff could not sue alone was raised as a point of law on the pleadings.

Where a plaintiff is added by amendment he is only entitled to such relief as he could have claimed if the action was commenced on the day he was added: see *Attorney-General* v. *Pontypridd Water Works Co.*, 1908, 1 Ch. 388; 98 L. T. 275.

This *Rule* does not provide for the issue, or service, of a new, or an amended writ, where a plaintiff is added; nor for service of the amended writ on the original defendants when a new defendant is added: see *Jamaica Ry.* v. *Colonial Bank*, 1905, 1 Ch. 677, 694; 92 L. T. 548.

Striking out parties.

Striking out Parties.—Under the former practice, if a party was improperly joined, the defendant might demur if the impropriety appeared on the face of the proceedings; otherwise it was necessary to defend, and proceed to a hearing of the cause. The present *Rule* enables the Court, on an interlocutory motion, to strike out a party improperly joined, before expense is incurred.

An objection that a person joined with others as plaintiff has no title to maintain the action is a matter of substance which should be raised on the pleadings, and not by motion to strike out parties under this *Rule*: *Morang* v. *Rose*, 3 O. L. R. 354.

Where an action is brought without proper authority, the action may be stayed in the case of a sole plaintiff; or in case there be several plaintiffs, some of whom have not authorized it, the names of such plaintiffs may be ordered to be struck out. The application may be made by the defendant, or by the parties whose names have been used without authority: *Barrie* v. *Weymouth*, 15 P. R. 95; *Barrie P. S. Bd.* v. *Barrie*, 19 P. R. 33. If the application is made by the defendant, the parties whose names are to be struck out are necessary parties to the motion: see *infra*, p. 566; a formal discontinuance of the action is no bar to the motion: *Gold Reefs of W. A.* v. *Dawson*, 1897, 1 Ch. 115; 75 L. T. 575.

Where a plaintiff alleged to be of unsound mind, not so found, sued by his next friend, an allegation in the defence that the plaintiff was not of unsound mind, was struck out, as irrelevant, and embarrassing, the proper way of raising such a question being by way of motion to stay the proceedings: *Richmond* v. *Branson*, 1914, 1 Ch. 968; 110 L. T. 763.

One of several plaintiffs making a compromise with the defendant is not entitled to have his name struck out as of course. Where a plaintiff desires to retire from an action he may be permitted to do

so on giving security for costs, and if he is a necessary party, though his name be struck out as plaintiff, it must be added as a defendant: *Re Mathews, Oales* v. *Mooney*, 1905, 2 Ch. 460; 93 L. T. 158. Rule 134.

If a defendant is improperly joined, he should apply to have his name struck out, at the earliest possible moment; but a defendant was struck out on his own application, though he had delivered a statement of defence upon which issue had been joined, and delay only influenced the decision as to the costs: *Vallance* v. *Birmingham & Midland Lands, etc., Corporation*, 2 Ch. D. 369. For cases of improper joinder of defendants: see notes to *Rule* 67.

Where two defendants are sued in the same action, in respect of separate torts, or other distinct and separate causes of action, either may apply to compel the plaintiff to elect against which of them he will proceed, and the name of the other will be struck out: *Sadler* v. *G. W. Ry. Co.*, 1896, A. C. 450; 74 L. T. 561; *Andrews* v. *Forsythe*, 7 O. L. R. 188; *Chandler* v. *Grand Trunk Ry.*, 5 O. L. R. 589. Plaintiff required to elect against which defendant he will proceed.

Where defendants did not move under this *Rule* to be struck out, but took part in the defence, they were held jointly liable with other defendants to the costs of the action: *Twinbarrow* v. *Braid*, W. N. 1878, 169.

The Court will not virtually try the cause, however, on such an application. Where, therefore, a plaintiff, a builder, sued for work and labour done, and made two persons defendants who occupied the position of lessee and lessor, alleging that there was a doubt which was liable to him, Lush, J., on the application of the lessor, refused to strike him out on his statement that the lessee was liable to do all repairs: *Anon.* W. N. 1875, 203; 1 Charl. Ch. Ca. 59. Under an order striking out a defendant, and giving the plaintiff leave to amend, he may not amend by striking out another defendant, even though that defendant's interest was determined: *Wymer* v. *Dodds*, 11 Ch. D. 436; *Elwon* v. *Vaughan*, W. N. 1879, 69. A defendant sought to be struck out is entitled to notice, that he may be heard as to the question of his costs: *Wymer* v. *Dodds*, *supra*.

A defendant in ejectment, a tenant, whose landlord had obtained leave to defend, and whose lease had expired pending the suit, was not allowed to have his name struck out, as the plaintiff's security would thus be diminished: *Johnston* v. *Oliver*, 9 P. R. 353.

Where relief is claimed against a defendant on the ground of tort, he ought not, on his own application, to be struck out; see *Healley* v. *Newton*, 19 Ch. D. 336.

Where there is a misjoinder of plaintiffs, a defendant may apply to stay proceedings until the plaintiffs elect which of them shall proceed, and the names of the others will then be struck out. On such an application the Court has no power to impose terms on defendants as regards any defence under the Statute of Limitations which they may have against the plaintiffs whose names are struck out, or to enable the latter to issue new writs *nunc pro tunc*: *Hulmance* v. *Raleigh*, 17 P. R. 458.

Adding Parties.—This *Rule* is to be read in connection with *Rules* 66, 67, and 134: *Edwards* v. *Lowther*, 24 W. R. 434; and any person who might have been joined originally under the latter *Rules* may be added under this *Rule*: see *Liddiard* v. *Toronto Ry.*, 5 O. L. R. 371; *Smith* v. *Hoseltine*, W. N. 1875, 250; 1 Charl. Ch. Ca. 56; Adding parties.

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Long v. *Crossley*, 13 Ch. D. 388, subject to the restrictions hereafter referred to, and to the power of the Judge in his discretion to refuse to interfere if injustice is likely to be done in any way by the addition: see *Edwards* v. *Lowther*, 34 L. T. 255. The principles on which the Courts acts under this *Rule* are discussed in *Smith* v. *London*, 19 O. L. R. 139.

The words "who ought to have been joined," in this *Rule* mean "ought, in order to do complete justice, to have been joined," and, as a general rule, "all parties against whom remedy or relief is sought should, if possible, be joined in the same action": *per* Archibald, J., in *Edwards* v. *Lowther*, 45 L. J. C. P. 419. There, an action was brought against a publisher of a newspaper for libel, and after issue joined the proprietor of the newspaper was added as a defendant on the plaintiff's application.

But the Courts do not interpret the *Rules* as empowering them to add parties at the instance of a defendant to the same extent as upon the plaintiff's application.

The *Rule* does not extend to class suits so as to enable one of the class to intervene as plaintiff where the original plaintiff's claim is settled before judgment: *Driffill* v. *Ough*, 13 O. L. R. 8.

Adding plaintiffs.

Adding Plaintiffs.—The addition of a plaintiff is subject to the provision of clause (2) of this *Rule*, that the addition shall be by his consent in writing; (*sed vide*, *Murray* v. *Wurtele*, 19 P. R. 288), but if he consents, the addition may be made against the wish of the other plaintiff, where the right of action has passed from the original plaintiff: *Emden* v. *Corte*, 17 Ch. D. 169; 29 W. R. 600: *sed quære*, in such a case should not the party in whom the cause of action has vested proceed under *Rule* 300.

Where a party brought an action in his own name instead of in the name of the person in whom the legal title of the property to be recovered was vested, an amendment was allowed adding such party: *McGuin* v. *Fretts*, 7 C. L. T. 159; *Walcott* v. *Lyons*, 29 Ch. D. 584; and see *Ayscough* v. *Bullor*, 41 Ch. D. 341.

But in a later case it was held that if the plaintiff by whom the action was commenced had no cause of action, the adding as a co-plaintiff at the trial a person who had the right of action, would not cure the defect, and the action must fail: see *Matthews* v. *Usher*, 1900, 2 Q. B. 535: *Colville* v. *Small*, 22 O. L. R. 426, at p. 429; and see *Hathoway* v. *Doig*, 6 Ont. App. 264; *New Westminster Brewery Co.* v. *Hannah*, 24 W. R. 899; *Walcott* v. *Lyons*, 29 Ch. D. 584; see, however, *Rule* 134 and notes; and *Kent* v. *Communauté des Sœurs de Charité*, 1903, A. C. 220.

In *De Hart* v. *Stevenson*, 1 Q. B. D. 313, one of the several co-owners of a ship, sued for freight dues; the defendant applied to add the other co-owners as plaintiffs confessedly in order to obtain the benefit of their liability for costs. The application was refused, on the ground that it was not shewn that the presence of the others was necessary in order to completely adjudicate upon and settle the questions arising in the action: see also *Horry* v. *Dovey*, 2 Ch. D. 721, and *Walcott* v. *Lyons*, *supra*.

Examples of adding plaintiffs.

In *Long* v. *Crossley*, 13 Ch. D. 388, an action was brought by a tenant for life for specific performance of an agreement, signed by her "for myself and those entitled after me," to accept a lease of a

coal mine. After notice of trial the plaintiff died, and the persons entitled in remainder, of whom the plaintiff's executor was one, wishing to adopt the suit, were at their request added as plaintiffs at the trial. The question whether the action would nevertheless fail was not considered by the Court. Fry, J., said: "I think that at present I have nothing to do with that. The object of the provision was, not that a party's case should be framed so as to succeed, but that it can be adjudicated on by the Court, whether in his favour or against him." Where a plaintiff assigned his interest to a third person, who obtained an order giving him liberty to prosecute the suit in the name of the original plaintiff, it was held on the application of the defendant, that the assignee was bound to amend the title of the action, so as to shew that he was the real plaintiff, and to set forth the assignment, by amendment or otherwise, in the statement of claim: *Seear* v. *Lawson*, 16 Ch. D. 121; 43 L. T. 716. *Quære*, whether the proper procedure in such cases is not under *Rule* 300. Rule 134.

Where the plaintiffs were lessees of eleven houses for a long term, one being sub-let, they, together with the sub-tenant, brought an action to restrain a nuisance, etc., subsequently the sub-tenant declined to go on. The other ten houses having been let in the meantime, two of the other sub-tenants were, on application, added as co-plaintiffs with their consent: *House Property & I. Co.* v. *H. P. Horsenail Co.*, 29 Ch. D. 190. The addition of a plaintiff was refused where the effect would be to constitute a new action which the plaintiff in the action commenced could not maintain: *Tinning* v. *Binghom*, 16 P. R. 110; *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297; *Durham* v. *Robertson*, *supra*, p. 554; *Hathaway* v. *Doig*, 6 Ont. App. 264.

After judgment finding defendants liable for a collision, the substitution of the owner of the cargo as plaintiff, instead of the then plaintiff, his agent, was allowed so as to enable the owner's damages to be assessed. It was held that judgment finding the liability and leaving the damages to be assessed was not final, and therefore there was a power to act under this *Rule*: *The Duke of Buccleuch*, 1892, P. 201.

In an action to restrain defendants from using certain premises as a smallpox hospital, application was made under this *Rule* by the plaintiff, to join another person with his consent who was an inhabitant of the same neighborhood, on the ground that since the action was commenced the plaintiff had given up his business and was going abroad. An order was refused, on the ground that the cause of action was injury to the plaintiff's own property only, and it was not necessary, to enable the Court effectually to dispose of all questions in the action, that anyone be added: *Dolton* v. *St. Mary Abbotts*, 47 L. T. 349. Refusal to add.

Consent of Person added as Plaintiff.—Notwithstanding *Murray* v. *Wurtele*, *supra*, p. 564, the *Rule* is imperative that a plaintiff cannot be added without his written consent, and the reason is obvious because every person named as plaintiff incurs a liability to be ordered to pay the costs of the action. The consent referred to in clause (2) should be verified by affidavit: see *Emden* v. *Carte*, 17 Ch. D. 169; *Turquand* v. *Fearon*, 4 Q. B. D. 280; 27 W. R. 396. The practice now requires the consent to be in writing and filed. It must be given personally by the party to be added; the consent in writing of his solicitor, though given with his knowledge, and in his presence, is not a compliance with the *Rule*, and is insufficient: *Fricker* v. *Von Grutten*, 1896, 2 Ch. 649; 75 L. T. 117. The objection that there is Consent of person added as plaintiff.

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no consent of a plaintiff sought to be added may be taken by defendant: *Turquand* v. *Fearon*, *supra*, p. 565; see also *Jackson* v. *Kruger*, 54 L. J. Q. B. 446; 52 L. T. 962; *Tryon* v. *National Prov.*, 16 Q. B. D. 678; 54 L. T. 167.

The case of trustee and *cestui que trust* is no exception to this provision; the trustee's consent will be required in order to make him a co-plaintiff on the application of his *cestui que trust*: *Besley* v. *Besley*, 37 Ch. D. 643; so also where an assignee for the benefit of creditors was sought to be added as a plaintiff in an action by a creditor to set aside a fraudulent conveyance: *Bank of London* v. *Wallace*, 13 P. R. 176; and persons alleged by the defendants to be beneficially interested in the subject matter of the action, cannot, on the defendant's application, be added as plaintiffs without their consent in writing: *Major* v. *Mackenzie*, 17 P. R. 18.

Where the consent of the absent party cannot be obtained, the plaintiff may, in some cases, be allowed to proceed by making him a defendant.

In *Duckett* v. *Gover*, 6 Ch. D. 82, a company was made, by mistake of law, a defendant instead of a plaintiff; and time was given to obtain the consent of the company to be joined as co-plaintiffs: see also *Mason* v. *Harris*, 11 Ch. D. 97, and *Pender* v. *Lushington*, 6 Ch. D. 70. Where a resolution of a company had been passed that the company's name should not be used in an action brought by a shareholder for himself, and also in the name of the company, against directors alleging misapplication of the funds, the company's name was struck out as plaintiff, and leave was given to amend the writ by adding the company as defendants: *Silber Light Co.* v. *Silber*, 12 Ch. D. 717. In *MacDougall* v. *Gardiner*, 1 Ch. D. 13, 22, it was said that every litigation on a company's behalf should be in the name of the company, if the company really desires it. See also *McHenry* v. *Lewis*, 25 So. Jour. 777. Where there is a fraud committed by persons who can command a majority of votes, the minority may sue, and the company need not be plaintiff: see *Atwool* v. *Merryweather*, L. R. 5 Eq. 464; *Menier* v. *Hooper*, L. R. 9 Chy. 350; *Mason* v. *Harris*, 11 Ch. D. 107; and see *Spokes* v. *Grosvenor, etc., Hotel Co.*, 1897, 2 Q. B. 124; 76 L. T. 679, per Chitty, L.J., but in that case the company must be made a defendant.

Jessel, M.R., in *Duckett* v. *Gover*, 25 W. R. 554, said: "An application to strike out the name of a person added as plaintiff without his consent can only be made by the person so added": but where proceedings were instituted without the authority of a company, they were set aside at the instance of defendants: see *Cape Breton Co.* v. *Fenn*, W. N. 1881, 23; and see *Barrie* v. *Weymouth*, 15 P. R. 95; *Barrie Public School Board* v. *Barrie*, 19 P. R. 31.

In *Cormack* v. *Grofrian*, W. N. 1876, 22, the action was by a shipowner against consignees of the cargo for demurrage, and a counterclaim was put in for damage to the cargo. Leave was refused to the plaintiff to add as co-plaintiffs the other owners (perhaps because they did not consent), notwithstanding that the plaintiff contended that it was a hardship on him to have to meet the counter-claim alone if others were liable as much as he.

Quære, whether, in such a case, an application by the plaintiff to add them as co-defendants to the counter-claim would have been more successful: see *Aikins* v. *Dominion Live Stock Ass.*, 17 P. R. 303; and *post*, p. 569.

In *Beck* v. *Dear*, W. N. 1876, 40; 2 Charl. Ch, Ca. 25, the addition of a plaintiff was refused where the object was to bring a counter-claim against him. See also *Bank of Commerce* v. *Bank of B. N. America*, 10 P. R. 158; *Norris* v. *Beazley*, 2 C. P. D. 80. Rule 134.

See also *Secar* v. *Lawson*, 16 Ch. D. 121, *supra*, where a plaintiff was, in effect, added on a defendant's application.

In *Emden* v. *Carte*, 17 Ch. D. 169, a trustee of a bankrupt plaintiff was added as a plaintiff, and the conduct of the action given to him on his own application, he alleging that the interest in the action had passed from the plaintiff to him. A similar order was made in *Bird* v. *Matthews*, 46 L. T. 512; see also *Woodward* v. *Shields*, 32 C. P. 282, and notes to *Rule* 301.

In *Saylor* v. *Cooper*, 2 Ont. 398, where the equitable owner of land sued in respect of a right of way of necessity implied by a grant of land, he was permitted to make the owner of the legal estate a co-plaintiff, by amendment at the hearing; and see *Lynes* v. *Snaith*, 1899, 1 Q. B. 486; 80 L. T. 122.

An amendment by adding a plaintiff ought not to be allowed so as to prejudice the defendant's right to set up the Statute of Limitations as against the added party: see *Hudson* v. *Fernyhough*, 61 L. T. 722; affirmed by C. A.: see 88 L. T. Jour. 253.

This *Rule* does not provide for the issue, or service, of an amended writ, where a plaintiff is added: see *McNabb* v. *Toronto Construction Co.*, *supra*, p. 559, nor for serving upon the original defendants an amended writ when a new party is added: see *Jamaica Ry.* v. *Colonial Bank*, 1905, 1 Ch. 677, 694; 92 L. T. 548. As to when an amended writ should be served, see notes to *Rule* 183.

See Eng. (1883) R. 124.

Actions have been sometimes inadvertently brought by the wrong person, as by *cestui que trust*, instead of trustee: by mortgagor, instead of mortgagee. The same mistake has been made where it was matter of real difficulty to say which of the two persons ought to sue, as in the case of contracts made by agents, as to which it is sometimes a question of much nicety to determine who ought to sue. The object of this *Rule* is to prevent such actions becoming abortive. Substitution and addition of plaintiffs.

Where an action has, through a *bonâ fide* mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action, does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff: *Hughes* v. *Pump House Hotel Co.* (No. 2), 1902, 2 K. B. 485; 87 L. T. 359.

The *bonâ fide* mistake, which must be shewn, may be one of law: *Duckett* v. *Gover*, 6 Ch. D. 82; *Mason* v. *Harris*, 11 Ch. D. 97.

An application under this *Rule* to substitute a plaintiff can only be made by the plaintiff on the record: *Clowes* v. *Hilliard*, 4 Ch. D. 413; and can be made only in cases where a *bonâ fide* mistake has occurred, which has been discovered after action brought; as where a new partner was brought into a firm before the dealing in question; but it is not intended to confer upon the Judge unlimited discretion to remodel the proceedings: *per* Mellor, J., in *Turquand* v. *Fearon*, 4 Q. B. D. at p. 282. In *Smith* v. *Haseltine*, W. N. 1875, 250; 1 Charl. Ch. Ca. 56, Huddlestone, B., said: "You have to satisfy me of two things: 1st, that there has been a *bonâ fide* mistake in the issue of the writ;

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and 2nd, that it is a necessary change;" see also *Clowes* v. *Hilliard*, *supra*, p. 567.

Substitution of plaintiff.

In an action by assignees of insolvents, the Judge at the trial held that the claim sued for did not pass, under the circumstances, to the assignees. The defendants having been given time during the sittings to ascertain whether they had any defence to an suit by the insolvents, the latter were added under this *Rule* as plaintiffs, and judgment was given in their favour, but without costs: *Woodward* v. *Shields*, 32 C. P. 282; but see *Durham* v. *Robertson*, 1898, 1 Q. B. 774; see also *Emden* v. *Carte*, 17 Ch. D. 169.

Where in a foreclosure action the plaintiff's solicitor swore that although he knew another person was interested in the mortgage he did not know when the action was commenced, as the fact was, that the mortgage had been assigned to such other person, the assignee was substituted as plaintiff: *Biggar* v. *Kemp*, 17 O. L. R. 360.

In an action to restrain the violation of a covenant, and for damages, the plaintiff was advised, after action commenced, that there was something in her title which might act as a personal bar to her obtaining relief. An amendment by making another person a co-plaintiff who was also entitled to the benefit of the same covenant was allowed, the real question being the effect of the covenant: *Ayscough* v. *Bullar*, 41 Ch. D. 341. Where a new plaintiff is thus added, the action, as regards him, is to be deemed to have been commenced, only from the date of his being added: *Ib.* See also *Walcott* v. *Lyons*, 29 Ch. D. 584.

Adding defendants on plaintiff's application.

Adding Defendants.—On the plaintiff's application, as a rule, all persons may, on proper terms, be added, against whom the plaintiff desires to proceed, and whom he might have made defendants originally.

A person whom plaintiff was entitled to join originally under *Rules* 66, 67, as a defendant, was added upon proper terms on the plaintiff's application after he had obtained discovery: *Tate* v. *Natural Gas Co.*, 18 P. R. 82.

A plaintiff, the assignee of a book debt, in an action against the debtor, was allowed to add the assignor, and make an alternative claim against him in the event of the debtor succeeding in his defence: *Langley* v. *Law Society of U. C.*, 3 O. L. R. 245.

On defendant's application.

Whether a defendant will be added, or not, upon a defendant's application, depends upon whether the adjudication upon, and settling of, the questions arising in the action requires the presence of the person proposed to be added: *Harry* v. *Davey*, 2 Ch. D. 721. In general a defendant will not be added against the plaintiff's will, unless his presence is necessary to enable the Court to effectually and completely settle all matters in question, and unless the parties will be prejudiced by his non-joinder: *Leduc* v. *Ward*, 54 L. T. 214; *McCheane* v. *Gyles*, *No. 2*, 1902, 1 Ch. 911; 86 L. T. 217. In *Norris* v. *Beazley*, 2 C. P. D. 80, a defendant sought to add a person as a defendant; the person sought to be added consented, and the object of the application was to enable such person to set up a counter-claim against the plaintiff, (and see *Montgomery* v. *Foy, Morgan & Co.*, 1895, 2 Q. B. 321). The plaintiff objected, and it was held that this *Rule* should not be made use of in a manner harassing to plaintiffs, by forcing them to include in their action persons *against whom they do not seek to proceed*, unless a strong case is made out, showing that, in the particular case, justice cannot be done without the person being brought in.

Denman, J., thers said: "We ought not to act upon it (the *Rule*) by adding a defendant without the consent of the plaintiff, except in cases where it is clearly made out that it is necessary to do so." Rule 134.

In *Drage* v. *Hortopp*, 28 Ch. D. 414, (where one executor brought an action for foreclosure without joining either as plaintiff or defendant his co-executor who had absconded to avoid prosecution for fraud), the Court refused to require the plaintiff to join the absentee as a party; and see also *Toronto & Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622, and *Sanders* v. *Peck*, 50 L. T. 630; 32 W. R. 462; *Peterson* v. *Fredericks*, 15 P. R. 361.

The addition of a defendant contemplated by this *Rule*, is not a person against whom the original defendant may have a remedy over: *Hewitt* v. *Heise*, 11 P. R. 47; or for contribution, or indemnity: see *Re Harrison*, 1891, 2 Ch. 349 (as to which see *Rule* 165), *Peterson* v. *Fredericks*, 15 P. R. 361; *McChesney* v. *Gyles*, No. 2, 1902, 1 Ch. 911: nor of a person claimed by a defendant to be liable to the plaintiff instead of himself: *Lerculey* v. *Horrison*, W. N. 1876, 39; 2 Charl. Ch. Ca. 26; *Lovell* v. *Holland*, W. N. 1876, 53; 2 Charl. Ch. Ca. 26; *Thompson* v. *London County Council*, 1899, 1 Q. B. 840; 80 L. T. 512. In such case the defendant can defend himself without the presence of the other party; and if the plaintiff does not proceed against the other party, the defendant is not injured. But the *Rule* has been held to apply where some only of several joint contractors are sued: *Robb* v. *Murray*, 13 P. R. 397.

Where the plaintiff, in misconception of his rights, had sued the defendants in their official capacity as servants of the Crown, he was not allowed to amend by suing them as private individuals: *Raleigh* v. *Goschen*, 1898, 1 Ch. 73; 77 L. T. 429. Defendants sued in wrong capacity.

As a general rule where an action is brought against one only of several joint contractors, he is entitled to have his co-contractors joined as defendants, and is not limited to serving them with a third party notice under *Rule* 165: *Pilley* v. *Robinson*, 20 Q. B. D. 155; as explained in *Wilson* v. *Balcarres*, 1893, 1 Q. B. 422; S. C. *sub nom.* *Wilson* v. *Killick*, 68 L. T. 169, 312, that is, where, under the old practice, a plea in abatement might have been pleaded: see also *Scarf* v. *Jardine*, 7 App. Cas. 364; *Robb* v. *Murray*, 13 P. R. 397; but not necessarily where the joint contractor resides out of the jurisdiction: *Wilson* v. *Balcarres*, *supra*: or, being within the jurisdiction, cannot be found after reasonable inquiry: *Robinson* v. *Geisel*, 1894. 2 Q. B. 685; 71 L. T. 70; or is insolvent: *Gildersleeve* v. *Balfour*, 15 P. R. 293, nor where the party sued is on the face of the contract the sole contractor, though other persons are behind jointly interested: *Toronto & Hamilton Navigation Co.* v. *Silcox*, 12 P. R. 622; see also *Eyre* v. *Moreing*, W. N. 1884, 58. Adding joint contractors as defendants.

In an action against a surety, the principal, who disputed liability, was added as a defendant on the application of the surety: *Reid* v. *Gould*, 13 O. L. R. 51.

Persons were added as defendants who appeared to be the persons really liable to plaintiffs, and were conducting the defence for the defendants sued: *Adams* v. *Watson Manufg. Co.*, 15 Ont. 218; and 16 Ont. 2, where the decision was affirmed as to the terms of payment of costs imposed as a condition precedent to amending.

In *Strathy* v. *Stephens*, 29 O. L. R. 383, the Court of its own motion added a party as a defendant who, although not a party, appears to Party added mero motu by Court.

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have been represented by counsel at the trial; such a course, however, could not be adopted without giving the added party an opportunity to defend if he desired it. In that case the Court assumed to act under this *Rule*, and *The Judicature Act*, s. 16 (*h*). Where the Court can add parties against the will of the plaintiff seems doubtful. The ordinary rule that a plaintiff is *dominus litis* would seem to be infringed by such a practice; the Court may rule that a person not before the Court is a necessary party; it is then open to the plaintiff to either appeal from the ruling or comply with it, by adding the party, but the addition if made, *semble*, should be on the plaintiff's motion. But it must be admitted that the cases as to adding parties are not always consistent with the principle of the plaintiff being *dominus litis*.

Members of club.

As to adding members of a club in an action against the club, and the right of those added to apply to have co-contractors added: see *Aikins* v. *Dom. Live Stock Ass.*, 17 P. R. 303.

Objection as to non-joinder, how to be raised.

It has been held that a defendant who is desirous of raising the objection that some one jointly liable with him has not been joined as a defendant, may make a motion under this *Rule* to add the persons jointly liable: *Gildersleeve* v. *Balfour*, 15 P. R. 293, or may apply in Chambers to have the action stayed, shewing that the person alleged to be jointly liable with him, is within the jurisdiction: *McArthur* v. *Hood*, 1 Cab. & E. 550; and see *Begg* v. *Ellison*, 14 P. R. 384; *Robinson* v. *Geisel*, *supra*, p. 569.

On such an application it need not be admitted by the plaintiff, or by the person sought to be added, that he is jointly liable with defendant. If the defendant shows some ground for so saying, he is entitled to have the person added on any proper terms as to costs: *Fardell, etc., Co.* v. *Bassel*, 15 T. L. R. 204; *sed vide Toronto & Hamilton Navigation Co.* v. *Silcox*, *supra*, p. 569.

By analogy to the old practice where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until co-contractors are added should shew by affidavit the names and residences of the persons whom he seeks to have added, and he is subject to the same liability as to costs, in case persons are added who turn out not to be liable: *Aikins* v. *Dom. Live Stock, etc.*, 17 P. R. 303.

Examples.

In *Byrne* v. *Brown*, 22 Q. B. D. 657, lessee sued the son of the lessee who was entitled to the term, subject to a sub-lease to D., for damages for breach of covenant caused by dilapidations made by D. Under the terms of the sub-lease to D. (who was brought in under a third party notice) it was doubtful whether he was liable to indemnify the defendant, or only the executors of the deceased lessee. On the defendant's application, the plaintiffs not objecting, the executors were added as defendants to enable them to get indemnity from D., and D. was held not entitled to object, though the case might be different if the plaintiffs objected.

In *Day* v. *Radcliffe*, 24 W. R. 844, an administration suit, where the plaintiff's title as a beneficiary under a will was doubtful, and the trustee under the will was the only defendant, the beneficiary interested in disputing the plaintiff's claim was added; and where an executor was sued for a legacy, a third person to whom he had paid it was ordered to be added as a co-defendant on the defendant's objection: *Clifton* v. *Crawford*, 18 P. R. 316.

In *Ashley* v. *Taylor*, 10 Ch. D. 788, a defendant died, and the cause of action alleged in the claim did not survive. Upon the plaintiff's motion, alleging further facts which shewed a cause of action which did survive, the administrator of the deceased defendant was added. See also *Rule* 301. Rule 134.

In *Head* v. *Bowman*, 9 P. R. 12, the plaintiff sued for damages caused by the flooding of his lands by defendant's mill dam. The G. W. Ry. Co. had turned the waters of the stream into another channel, which was not deep enough to carry off all the water if the defendant's dam were removed, so that plaintiff could not obtain complete relief by succeeding against the defendant; on the plaintiff's application liberty was therefore given to add the Ry. Co.

Defendants might, under the former Chancery practice, be added after the judgment, for the purpose of a motion for injunction to preserve the subject of the suit: *Young* v. *Huber*, 29 Gr. 49; *sed vide Attorney-General* v. *Corporation of Birmingham*, 15 Ch. D. 423.

In *Dix* v. *G. W. Ry. Co.*, 34 W. R. 712; W. N. 1886, 130; 54 L. T. 830; 55 L. J. Chy. 797, the defendant company covenanted separately with the plaintiff and two other covenantees by one indenture. The plaintiff sued for specific performance of the covenant without joining the separate covenantees. They were added on the application of the company; but see *McGheone* v. *Gyles*, No. 2, 1902, 1 Ch. 911, *supra*, p. 569.

In *Hewitt* v. *Heise*, 11 P. R. 47, it was held that the facts did not show a case for adding a defendant, but rather for service of a notice under *Rule* 185, claiming indemnity.

An officer of a corporation cannot be added merely for the purpose of discovery: *Wilson* v. *Church*, 9 Ch. D. 552. See notes to *Rule* 67.

Application by Third Persons.—In *Gibson* v. *Nelson*, 2 O. L. R. 500; 35 S. C. 181, a person who had acquired an interest after the commencement of a foreclosure action was on his own application added as a party, and in *Kino* v. *Rudkin*, 6 Ch. D. 160, a person to whom the defendant had assigned *pendente lite* was added at the trial at his own request. Where plaintiff had assigned his interest before suit it was doubted whether it was proper to allow the assignee to be added as plaintiff: *Foster* v. *Ward*, 9 L. R. Ir. 447. Application by third persons. Adding a defendant at his own instance.

In *Molloy* v. *Kilby*, 15 Ch. D. 162; 29 W. R. 127, it was held that third persons made defendants to a counter-claim and wishing to interrogate the plaintiff for discovery, should apply under this *Rule* to be made defendants to the original action.

Cases have arisen in which a third party has applied for leave to come in as a defendant. For such a case no express provision is made. In *Mills* v. *Griffiths*, 45 L. J. Q. B. 771, an action of ejectment was brought by a lessor against a lessee who had incurred a forfeiture; on motion of a mortgagee of the lessee to be added as a defendant, the Court refused to make an order, holding that the questions involved in the action were wholly on the covenant between the lessee and lessor. In *Wilson* v. *Church*, 9 Ch. D. 552, a representative action, a bond-holder who had a substantial interest and disputed the plaintiff's contention, was on his own application, added as a defendant. See also *Watson* v. *Cave*, 17 Ch. D. 19, and *Kino* v. *Rudkin*, 6 Ch. D. 160; *Debenture Co.* v. *De Murieta Co.*, 8 T. L. R. 496.

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In *Kitching* v. *Hicks*, 9 P. R. 518, an action against an assignee for the benefit of creditors, claiming a lien on goods taken by the assignee, certain creditors claiming that they had a substantial interest in the subject of the action were, on their own application, added as defendants.

A third party who would be commercially and incidentally, but not legally and directly injured by a judgment being obtained against the defendant in an action, is not entitled on the ground of such prospective injury to be made a party to the action; therefore, in an action to restrain the user of a machine alleged to be an infringement of the plaintiff's patent, the maker of the alleged infringement was not allowed, on his own application, to be added as a defendant: *Moser* v. *Marsden*, 1892, 1 Ch. 487; 60 L. T. 570.

In *Vovosseur* v. *Krupp*, 27 W. R. 176, a foreign sovereign (the Mikado), applied and was added as a defendant in order to enable him to apply to dissolve an injunction.

In *Ferris* v. *Ferris*, 9 P. R. 443, an action was brought by a father to recover arrears under an annuity deed against his son who had absconded. The son's wife had barred her dower by the annuity deed, and had brought a suit against her husband for alimony. She now applied to be let in to defend this action, on the ground that it was collusively brought to defeat her suit for alimony, and defraud her of dower. She was let in to dispute the amount claimed.

Where defendants are added as parties after the commencement of an action, the action as to them is, under this *Rule* (cl. 3), deemed to be commenced only from the date they are added: see *St. Louis* v. *O'Colloghon*, 13 P. R. 322; *Huthnonce* v. *Roleigh*, 17 P. R. 458; *i.e.*, from the time when they are served with the amended writ: see *Gooderham* v. *Moore*, 31 Ont. 86.

Costs.

Costs.—Where persons who are not necessary, but are proper parties, are added as defendants, upon an objection made by an original defendant, the Court may in its discretion refuse to award costs to such added parties: *Merry* v. *Pownall*, 1898, 1 Ch. 306; 78 L. T. 146; 46 W. R. 487; or may order the defendant, at whose instance they were added, to pay them, where it is ultimately found that they should not have been added: *Aikins* v. *Dom. Live Stock, etc.*, 17 P. R. 303.

Where the present *Rule* is not applicable, plaintiffs may nevertheless sometimes be added under *Rule* 134; see notes to that *Rule*, and *Emden* v. *Carte*, 17 Ch. D. 169; and *Smith* v. *Hoseltine*, W. N. 1875, 250.

For other cases in which the *Rule* has been acted upon: see *Val de Travers Asphalte Co. (Limited)* v. *London Tramway Co. (Limited)*, 48 L. J. C. P. 312; 40 L. T. 133; W. N. 1879, 46, and *Mercantile River Plate Co.* v. *Isaac*, W. N. 1876, 104; 2 Chan. Ch. Ca. 23; *Blackburn Union* v. *Brooks*, 28 W. R. 57; *Cupples* v *Strohon*, 29 L. R. Ir. 120; *Long* v. *Crossley*, 13 Ch. D. 388; *Corswell* v. *Hylond*, 3 T. L. R 708; *Lynes* v. *Snaith*, 1899, 1 Q. B. 486; 80 L. T. 122.

Service of amended writ.

Service of Amended Writ.—Clause 3 is an adaptation of C. R. 207: see Eng. (1883) R. 135, which is to the same effect. Where the person added is out of the jurisdiction, the writ, if originally issued for service within the jurisdiction, should before service be amended according to the form for service out of the jurisdiction: *Keate* v. *Phillips*, W. N. 1878, 186; or a concurrent writ should be issued.

The directions for service of the writ on new defendants do not meet the case of consolidated actions: *Re Wortley, Culley* v. *Wortley*, 4 Ch. D. 180, where the defendants were added to the consolidated action without service of any writ being required. Rules 135, 136.

Service of the writ of summons on a company, added for conformity as defendants, was dispensed with under this *Rule*, where the defendants already before the Court were directors and principal shareholders of the company, and were being sued in respect of money in their hands and found (as against them) to belong to the company: *Jones* v. *Miller*, 24 Ont. 268, *sed quære*.

Where a sole plaintiff died after delivery of statement of claim and his executors took out the common order to revive, copies of the writ, order to revive, and order adding a defendant, were directed to be served on the added defendant: *Austen* v. *Bird*, W. N. 1881, 129; 17 C. L. J. 365.

As against defendants added by amendment, the action will be deemed to be commenced from the time when they are served with the amended writ: *Goodcrham* v. *Moore*, and other cases, *supra*, p. 572.

This *Rule* does not provide for the issue or service of an amended writ where a plaintiff is added, nor for service on the original defendants where a new defendant is added: see *Jamaica Ry.* v. *Colonial Bank*, 1905, 1 Ch. 677, 694; 92 L. T. 548. As to when an amended writ should be served: see notes to *Rule* 183.

Appeal.—An appeal lies to the Appellate Division from an order of the Judge at the trial directing the case to stand over to add parties: *Payne* v. *Caughell*, 24 Ont. App. 556; and see *Monro* v. *Toronto Railway Co.*, 4 O. L. R. 36; 5 O. L. R. 483. Appeal.

135. If a statement of claim has been delivered previously to a defendant being added, it shall be amended in such manner as the making of the new defendant a party may render desirable; and a copy of the amended statement of claim shall also be delivered to the new defendant. C.R. 208. Amended statement of claim.

See Eng. R. 1875, O. 16, r. 16. It is omitted from Eng. Rules 1883.

C. R. 208 enabled the Court to dispense with an amendment. This provision has been omitted from this *Rule*, probably for the reason, that where an amendment is allowed it ought always to appear on the record, otherwise the judgment pronounced might appear not to be warranted by the record.

136. The Court may order that any pleading, petition or affidavit, or any part of a pleading, petition or affidavit, which is scandalous, be taken off the file, or may direct the scandalous matter to be expunged. C.R. 296. Court may order scandalous matter to be expunged.

Taken from Chy. O. 69.

Scandal.—This *Rule* enables the Court, at the hearing of any action or matter, *suâ sponte*, to order scandalous matter in any pleading, petition or affidavit to be taken off the files or expunged, or to do so on an application for that purpose at any time before the hearing. Scandal.

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As to scandalous matter in a pleading: see also *Rule* 137.

Application to strike out scandalous matter.

Nothing can be scandalous which is relevant: *per* Cotton, L.J., in *Fisher* v. *Owen*, 8 Ch. D. 653; *Jones* v. *Huntingdon*, 3 Chy. Ch. 117; *B*——— v. *W*———, 31 Beav. 342; *Millington* v. *Loring*, 6 Q. B. D. 190; and the test is, whether the matter alleged to be scandalous would be admissible in evidence in shew the truth of any allegation which is material with reference to the relief prayed: *Christie* v. *Christie*, L. R. 8 Chy. 499; *Cashin* v. *Cradock*, 3 Ch. D. 376. The Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not necessary that the applicant should be the injured person; *Cracknall* v. *Janson*, 11 Ch. D. 1; *Middleman* v. *Wilson*, L. R. 10 Chy. 230; *Sadlier* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Goddard* v. *Parr*, 24 L. J. Chy. 783.

Where proceedings are ordered to be taken off the files it is said to be the proper practice to destroy them: *Hill* v. *Hart-Davis*, 26 Chy. D. 471; *sed quære*, is not the proper practice to seal them up. Otherwise should they be destroyed, and the order be subsequently reversed, they could not be restored to the files. See also *Rule* 187.

The Court has jurisdiction to order in any proceeding, scandalous matter to be struck out; thus, scandalous statements in a bill of costs were ordered to be struck out: *Re Miller & Miller*, 51 L. T. 853; 33 W. R. 210; W. N. 1884, 234; *Erskine* v. *Gartshore*, 18 Ves. 114.

As to the power of the Court to strike out scandalous matter: see *Bright* v. *Morner*, W. N. 1878, 211; *Cracknall* v. *Janson*, 11 Ch. D. 1; and as to scandalous matter in affidavits: *Warner* v. *Moses*, W. N. 1881, 89; *Kenrick* v. *Kenrick*, 12 W. R. 335; *Sadlier* v. *Smith*, 7 P. R. 409; *Blake* v. *Albion L. A. Co.*, 24 W. R. 677.

Costs of motion.

The costs of the motion are as between solicitor and client: *Ex parte Thorp*, 1 Ves. 394; *Ex parte Porter*, 2 M. & Ayr. 220; *Ex parte Simpson*, 15 Ves. 478, and both the party and his solicitor concerned are liable to be ordered to pay costs of an application: *Ib.*; *Rottray* v. *George*, 18 Vee. 232, and see *Bishop* v. *Willis*, 5 Benv. 83; *Anon.*, 4 P. R. 242. As to the disallowance of the costs of unnecessary matter in pleadings and affidavits: see *Rule* 670.

Prolixity.

Prolixity.—Although there is no *Rule* specially giving the Court power to take pleadings or affidavits off the files for prolixity, it has nevertheless an inherent power to do so: *Hill* v. *Hart-Davis*, 26 Ch. D. 470; and pleadings may also be ordered to be struck out for prolixity: *Morsh* v. *Pontefract*, W. N. 1876, 7; 1 Chanl. Ch. Ca. 66; *Dovy* v. *Garrett*, 7 Ch. D. 473; or amended by striking out the prolix matter: *Brock* v. *Tew*, 18 P. R. 30.

Impertinence.

Impertinence.—The Court has also jurisdiction to order pleadings, petitions, or affidavits, containing matter which is impertinent, *i.e.*, irrelevant, to be taken off the files, or amended by striking out the offending matter.

Striking out pleadings.

137. Any pleading which may tend to prejudice, embarrass, or delay the fair trial of the action may be struck out or amended. C.R. 298.

See Eng. (1883) R. 309.

As to striking out scandalous matter: see *Rule* 136 and notes.

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Improper or embarrassing pleadings.

Striking out a Pleading as Improper or Embarrassing, on the Application of the Opposite Party.—Apart from the *Rules*, the Court has inherent jurisdiction to strike out a defence as frivolous, vexatious, and an abuse of the procedure, *e.g.*, where it attempts to retry, in another form, a question already decided against the defendant: *Reichel* v. *McGrath*, 14 App. Cas. 665; see also *Rule* 124.

As a rule, the only grounds for striking out pleadings are that they are either (1) embarrassing, (2) scandalous, or (3) tending to prejudice or delay: *Ryan* v. *Fish*, 10 P. R. 187, 192; but in *Chamberlain* v. *Chamberlin*, 11 P. R. 501, it was held that a defence which was wholly inapplicable, might be struck out, though neither scandalous, nor tending to prejudice, embarrass, or delay; and see *Glass* v. *Grant*, 12 P. R. 480; so also a pleading tendering no issue, and containing unnecessary matter: *Brock* v. *Tew*, 18 P. R. 30; a defence alleging want of notice of action, where defendants were not entitled to notice of action: *McCarthy* v. *Vespra*, 16 P. R. 416; and an allegation in a defence to an action by a person of unsound mind, suing by his next friend, that the plaintiff was not in fact of unsound mind, was struck out: *Richmond* v. *Branson*, 1914, 1 Ch. 968; 110 L. T. 763. Pleadings will not necessarily be struck out because they are inconsistent: *Re Morgan*, 35 Ch. D. 492; but where the plaintiff asked for an injunction and damages, and recovery of possession, it was held that such claims were inconsistent and embarrassing, and the plaintiff, though granted an injunction, was refused costs: *Evans* v. *Davis*, 27 W. R. 285.

On application of the opposite party to strike out.

An embarrassing pleading has been defined as one in which matter is pleaded which the party is not entitled to make use of: *Heugh* v. *Chamberlain*, 25 W. R. 742; W. N. 1877, 128; *Straiford* v. *Gordon*, 14 P. R. 407; or to prove: *Duryea* v. *Kaufman*, 21 O. L. R. 161; *e.g.*, in an action to enforce a contract for the sale of a patent without warranty, a defence putting in issue the validity of the patent: *Liardet* v. *Hammond Electric Light*, 31 W. R. 710; W. N. 1883, 96; allegations respecting matters compromised in a former suit, and which therefore could not be re-litigated: *Knowles* v. *Roberts*, 38 Ch. D. 263; *Reichel* v. *Magrath*, *supra*; or an allegation or claim that the action should be treated as supplemental to another action: *Nitrate Securities* v. *Williams*, 106 L. T. 730; or where inconsistent relief is claimed, *e.g.*, payment under an agreement, damages for its breach, and rescission of the agreement: *Grice* v. *Bartram*, 3 O. W. N. 178.

A pleading not drawn according to the *Rules* respecting pleadings is embarrassing: see notes to *Rules* 141, *et seq.*

As a general rule, a pleading should not be set aside on summary application unless plainly frivolous, or indefensible. Formerly the party was left to demur, and even though the pleading appeared to be demurrable, that was not a sufficient reason for striking it out: *Glass* v. *Grant*, 12 P. R. 480; *Straiford* v. *Gordon*, 14 P. R. 407; *Daley* v. *Byrne*, 15 P. R. 4; now, however, that demurrers are abolished, it would seem to be proper to move under *Rule* 124, in cases where that *Rule* is applicable.

A motion to strike out a reply on the ground of its being a departure from the statement of claim was refused: *McLaughlin* v. *Lake Erie & Detroit Ry.*, 2 O. L. R. 151; and see *Brophy* v. *Royal Victoria L. I. Co.*, 2 O. L. R. 651.

Where allegations are properly pleadable under *Rule* 141, the Court has no power to strike out the paragraph containing them, unless

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scandalous, or tending to prejudice, embarrass or delay, within the meaning of the present *Rule*: *Millington* v. *Loring*, 6 Q. B. D. 190.

Striking out the whole of a pleading.

The whole of a pleading may he atruck out; a atatement of claim: *Coshin* v. *Crodock*, 3 Ch. D. 376; *Ker* v. *Williams*, W. N. 1886, 16; a defence: *Preston* v. *Lomont*, 1 Ex. D. 361; or a reply: *Williomson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787. See alao *Golding* v. *Wharton Saltworks Co.*, 1 Q. B. D. 374; W. N. 1876, 40; 2 Charl. Ch. Ca. 40, and *Horris* v. *Gomble*, 6 Ch. D. 748; *Atty.-Gen.* v. *L. & N. W. Ry. Co.*, 1892, 3 Ch. 274; 2 R. 84.

In *Finch* v. *The Guordions of York Union*, 35 L. T. 360, a motion to atrike out the whole atatement of defence waa heid to he misconceived, as the defence was not ao frivoloua aa to juatify ita being aet aside. In *Weir* v. *Bornett*, W. N. 1875, 258; 1 Charl. Ch. Ca. 93, a defendant applied to compel the plaintiff to amend, in an action for false repreaentationa in regard to debenturea, atated to have been made in a latter and proapectua, and Huddleaton, B., refused to order an amendment of the claim, so as to ahew which of the false repreaentationa were in the letter, and which in the prospectus.

Striking out parts of pleadings.

The power to strike out ia not exerciaed so aa to enahle one party to dictate to the other how he ahould plead: *Rolfe* v. *Mocloren*, 3 Ch. D. 106, 108; hut portions of pleadinga have heen struck out which are not in accordance with *Rule* 141; *e.g.*, where they contained irrelevant allegations of fraud, to the effect that in transactions other than the one in queation the defendants had heen guilty of fraud: *Blake* v. *Albion L. I. Co.*, 35 L. T. 269; *Mcnhinick* v. *Turner*, W. N. 1876, 55; 2 Charl. Ch. Ca. 42; immaterial facts set out with prolixity: *Dovy* v. *Gorrett*, 7 Ch. D. 473; *Brock* v. *Tew*, 18 P. R. 30; admissions, *Askew* v. *N. E. Ry. Co.*, W. N. 1875, 238; 1 Charl. Ch. Ca. 90; *Davy* v. *Gorrett*, *supro;* evidence: *Jones* v. *Turner*, W. N. 1875, 239; 1 Charl. Ch. Ca. 91; *Cole* v. *Con. Pocific Ry. Co.*, 19 P. R. 104; *Gloster* v. *Toronto Electric Light Co.*, 4 O. W. R. 532; *Prince* v. *Toronto Ry. Co.*, 5 O. W. R. 88; *Fcornside* v. *Morris*, 2 O. W. N. 676; scandaloua atatementa which were immaterial: *Duncan* v. *Vereker*, W. N. 1876, 64; 2 Charl. Ch. Ca. 44: aee *Crocknoll* v. *Jonson*, 11 Ch. D. 1; *Sodlier* v. *Smith*, 7 P. R. 409; *Christie* v. *Christie*, L. R. 8 Chy. 499; *Wood* v. *Eorl Durhom*, 21 Q. B. D. 501; and notea to *Rule* 136; hut nothing is acandalous that is relevant to the merits: aee *Fisher* v. *Owen*, 8 Ch. D. 653, and other casea in note to *Rule* 136; *Whitney* v. *Moignord*, 24 Q. B. D. 630; Dan. Prac., 5th ed., 290. General statementa of title may he struck out: *Philipps* v. *Philipps*, 4 Q. B. D. 127; *Riddell* v. *Strothmore*, 31 Sol. Jour. 183; *Rule* 155; allegations so prolix aa to he ohacure: *Morsh* v. *Pontefract*, W. N. 1876, 6; 1 Charl. Ch. Ca. 66; see alao *Hill* v. *Hort-Dovis*, 26 Ch. D. 470; and unnecessary details though not amounting to statements of evidence: *Aderis* v. *Thrigley*, W. N. 1876, 56; 2 Charl. Ch. Ca. 43; paragraphs pleaded to a hypothetical case which might never ariae, and could only arise on an amended claim: *Fulford* v. *Wollocc*, 1 O. L. R. 278.

Paragraphs in a statement of claim tendering an immaterial issue: *e.g.*, in a cinim for damages caused hy a defect in a machine, an allegation in the statement of claim that defendants were insured against such accidenta waa atruck out as heing immaterial, and embarrassing: *Flynn* v. *Industriol Exhibition, etc.*, 6 O. L. R. 635; see also *Prince* v. *Toronto Ry. Co.*, 5 O. W. R. 88; nnd *Hoy* v. *Bingham*, 5 O. L. R. 224; or in a statement of defence which raised no issue, or only one that is immaterial: *Webb* v. *Hamilton Cataract Power Co.*,

7 O. L. R. 607; *Nitrate Securities* v. *Williams*, *supra*, p. 575; *Richmond* v. *Branson*, 1914, 1 Ch. 198; 110 L. T. 763. Rule 137.

In *Huntly* v. *Goskill*, 1905, 2 Ch. 656; 93 L. T. 785, parts of a statement of claim were struck out, and a certificate of *lis pendens* was vacated, as being an abuse of the process of the Court; but on an appeal by the plaintiff, the Court of Appeal set aside the writ, but gave the plaintiff leave to issue a new writ, properly framed. Vacating lis pendens.

In an action for seduction, a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the plaintiff's daughter. It was held that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute: *Appleby* v. *Franklin*, 17 Q. B. D. 93; but see *Smith* v. *Selwyn*, 137 L. T. Jour. 7, where the action was stayed; and *Vincent* v. *Sprague*, 3 U. C. Q. B. 283; *Brown* v. *Dalby*, 7 U. C. Q. B. 160; *Walsh* v. *Nattrass*, 19 C. P. 453; *Williams* v. *Robinson*, 20 C. P. 255; but see *E.* v. *F.*, 10 O. L. R. 489; 11 O. L. R. 582.

A paragraph in the prayer for relief will be rarely struck out: *Duryea* v. *Kaufman*, 21 O. L. R. 162.

Allegations in the statement of claim may be struck out where they have been abandoned by the reply: *Brooking* v. *Maudsley*, 55 L. T. 343. Allegations which have been abandoned.

For cases where several plaintiffs and defendants are joined, and causes of action alleged which can not be set up in one action: see notes to *Rules* 66 and 67. Parties or causes of action improperly joined.

In an action to restrain a breach of contract in restraint of trade, it was held to be embarrassing to claim both an injunction and liquidated damages, but, the point not having been taken until the hearing, it was held that the plaintiff should elect: *Grant* v. *Horrison*, 69 L. T. 307.

Where a statement of claim for libel set out the whole article complained of, the Court refused to strike out any part of it as embarrassing: *Hay* v. *Bingham*, 5 O. L. R. 224; but where a plaintiff set up a breach of 23 different patents he was ordered to limit his claim to any three of them: *Saccharin Co.* v. *Wild*, 1903, 1 Ch. 410; 88 L. T. 101.

In an action for slander, where there was a denial of the speaking of the words alleged, a paragraph of the defence, admitting the speaking of other words (setting out the defendant's version of what he had said), and saying that they were true, was struck out as embarrassing: *Rassam* v. *Budge*, 1893, 1 Q. B. 571; 5 R. 336; 68 L. T. 717; *Fulford* v. *Wallace*, 1 O. L. R. 278. Defence.

A defence separating a libel, and justifying as to part, without leaving it clear what part was justified, was struck out as embarrassing: *Fleming* v. *Dollar*, 23 Q. B. D. 388; so also a defence setting up that an alleged libel was fair comment, without setting out the facts on which it was alleged to be a fair comment: *Crow's Nest Coal Co.* v. *Bell*, 4 O. L. R. 660.

A plea denying liability is not embarrassing by being joined with a plea of tender before action, and payment into Court: *Davis* v. *National Insurance Co. of Ireland*, 16 P. R. 116.

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Reasons pleaded to shew why an act, said to be *ultra vires*, was not *ultra vires*, were held not to be irrelevant or embarrassing, and a matter alleged as a reason should not be struck out because it is a bad reason: *Tomkinson* v. *S. E. Ry. Co.*, 57 L. T. 358.

A defence in a *sci. fa.* action, which might have been pleaded as a defence to the original action, was struck out: *Shaver* v. *Cotton*, 16 P. R. 278.

Where a defendant pleaded that a sum paid by him into Court as security for costs, was a satisfaction of the plaintiff's claim, the defence was struck out: *Mendels* v. *Gibson*, 7 O. L. R. 611.

Embarrassing by being defective.

Where a pleading is defective in not containing all the allegations necessary to show a case for relief, or a defence, the pleading may, for that reason, be embarrassing, and, where the defects can be supplied, it will in general be proper to move to strike out the pleading or paragraph, thus, where in a claim by a simple contract creditor he omits to state that he sues on behalf of all creditors to set aside a conveyance as fraudulent against creditors, the objection should be raised by motion under this *Rule*; see *Scane* v. *Duckett*, 3 Ont. 370. So where a claim for ejectment alleged that prior to 1874 defendant was tenant and had paid rent, but since 1874 had not paid rent, it was held to be embarrassing as not showing any subsisting tenancy: *Molloy* v. *Lewers*, 12 L. R. Ir. 39; see also *Rowley* v. *Laffan*, 10 L. R. Ir. 9.

Where pleadings are such as should be struck out, they ought to be struck out by the Judge, and not be left to be dealt with as a question of costs: *Watson* v. *Rodwell*, 3 Ch. D. 380.

Amendment when allowed.

Ordinarily, instead of altogether striking out a pleading, or part of a pleading, the party whose pleading is defective will be given an opportunity to amend: *Moorhouse* v. *Colville*, W. N. 1876, 12; 1 Charl. Ch. Ca. 95; *Anon.*, W. N. 1876, 24; 2 Charl. Ch. Ca. 39.

Where a pleading is obscure, instead of striking it out, it may be ordered to be amended so as to make it clear to the opposite party: *Dryden* v. *Smith*, 17 P. R. 505; *Johnson* v. *Stafford*, 33 C. L. J. 433; and see *Rule* 138. So with an allegation improperly made as a distinct cause of action, but which might be properly pleaded as an aggravation of damages: *Agar* v. *Escott*, 8 O. L. R. 177.

An amendment which will injuriously alter the rights which the parties would have, if there were no amendment, will not be allowed: *Weldon* v. *Neal*, 19 Q. B. D. 394; *Hudson* v. *Fernyhough*, 61 L. T. 722; *e.g.*, an amendment for the purpose of setting up a claim, which, since the issue of the writ, has been barred by the Statute of Limitations: *Weldon* v. *Neal*, *supra*; *Lancaster* v. *Moss*, 15 T. L. R. 476.

Striking out amendments.

Matters improperly introduced by amendment may be struck out, *e.g.*, an amendment adding claims for assault, and false imprisonment, which would be barred by the Statute of Limitations, if made by a new writ, was struck out: *Weldon* v. *Neal*, *supra*.

In *Restell* v. *Steward*, W. N. 1875, 249, paragraphs improperly introduced into a statement of defence by amendment were struck out.

Frivolous or vexatious.

As to striking out a pleading as shewing no reasonable cause of action, or answer, or as being frivolous, or vexatious: see *Rule* 124.

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English authorities not always applicable in Ontario.

In view of the difference between the English and Ontario systems as to admissions (see *Rule* 144), caution will be necessary in applying the English authorities on the subject of striking out embarrassing pleadings. The English Rules require a party to deal specifically with the allegations in the previous pleading, and to deny such allegations as he is not prepared to admit; but where, as under the Ontario system, a party is not so bound to make denials, he might not, in framing his pleading, be embarrassed by an improper pleading, though he might be prejudiced if irrelevant statements of fact in such a pleading were allowed to go before a jury; but, even in England, in an action to establish a right of way, where the defence neither admitted nor denied the alleged right of way, an application to strike it out, as embarrassing, was refused: *Thornhill* v. *Weeks*, 1913, 2 Ch. 464; 109 L. T. 146.

Appeals.

The striking out of pleadings is in the discretion of the Judge; and, as a general rule, an appeal from his order will not be entertained, unless a question of principle is involved: see *Golding* v. *Whorton Saltworks Co.*, 1 Q. B. D. 374; *Watson* v. *Rodwell*, 3 Ch. D. 380; *Ruston* v. *Tobin*, 10 Ch. D. 558, 565; *Re Martin, Hunt* v. *Chambers*, 20 Ch. D. 365. Such an appeal was entertained in *Davy* v. *Garrett*, 7 Ch. D. 473; *Knowles* v. *Roberts*, 38 Ch. D. 263; see also *Loird* v. *Briggs*, 19 Ch. D. 22; *Peterkin* v. *McMorlone*, 4 Ont. App. 25.

On this subject, see also notes to sec. 16 (*f*), *supra*, p. 42 *et seq.*

Master no power to strike out interrogatories for impertinence.

Under this *Rule* the Master in Chambers, or Local Judge, or Master, has no power to strike out for impertinence, interrogatories which have been delivered for the examination of a witness under commission: *Williams* v. *Corby*, 8 P. R. 83.

For form of notice of motion, see H. & L. Forms, Nos. 412-416.

Particulars may be ordered.

138. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading or special endorsement, may in all cases be ordered. C.R. 299.

See Eng. (1883) R. 203.

See *Dryden* v. *Smith* (2), 17 P. R. 505, in note to *Rule* 141, *infra*, p. 592.

Particulars of pleadings.

Until this *Rule* the practice in Ontario as to ordering particulars depended upon the inherent jurisdiction of the Court to prevent injustice, no *Rules* on the subject having been adopted: *Queen Victoria Park, etc.*, v. *Howard*, 13 P. R. 14. This *Rule* has, however, made no substantial change in the practice. The principle upon which particulars were ordered in Ontario, even before this *Rule*, has been the same as in England, viz.: to prevent surprise and embarrassment at the trial, and to lessen expense of evidence: *Mason* v. *Vancamp*, 14 P. R. 296; *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410.

"As a general rule, applications for particulars are to be made before the applicant has pleaded over. Particulars are ordered with reference to pleading, and are distinguished from examination for discovery, which is to get at the knowledge of the adverse litigant. . . . Particulars are ordered primarily with a view to have the prior pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly," *per* Boyd, C.: *Smith* v. *Boyd*, 17 P. R. 463, at p. 467.

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Demand of particulars.

Demanding Particulars.—Before applying for particulars a written demand for the particulars desired should, in general, be made, so as to confine any subsequent motion to such particulars as are refused.

Where a party complies with a demand for particulars of his pleading, he will be restricted at the trial to the particulars given without any order for that purpose: *Young* v. *Erie & Huron Ry. Co.*, 17 P. R. 4.

Particulars given in compliance with a written demand, or an order, should be given in writing; an oral statement of them will not be sufficient: *Ryan* v. *Donovan*, 16 C. L. T. 71 (N. W. T.).

Application for particulars.

Application for Particulars.—The applicant should prove the previous demand, if any, and the non-compliance with it, and should shew by affidavit the need for particulars: *Roberts* v. *Owen*, 6 T. L. R. 172; *Sachs* v. *Speilman*, 37 Ch. D. 303-305, unless it is clear from the pleading that particulars of general allegations there made must be necessary, in which case a motion to strike out the pleading as embarrassing, or to compel its amendment by setting out particulars, will often be proper.

When amendment of pleading proper instead of particulars.

In *Kohfreitsch* v. *McIntyre*, 19 C. L. J. 116; 3 C. L. T. 173; it was held by Mr. Dalton, in Chambers, that, in a case where formerly a party would have been entitled to particulars of a pleading, the proper course will in general be to move to compel an amendment of the pleading so as to state the particulars required. In that case the defence was that a note sued on had been obtained by fraud, (as to pleading which, see *Rule* 143), and the defence was ordered to be amended so as to state the circumstances of the fraud: see *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685; *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 2 Charl. Ch. Ca. 36; in such a case particulars have sometimes been ordered: see *Baston* v. *Bradshaw*, 8 L. R. Ir. 30; *Appleman* v. *Appleman*, 12 P. R. 138. A like order would seem to be proper where justification is pleaded in general terms in an action for libel: see *Corcoran* v. *Robb*, 8 P. R. 49; or an action for wrongful dismissal: see *Sounders* v. *Jones*, 7 Ch. D. 435, 448; *Crabbe* v. *Hickson*, 14 P. R. 42; or in such a case as *Palmer* v. *Palmer*, 1892, 1 Q. B. 319, where a statement of claim alleged merely that plaintiff was entitled to possession of land as heir-at-law of B., who died seised in fee and in possession, and the plaintiff was ordered to give particulars of the relationship relied on as constituting him the heir.

General allegations sometimes permitted.

There may, however, be cases in which a general allegation may be allowed in the pleading to avoid prolixity, leaving the opposite party to apply for particulars if necessary: see *The Rory*, 7 P. D. 120, where a statement of claim, claiming damages for delivery of cargo in a damaged condition, alleged that the damage was occasioned by the defective condition of the vessel, or by the negligence or breach of duty of the defendants: see also *Appleman* v. *Appleman*, 12 P. R. 138.

Time for applying for particulars.

Time for Application.—As particulars are most frequently desider for the purpose of framing a pleading in answer, the application should be made before the applicant pleads over: *Smith* v. *Boyd*, 17 P. R. 463, 467; by a defendant before delivering a defence: see *Augustinus* v. *Nerinckx*, 16 Ch. D. 7; *Blackie* v. *Osmaston*, 28 Ch. D. 123; *Kelly* v. *Martin*, 6 O. W. R. 141; and by a plaintiff before delivering his reply, or amending his statement of claim. Putting in a defence is not necessarily a waiver of the right to particulars: *Sachs*

v. *Spellman*, 37 Ch. D. 295; 58 L. T. 102; *Watson* v. *North Metropolitan Co.*, 3 T. L. R. 273; but in general, in the absence of special circumstances, particulars will not be ordered after the close of the pleadings: *Smith* v. *Boyd*, 17 P. R. 463; see *S. C.*, 18 P. R. 296; and *Gourond* v. *Fitzgerold*, 37 W. R. 55, 265. Particulars can not, at that atage, be required for the purpose of pleading, and they will only be granted for the purposes of the trial, upon affidavit showing that they are necessary: *Bonk of Toronto* v. *Ins. Co. of N. A.*, 18 P. R. 27. Rule 138.

Where defendant applied before defence for particulars of transactions impeached, the circumstancee of which were within his own knowledge, and not that of the plaintiff, the application waa ordered to stand over until the defence was put in: *Sochs* v. *Spellmon*, *supro*; see *Re Morgon*, 35 Ch. D. 500.

Particulars may be ordered subject to the party required to deliver them having first an opportunity to examine for discovery: *Townsend* v. *Northern Crown Bonk*, 19 O. L. R. 489. Discovery before particulars ordered.

Where such an order is made, it should provide that the party to deliver the particulare ahould he at liberty to examine his opponent for discovery, and that the particulars should be delivered within a certain time after discovery has been, or might bnve been obtained: see *Ib.*

Thsre is ao hard and fast ruie as to the ciasa of caees in whicb particulars will he ordered to be delivered before discovery, or discovery to be given before particulars. The Court will look at the circumstances of each case: *Woynes Merthyr Co.* v. *Rodford*, 1896, 1 Ch. 29.

Where the detailа of the facta pleaded lie in the knowledge of the psrty asking particulara, particulare sbould not be ordered before discovery is given by the party asking the particulars: *Sims* v. *Slater*, 10 C. L. T. 227; *Millor* v. *Harper*, 38 Cb. D. 110; *Sochs* v. *Speilman*, *supro*; *Whyte* v. *Ahrens*, 26 Ch. D. 717; *Leitch* v. *Abbott*, 31 Ch. D. 374; *Maxim & Co.* v. *Nordenfeldt*, 1893, 3 Ch. 122; *Edelston* v. *Russell*, 57 L. T. 927; *Waynes Merthur Co.* v. *Radford*, 1896, 1 Cb. 29; but see *Zierenberg* v. *Labouchere*, 1893, 2 Q. B. 183, an action for libel.

In some cases all the particulars required may be obtained by examinaation for discovery: see *Saunders* v. *Jones*, 7 Ch. D. 435; explained in *Benbow* v. *Low*, 16 Cb. D. 97; *Frost* v. *Brooke*, 32 L. T. 312; *Hill* v. *Wotes*, L. R. 9 C. P. 688; *Blochford* v. *Green*, 14 P. R. 424; *Holl* v. *Bryce*, 6 T. L. R. 344. Particulars obtained by examination.

Where by examination for diacovery the defendant had obtained the informstion which would be given by particulars, particulars were refused: *Gould* v. *Beottie*, 11 P. R. 329.

Where a pleading sets up that a deed is fraudulent and void under *The Froudulent Conveyonce Act* (R. S. O. c. 105), particulars of the fraud should be obtained hy examination for discovery: see *Pitfield* v. *Guest* (Nov. Scot.), 18 C. L. T. 144.

Particulars—General Principles. — Particulara will be ordered giving information to prevent the opposite party from being takeu by surprise at the trial, and to eave unnecesaary expense: *Spedding* v. *Fitzpatrick*, 38 Cb. D. 410; *Turncock* v. *Sortoris*, 33 Sol. Jour. 58; *Newport, etc., Co.* v. *Paynter*, 34 Cb. D. 93; *Crompton* v. *Anglo-American*, General principles on which particulars are ordered.

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etc., 35 Ch. D. 283; *Thompson* v. *Birkley*, 31 W. R. 230; but not such as will oblige a party to disclose the evidence upon which he relies: *Queen Victoria Park Commissioners* v. *Howard*, 13 P. R. 14; (where defendants, pleading that certain lands were Ordnance Lands, were not ordered to give particulars of facts and means by which, and the time at which, the lands so became Ordnance Lands, it not appearing that the defendants had any special means of information not open to the plaintiffs); see also *Temperton* v. *Russell*, 9 T. L. R. 319; *Cave* v. *Torre*, 54 L. T. 518, 519; *Salisbury* v. *Nugent*, 9 P. D. 23. The drawing of the line between evidence, and particulars of facts to prevent surprise, is often difficult: *Britos Medical* v. *Britannia*, 59 L. T. 888; *Molsons Bank* v. *Hall*, 5 O. W. R. 625.

A defendant may be ordered to give particulars of documents, and of the transactions to which they relate, (but not of their contents) referred to in his pleadings, though he has in an affidavit on production of documents effectually claimed for those documents the privilege of non-production: *Milbank* v. *Milbank*, 1900, 1 Ch. 376; 82 L. T. 63.

A party is entitled to have the opposite party's case presented in an intelligible form; *Harbord* v. *Monk*, 38 L. T. 411; *Dryden* v. *Smith*, 17 P. R. 505; and if the charges are not sufficiently explicit, particulars may be ordered: see *Anon.*, W. N. 1875, 202, 220; or an amendment of the claim may be applied for: *Schomberg* v. *Zoebelli*, W. N. 1876, 106; 2 Chart. Ch. Ca. 36.

Particulars compel a litigant to state the details of what he pleads, whether he himself knows the facts or not; discovery compels him to state what he knows: see *Turnock* v. *Sortoris*, 33 Sol. Jour. 58.

In determining what particulars may be demanded, the decisions under the English practice of delivering interrogatories may be usefully referred to. These shew that a party cannot be compelled to disclose the details of his evidence, as contradistinguished from the facts: *Eade* v. *Jacobs*, 3 Ex. D. 335; explained in *Atty.-Gen* v. *Gaskill*, 30 W. R. 558; *Bidder* v. *Bridges*, 29 Ch. D. 29; *Benbow* v. *Low*, 16 Ch. D. 93; *Re Leigh, Rowcliffe* v. *Leigh*, 6 Ch. D. 256; *Sheward* v. *Lord Lonsdale*, 5 C. P. D. 47; 42 L. T. 172; *Commissioners of Sewers* v. *Glasse*, L. R. 15 Eq. 302; *Lister* v. *Thompson*, 7 T. L. R. 107; or matters which do not pertain to the questions to be raised at the trial, though they may be relevant if a judgment is obtained: *Parker* v. *Wells*, 18 Ch. D. 477; but the material facts upon which the issues in the case will be raised must be disclosed: *Ashley* v. *Taylor*, 38 L. T. 44, such as, in an action for dissolution of a partnership in the practice of surgeons, occasions when the defendant conducted himself in such a way as to make it impossible for the plaintiff to practice with him: *Lyon* v. *Tweddell*, 13 Ch. D. 375; and, in an action for wrongful dismissal, instances of misconduct relied on to justify the dismissal: *Saunders* v. *Jones*, 7 Ch. D. 435; *Crabbe* v. *Hickson*, 14 P. R. 42; and in an action for false imprisonment, particulars of reasonable and probable cause were ordered: *Green* v. *Garbutt*, 28 T. L. R. 575, 133 L. T. Jour. 330.

Where by his statement of claim, the plaintiff sued as trustee for A. B. "and others," upon motion by defendant he was ordered to amend his statement of claim by striking out the words "and others," or else to give particulars to defendant of such "others" within one week: *Johnson* v. *Stafford*, 33 C. L. J. 433.

Where the plaintiff claims not an account merely but a definite sum, he must state what his case is in detail, either in the pleadings or by way of particulars: *Blackie* v. *Osmaston*, 28 Ch. D. 119. Rule 138.

Where a party seeks to open a settled account, particulars of specific errors relied on may be ordered: *Ontario Lumber Co.* v. *Cook*, 11 O. L. R. 111.

Where a claim was for a liquidated sum under an agreement for services rendered, and money disbursed, particulars of services and disbursements were ordered: *Gunn* v. *Tucker*, 7 T. L. R. 280; see also *Sedgwick* v. *Yedras Mining Co.*, 4 T. L. R. 17; *Hall* v. *Symons*, 92 L. T. Jour. 337.

See also notes to *Rule* 33.

As to particulars of damages: see *Turnock* v. *Sartoris*, 33 Sol. Jour. 58; *Blachford* v. *Green*, 14 P. R. 424.

As to particulars of payment into Court: see *Rowe* v. *Kelly*, 59 L. T. 139; *James* v. *Radnor*, 6 T. L. R. 240.

Where particulars of money claims can be indorsed, or stated in the claim, they ought to be so: see *per* Lush, J., *Anon.*, W. N. 1875. 202; 1 Charl. Ch. Ca. 35. If, therefore, sufficient particulars are not given, the costs of an application to obtain them should be borne by the plaintiff.

In libel actions the following rules are established, viz., that where a defendant raises an imputation of misconduct against the plaintiff, the plaintiff ought to be enabled to go to trial with knowledge of the acts which it is alleged he has committed, and upon which the defendant intends to rely, as justifying the imputation; and if the particulars required are such as the defendant ought to give, he cannot refuse to do so, merely on the ground that his answer will disclose the names of witnesses: *Woolton* v. *Sicvier*, 1913, 3 K. B. 499; 109 L. T. 28. Particulars in libel actions.

Examples—Particulars not Ordered.—Particulars will not be ordered where the ordering of them will embarrass the party from whom they are asked, and the want of them will not take the party asking them by surprise, as where knowledge of the circumstances of the case lies with the party asking particulars: see *Roberts* v. *Owen*, 6 T. L. R. 172; *Lister* v. *Thompson*, 7 T. L. R. 107; *Temperton* v. *Russell*, 9 T. L. R. 319; *Scottish Ont., etc., Co.* v. *Toronto*. (Boyd, C., 20th Dec., 1897), or where they are immaterial, as, for example, in an action to recover certain charges, where the defence was that they were unreasonable and excessive, particulars of the items objected to were refused, as the plaintiff would at the trial have to prove that they were reasonable: *James* v. *Radnor*, 6 T. L. R. 240; see also *Care* v. *Torre*, 54 L. T. 515; *Gibbons* v. *Norman*, 2 T. L. R. 676; or where by them it is sought to have evidence of the facts disclosed, and not the facts themselves: see cases, *supra*, p. 582. Examples, where particulars not ordered.

Particulars of the fraud for which a conveyance was impeached were refused: *Pitfield* v. *Guest*, *supra*, at p. 581.

Where the plaintiff's claim was not a merely legal demand for an ascertained sum, but an equitable claim, which, if successful, would only lead to an account being taken, and particulars were not necessary to enable defendant to frame his defence, the plaintiff was not ordered to furnish them: *Augustinus* v. *Nerinckx*, 16 Ch. D. 16.

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Where a plaintiff was suing for an account by an administrator, an order requiring him to give particulars of the property of which he required an account was held to be erroneous, and was discharged: *Corr* v. *Anderson*, 112 L. T. Jour. 214.

Examples, where particulars were ordered.

Particulars Ordered.—Of payments which the defendants, who were mortgagees in a redemption action, admitted having received, and which were invoived in their counter-claim: *Kemp* v. *Goldberg*, 36 Ch. D. 505; 56 L. T. 736; of a sum for which credit was given by the claim, in order to enable defendant to frame his set-off or counter-claim: *Godden* v. *Corsten*, 5 C. P. D. 17; W. N. 1879, 190; of negligence, and damages, in an action for damages for injuries caused by negligent driving: *O'Meara* v. *Stone*, W. N. 1884, 72; 27 Sol. Jour. 359; of general allegations of trust, and breaches thereof: *Re Anstice*, 33 W. R. 557; 52 L. T. 572; of errors in progress certificates, though these were the result of information derived from documents prepared for the litigation which were privileged: *Can. Pac. R.* v. *Conmee*, 11 P. R. 297; of items alleged to be false entries, and of the nature of the objection to each: *Newport* v. *Paynter*, 34 Ch. D. 88; of false and fraudulent misrepresentations: *Seligmon* v. *Young*, W. N. 1884, 93; 28 Sol. Jour. 411; in an action for infringement of a trade mark, of "divers persons" alleged to have been deceived: *Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693; of items of a claim in respect of which the defendant pays money into Court, but only if the trial will be facilitated and neither party embarrassed: *Orient Steam Nav. Co.* v. *Ocean Marine Ins. Co.*, 34 W. R. 442. This case was decided under Rule 203, of Eng. Rules of 1883, providing expressly for a demand of particulars, and order therefor, if not given on demand, which is the practice pursued in Ontario without special *Rule*.

In an action for goods sold and delivered, a counter-claim for damages for inferior quality was set up. Particulars of the damages claimed were ordered: *Anon.*, W. N. 1875, 220; see also notes to *Rules* 33 (g) and 111.

Defendants claiming a road to be a highway by dedication were ordered, if they relied on any specific acts of dedication or declarations of intention to dedicate, whether alone or jointly with user, to give the nature and dates of the acts or declarations, and the names of the persons by whom they were done or made: *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410.

Alimony.

In suits for alimony, the former Chancery practice required that the various acts of violence, or adultery, relied on, should be set forth specifically in the bill, that the defendant might have notice of them, otherwise no evidence of such acts could be given: *Rodman* v. *Rodman*, 20 Gr. 428, 440, 441. This is in accordance with the present Rules of Pleading: see *Brook* v. *Brook*, 35 W. R. 351; 57 L. T. 425; In *Rosenstadt* v. *Rosenstadt*, 9 P. R. 311, an order was made for delivery of particulars of acts relied on, within one month, and confining the plaintiff's evidence to such acts: and though in that case it was considered convenient to order particulars, the decision shews clearly enough that the plaintiff's statement of claim was not properly framed to enable her to go into evidence. Particulars were ordered by names of servants in whose presence abusive language was alleged to have been used by plaintiff: *Bishop* v. *Bishop*, 1901, P. 325; 85 L. T. 173.

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Fatal Accidents Act.

In an action under *The Fatal Accidents Act*, by parents for the death of a son in a railway accident, particulars of the alleged negligence causing the death were refused, and also particulars of the damage claimed: *Mulvenna* v. *Can. Pac. Ry.*, 5 O. W. N. 779; and see *infra*, p. 587.

Wrongful dismissal.

In an action for wrongful dismissal, the plaintiff is entitled to a list of the specific acts which defendant is aware of, and on which he proposes to rely as justifying dismissal, and if further facts are afterwards discovered, particulars of them should also be furnished before trial: *Crabbe* v. *Hickson*, 14 P. R. 42; *Saunders* v. *Jones*, 7 Ch. D. 435; *Scott* v. *Mewberry*, 3 O. L. R. 252.

Malicious prosecution.

In an action for malicious prosecution defendant was not ordered to give particulars of what he relied on in support of an allegation of reasonable and probable cause, in the absence of any necessity for giving any such particulars being shown by plaintiffs: *Roberts* v. *Owen*, 6 T. L. R. 172.

False imprisonment.

In an action for false imprisonment as a lunatic, reasonable and probable cause as a defence was held to be an immaterial allegation, and particulars of it were refused: *Cave* v. *Torre*, 54 L. T. 87, 516.

Grounds of belief.

Where directors, sued for misrepresentations in a prospectus, set up that they had reasonable grounds to believe such representations to be true, particulars of such grounds of belief were ordered to be delivered: *Odman* v. *Oppert*, 1901, 2 K. B. 576; 87 L. T. 828.

Settled account.

Settled account: see *Ontario Lumber Co.* v. *Cook*, *supra*, p. 583.

Seduction.

In an action for seduction defendant was held not entitled to particulars of times and places, unless he made affidavit denying the seduction, so as to shew that he did not know the nature of the charges brought against him, which otherwise would be deemed to be matters within his own knowledge: *Thompson* v. *Birkley*, 31 W. R. 230; 47 L. T. 700; *Knight* v. *Engle*, 61 L. T. 780; *Hollister* v. *Annable*, 14 P. R. 11; *Mason* v. *VanCamp*, *Ib.*, 296; and see *Turner* v. *Kyle*, 2 O. L. T. 311. Where such an affidavit is made, particulars may be ordered before defence: *A.* v. *B.*, 7 O. L. R. 73; a denial of the paternity of the child does not entitle the defendant to particulars of others having had intercourse with the plaintiff's daughter: *Hooton* v. *Bailey*, 1907, 2 K. B. 18; 96 L. T. 537.

Criminal conversation.

In an action for crim. con., defendant is entitled to particulars of times and places, where he makes affidavit denying the alleged acts, and stating that he is ignorant of the charge, and that the application is made *bonâ fide*: *Keenan* v. *Pringle*, 28 L. R. Ir. 135; but not without such an affidavit, especially after an examination for discovery: *Murray* v. *Brown*, 16 P. R. 125.

Undue influence. Testator's mental capacity.

The practice in the Probate Division in England is not to order particulars of undue influence charged: *Salisbury* v. *Nugent*, 9 P. D. 23; or of allegations of a testator's unsoundness of mind: *Hankinson* v. *Barningham*, 53 L. J. Pro. 16.

Libel and slander.

In an action for libel against a newspaper, the statement of claim must be confined to the statement specified in the notice required by *The Libel and Slander Act* (R. S. O. c. 71), s. 8, to be given before action: *Obernier* v. *Robertson*, 14 P. R. 552.

Where the charge made against the plaintiff is general, the defendant who pleads justification must set out the facts on which he relies in support of his justification, and if he do not, particulars will

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be ordered: *Zierenberg* v. *Labouchere*, 1893, 2 Q. B. 183; 69 L. T. 172; *Bristol* v. *German P. & P. Co.*, 33 C. L. J. 462; *Wilkinson* v. *Hamilton Spectator*, 2 O. W. N. 471; and if it is necessary in order to enable the plaintiff to know what particular occasion, or transaction is referred to in the defence, the defendant may be required to disclose the names of persons, notwithstanding such disclosure may involve disclosing the names of the defendants' witnesses: *Wootton* v. *Sicvier*, 1913, 3 K. B. 499; 109 L. T. 28.

Where a review of a book stated that the plaintiff by his own confession was a barefaced liar, and the defence was justification, the plaintiff was held entitled to particulars of the passage relied on: *Devereux* v. *Clarke & Co.*, 1891, 2 Q. B. 582; and see *Foster* v. *Perryman*, 8 T. L. R. 115.

In an action for libel in a newspaper publication, which the defence said was an accurate report of certain public proceedings and fair comment thereon, particulars by interrogation were denied as to the names of persons on whose information the report was based: *Hennessy* v. *Wright* (No. 2), 36 W. R. 878; 24 Q. B. D. 445; and where the action is against the proprietor of a newspaper who admits the publication of the libel, and pleads an apology, the plaintiff is not entitled to interrogate the defendant as to the name of the writer, unless the identity of the writer is a fact material to some issue raised in the case: *Gibson* v. *Evans*, 23 Q. B. D. 384; *Blanc* v. *Burrows*, 12 T. L. R. 521; nor to have production of the original manuscript of the libel: *Hope* v. *Brash*, 1897, 2 Q. B. 188; 76 L. T. 823.

Particulars were ordered of a defence of justification in a libel suit, where it was not clear whether the defence was that what was charged against plaintiff was true, or was truly reported: *Hennessy* v. *Wright*, 57 L. T. 795; 57 L. J. Q. B. 594. In *Wills* v. *Carman*, 17 Ont. 223, a defendant not pleading justification, but saying that the alleged libel was a fair comment on matters of public interest, was held entitled to show what the facts were, as to the matters commented upon, in order to show that the comments upon them were fair; but this does not mean that a defendant can give evidence to show that the alleged libel is true without pleading justification: *Brown* v. *Moyer*, 20 Ont. App. 509; *Manitoba, etc.*, v. *Martin*, 21 S. C. R. 518.

A defendant in a libel action is not entitled to particulars of the names of persons, or dates, and places, where the alleged libel was published, in the absence of special grounds requiring them, and particularly when the particulars of the publication if any must be known to the defendant: *Keogh* v. *Incorporated Dental Hospital*, 1910, 2 Ir. R. 166.

Slander cases.

In an action for slander, particulars may be ordered of the persons to whom the slanderous words were spoken, or if such persons are unknown, or the words were spoken to the plaintiff, then the name of any person who was present and heard, or might have heard the words spoken: *Thornton* v. *Copstock*, 9 P. R. 535; which, it has been held in *Gould* v. *Beattie*, 11 P. R. 329 (see also *Patterson* v. *Dunn*, 14 P. R. 40), is in Ontario, to be followed in preference to the contrary views expressed in *Bradbury* v. *Cooper*, 12 Q. B. D. 94, and *Roselle* v. *Buchanan*, 16 Q. B. D. 656; but see *McMillan* v. *Colwell*, 7 C. L. T. 141; but it has been held, even in England, that those decisions are not to be extended to occasions of publication of an alleged libel: *Gourand* v. *Fitzgerold*, 37 W. R. 55. Particulars as

to the names of persons alleged to have been passing by, when the slanderous words were used, and particulars as to the alleged damages, have been refused: *Wingard* v. *Cox*, W. N. 1876, 106, 2 Charl. Ch. Cs. 33; see also *Colonial Insurance Corporation* v. *Prosser*, W. N. 1876, 55; 2 Charl. Ch. Ca. 35; *Restell* v. *Steward*, W. N. 1875, 231; 1 Charl. Ch. Ca. 87; more especially where the persons are persons whose names the plaintiff does not know: *Dawson* v. *Rogan*, 10 C. L. T. 300. Rule 186.

Where the plaintiff alleged slander spoken to S. C. "and others," particulars as to "others" were refused, where, before motion, the plaintiff gave all the information in his power as to what he knew of the other persons present, and the defendant did not swear that he could not plead without further particulars: *Winnett* v. *Applebe*, 16 P. R. 57.

In an action for slander imputing a specific charge, which is justified, no particulars are necessary: *Cuming* v. *Green*, 7 T. L. R. 408: see *Foster* v. *Perryman*, 8 T. L. R. 115; and *Heaton* v. *Goldney*, 1910, 1 K. B. 754; 102 L. T. 451.

But a defendant is entitled to the fullest particulars the plaintiff can furnish, as to places where, times when, and persons to whom alleged defamatory words were uttered; and also of the names of persons who have ceased to do business with plaintiff, in consequence of the alleged slander, and also particulars of the slanderous statements alleged as showing express malice, or in aggravation of damages: *Muller* v. *Gerth*, 17 P. R. 129; and see *Robinson* v. *Sugarman*, 17 P. R. 419.

Where fair comment was pleaded, and the defendant stated that the facts on which he commented were statements in certain specified documents, further particulars were refused: *Digby* v. *Financial News*, 1907, 1 K. B. 502; 96 L. T. 172.

In an action for slander of title, particulars were refused as to persons who would have given more than was realized at the sale in respect of which damages were claimed: *Catton* v. *Gleason*, 14 P. R. 222; but in an action for libel, particulars were ordered of the facts on which the plaintiff's claim for damages for loss of trade was based: *Blachford* v. *Green*, 14 P. R. 424. Slander of title.

Particulars were ordered of the links of relationship, whereby plaintiff sought to establish his title as heir, in an action for the recovery of land: *Palmer* v. *Palmer*, 1892, 1 Q. B. 319; also of the section of the Real Property Limitation Act on which defendant relied: *Dodge* v. *Smith*, 1 O. L. R. 46. Ejectment.

Particulars of negligence causing death of plaintiff's husband were refused, (plaintiff and defendant being both in ignorance of the circumstances); *Smith* v. *Reid*, 17 O. L. R. 265; and see *supra*, p. 585. Negligence.

As to the extent to which a defendant setting up a defence of misrepresentation in procuring insurance, arson, and improper statement of loss, may be ordered to give particulars: see *Katrine L. Co.* v. *Liverpool & L. Ins. Co.*, 17 P. R. 318. Insurance cases.

Particulars of objections to a patent must be given: see *Cropper* v. *Smith*, 51 L. T. 729: see form of order in *Ehrlich* v. *Ihlee*, 56 L. T. 819. Patent cases.

The general law applicable to discovery governs actions for infringement of patents. Full disclosure of the lines of attack must

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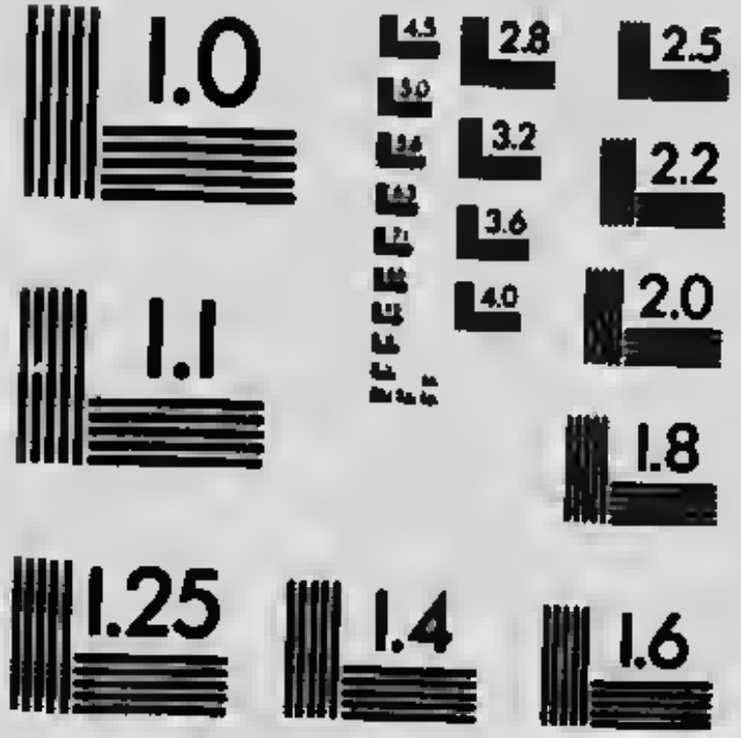

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be made, hut no such individualizing of the persons who are alleged to hs prior users as would enahle ths plaintiff to fix upon the defendant's witnesses: *Smith* v. *Greey*, 4 C. L. T. 589; 21 C. L. J. 58; 11 P. R. 169.

In *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 482, particulars of infringements of two patents were delivered. Ths defendant snswered the plaintiff's interrogatories, whereupon he discontinued as to one patent. The defendants then required the plaintiff to distinguish hetween the infringements compiained of, referring him to thsir answers and interrogatories, and interrogating him as to which of the processes, which they described, infringsd the patent relied on by him. It was held that the plaintiff was not obliged to particularize the infringements: see also *Birch* v. *Mather*, 31 W. R. 362; 22 Ch. D. 629; *Anglo-American Brush Co.* v. *Crompton*, 34 Ch. D. 152; 35 Ch. D. 283, under Imp. Act 46 & 47 Vict. c. 57, s. 29.

Particulars wers ordered of respects in which the defendants denied that the plaintiffs' patent was for any new invention, etc. (as alleged), and dates and occasions when, and aiso names of persons hy whom prior user was had: *Smith* v. *Greey*, 11 P. R. 169; see aiso *Holliday* v. *Heppenstall*, 41 Ch. D. 109; *Union Electrical, etc., Co.* v. *Electrical Storage Co.*, 38 Ch. D. 325; *Boyd* v. *Farrar*, 57 L. T. 866.

An application hy the defendant to amend his particulars of ohjections to a patent, on the ground that, pending the triai, the defendant had discovered new facts showing want of novelty, wss refus[illegible], it not being shown that he couid not with reasonahle diiigence have discovered the new facts sooner: *Moss* v. *Malings*, 33 Ch. D. 603.

All defects in the specifications of a patent on which ths defendant intends to reiy at the trial must be specified in ths particuisrs of ohjection: *Anglo-American Brush Co.* v. *Crompton*, 34 Ch. D. 152; 35 Ch. D. 283.

In an action for infringement of a duiy registered copyright, particulars were ordered showing the date of registration of the copyright, and the parts of defendant's book which infringed it: *Liddell* v. *Copp Clark Co.*, 19 P. R. 332.

"Not guilty by Statute."

Particulars of a defence under "not guiity, hy statute" may now be requirsd: see *Rule* 156.

Effect of order for particulars.

Effect of Order for Particulars.—Where particulars are deiivered pursuant to a demand, or an order, ths party deiivering the same wiii he restricted at the triai to the particulars so delivered, without any order for that purposs: *Young* v. *Erie & H. Ry. Co.*, 17 P. R. 4.

It may be made a term of an order for the deiivery of particuiars, that in dsfault of deiivery hy a plaintiff his action he dismissed, and in case of a defendant, that his defence he struck out: see *Davey* v. *Bentinck*, 1893, 1 Q. B. 185; 67 L. T. 742; or it may provids for the exclusion of evidence if no particulars, or insufficient particuiars, are given: *Noxon* v. *Patterson*, 16 P. R. 40, and if hy the terms of the order the iatter is the penalty imposed on a defendant for default, a further order wiii not he mads iimiting a time for deiivery of particuiars, and on default striking out the defence: *Bell* v. *Morrison*, 5 O. W. R. 226; ths order for particulars should not direct ths excision

of the pleading, on default, if it is good *per se*: *Noxon* v. *Patterson*, *supra*, p. 588. Rules 139-141.

Where an order was made for particulars of certain paragraphs of defence, and in default the paragraphs to be struck out, it was held that the officer with whom the pleadings were filed could strike out the paragraphs without further order, upon default being shown by affidavit: *Hamilton Road Co.* v. *Flatt*, 10 P. R. 581.

An order striking out particulars complained of as too general was refused, it being held that, if too general, the admission of evidence thereunder was in the discretion of the Judge at the trial: *Citizens Insurance* v. *Camphell*, 10 P. R. 129.

As to the giving of particulars by parties in a representative capacity: see *Higgins* v. *Weekes*, 5 T. L. R. 238.

GENERAL RULES OF PLEADING.

139. Every writ, pleading or other document, may be printed, typewriten, or written in whole or in part. C.R. 265. Pleadings may be written, etc.

See Eng. (1883) R. 205.

C. R. 265 limited the number of copies of a document to be allowed on taxation, but the new tariff has rendered that provision unnecessary.

When a pleading is printed *Rule* 188 prescribes the kind of type to be used.

Pleadings must be in English: see sec. 122, p. 293, *supra*.

140. Every pleading shall be filed, and served upon all parties concerned therewith, and shall be marked on the face with the date of filing, and with the title of the action, the description of the pleading, and the name and place of business of the solicitor and agent (if any) of the party filing the same, or the name and address of the party filing the same if he does not act by a solicitor. C.R. 266, *amended*. How pleadings delivered should be marked.

See Eng. (1883), R. 207.

This *Rule* is a consolidation and amendment of C. RR. 266, 267. Delivery includes filing and service.

In Ontario the delivery of a pleading includes both its filing and service. The English practice does not require pleadings to be filed: see *Lloyd* v. *Ward*, in note to *Rule* 121, p. 537, *supra*.

141. Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved; dates, sums and numbers shall be expressed in figures. C.R. 268. Form of pleadings.

The somewhat similar Eng. (1883) R. 200, provides for the signing of pleadings, and that a pleading "shall contain, and contain only,

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a statament in a summary form of the material facts, etc." The pleadings in England since this *Rule* ara now like a special indorsement on a writ, which indeed always serves as a statement of claim: see O. 20, r. 1. The Englisb pleadings and dacisions tberaon, and as to particulars, cannot now be safe guides in Ontario.

Facts to be stated.

The system of pleading introduced by tbe Jud. Act, 1881 requires not tbe legal result of the facts, but tha facts tbemselves, to be statad. A statement of claim, therefora, wbicb marely alleged that a good and valid do*natio mortis causo* had been made to tha plaintiff, without stating the facts which constituted it, was formerly held to be demurrable: *Re Porton, Townsend* v. *Porton*, 30 W. R. 287; 45 L. T. 755; so a statement that "thera was contributory negligence on tha part of the plaintiff," is a statement of a conclusion of law on a state of facts not set out: *Kelly* v. *Martin*, 6 O. W. R. 141.

Subsequent *Rules* modify slightly tha original *Rule* requiring tha facts only to he stated: see *Rule* 143, by which the contentions in point of law must be stated, so as to prevent surprise. In complying with tbese *Rules* therefore, it may not always he proper to state only facts.

Libel.

In an action for defamation, the plaintiff must set out, as formerly, tha words of the alleged libel: see notes to *Rule* 147, and *Robinson* v. *Sugormon*, 17 P. R. 419; *Hoy* v. *Binghom*, 5 O. L. R. 224; and the defendant must set out all the facts sbewing defences, *e.g.*, justification, or priviiege: *Belt* v. *Lowes*, 51 L. J. Q. B. 359; or intended to be relied on in mitigation of damages, such as the plaintiff's general bad character: *Scott* v. *Sampson*, 8 Q. B. D. 491; sea notes to *Rule* 158; or that the alleged libel (when in a newspaper article) was published in good faith and in the usual coursa of business: *Beaton* v. *Intelligencer, etc.*, 22 Ont. App. 97; or that the words were spoken on a privileged occasion: *Vansycle* v. *Parish*, 1 O. L. R. 13; so in an action for libel, where the defendant pleads fair comment on matters of puhlic interest, he must set out the facts upon which it is alleged that the article complained of was a fair comment, or allege tha truth tbereof: *Crow's Nest Cool Co.* v. *Bell*, 4 O. L. R. 660.

A statement of claim in an action for defamation for words charging tbe plaintiff with an offence under tbe Cr. Coda, ss. 533, 534, need not aver special damage, hut it is otherwise when the offence charged is a violation of ss. 529 or 530: see *Routley* v. *Horris*, 18 Ont. 405.

Slander.

In an action of slander it is not sufficient to allege that the defendant falsely, and maliciously, spoke, and published, the dafamatory words complained of. The tima and place, and the parsons to whom, or in whose presence, they wers spoken must be stated with reasonabla certainty: *Thornton* v. *Capstock*, 19 C. L. J. 254; the statement that the words wera spoken and published to certain named persons, "and to others at present unknown to the plaintiff," was held sufficient: *Townsend* v. *O'Keefe*, 18 P. R. 147; an allegation that during a period of 5 months the defendant spoka and published various slanders to certain named persons, and to others not known to the plaintiff, was held bad, and struck out because it did not shew which of the persons were present when the different statements were made, nor at which times and places they were present: *Ib.*

A counter-claim for slander, referring to charges set out in the statement of defence, on an occasion *primâ facie* privileged, and alleging tbst tbey were falsely and maliciously spoken, was held to be

s good pleading, though it omitted to shew in what respect the plaintiff had exceeded the privilege: *Hopewell* v. *Kennedy*, 9 O. L. R. 43. Rule 141.

A defence of purchaser for value without notice may be relied on at the hearing, though not expressly pleaded, if it be a just inference from the facts admitted, on the pleadings, or subsequently by agreement of the parties: *Taylor* v. *Blacklock*, 34 W. R. 175; and see note to *Rule* 148. Purchaser for value.

Ths pleadings in dower are governed by the same rules as those in other actions. The right of dower is a legal conclusion from certain facts, and those facts should be stated in the pleading: *Lauder* v. *Carrier*, 10 P. R. 612. Dower.

A plaintiff who claimed to be entitled to a right of way over a road, snd an injunction against the obstruction of the road, was required to state in his pleading the way, and the route, and limitations of the road, over which he claimed the right. A general statement that there was a road over a certain farm connecting two other farms, and that the plaintiff and his tenants were entitled to a right of way over it, was held to be embarrassing: *Harris* v. *Jenkins*, 22 Ch. D. 481; see also *Spedding* v. *Fitzpatrick*, 38 Ch. D. 410. So a plaintiff claiming an easement must set out the facts on which he relies as entitling him, by grant, prescription or otherwise: *Farwell* v. *Hoogan*, 12 L. R. Ir. 14; and as to a defence in such a case: see *Thornhill* v. *Weeks*, *supra*, p. 579. Other cases.

Where the pleadings alleged that "the company has otherwise acknowledged its insolvency," it waa held that aa a matter of pleading, the manner of acknowledgment should have been stated: *Re British American Loan, etc., Co.*, 4 C. L. T. 248.

In a foreclosure action where the mortgagee applies for judgment, on default of appearance, not only for foreclosure, hut also for a personal order for payment, the statement of claim ought, shortly, to contain an express statement of the covenant, or other contract, upon which the order is claimed: *Law* v. *Philby*, 56 L. T. 230; 35 W. R. 401.

Stating the Material Facts.—All facts which are material to the plaintiff's claim should be stated in the claim, and all the matters whether of law or fact relied on by way of defence should be stated in the defence, or the omission of some material allegation by way of claim, or defence, may ultimately prove fatal to the litigant: see *Haddington* [illegible] *Quarry Co.* v. *Huson*, 1911, A. C. 722; 105 L. T. 467. What are "material facts."

There is a difference in the rules governing pleadings in actions respecting patents for inventions and other cases: *Duryea* v. *Kaufman*, 21 O. L. R. 161. Tha "material facts" are those which the party must prove to be fully and completely successful: *Prince* v. *Toronto Ry. Co.*, 5 O. W. R. 88; and, generally speaking, any fact which may bs properly proved, may be pleaded; hut not facts, which, if proved, would have no effect upon the result: *Duryea* v. *Kaufman*, *supra*, hut allegations consisting of an historical history of the plaintiff's claim though unnecessary in one view, hut shewing why the action was brought, were allowed to stand: *Curry* v. *Clarkson*, 2 O. W. N. 221; and see *Fearnside* v. *Morris*, *Ib.*, 676. Facts may be "material," thongh they are not facts which must be proved in order to establish the cause of action; if they are facts which, if proved, would affect the damages, thsy are properly pleadable in a statement of claim: *Millington* v. *Loring*, 6 Q. B. D. 196; (explained. *Prince* v. *Toronto Ry. Co.*,

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supra); *Lamb* v. *Beaumont*, 49 L. T. 772; *Glossop* v. *Spindler*, 29 Sol. Jour. 556; *Whitney* v. *Moignard*, 24 Q. B. D. 630; so facts in mitigation of damages, in an action for malicious arrest: *Pursley* v. *Bennett*, 11 P. R. 64; and in an action for slander: *Vonsycle* v. *Parish*, 1 O. L. R. 13. The Eng. Rules of 1883 (R. 237), provide that no defence as to damages shall be necessary; and, therefore, such a defence is not allowed to be pleaded: *Wood* v. *Earl of Durham*, 37 W. R. 222; *sed vide*, *Whitney* v. *Moignard*, 24 Q. B. D. 630. There is no similar provision in Ontario.

In an action for malicious prosecution, a part of the statement of claim, setting out the observations of the Judge, before whom the plaintiff was tried on a criminal charge, was struck out, but a part, stating damage from publication of such charge, was allowed to stand: *Morrow* v. *Cheyne*, 12 P. R. 487.

In an action for damages for false representations inducing the plaintiffs to supply the defendant with goods and money, it is sufficient to aver that the goods and money were supplied on the faith of statements, oral, and written, (specifying them), falsely and fraudulently made, leaving the details of goods, etc., to be given by particulars subsequently if required: *Arthur* v. *Runnians*, 18 P. R. 205.

Illegality.

A plea to an action on a contract, that it was entered into for immoral, or illegal, consideration, must set out the particular facts relied on as establishing such consideration: *Clark* v. *Hogar*, 22 S. C. R. 510; see note to *Rule* 143.

Though each paragraph should as nearly as possible contain a separate allegation, it need not contain a separate cause of action or defence: *Union F. I. Co.* v. *Lyman*, 46 U. C. Q. B. 453. The facts must be stated concisely, without any rhetoric: *per* Melliah, L.J., in *Watson* v. *Rodwell*, 45 L. J. Chy. 744; 3 Ch. D. 380; but if a pleading states only material facts, it will not be struck out merely because the facts are stated at too great a length: *Heop* v. *Marris*, 2 Q. B. D. 630; unless the pleading is so prolix as to embarrass: *Davy* v. *Garrett*, 7 Ch. D. at p. 488; *Mar.* v. *Pontefract, etc.*, W. N. 1876, 7.

Prolixity.

Prolixity may consist in (1) necessary facts being stated at undue length; or (2) statements of unnecessary facts: *per* Baggallay, L.J., in *Davy* v. *Garrett*, 38 L. T. 77. It is improper to state argument, or inferences and conclusions of law: *Davy* v. *Garrett*, *supra*, and *per* Mellish, L. J., in *Watson* v. *Rodwell*, *supra*: *Hanmer* v. *Flight*, 35 L. T. 127; *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; but matters of law may, and *semble* should, be raised: see *Rules* 122, 143; but "charges" such as were sometimes introduced in Equity pleadings, and which were merely statements of the pleader's view of the equity should not be stated: *Watson* v. *Rodwell*, *supra*; nor evidence, *e.g.*, facts shewing that a person is the heir-at-law of a deceased person: *Evelyn* v. *Evelyn*, W. N. 1880, 62; see also *Blake* v. *Albion Life Ins. Co.*, 35 L. T. 269; 45 L. J. C. P. 663; *Jones* v. *Turner*, W. N. 1875, 239; *Williamson* v. *L. & N. W. Ry. Co.*, *supra*; *Prince* v. *Toronto Ry. Co.*, 5 O. W. R. 88; nor evidence in the shape of admissions: *Askew* v. *N. E. Ry. Co.*, W. N. 1875, 238. Documents relied on as admissions are nothing but evidence; *Davy* v. *Garrett*, 7 Ch. D. 473.

Admissions and other evidence.

Arrangement of allegations and causes of action and defence.

A plaintiff is entitled to have the defences set out in such a manner as will enable him upon reading them to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. Paragraphs should be arranged so as to group separate defences: *Dryden* v. *Smith*, (2) 17 P. R. 505.

The Court has a discretion to strike out statements which are open to any of these objections: *Rule* 137. There are many cases in which facts and evidence are so mixed up as to be almost indistinguishable: *per* Archibald, J., in *Smith* v. *West*, W. N. 1876, 55; 2 Charl. Ch. Ca. 51. Rule 141.

The plaintiff in an action to recover land, must set out all the material facts upon which his title is founded; but a defendant need not do so, unless his title is equitable: see note to *Rule* 155.

The plaintiff need not state under what particular form of action he is proceeding; nor in what legal relation he claims to stand to the defendant: *Metropolitan Ry. Co.* v. *Defries*, 36 L. T. 150, 494; *Honmer* v. *Flight*, 24 W. R. 346.

What is material, is a statement of the facts, and of the relief claimed: and the facts need not be distributed so as to show which of them support each claim to relief. So long as the facts show which plaintiff is entitled to any one kind of relief claimed, or, where there is a claim for general relief, to any relief at all, the paragraph containing them will not be objectionable: *Watson* v. *Hawkins*, 21 W. R. 884.

The old form of Common Law pleading for money had and received, was considered a sufficient statement of that fact; and an application for the amendment of the statement of claim by setting forth the circumstances under which the money was received, was dismissed: *Bartlett* v. *Roche*, W. N. 1876, 54; but the old Common Law pleadings, as a rule, are no longer admissible. Former Common Law Forms.

Defences, of "never indebted" and "set-off," in the old forms, have been struck out as violating the present *Rule*: *Davis* v. *Yeo*, Mr. Dalton, 11th April, 1882. See *Copley* v. *Jackson*, W. N. 1884, 39.

The pleading of the "common counts" is not admissible: *Sproule* v. *Ferrier*, 20 C. L. J. 284.

The plea of "not guilty," without statutory authority to plead it, is not admissible: *Peterborough* v. *Midland Ry. Co.*, 12 P. R. 127.

Where a condition is set up in a pleading, it is unnecessary to aver performance, as that is implied: see *Rule* 146. And the opposite party must, in his pleading, specify the condition which has not been performed, if he desires to set up non-performance. Conditions precedent.

The English (1883) Rule 210 is an express Rule on the subject: see also *Bradley* v. *Chamberlyn*, 1893, 1 Q. B. 439.

Quære, whether hypothetical defences can be pleaded: *Smith* v. *Farr*, 14 Ont. 729.

An appearance with these words added, "the defendant admits only $103, but otherwise disputes the plaintiff's claim in this action," was held to be in effect a statement of defence: *Voight, etc., Co.* v. *Orth*, 5 O. L. R. 443. Unconventional forms of pleadings.

C. R. 283 expressly provided that a defence in abatement shall not be pleaded, but that *Rule* has not been included. No plea in abatement.

A plea in abatement was one which showed some ground for abating, or quashing, the writ, or the writ and declaration. Such pleas were generally based on the non-joinder of parties, or the

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personal incompetency of the parties to sue, or be sued, or the want of jurisdiction in the Court; and according to the former procedure, where such a plea was pleaded, it must have been disposed of before a plea to the merits need be pleaded. An instance of an ineffectual attempt to raise what amounted to a plea in abatement, will be found in *Preston* v. *Lamont*, 1 Ex. D. 361.

Though the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant, who ought to be included in the action, is abolished, yet an objection to the want of parties ought to be disposed of upon the same principles on which a plea in abatement would have succeeded, or failed: *per* Lord Cairns in *Kendall* v. *Hamilton*, 4 App. Cas, 516; 41 L. T. 418.

A defence stating that the plaintiff is a married woman, and that her husband is a necessary party, is in reality an informal plea in abatement, and was held to be no defence: *Abouloff* v. *Oppenheimer*, 30 W. R. 429.

Under *Rule* 48 permitting the entry of a conditional appearance, it would seem as if a plea to the jurisdiction may now be pleaded; whether a defendant could insist that that plea must be first adjudicated before he can be required to deliver a defence is not clear: see notes to *Rule* 48.

Signature of counsel unnecessary.

The signature of counsel to a pleading is unnecessary.

Admission of statements of opponent.

142. Each party shall admit such of the material allegations contained in the pleading of the opposite party as are true, and a defendant shall not deny generally the allegations contained in the statement of claim but shall set forth the facts upon which he relies even though this may involve the assertion of a negative. C.R. 269, *amended*.

This *Rule* corresponds in principle with the former practice in Chancery. The Eng. (1883) R. 371, is permissive only, and authorizes, but does not require (as this *Rule* does) a party to the action to give notice, by his own statement or otherwise, that he admits the truth of the whole or part of his adversary's pleading.

In *Lee* v. *Button*, 12 Ch. D. 383, Malins, V.C., said that a defendant ought not to deny the plain and acknowledged facts, which it is neither to his interest, nor in his power, to disprove.

As to the construction of admissions not made by reference to paragraphs of the opposite party's pleading: see *Dovey* v. *Irwin*, 4 Ont. 8.

Where all the material allegations in the plaintiff's claim were admitted, he was not allowed to go into evidence: *The Hardwick*, 9 P. D. 32.

As to costs, where proper admissions are not made: see *Rule* 671.

As to withdrawing admissions made otherwise than in pleadings: see *East* v. *O'Connor*, 19 P. R. 301, in notes to *Rule* 222, *infra*.

By *Rule* 144 "save as otherwise provided" the silence of a pleading as to any allegation in a previous pleading is not to be an admission of its truth. Where no defence is put in, then, on the pleadings

being noted closed, the defendant is taken to admit the facts set out in the statement of claim: *Rule* 354. Rule 143.

143. A defendant to an action or counter-claim shall raise all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or Common Law, or Statute of Frauds. C.R. 271. Pleadings to raise all grounds of defence or reply.

See Eng. (1883), R. 211.

In *Byrd* v. *Nunn*, 5 Ch. D. 781, where a statement of defence denied the making of an agreement alleged, and proceeded to say that the person by whom it was alleged to have been made was of unsound mind, it was held that the only issue was the unsoundness of mind of the alleged contractor. In *Collette* v. *Goode*, 7 Ch. D. 842 the defendant alleged that a song was not duly registered by reason of the time of registration not being entered; he was not allowed to prove that the registration was void, by reason of the name of the publishers not being duly stated. Both the above cases, however, depended to a great extent, upon the English Rules as to admissions, which have not been adopted in Ontario: see note to *Rule* 144.

Plea to the Jurisdiction of the Court.—In a proper case the Court will allow an objection of ouster of jurisdiction to be raised at the trial, though not previously raised by the pleadings: *Crossfield* v. *Manchester Ship Canal Co.*, 1904, 2 Ch. 123. Jurisdiction.

Notice of Action.—Want of notice of action, when necessary, (see *The Libel and Slander Act* (R. S. O. c. 71, s. 8), must be pleaded: *Verratt* v. *McAulay*, 5 Ont. 313; *McKay* v. *Cummings*, 6 Ont. 400; and see *Conmee* v. *Weidman*, 16 P. R. 239. Notice of action.

Notice of Dishonour.—In an action on a dishonoured cheque, notice of dishonour to the drawer should be averred: *Fruhouf* v. *Grosvenor*, 67 L. T. 550; 61 L. J. Q. B. 717; 8 T. L. R. 744. Notice of dishonour.

Libel—Justification—Privilege.—In an action for libel, justification, or privilege, must be specially pleaded: *Belt* v. *Lawes*, 51 L. J. Q. B. 359, and see notes to *Rule* 141. Justification—privilege.

Fraud.—As to the mode of pleading fraud; see notes to *Rule* 148. Fraud.

Statute of Limitations.—Where the Statute is pleaded the particular section or sections relied on should be specified, or the defendant may be required to give further particulars: *Dodge* v. *Smith*, 1 O. L. R. 46. Pleading Statute of Limitations.

But *The Public Authorities Act* (R. S. O. c. 89), was held to be a Statute of Limitations, and its limitation provisions available as a

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defence on a pleading merely setting up a Statute of Limitation without specifying the Act: *Gregory* v. *Torquay*, 1911, 2 K. B. 556; 105 L. T. 138 (a C. C. case).

Wherever the plaintiff is allowed, by amendment, to set up a new claim, the Court may, and ordinarily will, impose the term, that the defendant shall be in the same position in regard to such new claim under the Statute of Limitations, as if the action, as to such claim, had been commenced at the date of the amendment: *Hoguboom* v. *MacCulloch*, 17 P. R. 377.

Pleading Statute of Frauds.

Statute of Frauds.—The effect of this *Rule* and of *Rule* 154 is to require the defendant who wishes to rely on the Statute of Frauds, in an action between the parties to a contract, to plead the Statute specifically; but where the plaintiff has to show a title good *in omnibus* (as in an action for conversion of goods), the defendant may, without specially pleading the Statute of Frauds, set up that the plaintiff's title is based upon a contract which is void under that Statute: *Kent* v. *Ellis*, 31 S. C. R. 110.

Formerly "at law, if the contract was denied, it was a matter of evidence whether the contract was one which could be sued upon, or whether the remedy was barred by the Statute; but in Equity, if the defendant intended to rely upon the Statute of Frauds, or any other special statute, he was compelled to make a special averment of his intention": *per* Mellish, L.J., in *Clarke* v. *Callow*, 46 L. J. Q. B. 54; see also *Morgan* v. *Worthington*, 38 L. T. 443.

Formerly in Equity the statute might have been relied on by demurrer where the facts, which made the statute apply, appeared on the face of the bill: *Wood* v. *Midgeley*, 2 Sm. & G. 115; Agnew on Statute of Frauds, 494; and might have been relied on as a defence, though not pleaded in the answer: *Wilde* v. *Wilde*, 20 Gr. 521; *sed vide Butler* v. *Church*, 18 Gr. 190; but in *Clarke* v. *Callow*, *supra*, the plaintiff, by anticipation of the defence of the statute, alleged facts to show that the contract, though verbal, was a binding one under the Statute, and the defendants traversed these facts merely, not setting up the Statute; and it was held that defendant was not entitled to rely on the Statute.

The facts which make the Statute apply should be stated, and the particular provisions relied upon should be pointed to. It is not sufficient to merely make a general statement of reliance on the Statute: *Pullen* v. *Snelus*, 40 L. T. 303. But see *James* v. *Smith*, 1891, 1 Ch. 384, where it was held that it is not necessary to plead any particular section of the Statute of Frauds, but the defendant having pleaded sec. 4 was not allowed to amend, or avail himself of sec. 7; (see S. C. in Appeal, 65 L. T. 544, and *Dodge* v. *Smith*, 1 O. L. R. 46).

Though it has not been proper since the Judicature Act to raise the defence of the Statute of Frauds by demurrer: *Catling* v. *King*, 5 Ch. D. 660; *Morgan* v. *Worthington*, 38 L. T. 443; *Towle* v. *Topham*, 37 L. T. 308; *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 51; *Shardlow* v. *Cotterill*, W. N. 1881, 2; *Futcher* v. *Futcher*, 29 W. R. 884, and see *Johnasson* v. *Bonhote*, 2 Ch. D. 298, a question under the Statute may probably now be raised under the procedure adopted in lieu of demurrers (see *Rules* 124, 126) where the facts which make the Statute apply appear upon the pleading of the opposite party.

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Where the Statute is not pleaded, it cannot now be relied on as a defence: see *Olley* v. *Fisher*, 34 Ch. D. 367.

Where a plaintiff at the trial is allowed to amend by setting up a new case, the defendant is *ex debito justitiæ* entitled to amend by setting up a defence thereto, and may in such defence set up the Statute of Frauds as to the new case, though not previously pleaded: *Emsley* v. *Harrison*, 17 P. R. [illegible]; *Brunning* v. *Odhams*, 75 L. T. 602.

See also *Rule* 154 and notes

Pleading other statutes.

Other Statutes.—As to pleading statutes relied on, other than the Statute of Limitations, and the Statute of Frauds: see 83 L. T. Jour. 93; *Coburn* v. *Collins*, 35 Ch. D. 373 (registration necessary under the Bill of Sales Act): *Hoyward* v. *Lely*, 56 L. T. 418 (registration under the Copyright Act); from which it would appear to be well to mention any statute relied on in the pleading, in order to prevent the imputation of an attempt to surprise. The pleadings in the above cases were held insufficient, but amendments were allowed: see also *McKoy* v. *Cummings*, 6 Ont. 400. As to *The Chattel Mortgage Act*, see *Williams* v. *Leonard*, 16 P. R. 544; 17 P. R. 73; *Siven* v. *Temiskaming Mining Co.*, 2 O. W. N. 129; and as to *The Registry Act* (R. S. O. c. 124), see *B. & L. Assoc.* v. *Poaps*, 27 Ont. at p. 476, and as to *The Master and Servant Act* (R. S. O. c. 144), see *Neil* v. *Park*, 10 P. R. 476.

A mistake in the year of the Statute referred to in a pleading, would not appear to be fatal, provided that it reasonably appears what statute is intended: *Renton* v. *King*, 93 L. T. 10.

Illegality.

Illegality.—See *Pearson* v. *Carpenter*, 35 S. C. R. 886. Where a contract sued on was illegal, it is not necessary expressly to plead the illegality as the Court is bound to take notice of it: *N. W. Salt Co.* v. *Electrolytic Alkali Co.*, 107 L. T. 439; but the facts constituting the illegality must be stated: *Clark* v. *Hogor*, 22 S. C. R. 510.

Res Judicata.—Estoppel by *res judicata* cannot be relied upon unless specially pleaded: *Cooper* v. *Molsons Bank*, 26 S. C. R. 611; *Hounstan* v. *Sligo*, 29 Ch. D. 448; *Edevain* v. *Cohen*, 43 Ch. D. 187.

Performance.—As to the averment of performance of conditions precedent: see note to *Rule* 146.

Silence of pleading no admission.

144. Save as otherwise provided, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party shall not be construed as an admission of the truth of such allegation. C.R. 272.

See Eng. (1883) R. 209, which is different.

This *Rule* introduces the practice of the Court of Chancery as to admissions: Chy. O. 123; see also *Rule* 142. It was a principle of Common Law pleading that each party was to be taken to admit those allegations in the pleadings of the opposite party which he did not deny, and that is the present English practice.

Exceptions to Rule.

"Save as Otherwise Provided."—The exceptions referred to in these words are those which require the pleading to specifically deny the right of the party to claim in a representative capacity; or the alleged constitution of a partnership firm: *Rule* 152; or the incorporation

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of a corporate party: *Rule* 153; or the legality of a contract; or its sufficiency in point of law: *Rule* 154.

Where a material fact therefore is alleged in a pleading, and the pleading of the opposite party is silent in respect thereto, the fact must be considered in issue: *Waterloo Mutual, etc.*, v. *Robinson*, 4 Ont. 295; *Seabrook* v. *Young*, 7 C. L. T. 152; *King* v. *Bailey*, 31 S. C. R. 342.

Where a pleading, however, does not maintain silence, but contains an answer to allegations in opposite pleadings which has no sense if not read as admitting certain statements, those statements must be taken as admitted: *Richardson* v. *Jenkins*, 10 P. R. 292.

The present *Rule* is not applicable where under *Rule* 122 a point of law is raised on the pleadings. Thus where a reply raised a question of law to the effect that certain paragraphs of the statement of the defence raised no defence to the action, it was held that this *Rule* did not apply, and that the statements referred to were thereby admitted for the purposes of the argument of the question of law: *Hollender* v. *Ffoulkes*, 26 Ont. at p. 65.

The English Rules under the Judicature Acts, in regard to admissions, differ from the above: see Eng. (1883) Rules 209, 213, 216, 218, the effect of which is that, so far as regards statements of claim and defence and counter-claim, and as regards parties who are not infants or lunatics, the want of a specific denial of a fact will operate as an admission, and will entitle the party, whose pleading is thus admitted, to move for judgment; and thus upon a technical construction of the pleadings final judgment may be obtained: see *Thorp* v. *Holdsworth*, 3 Ch. D. 637, and *Rutter* v. *Tregent*, 12 Ch. D. 758; and the merits might sometimes not be reached: see *Tildesley* v. *Harper*, 7 Ch. D. 403; reversed, however, in appeal, 10 Ch. D. 393: *Lumsden* v. *Winter*, 8 Q. B. D. 650; *Coroli* v. *Hurst*, W. N. 1883, 115; *Thornton* v. *Church*, 10 L. R. Ir. 378; *Williamson* v. *London & N. W. Ry. Co.*, 27 W. R. 724; *Elliot* v. *Harris*, 17 L. R. Ir. 351.

By *Rule* 142 (which is founded upon Chancery G. O. 124), each party is to admit such allegations in the pleadings of the opposite party as are true; and if he does not do so, he may have to bear, or be ordered to pay, the costs so occasioned in any event, if the Court should think the admission was unreasonably withheld.

Relief claimed to be stated specifically.

145. Every statement of claim and counter-claim shall state specifically the relief claimed, either simply or in the alternative, and may also ask for general relief. When damages are claimed the amount shall be named. C.R. 273.

The Eng. (1883) R. 230, is different, providing that general or other relief need not be prayed for, and may always be given. The clause as to damages is new.

Claim for general relief.

A claimant is not entitled to any relief unless it is specifically prayed for, or can be given under a prayer for general relief; and if general relief is not asked for, it will be considered that the party does not want it: *Holloway* v. *York*, 25 W. R. 627; *Cargill* v. *Bower*, 10 Ch. D. 508. Where general relief is claimed, a plea ing will not be open to objection, if the facts stated in it show that the plaintiff

is entitled to any relief: *Watson* v. *Hawkins*, 24 W. R. 884, unless the relief be foreign to the scope of the claim: *Gaughan* v. *Shorpe*, 6 Ont. App. 417; *Gunn* v. *Trust & Loan Co.*, 2 Ont. 393. It is sufficient to set out in the statement of claim facts which entitle to relief, and pray for any relief that the facts warrant: *Phelps* v. *White*, 7 L. R. Ir. 160. Under a prayer for general relief the Court will grant the appropriate relief which the facts warrant, although unable to grant the specific relief claimed: see *Slater* v. *The Canada Central Ry. Co.*, 25 Gr. 363. It will warrant a mandatory order if that is the appropriate relief, even though not specifically prayed for: *Holman* v. *Knox*, 3 O. W. N. 154. Rules 146, 147.

Facts, arising after action brought, entitling the plaintiffs to further relief, in respect of the subject matter of the litigation, beyond what they were entitled to at its commencement, have been allowed to be set up by amendment: *Yorkshire Waggon Co.* v. *Cornwall Minerals Ry. Co.*, 73 L. T. Jour. 120.

In an action for an injunction, under the usual prayer for general relief, damages are included: *Serroo* v. *Noel*, 15 Q. B. D. 549.

As to the efficiency of a prayer for general relief: see *Cook* v. *Martyn*, 2 Atk. 3, and the observations thereon in *Byrne* v. *Frere*, 2 Moll. 166.

It does not follow, because a plaintiff has asked for reformation of a document, that a defendant is entitled to claim the same relief though he has not asked for it: *Wolfe* v. *Hayes*, 1 Ont. 322; 18 C. L. J. 177. As to asking two inconsistent kinds of relief: see *Evans* v. *Davis*, 27 W. R. 285, referred to in note to *Rule* 137, and *Breslauer* v. *Barwick*, 36 L. T. 52; 24 W. R. 901.

As to claiming alternative relief: see *Duryea* v. *Kaufman*, 21 O. L. R., at p. 177.

146. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, and an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading. C.R. 1304. Performance of conditions precedent to be implied, unless specifically denied.

See Eng. Rule (1883), 210, to the same effect.

Under this *Rule* no averment of the performance of a condition precedent is necessary; the party setting up the condition impliedly avers also its performance; it lies upon the opposite party by his pleading to specify particularly the non-performance of any condition precedent on which he intends to rely.

147. Where the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof. C.R. 275. Effect of document may be stated.

See Eng. (1883) R. 217.

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This does not dispense with the necessity for setting forth the precise defamatory words in an action of libel or slander: *Harris* v. *Warre*, 4 C. P. D. 125; *Bradlaugh* v. *The Queen*, 3 Q. B. D. 607; *Darbyshire* v. *Leigh*, 1896, 1 Q. B. 554; 74 L. T. 241; *Hay* v. *Bingham*, 5 O. L. R. 224; see also *Davy* v. *Garrett*, 7 Ch. D. 473.

Where *res judicata* in an Irish Court was alleged, a brief statement of the Irish judgment was held sufficient: *Houston* v. *Sligo*, 29 Ch. D. 448; 52 L. T. 96.

It is sufficient to state the effect or substance of the limitations in a will, without setting out the precise words used in the will: *Darbyshire* v. *Leigh*, 1896, 1 Q. B. 554; 74 L. T. 241.

A lost grant may be pleaded without stating date, or parties: *Palmer* v. *Guadagni*, 1906, 2 Ch. 494; 95 L. T. 258.

Allegation of malice, etc.

148. Where it it material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred. C.R. 276.

Same as the Eng. (1883) R. 218.

Where an act is lawful in itself, so that no cause of action arises from the doing of it, the fact that it was done maliciously, or from a bad motive, does not make one: *Chaffers* v. *Goldsmid*, 1894, 1 Q. B. 186; *Allen* v. *Flood*, 1898, A. C. 1; and no use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper, or even malicious: *Mayor, etc., of Bradford* v. *Pickles*, 1895, A. C. 587; see also *Davy* v. *Garrett*, 7 Ch. D. 489; *Riddell* v. *Strathmore*, 3 T. L. R. 329.

A statement by a trader that his own goods are superior to those of another trader, even if untrue, and the cause of loss, gives no cause of action; and the allegation of malice does not convert a statement *primâ facie* lawful into one *primâ facie* unlawful: *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 86.

Fraud.

Fraud.—Fraud should be distinctly charged as fraud: *Davy* v. *Garrett*, 7 Ch. D. at p. 489; and if "fraudulently," or words of similar import are omitted, there must be allegations of fact which necessarily, and *per se*, amount to fraud: *Byrne* v. *Muzio*, 8 L. R. Ir. 396, and see *Rule* 143; and the facts constituting the fraud should be stated, or no evidence in support will be received: *Re Rica Gold Washing Co.*, 11 Ch. D. 36, 43, 47; *Redgrave* v. *Hurd*, 25 Sol. Jour. 372; *Arkwright* v. *Newbold*, *Ib.*, 338; *Symonds* v. *City Bank*, W. N. 1886, 19; 80 L. T. Jour. 245; see *Smith* v. *Chadwick*, 9 App. Cas. 187; *Cargill* v. *Bower*, 10 Ch. D. 502; but where facts and circumstances are set out from which an inference of fraudulent intent, etc., may be inferred, the inferrence may be drawn: see *Herring* v. *Bischoffsheim*, W. N. 1876, 77; *Johnson* v. *Barnes*, W. N. 1883, 32; but see *Davy* v. *Garrett*, *supra*. See *Kaltenbach* v. *Lewis*, 30 W. R. 356; 45 L. T. 666, for allegations which were considered to amount to a charge of fraud.

A general allegation of fraud, however strong the words used, where there was no statement of the circumstances relied on as constituting the alleged fraud, was held not to amount to an averment of fraud, of which any Court ought to take notice: *Wallingford*

v. *Mutual Society*, 5 App. Cas. 685, 697, 701. In that case, however, the allegation in question was contained in an affidavit filed by defendant upon a motion to obtain judgment on a specially indorsed writ. The construction of this *Rule* was not in question. Rule 148.

Fraudulent concealment of fraud, which within *Gibbs* v. *Guild*, 9 Q. B. D. 59, may be relied on as ground of equitable relief against the running of the Statute of Limitations, being a question of fact, must be averred as such in the pleadings: *Barber* v. *Houston*, 14 L. R. Ir. 273.

In *Herring* v. *Bischoffscheim*, W. N. 1876, 77, the statement of claim alleged the purchase of bonds through fraudulent misrepresentations in the prospectus of the company, and, on a motion to strike out parts of the statement of claim as prolix, it was held sufficient to allege generally that the prospectus, which was set out, was fraudulent to the knowledge of the defendants, without specifying the particulars, and without going into either the motive which led to the issue of the prospectus, or the particulars of the fraudulent scheme of which the prospectus formed a part.

As to obtaining more specific allegations, or particulars, of fraud charged: see notes to *Rules* 138 and 141.

Malice.—It will be sufficient under this *Rule*, in an action for malicious prosecution, to allege that the proceedings were taken without reasonable or probable cause, without setting forth the circumstances from which the same would be inferred: *Aderis* v. *Thrigley*, W. N. 1876, 56; 2 Chari, Ch. Ca. 43. Malice.

In an action for malicious prosecution the plaintiff should allege the absence of reasonable cause, and the presence of malice, as the burden of proof thereof rests on him: *Abrath* v. *N. E. Ry. Co.*, 11 Q. B. D. 440; 11 App. Cas. 247; 55 L. T. 63; *Hicks* v. *Faulkner*, 8 Q. B. D. 167; see *Malcolm* v. *Perth Mut., etc.*, 29 Ont. 717; *St. Denis* v. *Shoultz*, 25 Ont. App. 131; in an action for false imprisonment, neither allegation, nor proof, of malice is necessary, and the burden of shewing reasonable cause is on the defendant: *Hicks* v. *Faulkner*, *supra*.

For an action against a corporation for malicious prosecution: see *Corford* v. *Carlton Bank*, 1899, 1 Q. B. 392; 1900, 1 Q. B. 22; and for a malicious libel: see *Citizens Life Assce. Co.* v. *Brown*, 1904, A. C. 423.

Negligence. — A statement of claim was held sufficient, which alleged that while the plaintiff was using an hotel, of which the defendant was a proprietor, as a guest for reward to the defendant, by the negligence of defendant the ceiling of the room, in which the plaintiff then was, fell upon and injured him: *Sandys* v. *Florence*, 47 L. J. C. P. 598. Negligence averred generally, was held sufficient in *Quillinon* v. *Canada Southern Ry.*, 6 Ont. 567. Negligence.

Condition of Mind.—Where knowledge, or ignorance, is material, it should be alleged, *e.g.*, of untruthfulness of statements in particulars of sale: *Redgrave* v. *Hurd*, 20 Ch. D. 1; of unsafe condition of the defendant's premises, in an action by a servant for injuries through their unsafe condition: *Griffiths* v. *London & St. Katharine Docks Co.*, 13 Q. B. D. 259; of want of knowledge on the servant's part: *Ib.*; threats and intention to commit a trespass: *Stondard* v. *Vestry of St. Giles*, 20 Ch. D. 195. Condition of mind.

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Purchase for value without notice.

Purchaser for Value without Notice.—This claim, or defence, should generally be made specifically: *Atty.-Gen.* v. *Biphosphated, etc., Co.*, 11 Ch. D. 327; but may sometimes be inferred from facts alleged: *Taylor* v. *Blakelock*, 32 Ch. D. 564. See *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 39, as to proof of payment of purchase money.

Allegation of notice.

149. Where it is material to allege notice to a person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of the notice is or are material. C.R. 277.

See Eng. (1883) R. 219.

Implied contract.

150. Where a contract or relation between persons does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege the contract or relation as a fact. C.R. 278.

To the same effect as the Eng. (1883) R. 220.

Where a Court has to find a contract in a correspondence, and not in one note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration: *Hussey* v. *Horne Payne*, 4 App. Cas. 311; *N. W. Transportation Co.* v. *McKenzie*, 25 S. C. R. 38.

An agreement is not strictly speaking a fact; it is an inference of law from facts. The material facts should therefore be stated: *Rule* 141. If there is an "express agreement" in writing, that fact should be stated, and the effect of the document set forth: *Rule* 147. If the agreement is to be gathered from a series of letters, conversations, or circumstances, the present *Rule* applies: *Turquand* v. *Fearon*, 40 L. T. 543; see also *Smyth* v. *Levinge*, 39 L. T. 579; *Noad* v. *Murrow*, 40 L. T. 100. There should not be merely a bare statement that "it was agreed," however, "as a general rule it is not sufficient to state merely that there was an agreement . . . the party pleading . . . must give such particulars as will enable his opponent to meet the case set up": per Thesiger, L.J., in *Turquand* v. *Fearon*, 40 L. T. at p. 545. In other words the party must make a general reference to the letters, conversations, or circumstances.

Where an agreement to have any effect in law must be in writing, it is sufficient to allege that there was an agreement without alleging that it was in writing; that it was in writing is matter for evidence at the trial: *Pasco* v. *Richards*, 50 L. J. Chy. 340; and it lies upon the party setting up the agreement to prove one sufficient in law at the trial: *Privett* v. *Hay*, Mr. Dalton, 4th March, 1884. See also *Fraser* v. *Pape*, 91 L. T. 340, *supra*, p. 545.

Facts presumed need not be stated.

151. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side.

[*E.g.*—Consideration for a bill of exchange.] C.R. 279.

Same as the Eng. (1883) R. 221.

152. If either party wishes to deny the alleged constitution of any partnership, or the right of any other party to claim as executor, or as trustee, or as assignee in insolvency, or in any representative or other alleged capacity, he shall deny the same specifically, or the same will be taken to be admitted. C.R. 280. Denial of representative capacity.

See Eng. (1883), R. 238.

See notes to *Rule* 144.

153. Unless the incorporation of a corporate party is specifically denied, it shall not be necessary to prove it. C.R. 281. Incorporation.

The *Rule* would seem to apply to plaintiffs suing, or defendants sued, in an alleged corporate capacity, though they be not, in fact, incorporated: see *Krug Furniture Co.* v. *Berlin Union, etc*, 5 O. L. R. 463. See *Rule* 108.

154. Where a contract is alleged, a denial of the contract shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. C.R. 282. Denial of contract only denial of the making.

See The Eng. 1883, R. 216.

A plea of *non est factum* pleaded to a declaration filed before The Judicature Act, in an action on a policy of insurance, was held to be not embarrassing: and under this *Rule* it must be treated as a denial of the making of the contract of insurance in fact: *Burnett* v. *Union Mut. F. Ins. Co.*, 32 C. P. 134.

In an action of ejectment by an assignee of a lessee against the assignors, the statement of claim alleged an assignment by deed by defendants to the plaintiffs. The defendants denied "that they had assigned or made over the premises" to the plaintiff. This was held under the corresponding Irish Rule to put in issue the execution of the assignment only, and not its invalidity as contrary to a covenant against alienation in the lease: *Hayes* v. *Corcoran*, 8 L. R. Ir. 75.

Where a plaintiff sets up a written contract in a case within the Statute of Frauds, it is not necessary for the defendant to plead the statute as a defence, and evidence of a parol contract in such a case is not admissible without an amendment of the pleadings: and if such amendment is allowed the defendant should, if he desires it, be allowed to set up the statute: *Brunning* v. *Odhams*, 75 L. T. 602: *Elmsley* v. *Harrison*, 17 P. R. 425.

155. A defendant in an action for the recovery of land who is in possession by himself or his tenant need not plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable Defence to action for recovery of land.

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ground against any right or title asserted by the plaintiff; but, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and he may rely upon any ground of defence which he can prove. C.R. 285.

Same as Eng. (1883), R. 254, except that the latter provides that by so pleading he shall be taken to deny the allegations in the statement of claim: see *Danford* v. *McAnulty*, and not *infra*.

This *Rule* only applies to a defendant. In an action for recovery of land the statement of claim is as much subject to the foregoing *Rules* as in any other action, and the plaintiff must therefore set forth the material facts upon which he relies to prove his title. The effect of a deed is not a fact, and a statement of claim which merely alleged that by virtue of certain deeds, etc., plaintiff was entitled to possession of land, and did not state the purport of the deeds or set out the plaintiff's pedigree, or show the devolution of title by which the land in question became vested in the plaintiff, was therefore held embarrassing: *Philipps* v. *Philipps*, 4 Q. B. D. 127; 39 L. T. 329 and 556; *Davis* v. *James*, 26 Ch. D. 778; *Jones* v. *Curling*, 13 Q. B. D. 273. So also a statement of claim, which simply alleged that the plaintiff had been wrongfully dispossessed of the land by the defendant, was set aside for not stating the facts which shewed the plaintiff's interest in the land: *O'Connor* v. *O'Hara*, 8 L. R. Ir. 249; see also *Lyell* v. *Kennedy*, 20 Ch. D. 491; 8 App. Cas. 217; *Cromwell* v. *Swail*, 1 T. L. R. 474.

A statement of claim stating that "by virtue of a certain settlement, the plaintiff is entitled" without setting out or stating the effect of the limitations in the settlement is insufficient: *Riddell* v. *Strathmore*, 31 Sol. Jour. 183.

A statement that the plaintiff, or any person through whom he claims, was on such a day seised in fee simple in possession, would seem to be sufficient statement of a plaintiff's title: see the Form in Wilson's Jud. Act, 7th ed., 572; and *Smith* v. *Cairns* (before Chief Justice Galt, 8th April, 1889). In *Beatty* v. *Leacy*, 16 L. R. Ir. 132, a general allegation of the plaintiff's derivative title was held sufficient.

In several cases under the Irish Jud. Act, a defence, in actions of ejectment for non-payment of rent, has been set aside as embarrassing, where it, in effect, merely denied that defendant was tenant, without alleging anything as to the defendant's title, or saying that he was in possession: see *Hildige* v. *O'Farrell*, 8 L. R. Ir. 158; *Barnes* v. *Barnes*, 8 L. R. Ir 165; *Rowley* v. *Laffan*, 10 L. R. Ir. 9.

Where the plaintiff's case depended on the heirship of A., and that fact was stated simply, without shewing how A. became heir, the pleading was held sufficient: *Evelyn* v. *Evelyn*, 42 L. T. 248; 28 W. R. 531.

But in *Palmer* v. *Palmer*, 1892, 1 Q. B. 319, a defendant was held entitled to particulars shewing the links of relationship on which plaintiff relied as constituting him "heir:" see also *Blacklidge* v. *Anderton*, W. N. 1893, 112.

An action for the assignment of dower is an action for recovery of land: *McCulloch* v. *McCulloch*, 4 C. L. T. 252; *McLean* v. *McLean*, 17 P. R. 440.

In an action for dower, the facts shewing the right of dower (which is a legal conclusion from the facts) must be stated: *Louder* v. *Carrier*, 10 P. R. 612. Rule 156.

Equitable Estate or Right.—The defendant relying on an equitable title must, in his statement of defence, allege the nature of the deeds and documents on which he relies; and it is not sufficient to allege that by virtue of divers *mesne* acts, and *mesne* assurances, all the estates and interests of the plaintiff's predecessor in title are now vested in the defendant: *Sutcliffe* v. *Jones*, 40 L. T. 875; 27 W. R. 750. A defendant who pleads merely that he is in possession, was always at liberty to question the plaintiff's title, even under the English system of pleading, by which what is not denied is taken to be admitted: *Danford* v. *McAnulty*, 6 Q. B. D. 645, affirmed in H. L. 8 App. Cas. 458; and this is now expressly provided in the English 1883, R. 254; *à fortiori* under the Ontario system, where mere non-admission puts the plaintiff to proof. Equitable title.

See *Attorney-General* v. *Midland Ry. Co.*, 3 Ont. 511, and *Adamson* v. *Adamson*, 17 Ont. 425; *Allan* v. *Woods*, 68 L. T. 143.

156. Where a defendant by virtue of any statute enabling him so to do pleads not guilty by statute he shall in his defence refer to the statute giving the right so to plead, and also to all statutes upon which he relies, giving chapter and section in every such reference, and if so required shall deliver particulars of his defence. C.R. 286 and 287, *amended*. Plea of "not guilty by statute" to contain reference to statute relied on

See Eng. (1883) R. 208.

Formerly the Court did not, in general, with this plea allow other pleas: *Neale* v. *McKenzie*, 2 Dowl. P. C. 702; but these *Rules* contain no such provision.

Formerly there were several statutes authorizing the defence of "not guilty by statute" to be pleaded, but of late years this provision has been, very generally, repealed. The defence may be pleaded by a railway under Dominion control, in an action against it for indemnity for damage, or injury, sustained by reason of the railway; see *The Railway Act* (R. S. C. c. 37), s. 306; *Reist* v. *Grand Trunk Ry Co.*, 15 U. C. Q. B. 355; *Pew* v. *Buffalo & Lake Huron Ry. Co.*, 17 U. C. Q. B. 282.

The statute must be formally pleaded to enable the defendant to avail himself of any defence under it: *McKay* v. *Cummings*, 6 Ont. 400.

An informal pleading of the statute has been allowed to be amended so as to be pleaded in the form of the general issue: *Grant* v. *Culbard*, 19 Ont. 20; and see *Bond* v. *Conmee*, 16 Ont. App. 419.

Formerly, a railway company could not be required to give particulars of the defence of "not guilty by statute:" *Taylor* v. *Grand Trunk Ry.*, 2 O. L. R. 148, overruling *Jennings* v. *Grand Trunk Ry. Co.*, 11 P. R. 300, in which particulars were ordered, where the plaintiff was not aware of the defence intended to be set up. Under this *Rule*, a defendant may now be required to give particulars of the defence; which practically neutralizes the benefit of such plea. Particulars.

Rule 157.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract: *Peterborough* v. *Midland Ry. Co.*, 12 P. P. 127; *Scottish Ont., etc., Co.* v. *Toronto*, 24 Ont. App. 208; and see *Brown* v. *Blackwell*, 35 U. C. Q. B. 239.

The plea of "not guilty by statute" puts in issue not only the defence which the statute gives, but also all the defences which were admissible under the general issue at Common Law: *Ross* v. *Clifton*, 11 A. & E. 631.

Contributory negligence may be set up under this plea: *Doan* v. *Michigan Central*, 17 Ont. App. 481.

An equitable defence is not admissible under this plea: *Brown* v. *Blackwell*, 35 U. C. Q. B. 230.

A plea of the general issue by statute was not demurrable, though no statute is applicable: *Cairns* v. *Water Commissioners of Ottawa*, 25 U. C. P. 551.

In an action in the County Court a plea of "not guilty by statute" does not necessarily raise any question as to the title of land, so as to exclude the jurisdiction of the Court: *Bell* v. *Grand Trunk Ry. Co.*, 16 C. P. 252.

The provisions of this *Rule* must be strictly followed: *Bond* v. *Conmee*, 15 Ont. 716; 16 Ont. App. 398; *Heming* v. *Woodyatt*, 32 C. L. J. 126. Both the statute by which the plea is allowed, and that containing the matter relied on by way of defence, must be mentioned in the margin: *Van Natter* v. *Buffalo & Lake Huron Ry. Co.*, 27 U. C. Q. B. 581; *Belch* v. *Arnott*, 9 C. P. 68; *Doan* v. *Michigan Central Ry.*, 18 Ont. 482; and see *Grant* v. *Culbard*, 19 Ont. 20, where an amendment was allowed; but where evidence is given under the pleas as pleaded, without objection at the trial, it is too late afterwards to object to the sufficiency of the plea: *Doan* v. *Michigan Central Ry.*, 17 Ont. App. 481.

If the defendant omits to follow the requirements of this *Rule*, he cannot give special matter in evidence under a defence of "not guilty": see *Joy* v. *McKinn*, 1 U. C. C. P. 13. An amendment may sometimes be allowed to supply the omission, even after verdict: *Edwards* v. *Hodges*, 15 C. B. 477; *Van Natter* v. *Buffalo & Lake Huron Ry. Co.*, 27 U. C. Q. B. 581. But where a defendant pleaded "not guilty," intending to justify under a statute, but the Nisi Prius record had not the words "by statute" in the margin, the Judge at Nisi Prius refused to allow an amendment by the addition of those words, as it was not shown that they were in the margin of the defendant's plea: *Forman* v. *Dawes*, 1 Car. & M. 127. The parties may so act at the trial, and subsequently, as to be precluded from raising the objection of the omission to name a particular statute in the margin of the plea: *Burridge* v. *Nicholetts*, 6 H. & N. 383.

The words "according to statute" instead of "by statute" written in the margin, are sufficient: *Robertson* v. *Cooley*, 7 U. C. Q. B. 305.

Inconsistent pleadings.

157. A subsequent pleading shall not raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. C.R. 288.

See Eng. (1883) R. 212.

The object aimed at by this *Rule* is to prevent what, under the Common Law system of pleading, was called "departure." Where it is now desired to vary something stated in a former pleading of a party, it must be done by amendment of that pleading. Rule 158.

A second pleading may add a fact to, but must not contradict, the first: *per* Brett, L.J., in *Breslauer* v. *Barwick*, 36 L. T. 52; 24 W. R. 901; nor raise a fresh cause of action: *Collambell* v. *Flight*, W. N. 1877, 125. See also *Williamson* v. *L. & N. W. Ry. Co.*, 12 Ch. D. 787; *Duckworth* v. *McClelland*, 2 L. R. Ir. 527; *Kingston* v. *Corker*, 29 L. R. Ir. 364. Where a reply violates this *Rule* the Judge at the trial may refuse to try the action: *Hurd* v. *Bostwick*, 16 P. R. 121.

In an action for goods sold, the defence was coverture; plaintiff replied, that he was not aware that defendant was a married woman, and thought she was a widow, and that she obtained credit by representing herself to be entitled to an annuity under a separation deed; and it was held that the reply did not raise a claim inconsistent with the previous pleading: *Collet* v. *Dickenson*, W. N. 1878, 52.

In the following cases pleadings have been held to be unobjectionable:

Action for infringement of patent, by alteration of goods supplied by plaintiffs—Defence that, under an agreement with the plaintiffs, the alterations were authorized—Reply denying this and asking rectification of the agreement on the ground of mistake, if it did so authorize: *McLaughlin* v. *Lake Erie & Detroit River R. R. Co.*, 2 O. L. R. 151.

Action for possession.—Defence a mortgage made by plaintiff's father and assigned to defendant—Reply that there was no consideration for the assignment, and that the assignor was of unsound mind to the knowledge of defendant: *Smith* v. *Smith*, 2 O. L. R. 410.

158. In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, he shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the presiding Judge, unless [in his pleading or] by notice given seven days at least before the trial he furnishes particulars in writing to the plaintiff of the matters as to which he intends to give evidence. C.R. 488, *amended*. Libel or slander, particulars of evidence in mitigation.

See Eng. (1883) R. 461.

The words in brackets indicate the amendment which has been made in C. R. 488.

No demand for these particulars is necessary. They must be furnished as a condition precedent to giving of evidence of the matters mentioned.

Rule 158.

Notwithstanding C. R. 488, it was held that the facts relied on in mitigation of damages in an action for libel or slander must be set out in the defence: *Beaton* v. *Intelligencer P. Co.*, 22 Ont. App. 97; *Vansycle* v. *Parish*, 1 O. L. R. 13; *McKenzie* v. *McLaughlin*, 38 C. J. 131; but see *Fulford* v. *Wallace*, 1 O. L. R. 278; and even though they were, a notice under the *Rule* would also be necessary. Under the *Rule* as amended, if the particulars are given in the defence, then the seven days' notice is not requisite. According to the above mentioned decisions, it seems to be doubtful whether a defendant could qualify himself to give the evidence referred to in the *Rule* merely by giving the notice, where he had omitted to give the particulars in his defence. The safest course would therefore appear to be to give the particulars in the defence.

Where the defence does assert the truth of the statement complained of, it has been held that evidence as to the plaintiff's character with a view to mitigation of damages, is not admissible unless the facts relied on are pleaded: *Scott* v. *Sampson*, 8 Q. B. D. 491, so that the effect of the *Rule* and this decision is, that whether the truth of the alleged libel or slander be pleaded or not, the evidence referred to in this *Rule* cannot be given, unless the particulars are furnished as therein mentioned. Evidence in mitigation of damages is admissible where the defendant pleads that the publication complained of was privileged: *Mangena* v. *Wright*, 1909, 2 K. B. 958; 100 L. T. 960.

It will be observed that the *Rule* is directed to evidence in chief as to two points, (*a*) the circumstances of publication, (*b*) the character of the plaintiff, and does not preclude evidence which can be obtained by cross examination of the plaintiffs' witnesses, nor does it preclude evidence in chief as to any other matters than those above mentioned, even though particulars have not been furnished either in the defence, or by notice.

As to the nature of the particulars to be furnished: see notes to *Rule* 138.

Before delivery of defence.

159. A ground of defence or counter-claim which has arisen after action, but before the defendant has delivered his statement of defence, may be pleaded either alone or with other grounds of defence. C.R. 289.

See first part of Eng. (1883) R. 282. Under this *Rule* the defendant may, in his defence, set up any ground of defence, or counter-claim, which he has at the time of delivering the defence, no matter when such ground arose; and not merely grounds of defence which arose before the time limited for delivering the defence.

Whether a ground of counter-claim arising after action brought can be set up was the subject of conflicting decisions in England: see *Beddall* v. *Maitland*, *Toke* v. *Andrews*, and other cases cited in notes to *Rule* 115, pp. 523-524. The words "or counter-claim" have been inserted in this *Rule* to remove any doubt. See also *Chamberlain* v. *Chamberlin*, 11 P. R. 501, and notes to *Rules* 115 and 161.

Where the claim sued for had been attached by garnishee proceedings instituted before action, any payment made by the defendant *pendente lite* in pursuance of such proceedings constitutes a defence arising after action, and does not relate back to the attaching order: *Pickard* v. *Tims*, 19 P. R. 109.

A plaintiff cannot, except by way of defence to a counter-claim (*Rule* 160), set up matters arising *pendente lite* as a ground of claim: *McLean* v. *McLean*, 17 P. R. 440. Rules 160-162.

As to raising new matter after judgment: see *Rule* 523 and notes.

160. If, after a counter-claim has been delivered, a ground of defence thereto arises it may be pleaded in answer thereto. C.R. 290. Defence to counter-claim.

See Eng. R. (1883) R. 282, *last part*.

A plaintiff may, in his reply to a counter-claim of defendant, counter-claim in respect of a cause of action accruing after the issue of the writ, or arising at the same time, and out of the same transaction as the counter-claim of defendant: *Toke* v. *Andrews*, 8 Q. B. D. 428; *Renton* v. *Neville*, 1900, 2 Q. B. 181; 82 L. T. 446, and under this *Rule* he may also set up as a defence matter arising after the delivery of the counter-claim.

But where a claim which might have been pleaded by way of counter-claim is pleaded as a set-off, the plaintiff may not reply matters arising subsequent to action brought: *McNamara* v. *Skain*, 23 Ont. 103. See also notes to *Rule* 115.

161. Where a ground of defence or counter-claim arises after the delivery of the statement of defence or counter-claim, the defendant may within ten days after such ground of defence or counter-claim has arisen, deliver a further defence or counter-claim, setting forth the same, or introduce the same by amendment into his statement of defence or counter-claim. C.R. 291. After delivery of defence.

See Eng. (1883) R. 283.

A counter-claim and set-off were, under the Eng. Rules corresponding to the original Ont. Rules, held to constitute a ground of defence within this *Rule*: *Wood* v. *Goodwin*, W. N. 1884, 17, and this will, no doubt, be so now under this *Rule*, and *Rule* 115: see *contra*, *Chamberlain* v. *Chamberlin*, 11 P. R. 501, under the original *Rules*.

In computing the ten days, Vacation is not reckoned: *Rule* 179 and the time may be enlarged: *Rule* 176; and see *Re Jones*, *Eyre* v. *Cox*, 25 W. R. 303.

By pleading such a plea at law under the former practice, a defendant abandoned all his former pleas: *Barker* v. *Palmer*, 1 Salk. 178; but this is not so under the present *Rules*, though *semble*, other defences fall to the ground if the plaintiff confesses the new plea: see *Fosler* v. *Gamgee*, 1 Q. B. D. 666.

162. Where a ground of defence to any counter-claim arises after the delivery of the defence thereto the defendant to the counter-claim may within 10 days after such ground of defence has arisen, deliver a further Defence to counter-claim arising after reply.

Rules 163, 164.

pleading setting forth the same, or may set up such new ground of defence by amendment. C.R. 292.

See Eng. (1883) R. 283. The same liberty is here given to a plaintiff after the time for delivering a reply has expired as is, by the preceding *Rule*, given to a defendant after the delivery of his defence.

Amendment on praecipe.

163. Any such amendment may be made on præcipe, C.R. 293, *amended*.

This and the preceding *Rule* provide two methods for setting up matters of defence to a counter-claim arising after a defence thereto has been delivered, *e.g.* (1) a further pleading, or (2) the amendment of the previous pleading. These *Rules* are confined to matters arising within ten days prior to the delivery of such further pleading, or the amendment of the previous pleading. They do not warrant the introduction of any other matters of defence, and if, under colour of these *Rules*, matters of defence were introduced which did not arise within the ten days, such pleading, or amendment would be irregular, and be liable to be set aside.

Where the ten days is suffered to elapse, an application to extend the time might be made under *Rule* 176: see *Re Jones, Eyre* v. *Cox*, 25 W. R. 303.

Plaintiff may deliver confession of defence.

164. Where any defendant pleads any ground of defence or counter-claim which has risen after the commencement of the action, the plaintiff may deliver a confession of such defence; and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless otherwise ordered. C.R. 295.

See (1883) R. 284.

Payment of money into Court is not a "defence" within the meaning of this *Rule*: *Cullander* v. *Hawkins*, 2 C. P. D. 592.

Under the Rules 22-23 of T. T. 1856, which were to the same effect, though a defendant pleaded with such a plea other defences arising before action, the plaintiff was nevertheless entitled to confess the plea, and have his costs, the other pleas failing to the ground. And this *Rule* seems to have the same effect: *Foster* v. *Gamgee*, 1 Q. B. D. 666. There is no difference in this respect between a plea of bankruptcy, and any other plea: *Foster* v. *Gomgee*, *supra*. A plea that defendant was an adjudicated bankrupt, upon an act of bankruptcy which occurred after the service of the writ, was held to be "a ground of defence which has arisen after the commencement of the action," and the plaintiff was held entitled to confess it, and sign judgment for his costs under this *Rule*: *Champion* v. *Formby*, 7 Ch. D. 373.

Such a confession is a determination of the matters in litigation, and precludes a second action for the same cause: *Newington* v. *Levy*, L. R. 5 C. P. 607; 6 C. P. 180.

For form of confession: see Form No. 28; H. & L. Forms, No. 560; and of judgment for costs, Form No. 99; H. & L. Forms, No. 858.

This *Rule* applies to a counter-claim in the nature of a pecuniary set-off, arising after action brought: *Ellis* v. *Munson*, 36 L. T. 585:

Wood v. *Goodwin*, W. N. 1884, 17, and to counter-claims generally: see notes to *Rules* 115, 161; but the Eng. *Rule* does not in terms apply to counter-claims: *Beddoll* v. *Maitland*, 17 Ch. D. 174. Rule 164.

Where a Judge refused to deprive the plaintiff of the costs, under the last clause of this *Rule*, it was held that they were costs left within the discretion of the Judge within section 49 of the English Judicature Act (corresponding to sec. 24 of the Ont. Act), and that, therefore, there could be no appeal from the decision, except by leave: *Perkins* v. *Beresford*, 47 L. T. 515; and see *Hopkins* v. *Vickers*, 3 T. L. R. 610.

Defendants delivered a further defence of matter arising since former defence. Plaintiff delivered a confession of this defence, and signed judgment for costs. The defendants asserting that the point was sufficiently raised by the former defence, which was not intended to be waived, and consenting to withdraw the further defence, the judgment for costs was set aside under this *Rule*: *Bridgtown, etc.*, v. *Barbados Water Supply, etc.*, 38 Ch. D. 378.

This *Rule* was held not to apply, where the defence also set up matters of defence, which had occurred before the commencement of the action: *Horrison* v. *Abergavenny*, 57 L. T. 360; and where an action had been brought by a judgment creditor against a judgment debtor and another, to set aside a conveyance as fraudulent, and, after pleading of several defences, the judgment debtor obtained leave to amend by adding as a defence, without abandoning his other defences, that the plaintiff's claim had become extinguished by reason of a set-off ordered in another action, it was held that this was a case in which the plaintiff should not be allowed to confess the new defence, and sign judgment for costs: *Patterson* v. *Smith*, 14 P. R. 558.

As to discontinuance of the action by the plaintiff in other cases: see *Rule* 321.

Rule 165.

CHAPTER VIII.

THIRD PARTY PROCEDURE.

Third party notice, where contribution or indemnity claimed.

165.—(1) Where a defendant claims to be entitled to contribution or indemnity from or any other relief over against any person not a party to the action, hereinafter called a third party, he may issue a notice in accordance with Form 24 (hereinafter called the third party notice) which shall be sealed in the same manner as the writ of summons, and shall state the nature and grounds of the claim.

(2) A copy of the notice shall be filed, and a copy together with a copy of the statement of claim, or, if there be no statement of claim, of the writ, shall be served on the third party within the time limited for the delivery of the defence. C.R. 209.

Third parties.

Provision for the case of "other relief over" is not contained in Eng. (1883) R. 170. In other respects this *Rule*, though not in identical terms with, is to the same effect, except that the Eng. Rule provides (as C. R. 209 formerly did), that the leave of the Court must be obtained to issue a third party notice.

For Form: see No. 24; H. & L. Forms, No. 478. This Form requires the place of issue to be added.

The *Rules* relating to third party procedure provide machinery for giving effect to sec. 16 (*d*) of the Act, *supra*, p. 40.

The third party procedure as provided by the *Rules*, applies only to actions commenced by writ, not to summary proceedings, such as an originating summons in England: *Re Wilson, Atty.-Gen.* v. *Woodall*, 45 Ch. D. 266; 63 L. T. 100; nor to proceedings commenced in Ontario under *Rule* 10.

Scope of the Rules.

Scope of the Rules.—By *Rules* 67 and 68, plaintiffs are given the fullest liberty to join as defendants all persons against whom, jointly, severally, or in the alternative, they may jointly, severally, or in the alternative, claim relief. By sec. 16 (*d*) of the Act, in furtherance of one of the main objects of the Legislature, namely, to have the claims of all persons interested in the subject of the litigation disposed of in the same action, a further and entirely new jurisdiction was conferred upon the Court. By that section a defendant to an action may obtain (1) *against a plaintiff alone*, or *the plaintiff and some other person*—any relief that might be granted in an independent action by the same defendant against the same plaintiff alone, or against the same plaintiff and such other person; (2) *against (a) a co-defendant*, or (*b*) *any other person*—any relief relating to, or in connection with, the original subject of litigation, which might be

granted in an independant action by such defendant against such co-defendant, or other person; and it has been said that a liberal construction should be given to the *Rules* relating to third party procedure: *Steele* v. *Can. Pacific Ry.*, 25 O. L. R. 492. Rule 186.

The mode in which a defendant may obtain the relief above mentioned against a plaintiff alone, or along with some other person, is by counter-claim, and treated of *supra*: *Rule* 113, *et seq.* A counter-claim, as the name imports, is one advanced against that of the opposite party; a counter-claim by a defendant must therefore be a claim against the plaintiff alone, or against the plaintiff and some other person or persons: whereas third party procedure is for the purpose of enabling a defendant to obtain relief against a co-defendant or some third parties only, in respect of a liability in which the plaintiff is not concerned.

By a counter-claim, to a certain extent, complete relief may be obtained against a co-defendant, or a third person not originally a party: *Rules* 113-117; but no counter-claim can be set up which does not seek relief against a plaintiff: see notes to *Rule* 115.

The third party procedure provided by the *Rules* prescribes the procedure, so far as has, at present, been thought expedient, for giving a defendant (whether so in an action, or a counter-claim: see *Levi* v. *Anglo-Continental, &c.*, 1902, 2 K. B. 481; 86 L. T. 857), relief against a co-defendant, or any other person, as contemplated by section 16 (*d*) of the Act.

The present *Rules* provide that:—

(1) Third party procedure is confined to claims for (a) contribution from,—(b) indemnity from,—and (c) other relief over,—against a third party.

(2) Contribution, indemnity, or other relief over, may be enforced against a co-defendant, as well as a person not originally a party.

(3) Final judgment may be given between a defendant and a third party or between a defendant and a co-defendant, in the same proceedings, without the bringing of a subsequent action.

(4) The third party procedure applies not only to the parties to the action, but also to parties to a counter-claim, who may also avail themselves of it: see *Levi* v. *Anglo-Continental, etc., supra.*

Contribution.—Where a defendant claims contribution, or indemnity against a co-defendant, the procedure prescribed by this *Rule* must be followed; it is not enough merely to claim it by his defence: see *Gregson* v. *Henderson Roller Bearing Co.*, 20 O. L. R. 584. Contribution

The right to contribution is an equitable right arising where two or more persons are subject to a common liability, other than for a fraud, or other wilful tort: see *Johnson* v. *Wild*, 44 Ch. D. 146; *Sutton* v. *Dundas*, 17 O. L. R. 556.

Except in cases of liability for fraud, or other wilful tort, the right exists between trustees: *Butler* v. *Butler*, 14 Ch. D. 329; *Re Eyton. Bartlett* v. *Charles*, 45 Ch. D. 458; 63 L. T. 336; *Lever* v. *Penrce*, W. N. 1888, 105; *quasi* trustees, such as directors: *Ramskill* v. *Edwards*, 31 Ch. D. 100; co-partners or co-adventurers in partnership: *McLaren* v. *Marks*, 10 P. R. 451; *Lowe* v. *Dixon*, 16 Q. B. D. 455; co-sureties: *Moorhouse* v. *Kidd*, 28 Ont. 35; affirmed in C. A., 18 C. L. T. 235; 34 C. L. J. 381.

Rule 165.

There is no right to contribution between *tortfeasors*, knowingly committing the wrong: *Atty.-General* v. *Wilson*, Cr. & Ph. 1; *Lingard* v. *Bromley*, 1 V. & B. 117; *Power* v. *Hoey*, 19 W. R. 916; *Merryweather* v. *Nixon*, 8 T. R. 186; and *per* Lord Herschell, *Palmer* v. *Wick*, 1894, A. C. 318; see also *The Englishman*, 43 W. R. 670; Pollock on Torts (5th ed.), 191; 124 L. T. Jour. 168; but a trustee committing a breach of trust, at the request, or instigation, or with the consent in writing, of his *cestui que trust*, is in some cases entitled to be indemnified out of the share in the trust estate of such *cestui que trust*; *The Trustee Act* (R. S. O. c. 121), s. 36.

In an action against some of the directors of a company for misapplication of the funds of the company, the defendants were allowed to serve a third party notice upon a person who was also a director at the time of the alleged misapplication, and who would be liable to contribute: *Furness* v. *Pickering*, 1908, 2 Ch. 224; 99 L. T. 142.

An assignee of a lessee, as to part of the land leased, who had paid the whole of the rent due by the lessee, was held not entitled to contribution from the assignee of the lessee of the remaining part of the land, there being an independent and not a common liability: *Johnson* v. *Wild*, *supra*, p. 613; but *semble*, in such a case relief over might properly be claimed under this *Rule*.

Where a surviving executor is sued for an account, and he seeks contribution against the representatives of the deceased executor, he cannot insist on the plaintiff making such representatives defendants, but he may proceed against them as third parties under this *Rule*: *Re Harrison*, 1891, 2 Ch. 349; 64 L. T. 442.

As to contribution between co-defendants: see notes to *Rule* 170.

Indemnity.

Indemnity.—Indemnity arises where the defendant sued by the plaintiff, though liable to the plaintiff, may have a right to indemnity over against a third party whom the plaintiff could not sue. A defendant does not lose his right to have his claim against a third party determined in an action against him, because the plaintiff in addition to claiming on grounds as to which there is, or may be, a right of indemnity, also alleges grounds for relief against the defendant with which the third party has no concern: *Pettigrew* v. *Grand Trunk Ry.*, 22 O. L. R. 23; but where the right to indemnity does not exist in the event of negligence by the defendant, and the plaintiff's claim is wholly based on the alleged negligence of the defendant, in such a case a third party notice claiming indemnity would not be proper: *Hunter* v. *Hamilton Bridge Works*, 2 O. W. N. 251.

The right to indemnity within the English Rules must be one arising out of a contract for indemnity as such, expressed, or implied: *Speller* v. *Bristol Steam Navigation Co.*, 13 Q. B. D. 96, where it was held that a warranty of seaworthiness of a vessel hired, was no such contract for indemnity against a claim for damages for the injury of plaintiff's goods in the vessel by reason of its not being seaworthy. So in an action for trespass by cutting timber, defendants justifying their acts under an agreement with third parties from whom the defendants purchased the timber, would not seem to be entitled to bring in the third parties and claim indemnity, under the English Rule, the damages not being necessarily the same, and *semble*, there would not be a case for relief over within the Ontario *Rule*: see *Parent* v. *Cook*, 2 O. L. R. 712; 3 O. L. R. 350. See also

The Jacob Christensen, 1895, P. 281, and *Payne* v. *Caughell*, 17 P. R. 39; *Markham* v. *Paget*, 1908, 1 Ch. 697; 98 L. T. 605. Rule 166.

Cases where there is no such contract, but merely a right to damages against the third party if the plaintiff succeeds in recovering from defendant, are not within the English Rules: *Birmingham Land Co.* v. *L. & N. W. Railway Co.*, 34 Ch. D. 261; *Pontifex* v. *Foord*, 12 Q. B. D. 152; *Payne* v. *Caughell*, 17 P. R. 39; and see *Wilson* v. *Boulter*, 18 P. R. 107; *Windsor, &c.*, v. *Highland Park*, 19 P. R. 130; *Miller* v. *Sarnia Gas Co.*, 2 O. L. R. 546; but may sometimes be cases of "other relief over" within the Ontario *Rule* 165; but not where the damages claimed against the third party are not in any way measured by the damages recoverable by the plaintiff against the defendant: *Gagne* v. *Rainy River Lumber Co.*, 20 O. L. R. 433.

Cases of an express contract for indemnity will present no difficulty; but an express contract may be met by a defence that the claim is not within the contract: see *Page* v. *Midland*, 95 L. T. Jour. 252, following *Hunt* v. *White*, 37 L. J. Ch. 326. Express contract

In *Hull* v. *Sim*, 10 T. L. R. 463, in an action against the committee of a club, they were held entitled to bring in some of the members, under a rule of the club which provided that the committee of the club was to be indemnified by the members.

A covenant by the assignee of a lease to indemnify the assignor against liability on the covenants in the lease was enforced by third party proceedings: *Gooch* v. *Clutterbuck*, 1899, 2 Q. B. 148; 81 L. T. 9; and so also a covenant by an assignee of the equity of redemption of mortgaged property to assume the mortgage: *McMurtry* v. *Leushner*, 3 O. W. N. 1176.

A contract for re-insurance is not a contract for indemnity: *Geen* v. *Herring*, 1905, 1 K. B. 152; 92 L. T. 37; *Nelson* v. *Empress Assce. Co.*, 1905, 2 K. B. 281; 93 L. T. 62.

An implied right of indemnity may arise in the case of principal and agent: see *Langley* v. *Law Society of U. C.*, 3 O. L. R. 245; *Birmingham Land Co.* v. *London & N. W. Railway*, 34 Ch. D., at p. 277; of acts done at request: *Ib.*, and *Carshore* v. *N. E. Railway Co.*, 29 Ch. D. 344; of identical contracts (*e.g.*, for supply of goods with a warranty), where the second contract (with a similar warranty), is entered into with knowledge of the first: see *Birmingham Land Co.* v. *London & N. W. Railway*, 34 Ch. D. p. 277; also *Jacobs* v. *Brown*, W. N. 1884. 23; *Hort* v. *Brown*, 28 Sol. Jour. 577; *Steel* v. *Dixon*, W. N. 1880, 113; 42 L. T. 765; 28 W. R. 796; also between trustees and their *cestui que trust* concurring in a breach of trust: *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Re Holt*, 1897, 2 Ch. 525; *The Trustee Act* (R. S. O. c. 121) s. 35; *Re Salmon, Priest* v. *Uppleby*, 42 Ch. D. 351. (In the last case, however, there seems to have been an express contract for indemnity). There is no right of indemnity on the part of a passive trustee for a breach of trust by the acting trustee, except under special circumstances, as where the acting trustee is solicitor for the trust, or has derived personal benefit from the breach of trust: *Bahin* v. *Hughes*, 31 Ch. 390; *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; all are equally liable to the *c. q. t.*: *Cowper* v. *Stoneham*, 68 L. T. 18. Implied contract.

Where an action was brought against a surviving trustee for recovery of a trust fund, lost by misapplication thereof by a deceased

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trustee, a solicitor, it was held that the partners of the deceased solicitor could not be brought in as third parties on a claim of defendant to be indemnified by them, the right of the defendant to recover from the surviving partners a sum equal to the lost trust fund being an independent right not depending on the liability of the defendant: *Wynne* v. *Tempest*, 1897, 1 Ch. 110; see also *Campbell* v. *Farley*, 18 P. R. 97.

A surety is entitled to call upon his principal to discharge the liability for which he is surety, even though the surety has not been sued for, or paid it: *Ascherson* v. *Tredegor Dry Dock Co.*, 1909, 2 Ch. 401; *Cunningham* v. *Lyster*, 13 Gr. 575; *Mewburn* v. *Mackelcan*, 19 App. 729; *sed vide Re Beavan, Davies* v. *Beavan*, 1913, 2 Ch. 595.

As to claims against third persons for indemnity against liability for damages arising out of negligence of the third persons as contractors: see *McCann* v. *Toronto*, 28 Ont. 650.

The right to indemnity may have arisen either before, or after, the commencement of the action: *Edison* v. *Holland*, 33 Ch. D. 497; see also *Edison* v. *Joblochkoff*, 35 W. R. 178.

As to the difference between a guaranty, and a contract of indemnity: see *Guild* v. *Conrad*, 1894, 2 Q. B. 885; 71 L. T. 140; *Beattie* v. *Dinnick*, 27 Ont. 285.

The claim for indemnity need not necessarily be for the whole of the plaintiff's claim; it may be for any separate, or aeparable part of it: see *Swale* v. *Can. Pacific Ry.*, 25 O. L. R. 492.

Other relief over.

Other Relief Over.—This is a new class of case provided for in Ont.; but not under Eng. (1883) R. 170.

The object of the present *Rules* is to extend the third party procedure to cases where a defendant, if he is held to be liable to the plaintiff, has a right of action to recover from another the amount for which he may be liable to the plaintiff: see *Miller* v. *Sarnia Gas Co.*, 2 O. L. R. 546; *Gagne* v. *Rainy River Lumber Co.*, 20 O. L. R. 433; or a specific part of it: see *Swole* v. *Can. Pac. Ry.*, 25 O. L. R. 492, against another person, whether by way of contribution, or indemnity, or as damages under an independent contract, or otherwise; and relief against a third party can probably now be obtained in Ontario in cases in which it could not be obtained under the Eng. Rules or the former Ont. Rules which followed them: see for example *London & Western Trusts* v. *Loscombe*, 13 O. L. R. 34, 36; *Constantine* v. *Warden*, 44 W. R. 162; 73 L. T. 450; 12 T. L. R. 33, where a defendant who became liable in consequence of a failure to unload a ship pursuant to a charter party, was held not entitled to claim over against a third party, a purchaser of the cargo from the defendant, under an agreement by which he was liable to the defendant for "any loss, demurrage or expenses arising therefrom"; and see *The Jacob Christensen*, 1895, P. 281. But the scope of the *Rules* in cases of "relief over" cannot yet be said to be at all well defined. A tendency to restrict the scope was at first rather indicated in *Miller* v. *Sarnia Gas Co.*, 2 O. L. R. 546, where it was said that the third party procedure is only applicable where a defendant, if liable to the plaintiff, is entitled to recover against the third party the very damages which the plaintiff seeks to recover against him; but in *Swale* v. *Can. Pac. Ry.*, *supra*, it was held that the *Rules* should be construed liberally and it seems

to hsve been considered that in previous casea too nurrow an intsrpre- Rule 166.
tstion had been given to them. It would seem that an independent right, which may be enforced hefors defendant is damnified, and whether he ia damnified or not, is not a right to either indemnity, or relisf over: see *Wynne* v. *Tempest*, 1897, 1 Ch. 110; 75 L. T. 624; *supra*, p. 616; *Campbell* v. *Farley*, 18 P. R. 97; see nlso *Birmingham Land Co.* v. *L. & N. W. Ry. Co.*, 34 Ch. D. 261; *Moore* v. *Death*, 16 P. R. 296; *London & Western Trusts* v. *Loscombe*, *supra*, p. 616.

Oae ohject of the *Rules* is to prevent the sams question, common as between ths plaintiff and defendant, and ths defendant and the third party, from heing tried on different occasiona and in different fornms: *Wilson* v. *Boulter*, 18 P. R. 107; hut where damages, if recoversble by defendants, would he assessed upon a different principle from those of the plaintiff, there is no such identical question, snd no case for relief over: *Ib.*, ses also *Parent* v. *Cook*, 2 O. L. R. 712; 3 O. L. R. 350; *Pontifex* v. *Foord* 12 Q. B. D. 152; *Cotton* v. *Bennett*, 26 Ch. D. 161.

In an action for conversion of goods, the defendant may bring in the party who sold him the goods as a third party against whom he is entitled to relief ovsr: *Confederation Life Association* v. *Labatt*, (No. 2), 18 P. R. 266.

Where the plaintiff claimed a haiance due to him for hire of a race track, and the defendants alleged an agreement hy n Ferry Company to pay $15 per day to defendants while the races were heing carried on, it was heid that defendants had no right to contribution or indemnity, or any relief over, against the Ferry Company, in respect to the plaintiff's claim for rent: *Windsor Fair Grounds* v. *Highland Park Club*, 19 P. R. 130.

In an sction hy an employee in a factory for damages for injuries occssioned hy alleged negligence, in that a retort by which the injury was caused was defective, and without a safety valve, a third party notice given hy defendant to the manufacturers of the retort was set aside, ths retort sppearing to have heen manufactured under a written contract containing no warranty, and providing that the defendants were to put in their own fittings, including the safety valve: *Wilson* v. *Boulter*, 18 P. R. 107.

The *Rules* do not, and even the original *Rule* did not enahle defendsnt to hring in a third party in an action for specific performance hy a vendor, so as to have it determined between plaintiff and defendant, whether the third party has a title to the whole, or part of the lsnd: *Begg* v. *Ellison*, 14 P. R. 384.

Other Cases.—In certain special cases hy statute, relief over Other cases.
against a third party may he ohtained hy a defendant. By *The Municipal Act* (R. S. O. c. 192), s. 464, a municipal corporation sued for damages sustained by renson of any obstruction, excavation, or open- Obstruction, etc., of highways.
ing in, or near, a highway, or hridge, made, left, or maintained, by any person other than the corporation, or a aervant or agent of the corporation, may have such other person (including corporation) added as s defendant or third party: see also *Erdman* v. *Walkerton*, 15 P. R. 12; *Stilliway* v. *Toronto*, 20 Ont. 98; *Homewood* v. *Hamilton*, 1 O. L. R. 266; hut such third person cannot properly be joined hy the plaintiff ss a co-defendant with the corporation: *Baines* v. *Woodstock*, 10 O. L. R. 694.

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Third party procedure.

Third Party Procedure—General Principles.—If a third party is a necessary party to the action as regards the plaintiff, the defendant ought to have him added as a defendant, and not as a third party under this *Rule*: see *Pilley* v. *Robinson*, 20 Q. B. D. 155, and other cases in notes to *Rule* 134; and see *Bank of Commerce* v. *Bank of B. N. A.*, 20 C. L. J. 136; 4 C. L. T. 200.

Under C. R. 209, before a third party notice could be served, it was necessary to obtain the leave of the Court; that preliminary is no longer necessary; but if the defendant improperly serves a third party notice, it will be open to the plaintiff, or to the party served, to move to set it aside; and the cases in which leave to serve a notice under C. R. 209 will be useful in determining whether or not a notice served is within this *Rule*.

Leave to serve a notice was refused where defendant claimed indemnity from three persons jointly, viz.: a plaintiff, a defendant, and a third person: *Re Gilson*, 1894, 2 Ch. 92. *Semble*, that was a case for filing a counter-claim.

Whether the claim which the defendant has against the third party, need not be identical or co-extensive with the plaintiff's claim against the defendant himself, *quære*: see *Swonseo Co.* v. *Duncan*, 45 L. J. Q. B. 640; 1 Q. B. D. 649, and *Miller* v. *Sarnia Gas Co.*, 2 O. L. R. 546; *semble*, it must: *Gagne* v. *Rainy River Lumber Co.*, 20 O. L. R. 433.

"The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal, which sometimes arose, by the same question being differently decided by different juries": *Renecke* v. *Frost*, 1 Q. B. D. 422, *per* Blackburn, L.J.; see also *Re Collie*, 2 Ch. D. 51.

A right to indemnity arising after action brought, entitles a defendant to notify a third party: *Edison & Swon Co.* v. *Holland*, 33 Ch. D. 497.

The third parties can only be joined before trial: *Lockie* v. *Tennont*, 5 Ont. 52, and will not be allowed to be brought in, if the plaintiff will be prejudiced: *Bower* v. *Hortley*, 1 Q. B. D. 652; *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489; see also *Swanseo, etc.*, v. *Duncan*, 1 Q. B. D. 648-9, and *Rule* 171; *Hutchison* v. *Colorado United Mining Co.*, W. N. 1884, 40; *Mead* v. *Etobicoke*, 13 P. R. 341.

Leave to serve a third party notice was refused, where the defendants claimed that the damage in question had been occasioned by the proposed third party, and there were other actions by other plaintiffs pending in which the same point was raised, on the ground that the proposed third party would be prejudiced by the damages being assessed piecemeal, and the plaintiff would also be prejudiced, and unnecessarily delayed: *Mahoney* v. *Canada Foundry Co.*, 12 O. L. R. 514.

Married woman as third party.

A married woman may be brought in as a third party, if a separate action might be brought against her: *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533; *Jones* v. *Elderton*, W. N. 1884, 39.

Third party notice by a plaintiff counterclaimed against.

Where a defendant in an action counterclaims against a plaintiff, the plaintiff may serve a third party notice on a person against whom he claims contribution or indemnity in respect of the counterclaim: *Levi* v. *Anglo Continental, etc.*, 1902, 2 K. B. 481.

See notes to *Rule* 166, *et seq.*

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A third party cannot counterclaim against the plaintiff: *Eden* v. *Weardale*, 28 Ch. D. 333; but it would seem that he may against the defendant who brings him in: *Ib.* 338; 54 L. J. Chy. 384; *Borough* v. *James*, W. N. 1884, 32.

A third party is not a person served with notice of proceedings within the definition of "defendant" in sec. 2 of the Act; but by an order giving directions under *Rule* 169, he may be placed in the same position as a defendant: *Eden* v. *Weardale*, 28 Ch. D. 338; 35 Ch. D. 287.

Replevin.

The *Rules* relating to third party procedure apply in an action of replevin: *Bradley* v. *Clarke*, 19 C. L. J. 80; 9 P. R. 410.

Counter-claim not proper to raise claim for relief against co-defendants.

Where a defendant makes a claim against a co-defendant for indemnity or other relief, his proper course is to proceed under *Rules* 165 and 170, and not by counterclaim: *Furness* v. *Booth*, 4 Ch. D. 586. The contrary ruling of V.-C. Hall in *Shephard* v. *Beane*, 2 Ch. D. 223 (an earlier case), has not been followed, and was subsequently disapproved of by the same Judge in *Harris* v. *Gamble*, 6 Ch. D. 748. The defendant might formerly raise a question against a co-defendant by a pleading which also stated a defence against a plaintiff; but such pleading is not a counterclaim, and should not be so entitled: *Furness* v. *Booth*, *supra*. It would seem, however, that this cannot now be done; if a defendant claims relief over against a co-defendant he must now proceed under *Rule* 170.

Fourth, etc., parties.

In *Walker* v. *Balfour*, 25 W. R. 511, it was held that a third party brought in under *Rule* 165, was not entitled under that *Rule* to have any other person against whom he has a claim, added; but in *Fowler* v. *Knoop*, 37 L. T. 219; W. N. 1877, 68, the third party against whom indemnity was claimed, was allowed, under the concluding words of section 16 (d), of the Act, to bring in a fourth party, from whom he claimed indemnity upon the same grounds upon which it was claimed from him: and see *Klawanski* v. *Premier Petroleum Co.*, 104 L. T. 567. Perhaps the point cannot yet be considered as settled: see *Yorkshire Waggon Co.* v. *Newport Coal Co.*, 5 Q. B. D. 268; *Witham* v. *Vane*, W. N. 1880, 108.

Practice in third party proceedings.

Practice.—As already pointed out, leave to serve the notice is no longer necessary. The notice must be filed in the office where the writ issued, and sealed as a writ of summons, and service must be effected as in the case of a writ of summons, and the third party after service must enter an appearance if he intends to contest the plaintiff's claim as against the defendant who served the notice, or such defendant's claim to indemnity, contribution, or relief over. If he does not appear he is bound by the decision, both as to the plaintiff's claim against the defendant, and the defendant's claim for indemnity, contribution, or relief over: *Rule* 166. If he appears, before anything further can be done in respect of the claim to contribution, etc., directions must be obtained as to the extent to which, and the mode in which, the claim is to be determined: *Rule* 169.

Notice must be served on the third party within the time for delivering the defence: *Rule* 165; but see *Re Gilson*, 1894, 2 Ch. 92; but there is power to extend the time: *Rule* 176; the plaintiff not objecting: *Swale* v. *Can. Pac. Ry.*, 25 O. L. R. 492.

A notice which was too late, having been served after the pleadings were closed, and the action entered for trial, was under the

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circumstances not allowed to be made good by the granting of an extension of time, and was set aside on the application of the third party: *Porent* v. *Cook*, 2 O. L. R. 709; 3 O. L. R. 350.

Under the former C. R. 209, an application for leave to serve a third party notice would not be entertained after the close of the pleadings: see *Lockie* v. *Tennant*, 5 Ont. 52; *Birmingham L. Co.* v. *L. & N. W. Ry.*, 56 L. T. 702; *Associated H. Co.* v. *Whichcord*, 8 Ch. D. 457; and it would seem to be doubtful whether after judgment there is jurisdiction, on an appeal, to add a third party by amendment: see *Edison, etc.*, v. *Holland*, 41 Ch. D. 28; or to allow a defendant to claim relief against a co-defendant: *Boulthee* v. *Cochrane*, 17 P. R. 9.

Evidence.

Where the time for service of a third party notice under this *Rule* has expired, a special application to extend the time for filing it might be made: *Rule* 175. The motion should be on affidavit accounting for the ispse of time, and shewing the state of the action, the nature of the plaintiff's claim, and the circumstances under which the right to indemnity, contribution, or relief over, is claimed. The defendant must make out a *primâ facie* case; it is not sufficient merely to state that he claims contribution, etc., etc.: *Birmingham L. Co.* v. *L. & N. W. Ry.*, *supra*; but the Court in giving leave to issue a notice, did not decide that the claim is a valid one, but merely that a *primâ facie* case has been made for the relief claimed by the defendant against the third party: *Carshore* v. *N. E. Railway Co.*, 29 Ch. D. 344; *Edison, etc.*, v. *Holland*, 33 Ch. D. 497; *Beynon* v. *Godden*, 4 Ex. D. 247; *Pettigrew* v. *Grand Trunk Ry.*, 22 O. L. R. 23.

Service of notice out of jurisdiction.

Service of Notice.—The notice to the third party is to be served according to the *Rules* relating to the service of writs of summons: *Rules* 15, *et seq.* Such notice may therefore be served out of the jurisdiction under *Rule* 25, and in such a case leave to serve would be necessary, as in the case of a writ of summons, and such service will be allowed only where, if it were a writ, it would be capable of being so served; and in determining whether the notice can be so served, if it were a writ, the Court will not have regard to the plaintiff's claim, but will only consider the defendant's claim actually made in the notice: *McCheone* v. *Gyles*, 50 W. R. 376; 1902, 1 Ch. 287; 86 L. T. 1; see notes to *Rule* 25 and *Swonseo Shipping Co.* v. *Duncan*, 1 Q. B. D. 644; *Dubout* v. *Macpherson*, 23 Q. B. D. 340. In such case the time for appearance (ten days) mentioned in *Rule* 166 will not be sufficient; and in *Swonseo, etc.*, v. *Duncon, supra*, this was used as an argument that the enactments as to notice to third parties were not intended to apply to persons out of the jurisdiction. The answer given by the Master of the Rolls to this objection was, that the order giving leave to serve the notice out of the jurisdiction is to name such a time for appearance as the necessity of the case as to time and place requires. see *Rule* 27, and the *Rule* allowing ten days only must be taken to be modified accordingly.

Time for appearance.

Third party appearance.

Default of appearance of.

166. If a third party desires to dispute the plaintiff's claim in the action as against the defendant or his own liability to the defendant, he shall enter an appearance within ten days from the service of the notice, and in default of his so doing, he shall be deemed to admit the

validity of any judgment obtained (whether by consent or otherwise) against such defendant, and his own liability to contribute or indemnify, claimed in the third party notice. C.R. 210. Rule 166.

See Eng. (1883) R. 171.

Tha notice, Form No. 24, in the *Rules*, should in casee of "other relief over" be slightly modified in its last paragrapb. Instead of the words "your own liability to contribute or indemnify," there should be stated appropriately the liability to which it is claimed that the third party ie eubject. See H. & L. Forms, No. 478.

As to the time for entering appearance in the case of a third party out of the jurisdiction: see note to *Rule* 165, p. 620, *supra*.

Appearanco indicates a desire to dispute the plaintiff's claim in the action, as against the defendant, on whose hebalf the notice bas been given, or the third party's own liability to the defendant. When a motion is afterwarde made under *Rule* 169 for directions, the third party will etate whetber he admits hie own liability to the defendant, snd whether he wishee to dispute the plaintiff's claim, and the extent to which he will be allowed to take part in the action will be defined accordingly. Appearance by third party served under Rule 165.

Where tbe third party appeare, nothing more csn be done in regard to tbe claim for contribution, etc., without an application under *Rule* 169 for directions; as to subsequent proceedings: eee notes to that *Rule*.

By non-sppearance the third party is taken to admit the validity of any judgment obtained against the defendant who brought him in, and his own liability to the extent of the claim made against him by tbe third party notice. In such a case the defendant may note the pleadings closed against the third party, and if he does not do so in due course the plaintiff may compel him to do so in order that tbe action msy be proceeded with: *Niogaro & Ontario Construction Co.* v. *Wyse*, 4 O. W. N. 248. Ae to judgment against the third party in such case: see *Rules* 167, 168.

Motion to Set Aside Notice.—The third party may move to set aside tbe notice served upon him: *Benecke* v. *Frost*, 1 Q. B. D. 429; *Bower* v. *Hartley*, *Ib.* 652; *Horwell* v. *London Gen. Omnibus Co.*, 2 Ex. D. 365; and *semble*, he generally should take that course if he intends to dispute the propriety of bis being served, and not wait until a motion for directione is msde under *Rule* 169; see *Holden* v. *Grand Trunk Ry.*, 2 O. L. R. 421. Motion to set aside notice.

In England a conditional appearance msy be entered by a third party who intends to move to eet aside a notice served on him: see Eng. (1883), R. 100; *Pleasants* v. *E. Dereham*, 47 L. T. 439; *Nelson* v. *Pastorino*, 49 L. T. 564; but in Ontario a conditional appearance cannot be entered except by leave of the Court or a Judge: *Rule* 48; and it hss now been decided in Ontario, that the third party should not appesr as a preliminary to moving to set aside the notice: *Windsor, etc.*, v. *Highland Park*, 19 P. R. 130. Appearance whether necessary.

Notice of an application to aet aside the notice muet of course be given to the defendant who served the notice, and may also properly he given to tbe plaintiff, who is interested in seeing that no question Notice to plaintiff.

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is introduced into the litigation which may prejudice him: see *Bower* v. *Hortley*, 1 Q. B. D. 652; *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489.

Order.

If the defendant who gave the notice cannot, from the nature of the case, become entitled to any remedy, or relief over, against the third party, the service will be set aside: *Horwell* v. *London General Omnibus Co.*, 2 Ex. D. 365; as where it was made to appear that the contract under which indemnity was claimed did not apply to the state of facts appearing in the pleadings between the plaintiff and defendant: *Ferguson* v. *Toronto*, 14 P. R. 358. See also *Rice* v. *Alliance, etc., Gas Co.*, 12 L. R. Ir. 172; *Johnson* v. *Wild*, 44 Ch. D. 146; *Birmingham L. Co.* v. *L. & N. W. Ry.*, 34 Ch. D. 261; *Hammond* v. *Bussey*, 20 Q. B. D. 97; *Pontifex* v. *Foord*, 12 Q. B. D. 152; *Catton* v. *Bennett*, 26 Ch. D. 161; *Moore* v. *Death*, 16 P. R. 296.

Discovery in third party proceedings.

Discovery.—C. R. 465 expressly provided that a third party after defence, or after the time for defence had expired, should be liable to make discovery, and to obtain discovery from the defendant giving the third party notice. That Rule has not been continued, but *Rule* 348, no doubt, now applies to a third party, and possibly also, by analogy, *Rule* 327.

A third party appearing was not, nor is he now, entitled to an order for production as against the plaintiff. But if directions were obtained under *Rule* 169, allowing him to defend as against the plaintiff, he would then be, and probably is still, in the same situation, with respect to the plaintiff, as any other defendant and might, and probably still may, obtain discovery from, and be compelled to give it to, the plaintiff: *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weordale*, 34 Ch. D. 223; see also *Brodley* v. *Clarke*, 9 P. R. 410, where, though there was no direct issue between the plaintiff and a third party, yet, as the latter had all the rights of a defendant, and virtually took his place, the plaintiff was allowed to examine him under *Rule* 327.

Semble, a third party, made a defendant by counter-claim, may not be entitled to give notice for production to the original plaintiff, but on special application he may obtain an order, where the circumstances warrant it: see *The Alcoy & Gandia Ry.* v. *Greenhill*, 74 L. T. 345.

Discontinuance. — Notice of discontinuance of claim against a third party given by the defendant under *Rule* 321 was upheld: *Bucknall* v. *Mitchell*, 13 O. W. R. 44.

Third party judgment against, how obtained.

167. Where the third party makes default in entering an appearance, the defendant giving the notice, in case he suffers judgment by default, shall be entitled at any time to move for judgment against the third party to the extent of the contribution, indemnity or relief over claimed in the third party notice. C.R. 211.

See Eng. (1883) R. 172.

No judgment can be summarily entered against a third party for default of appearance; a judgment can only be obtained under this

Rule, or *Rule* 168, on motion, of which the third party should have notice: *sed vide, Rules* 35, 354. Rules 168, 169.

C. R. 211 provided that a defendant should only be entitled to judgment against the third on proof of satisfaction of the judgment against himself; but that provision has been omitted from these *Rules*.

For proof of default in entering of appearance: see *Rule* 36.

Where the defendant moves for judgment against a third party, before he has himself satisfied the plaintiffs' judgment against himself, a reasonable term may sometimes be, that the amount payable by the third party be paid into Court: see *Cunninghom* v. *Lyster*, 13 Gr. 575; *Boyd* v. *Johnston*, 20 Ont. 404; *Mewburn* v. *Mockelcan*, 19 Ont. App. 729.

This *Rule* will probably not affect the decisions in which it was held that a person entitled to indemnity might obtain judgment before he has actually paid anything to the person to whom he is liable: see *English and Scottish Trust Co.* v. *Flotou*, 36 W. R. 938; *Underhoy* v. *Read, Ib.*, 75; *Clendennon* v. *Grant*, 10 P. R. 593; *Cunningham* v. *Lyster, supro; Boyd* v. *Johnston, supra; Mewburn* v. *Mockelcan, supra*, and *Federol Bonk* v. *Horrison*, 10 P. R. 271.

168. Where a third party makes default in entering an appearanee, if the aetion is tried and results in favour of the plaintiff, the Judge who tries the action may, at or after the trial, direct such judgment as the nature of the case may require, to be entered for the defendant giving the notiee against the third party. C.R. 212. Third party judgment against, how obtained.

See Eng. (1883) R. 173. See notes to *Rule* 167.

In cases coming within the principle of *Cunnirghom* v. *Lyster*, *Boyd* v. *Johnston*, and *Mewburn* v. *Mockelcan*, the third party may be ordered to pay the amount for which he is found liable into Court: but see *Sutherlond* v. *Webster*, 21 Ont. App. 228; *Re Beavon, Dovies* v. *Beavan*, 1913, 2 Ch. 61.

169. Where the third party appenrs pursuant to the third party notiee, the defendant giving the notiee may apply for directions, and the Court may order the question of liability, as between the third party and the defendant giving the notiee, to be tried in sueh manner at or after the trial of the aetion, as may seem proper; and may give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take part therein, and generally may order sueh proceedings to be taken and give such directions as may appear proper for having the question between the defendant and the third party most eonveniently determined, and as to the mode and extent in or to which the Defendant notifying third party may apply for directions.

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third party shall be bound or made liable by the judgment in the action. C.R. 213.

See Eng. (1883) RR. 174 and 175.

The application should be made in Chambers: see *Rules* 207 (4), 208, 209.

Directions as to procedure.

Application for Directions.—After appearance by a third party, or co-defendant, against whom relief is claimed (*Pontifex* v. *Foord*, 12 Q. B. D. 152), before the trial can be had of any issue raised against him under the third party notice, the directions of the Court must be obtained under this *Rule*, as to the extent to which the third party is to take part in the action, and how the question between the defendant and the third party, or co-defendant, is to be determined: *Piller* v. *Roberts*, 21 Ch. D. 198; *Flower* v. *Todd*, W. N. 1884, 47; *Burke* v. *Pittman*, 12 P. R. 662; *Tritton* v. *Bonkort*, 35 W. R. 474. Without an order under this *Rule* the Court at the trial will not entertain the question raised by the third party notice: *Ib.*, and the third party is not entitled to take any part in the trial, and is not entitled to costs: *Gibb* v. *Camden*, 16 P. R. 316; and see *The Millwall*, 1905, P. 155; 93 L. T. 426. The Court is not, on an application for directions, precluded from considering whether the case is one in which third party proceedings can properly be taken: *Dunn* v. *Toronto Ferry Co.*, 11 O. L. R. 16.

This application may sometimes be the first opportunity the plaintiff has of considering how the introduction of the third party will affect him, and notice of the motion must of course be given to him: see *Bower* v. *Hortley*, 1 Q. B. D. 652; *Wye Valley, etc.*, v. *Hawes*, 16 Ch. D. 489; *Swansea, etc.*, v. *Duncon*, 1 Q. B. D. 648-9; *Finlay* v. *Scott*, W. N. 1884, 8.

In general the motion will be made, as the *Rule* provides, by *the party giving the notice;* but an application seems to have been made by the third party in *Piller* v. *Roberts*, 21 Ch. D. 198.

Time for trial of question against the third party.

The words "at or after the trial of the action," have been construed as meaning that any question between the plaintiff and the defendant should be tried at the trial between the plaintiff and the defendant, or that directions should then be given as to further proceedings: *Coister* v. *Chopmon*, W. N. 1884, 31. It was there said that it was not intended that an action should go to trial between defendant and third party after the question between the plaintiff and defendant had been determined. The intention of the *Rules* is that a third party is, if he desires it, to have an opportunity to contest the plaintiff's claim, as well as his liability to the defendant who brings him in; and therefore directions must be obtained at a stage when it is possible that there may still be a trial between plaintiff and defendant. After judgment has been obtained against the defendant, a Judge cannot give directions as to the trial of the question of the liability of the third party, who has been brought in: *Rich* v. *Dorrett*, 28 Sol. Jour. 513, and this seems to be still the rule.

Effect of settlement of action before trial.

Where after a third party had been brought in, and directions had been given as to trial, the action was settled as between the plaintiff and defendant, it was held that the defendant could not proceed to trial against the third party, and the claim of defendant against the third party was dismissed with costs, without prejudice to the

defendant's bringing an action against him: *Wheeler* v. *Cornwall*, 4 O. L. R. 120. Rule 169.

If the case proceeds to trial between the original parties without obtaining directions under this *Rule* as to a third party who has appeared, *semble*, the third party proceedings thereby become abortive, and no subsequent order can be made giving the defendant any relief against such third party, but he would have to proceed against him by a separate action: see *Gregson* v. *Henderson Roller Co.*, 20 O. L. R. 584, 590. Effect of going to trial without directions.

The Court or Judge may give such directions as may be proper for having the question in which the third party is interested determined, subject always to the condition that the plaintiff must not be prejudiced or unreasonably delayed: see *Rule* 171, and *Corshore* v. *N. E. Ry. Co.*, 29 Ch. D. 346; or, looking at the circumstances, and notwithstanding that the third party may not have moved to discharge the service of the notice upon him, and notwithstanding that an appearance has been entered by the third party, the Court or Judge may determine that it is not a proper case for citing a third party, or that the giving of any directions will prejudice or delay the plaintiff, and may therefore refuse to give any: *Schneider* v. *Bott*, 44 L. T. 142; 8 Q. B. D 101; *Pontifex* v. *Foord*, 12 Q. B. D. 152; *Donn* v. *Toronto Ferry Co.*, 11 O. L. R. 16; see *Bower* v. *Hartley*, 1 Q. B. D. 652; *Associated H. Co.* v. *Whichcord*, 8 Ch. D. 457; in which case the third party must be considered as dismissed from the action: *Schneider* v. *Bott*, 8 Q. B. D. 701; 45 L. T. 370; 50 L. J. Q. B. 525; 30 W. R. 420; 18 C. L. J. 56; see *Baxter* v. *France*, 1895, 1 Q. B. 591; or may dismiss the third party from the action without any motion for that purpose by the third party: *Scripture* v. *Reilly*, 14 P. R. 249. Order on motion for directions.

Where an application for directions involves a preliminary question, as to whether there is a right to indemnity, etc., about which there is great doubt, that doubt may sometimes be a sufficient ground for refusing to give directions; as to such cases: see *Baxter* v. *France*, 1895, 1 Q. B. 455, 591; 72 L. T. 183; and see where the claim set up is really and properly the subject of a counter-claim: *Moore* v. *Death*, 16 P. R. 296; but see *Holden* v. *G. T. R.*, *infra*, and *Donn* v. *Toronto Ferry Co.*, *supra*.

Upon the application for directions, none will be given for the trial of the question between the defendant and the third party, unless the Judge or officer is satisfied that there is a proper question to be tried. If satisfied that the case is one for contribution, indemnity, or other relief over, but that there is no disputed question to be tried, he may give judgment against the third party: *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 536; and see cases cited under *Rule* 222; or if the case is not a proper one for the application of the third party procedure, he may make no order for trial.

Directions were given where it was desirable that the question of the defendant's liability to the plaintiff should be established in such a way as to be binding on the third parties, although all matters in dispute between the defendant and the third parties would not be determined in the action; and the questions between the defendant and the third party were ordered to be tried after the trial of the action: *Holder* v. *Grand Trunk Ry.*, 2 O. L. R. 421, and see *Christie* v. *Toronto*, 15 P. R. 415.

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Where a co-defendant is served with a notice claiming relief under *Rule* 170, on the motion for directions under this *Rule* the question of the propriety of serving the notice may be raised: see *Baxter* v. *France*, 1895, 1 Q. B. p. 458; *Holden* v. *Grand Trunk Ry. Co.*, 2 O. L. R. p. 423.

Directions refused.

Refusal of Motion.—Where the motion for directions under this *Rule* is refused, that is equivalent to a dismissal of the third party from the proceedings: *Baxter* v. *France*, *supra*; *Schneider* v. *Batt*, 8 Q. B. D. 701; 45 L. T. 370; and see *Scripture* v. *Reilly*, 14 P. R. 249, and *semble*, the question of costs should then be disposed of.

Directions given.

Application Granted.—Where the application is rightly made, the third party, on the return of the motion, should declare whether or not he admits his liability to the defendant, and whether or not he desires to dispute the plaintiff's claim against the defendant. If he admits that, in the event of the plaintiff's succeeding, he is liable to the defendant, he may be allowed to defend, or to actively assist in resisting the plaintiff's claim, if he so desires: *Pearson* v. *Lane*, W. N. 1875, 248; *Coles* v. *Civil Service*, 26 Ch. D. 529.

If the third party does not admit his liability, that question may be ordered to be determined at the trial under *Rule* 169: *Flower* v. *Todd*, W. N. 1884, 47; 28 Sol. Jour. 301; see also *Callender* v. *Wallingford*, 53 L. J. Q. B. 569; *Blore* v. *Ashby*, 42 Ch. D. 682; or after the trial: *Holden* v. *G. T. R.*, *supra*; and if he desires so to do, he may be allowed to put in a defence to the plaintiff's claim, and take such part in the proceedings as seems right under the circumstances of the case: *Coles* v. *Civil Service*, *supra*; see form of order in that case, and in Seton on Decrees, 5th Ed., p. 23, also *Borton* v. *L. & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 22 Q. B. D. 657; 60 L. T. 651; *Christie* v. *Toronto*, 15 P. R. 415.

If the pleadings are closed as regards the plaintiff and defendant at the time the application for directions is made, that fact should be mentioned to the Court, so that special directions as to pleading and notice of trial may be given. Where this was not done, and the action had been previously set down for trial, and notice of trial given by the plaintiff, an order, made on the application for directions, allowing a third party to defend, and for the trial of the issue between the defendant and the third party at the trial, and the delivery of a defence by the third party, was held to have the effect of re-opening the pleadings, making it necessary for the plaintiff to make up a new record, including the defence of the third party, to enter the case again, and to give notice of trial to the defendant, and to the third party: *Confederation Life, etc.*, v. *Laboll*, 18 P. R. 238.

Examples of directions in third party proceedings.

Examples of Directions.—In an action by the holders of a bill, indemnity as to part was claimed by the acceptors from the drawer, on the ground that the consideration had in part failed; the drawer denied failure of consideration; an order was made substituting the drawer for the plaintiff, and allowing him to sue on the bill, upon the acceptor's undertaking to pay the amount not in dispute, and the drawer's paying to the plaintiff the balance in dispute: *National Provincial Bank of England* v. *Bradley Bridge, etc., Co.*, W. N. 1876, 63; 2 Chari. Ch. Ca. 30.

A. contracted to sell goods to B. with a warranty, and himself bought the goods from C. stipulating for a similar warranty. B. sued

A. for breach of warranty. It was held that C. was properly brought in, and directions were given for trial of the liability of C. to indemnify A.: *Hort* v. *Brown*, 28 Sol. Jour. 577. Rule 169.

Third parties admitting their liability to indemnify were substituted as defendants with the plaintiff's consent: *Commissioners of Waterford* v. *Veale*, W. N. 1876, 23, but not where plaintiff objected: *Measures* v. *Thomas*, W. N. 1875, 23; see also *Norris* v. *Beasley*, 2 C. P. D. 80; *Dawes* v. *Thornton*, W. N. 1876, 74; *Seligman* v. *Mansfield*, W. N. 1875, 240; *Barton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 22 Q. B. D. 657; 37 W. R. 592; 60 L. T. 651.

The third party may probably obtain leave under this *Rule* to counter-claim against the defendant, or at any rate the fact of his having a valid counter-claim will prevent judgment from being given against him: *Borough* v. *James*, W. N. 1884, 32; but a third party will not be allowed to counter-claim against the plaintiff: *Eden* v. *Weardale, etc.*, 28 Ch. D. 333.

If the defendant does not effectually defend the action, and the third party has not liberty to defend, further application may be made by him for directions: *Barton* v. *L. & N. W. Ry. Co.*, *supra*; and see *Blore* v. *Ashby*, 42 Ch. D. 682.

Giving a third party leave to appear at the trial, and ordering him to be bound by the judgment which shall be given, is not equivalent to giving him leave to defend the action: *Deseronto Iron Co.* v. *Rathbun Co.*, 11 O. L. R. 433. Where a third party obtains leave to appeal from a judgment in the name of the defendant, it is not competent for him to prosecute the appeal in his own name: *Ib.*

Effect of Directions.—A third party permitted to defend, or to take part in defending the action, does not become a defendant for all purposes: *Eden* v. *Weardale*, 35 Ch. D. 281; but see sec. 16 (*d*), last sentence; though, if he is really the person who is fighting the plaintiff, he may be added as a defendant: *Edison, etc.*, v. *Holland*, 41 Ch. D. 33. Effect of directions in third party proceedings.

A third party defending the action along with the defendant is not confined to the defences which are open to the defendant: *Callender* v. *Wallingford*, 32 W. R. 491; but see *Bell* v. *Van Dodelszen*, W. N. 1883, 208, where, defendant admitting the plaintiff's claim, the third party was not allowed to dispute it. In such case the third party would not seem to be bound by the judgment against defendant in proceedings between the defendant and the third party.

Where a third party has liberty to appear at the trial, he may cross-examine the plaintiff's witnesses on the question of the liability of defendant to the plaintiff: *Re Salmon*, 42 Ch. D. 362; and may call witnesses: *Barton* v. *L. N. & W. Ry. Co.*, 38 Ch. D. 144; and see *Deseronto Iron Co.* v. *Rathbun Co.*, *supra*.

As to the giving of the directions having the effect of opening the pleadings: see *Confederation Life, etc.*, v. *Labatt*, *supra*, p. 626.

Discovery as between Parties to the Action and a third Party. —Former C. R. 465, provided for discovery as between the third party and the defendant bringing him in. There is now no express *Rule* providing for discovery as between the third party and the plaintiff, or the defendant; but where the third party appears and is permitted Discovery.

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to defend the action, he would, as regards the plaintiff and defendant bringing him in, then seem to be a defendant, and under this *Rule* it would be competent for the Court to give directions as to discovery: or where the third party is only given leave to take a limited part in resisting the claim of the plaintiff, an order, upon a special application in Chambers for that purpose, or upon the motion for directions under this *Rule*, may be made in favour of the third party for discovery by the plaintiff; *Eden* v. *Weardale* (No. 3), 35 Ch. D. 287. In like manner the plaintiff may obtain discovery from the third party: see *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weardale* (No. 2), 34 Ch. D. 223; *Bradley* v. *Clarke*, 9 P. R. 410; *Piller* v. *Roberts*, 21 Ch. D. 201; *Hornby* v. *Cardwell*, 8 Q. B. D. 329.

Costs of third party proceedings.

Costs.—The costs of the proceedings will in general be reserved till the trial: *Benecke* v. *Frost*, 1 Q. B. D. 422, but *quære* whether the order giving directions should not make some reference to the costs of the proceedings: *Tomlinson* v. *Northern Ry.*, 11 P. R. 526; see also *Gibb* v. *Comden*, 16 P. R. 316.

Where the motion for directions is refused, it would seem that the costs of the third party or defendant against whom relief is claimed should be provided for. Jud. Act, s. 74, *supra*.

A third party who is given liberty to contest the plaintiff's claim against the defendant should not, without necessity, defend separately from the defendant, where his case and that of the defendant are identical, as against the plaintiff. If he does do so, he may be refused costs, even though the plaintiff fails: *Williams* v. *Buchanan*, 7 T. L. R. 226.

Where the third party on being served with notice, pays the plaintiff's claim, he is liable to the defendant for his costs of defence as between solicitor and client, and for his costs of claim between party and party: *King* v. *Federal Life Ins. Co.*, 17 P. R. 65.

Where a third party appears and obtains leave to defend, his costs are in the discretion of the Judge at the trial, and may be ordered to be paid by the plaintiff: *Witham* v. *Vane*, 28 W. R. 812; W. N. 1880, 108; 1881, 79; 44 L. T. 718; *Fulton* v. *Brown*, 18 P. R. 137; *Russell* v. *Eddy*, 5 O. L. R. 379; or by defendant: *Dawson* v. *Shepherd*, 49 L. J. Q. B. 529; W. N. 1880, 110; *Ewing* v. *Toronto*, 18 C. L. T. 237; 34 C. L. J. 417; or to be borne by himself: *Williams* v. *S. E. Ry. Co.*, 26 W. R. 352; *Re Salmon*, 42 Ch. D. 352; *Williams* v. *Buchanan*, 7 T. L. R. 226; *Tomlinson* v. *Northern Ry.*, 11 P. R. 419, 526; *Wallbridge* v. *Gaujot*, 13 P. R. 463; or he may be ordered to pay the plaintiff's costs directly: *Piller* v. *Roberts*, 21 Ch. D. 198; *Edison* v. *Holland*, 41 Ch. D. 28; or defendant's costs: *Bates* v. *Burchell*, W. N. 1884, 108; *Morgan* v. *Hardy*, 17 Q. B. D. 782; *Jablochkoff* v. *McMurdo*, W. N. 1884, 94; *Staness* v. *Anglo American Ins. Co.*, 3 O. W. N. 886; and costs payable by defendant to the plaintiff may be given to defendant against the third party: *Hornby* v. *Cardwell*, 8 Q. B. D. 329; *Morgan* v. *Hardy*, *supra*; see also *Beynan* v. *Godden*, 4 Ex. D. 246; *Blore* v. *Ashby*, 42 Ch. D. 682.

Where defendants were sued for insurance moneys which they had paid to deceased's executors, taking from them a bond of indemnity, and the executors, being brought in as third parties, paid the plaintiff's claim and costs, the defendants were held entitled against the third parties to the costs of their defence between solicitor and client.

and costs of their claim against the third parties between party and party: *King* v. *Federal Life Ins. Co.*, 17 P. R. 65. Rule 170.

Where no directions were made giving a third party leave to take part in the action, and he voluntarily appeared at the trial and asked to be made, and was made a defendant, it was held that the defendant who gave the notice could not be ordered to pay his costs: *Gibb* v. *Camden*, 16 P. R. 31.

170. Where a defendant claims to be entitled to contribution or indemnity from or relief over against any other defendant, a notice may be issued and the same procedure shall be adopted as if such last mentioned defendant were a third party, except that a copy of the statement of claim or writ need not be served with the third party notice, and service may be effected upon the solicitor in the action, if any, of the defendant sought to be made liable as a third party. C.R. 215. Claims to contribution, indemnity, etc., against a co-defendant.

The present *Rule* makes it clear that relief in the cases contemplated by *Rule* 165 may now be given between co-defendants, as well as between a defendant and a third party, and by the same general mode of procedure, this was formerly doubtful: see H. & L. Jud. Act, 2nd ed., p. 385.

No leave to issue the notice need be obtained: *Baxter* v. *France*, 1895, 1 Q. B. 455, 458; *Holden* v. *Grand Trunk Ry.*, 2 O. L. R. p. 423; see also *Towse* v. *Loveridge*, 25 Ch. D. 76. It is perhaps doubtful whether a defendant who has already appeared in the action should enter a second appearance to the notice, but that course was taken in *Baxter* v. *France*, *supra*, and is, it is submitted the proper course under this *Rule*. The notice (Form 24; see H. & L. Forms, No. 478), served on the co-defendant will direct him to appear if he disputes the claim made by the notice, and failure to appear will, it would seem, subject him to the consequences stated in *Rule* 166 and in the notice.

When an application is made under *Rule* 169, for directions as to the proceedings upon such claim, the defendant against whom relief is claimed may object to the claim being entertained: see *Schneider* v. *Batt*, 8 Q. B. D. 705; *Wye Valley Ry. Co.* v. *Howes*, 16 Ch. D. 489; *Baxter* v. *France*, 1895, 1 Q. B. 455; and it has also been held that this is the proper course to be pursued where a co-defendant served contends that the claim is not one to which *Rule* 170 is applicable, or objects to the question between himself and his co-defendant being tried. It is not proper (unlike in this respect the case of a notice served on a person not a party to the action) to move to set aside the notice: *Baxter* v. *France*, *supra*; but see *Towse* v. *Loveridge*, 25 Ch. D. 76. Motion for directions.

A claim by a defendant against a co-defendant for indemnity will not be tried without an order under *Rule* 169 providing for the determination of the claim raised: *Burke* v. *Pittman*, 12 P. R. 662; *Flower* v. *Todd*, W. N. 1884, 47; *Tritton* v. *Bonkart*, and other cases, *supra*, p. 624.

The procuring by a defendant of the pleadings of a co-defendant who claims contribution, etc., from him does not operate as a notice to the former: *Steel* v. *Dixon*, 28 W. R. 796; 42 L. T. 765.

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In *Walker* v. *Dickson*, 14 P. R. 343, where the defendant claimed indemnity against a co-defendant, the question was directed to be tried at the same time and place as the plaintiff's claim, notwithstanding that the time for pleading to the claim for relief over had not expired, and that it was, at the date of the order, too late to give the usual ten days' notice of trial to the third party.

As to whether a defendant who is entitled to indemnity from a co-defendant is entitled to judgment before he has actually paid anything in discharge of his liability to the plaintiff: see *Rules* 167, 168, and notes.

Security for costs.

Security for Costs.—As to security for costs by a defendant from a co-defendant making a claim against him: see *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

Plaintiff not to be delayed by questions between defendants.

171. A plaintiff is not to be prejudiced or unnecessarily delayed by reason of questions between the defendant and the third party in which he is not concerned; and such directions shall be given and terms imposed as may be necessary to prevent delay of the plaintiff, where it can be done without injustice to the defendants and third party. C.R. 216.

The object of the present *Rule* is to prevent the plaintiff from being delayed by questions between the defendant and a third party, whether such third party is a stranger or a co-defendant.

There is no express *Rule* like this under the English Practice, but the decisions of the Courts are to the same effect: see *Bower* v. *Hartley*, 1 Q. B. D. 652; *Wye Valley Ry. Co.* v. *Hawes*, 16 Ch. D. 489; *Barton* v. *London & N. W. Ry. Co.*, 38 Ch. D. 144; *Byrne* v. *Brown*, 22 Q. B. D. 657; 60 L. T. 651; *Hutchison* v. *Colorado U. M. Co.*, W. N. 1884, 40.

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CHAPTER IX.

TIME AND VACATIONS.

Standard time, meaning of.

By *The Definition of Time Act* (R. S. O. c. 132), s. 2, "standard time is adopted as regards any time mentioned in any Act of the Ontario Legislature, Rule of Court, by-law, deed, or other instrument, unless otherwise stated. As regards that part of the Province which lies east of the meridian, of 90° west longitude, standard time is reckoned as 5 hours behind Greenwich time; and as regards that part of the Province lying west of the said meridian, standard time is reckoned as 6 hours behind Greenwich time.

"Month" means calendar month.

This Act also provides that the term "month" in any Act or Rule of Court means a calendar month unless otherwise specifically stated: *Ib.*, s. 3.

In the absence of statutory, or other provision, to the contrary, "month" in contracts and legal documents means lunar month: *Hutton* v. *Brown*, 29 W. R. 928; and there is, in England, no general exception making it mean a calendar month in commercial documents: *Bruner* v. *Moore*, 1904, 1 Ch. 305; but in Ontario: see *supra*; and see *Bills of Exchange Act* (R. S. C. c. 119), s. 46 (2).

Period of less than 6 days.

172. Where a period of less than 6 days is prescribed holidays shall not be reckoned. C.R. 343.

See Eng. (1883), R. 962. Holidays are defined by the *Interpretation Act* (R. S. O. c. 1), as follows:—

"Holiday," meaning of.

"29 (*l*). The word "holiday" shall include Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday, or the day fixed by proclamation of the Governor-General, for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labour Day, and any day appointed by proclamation of the Governor-General or the Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving, and whenever any other holiday falls on a Sunday, the next day following shall be in lieu thereof a holiday." See also R. S. C. c. 1, s. 34 (1).

This *Rule* does not apply to Division Courts: *Re McKay* v. *Talbot*, 3 O. L. R. 256.

Statutory holidays other than Sundays, were held not to be *dies non juridici*: *Foster* v. *Toronto Railway Co.*, 31 Ont. 1; *sed vide* Holmested's *Sunday Laws of Canada*, pp. 48-65; and see *Rule* 174, which appears to recognize that all holidays are non-juridical days.

This *Rule* applies to the computation of the 48 hours' notice of the examination of a party required to be given under *Rule* 346: *Lovelace* v. *Harrington*, 10 O. R. 157.

Where the limited period is *not less* than six days, holidays are counted: *Ex parte Vine*, 4 Ch. D. 794; *Cornish* v. *Monning*, 18 C. L. J. 143. except when the last day is a holiday, when, by *Rule* 174, it is not to be reckoned: *Taylor* v. *Jones*, 45 L. J. C. P. 110.

Rules 173, 174.

As to how far the Court regards a fraction of a day: see *Broderick* v. *Brootch*, 12 P. R. 561; *Clarke* v. *Bradlaugh*, 8 Q. B. D 63; 46 L. T. 49.

Where a statute limits a time for making an application, serving notice of motion within the prescribed time is sufficient, and it is not absolutely necessary that the application should be brought on to be heard within that time: *Re Sweetman & Gosfield*, 13 P. R. 293; *Re Shaw & St. Thomas*, 18 P. R. 454; *Re Gallop* v. *Central Queensland Co.*, 25 Q. B. D. 230; 62 L. T. 834.

Days, how computed.

173.—(1) Where a number of days not expressed to be clear days is prescribed the same shall be reckoned exclusively of the first day and inclusively of the last day

Clear days.

(2) Where the days are expressed to be clear days, or where the term "at least" is added, both days shall be excluded. C.R. 344.

Clause (1) see Eng. (1883), R. 972. Clause (2) no corresponding Eng. Rule.

Even in a statute, where the time within which an act is to be done is to run from a certain date, or event, the day of the date, or event, must be excluded in the computation of the time: *Goldsmiths Co.* v. *Metropolitan Ry. Co.*, 1904, 1 K. B. 1.

When the expression "clear days" is not used, days are "clear" when expressed to be "at least" a certain number of days: see clause (2); and *Reg.* v. *Shropshire Justices*, 3 A. & E. 173; Fisher's Digest, p. 8323; *Webster* v. *Leys*, 3 C. L. T. 504; *Kemohr* v. *Marx*, 18 C. L. J. 444, 19 C. L. J. 10, 3 C. L. T. 31.

This *Rule* applies to the construction of orders made in actions limiting the time for doing any act: *Bank of B. N. A.* v. *Hughes*, 7 C. L. J. 136.

Where last day is holiday.

174. Where the time for doing any act or taking any proceeding expires on a holiday the act or proceeding may be done or taken on the next juridical day. C.R. 345.

See Eng. (1883) R. 963.

This *Rule* does not apply to extend the time for registration of a chattel mortgage under the statute: *Morgan* v. *Pinkerton*, 7 Ont. App. 490; nor to extend the time fixed by a Statute of Limitations, and therefore, in an action on a promissory note, where the limit of time under such a statute expired on Sunday, and the writ was not issued till Monday, the bar of the statute was held to apply: *Morris* v. *Richards*, 45 L. T. 210; see also *Flower* v. *Bright*, 2 J. & H. 598; but since *The Interpretation Act* (R. S. O. c. 1) s. 28 (*h*): "If the time limited by an Act for any proceeding, or for the doing of anything, expires or falls upon a holiday, the time so limited shall extend to, and such thing may be done on the next following which is not a holiday."

When the time for appealing from Chambers expires on a holiday, the motion may be made the next day: *Tyler* v. *Jones*, 45 L. J. C. P. 110.

As to a notice of motion given for a day: see *Rule* 215.

Rules 175, 176.

175. Any time prescribed may be enlarged or abridged by consent in writing, without order. Con. Rule 478. C.R. 347.

Enlargement of time by consent.

The reference to Con. Rule 478 appears to be an error, and refers to the Rule on which C. R. 347 was founded.

"Prescribed" means prescribed by Rules of Court: see *McLean* v. *Pinkerton*, 7 Ont. App. 490, and see *infra*.

176. The Court may from time to time enlarge or abridge the time prescribed by the Rules, or by an order, for doing any act or taking any proceeding, and this power may be exercised although the application is not made until after the expiration of the time prescribed. C.R. 353.

Enlargement or abridgment of time.

See Eng. (1883) R. 967.

An application under this *Rule* should be on notice to the parties affected if they have appeared.

A motion to extend the time for making a motion may be made at the same time as a motion which is objected to as out of time: *Bradshow* v. *Warlow*, 32 Ch. D. 403.

Scope of Rule.—The *Rule* only applies where a limited time is fixed for something to be done, and not where the *Rules* direct some act to be done before another: *Re Pilcher*, *Pilcher* v. *Hinds*, 11 Ch. D. 905; 40 L. T. 832.

Scope of Rule.

The Court cannot, under this *Rule*, extend the time for renewing a writ where in the absence of such renewal the claim would be barred by the Statute of Limitations: *Doyle* v. *Kaufman*, 3 Q. B. D. 340; and see *Magee* v. *Hastings*, 28 L. R. Ir. 288; but the time for issuing a concurrent writ may be extended, the original having been kept renewed so that it could be acted upon within the jurisdiction: *Smallpage* v. *Yonge*, 55 L. T. 44, distinguishing *Doyle* v. *Kaufman*. See also note to *Rule* 9 *supra*, p. 323; *St. Louis* v. *O'Callaghan*, 13 P. R. 322.

An extension of the time limited by C. R. 1044 for delivery of a statement of claim was extended, though the liberty of the subject was involved: *Winch* v. *Travis*, 13 P. R. 102.

It was said in *Parent* v. *Cook*, 2 O. L. R. 709; 3 O. L. R. 350, that the time for delivering a third party notice could not be extended under this *Rule*, but it was so extended: *Swale* v. *Can. Pac. Ry.*, 25 O. L. R. 492; *Dominion Bank* v. *Armstrong*, 5 O. W. N. 105.

There is no power to extend (*McLean* v. *Pinkerton*, 7 Ont. App. 495; *Re Oliver and Scott*, 43 Ch. D. 310; 61 L. T. 552; *McCarron* v. *Metropolitan Life Ins. Co.*, 35 C. L. J. 421), or to shorten (*Re Sweetman & Gosfield*, 13 P. R. 293), the time fixed by a statute, and not by the *Rules*. The time for moving against an award was extended in *Re Oliver & Scott*, *supra*, because the time for moving was fixed by Rules passed by lawful authority altering the statute. 9 & 10 W. 3, c. 15, s. 2. See also *Flower* v. *Bright*, 2 J. & H. 590. The time for payment of costs under an order which dismissed the action in default of payment was twice extended, but this was done by ex-

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tending the time for appealing from the original order of dismissal: see *Stroti* v. *Toronto Construction Co.*, 22 O. L. R. 211.

Tha time allowed by *Rule* 313 for tnking maney out of Court, which has been paid in with n defence, cannot he extended under this *Rule* after tha plaintiff has proceeded ta trial: *Magonn* v. *Ferguson*, 18 P. R. 201.

This *Rulc* does not empower the Caurt to allow an application as to costs, which by Jud. Act, s. 74, if made to n Judge, must he made at the trial, to be made nt any later pariod: *Boker* v. *Oakes*, 2 Q. B. D. 171; but see *Fritz* v. *Hobson*, 14 Ch. D. 542.

Extending time for appealing.

Extending Time for Appealing.—In appenls to tha Appellate Division, the applicatiou for an extension of time to appeal should be made ta a Judgo of the liigh Court Division as, until the nppeal is lodged, the Appellate Division would not appear to hava any jurisdiction. It wns at one time held that in giving lenve, or extending time, thera was a difference between applications before, snd after judgment. In the former case, lenve was rendily granted, unless the opposite party was injured in some respect, for which payment of costs could not compensata him; but in tha latter case after the action had heen once tried, and judgment given, the party in whose favour the judgment is, was held to have n vested right in it of which he is not to be deprived, except under special circumstances: see *Collins* v. *Vestry of Paddington*, 5 Q. B. D. 368; *Miller* v. *Brown*, 9 P. R. 542; *Shupe* v. *Shupe*, 4 C. L. T. 129; *Croig* v. *Phillips*, 7 Ch. D. 249; *McAndrew* v. *Borker*, 7 Ch. D. 701; sea *Re Ambrose Lake Tin ond Copper Co., Taylor's Cose*, 8 Ch. D. 643; *Re Sceptre Licensed Victuallers Fire Insuronce Co., Ex parte How*, W. N. 1879, 6; hut these cases have heen gradusliy departed from, and it is now held that no such distinction exists, but that each case depands upon its own circumstances, and discretion is to be exercised, accardingly, in either case, so as to do what justice may require in the particular case: *Cusack* v. *L. & N. W. Railway*, 1891, 1 Q. B. 347; *Abell* v. *Morrison*, 14 P. R. 210; see also *Re Gobourie, Casey* v. *Gabourie*, 12 P. R. 252; *Re Clayton Mills Manufg. Co.*, 37 Ch. D. 28; *Esdoile* v. *Poyne*, 40 Ch. D. 520; *Ross* v. *Robertson*, 7 O. L. R. 464; *Roy* v. *Port Arthur*, 7 O. L. R. 737, and notes, *supra*, p 115.

No precise rules can be laid down as to what constitute circumstances sufficient to cail for tha exercise of the discretion of the Court: see *Corter* v. *Stubbs*, 6 Q. B. D. 116; *Re Manchester Economic B. S.*, 24 Ch. D. 488; *Willy* v. *Standord, etc.*, 10 P. R. 34. Even in the case of the time for taking a step heing allowed to expire by mistake, there is no hard and fast rule that an extension will not be givan unless thare has heen conduct on the part of the opposite party conducing to tha mistaka: *Illingwòrth* v. *Melbourne*, 18 T. L. R. 775.

As a general rule after delay and expiry of tha regular time, thers must be shewn a *bonâ fide* intention to appeal held whila the right to appeal existed, and a suspension of further proceedings hy reason of some special circumatances: *Smith* v. *Hunt*, 5 O. L. R. 97. Tha spplicant must also shew *primâ facie* error in the judgment: *Union Bonk* v. *Rideau Lumber Co.*, 19 P. R. 106; *Ross* v. *Robertson*, *Roy* v. *Port Arthur*, *supro*.

Whera thera has heen delay on hoth sides, hut an appeal is ready, though too late to he set down in due course, consent should ordinarily be given to its being entered: see *McLoughlin* v. *Moyhew*, 5 O. L. R. 114.

Thus, though, generally speaking, an extension will be granted where justice requires it: *Re Gabourie, Casey* v. *Gabourie*, 12 P. R. 252; and cases *supra;* two particular lines of cases have been noticed in which leave may be given, 1st, where there is unavoidable accident, whereby a party is unable to bring on his appeal; and 2nd, where some equity is raised on behalf of the appellant from the conduct of the other side: *Langtry* v. *Dumoulin*, 4 C. L. T. 351; *Re Mansel, Rhodes* v. *Jenkins*, 7 Ch. D. 711; *Re Blyth & Young*, 13 Ch. D. 416. Mistake on the appellant's part with which the respondent has nothing to do may be a ground, and it is not essential to shew misconduct by the respondent (though there are expressions in the cases to the contrary): see *Re Mansel, Rhodes* v. *Jenkins, supra; McAndrew* v. *Barker*, 7 Ch. D. 701; *Curtis* v. *Sheffield*, 21 Ch. D. 5; *Rumohr* v. *Marx*, 19 C. L. J. 10; *Berdan* v. *Birmingham*, 7 Ch. D. 24; but there must be an equity shewn in the applicant's favour either from conduct of the other party, or from something else recognized as a ground of equity: *Re New Callao, etc.*, 22 Ch. D. 484; *Re Manchester Economic B. S.*, 24 Ch. D. 488; *Peckett* v. *Short*, 32 W. R. 123; *Wilby* v. *Standard, etc.*, 10 P. R. 34; *Lewis* v. *Talbot Road Co.*, 10 P. R. 15; *Sieveright* v. *Leys*, 9 P. R. 200; *Langdon* v. *Robertson*, 12 P. R. 139; *Re Gabourie*, 12 P. R. 252; *Esdaile* v. *Payne*, 40 Ch. D. 520; *McNair* v. *Andenshaw*, 1891, 2 Q. B. 502; and the onus of shewing such equity is on the applicant: *Shupe* v. *Shupe*, 4 C. L. T. 129. Rule 176.

In *Dayer* v. *Robertson*, 9 P. R. 78, time for appealing from an Official Referee in Chambers, was extended where the time had expired through a misapprehension of the practice: see *Crow* v. *Samuel*, 2 C. P. D. 21; and in *D'Ivry* v. *The World*, 17 P. R. 543, where, though a sittings of the Court had been lost, substantial steps towards bringing on the appeal had been taken, and security had been given for a large part of the debt and costs.

An extension was granted where the applicants had been, without their default, in ignorance of the order appealed from, and applied as soon as they heard of it: *Re Padstow, Total Loss, etc., Ass'n.*, W. N. 1882, 1; 51 L. J. Chy. 344; where a notice of appeal was withdrawn by mistake, and immediately renewed: *Re Ambrose, etc., Taylor's Case*, 8 Ch. D. 643; where the delay was attributable to the Court: *Mcrae* v. *White*, 9 P. R. 288; under peculiar special circumstances: *Re Lake Superior Native Copper Co.*, 11 P. R. 36; where some of the parties affected by the judgment lived at a great distance, and out of the jurisdiction: *Re Jacques*, 30 W. R. 394; but not where due diligence in communicating with them was not shewn: *Miller* v. *Brown*, 9 P. R. 542; and where the order appealed from, viz., for the winding up of a company, was founded upon a void resolution of which the appellant, who obtained the order, was not aware, and therefore had not disclosed to the Court: *Re Manchester Economic B. S., supra*; where the case was important, and there were conflicting decisions below: *Powell* v. *Peck*, 12 P. R. 34; where leave was necessary, and had not been applied for, but proceedings to appeal had been taken in proper time, and a fairly arguable point of law was presented: *Langdon* v. *Robertson*, 12 P. R. 139, approving of the rule expressed in *Sieveright* v. *Leys*, 9 P. R. 200; and see *Re Gabourie*, 12 P. R. 252, and *Foley* v. *Canada P. L. & S. Co.*, 18 C. L. J. 444. Extension granted.

Leave was granted where the proposed appeal was from an order refusing to set aside a judgment obtained by default in an action for recovery of land, where the omission to file defence was due to a

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mere slip of the solicitor, the application for relief being made promptly, and the action having been directed to be brought, on the staying, by a previous action, of proceedings under a power of sale in a mortgage, presumably because the plaintiff's right to exercise the power was not clear: *Bourne* v. *O'Donohoe*, 17 P. R. 274.

Where counsel had been instructed to draw the necessary notice of appeal, but owing to illness had been unable to do so, leave to appeal was granted: *Rumbold* v. *London C. C.*, 100 L. T. 259; so also where the time to appeal from a judgment at the trial had, by mistake of counsel, been suffered to elapse: *Baker* v. *Faber*, 124 L. T. Jour. 215.

Extension refused.

An extension was refused where the object of the appeal was to fix executors with interest on money which they had invested, and on which a loss had occurred: *Coates* v. *McGlasham*, 2 Chy. Ch. 218; where the delay was owing to the applicant's ignorance of the practice: *Wilby* v. *Standard, etc.*, 10 P. R. 34; or to the party having inexcusably proceeded under the old and repealed practice: *Brown* v. *Dorse*, 34 W. R. 776; *Re Crosley*, 34 Ch. D. 664; or to the inadvertence of his solicitor: *Winnett* v. *Renwick*, 6 P. R. 233; (but see *Walton* v. *Jarvis*, 18 U. C. Q. B. 620; *Weldon* v. *De Bathe*, 3 T. L. R. 445); or the misconstruction of a Rule of Court: *International Financial Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241; or the mistake of counsel as to the time allowed for appealing: *Re Coles and Ravenshear*, 1907, 1 K. B. 1, 95 L. T. 750; but see *Rumbold* v. *London C. C. supra*. A contrary subsequent decision by a Court of Appeal does not form a special circumstance: *Craig* v. *Phillips*, 7 Ch. D. 249; *Allan* v. *McTavish*, 3 C. L. T. 196; see *contra*, *Re Normantown*, 50 L. J. Chy. 223; nor does the fact of a statute having been passed altering the law, even though it be retrospective: *Eyre* v. *Wynn Mackenzie* (No. 2)). 1896, 1 Ch. 135; 73 L. T. 571.

See also *Baddin* v. *Sutherland*, 20 C. L. J. 146; 4 C. L. T. 205; and *Hamilton Prov. Loan Co.* v. *Dumble*, 20 C. L. J. 147; 4 C. L. T. 205.

In *Curtis* v. *Sheffield*, 21 Ch. D. 1, (see also 20 Ch. D. 398), leave to appeal from a decree 45 years old, which declared future rights, was asked by a person who applied promptly after the happening of the event which entitled him to a fund if the decree should be reversed; but leave was refused, the fact that future rights were declared being held to be no sufficient reason for giving leave in a case where all parties, who could in any event be interested, were before the Court when the declaration was made.

The order extending the time granting leave to appeal should provide for the contingency of the appeal being abandoned; and where the costs of the motion are not provided for in the appellate Court, the Court in which the order extending the time was made is the proper tribunal to correct the omission: *Milson* v. *Carter*, 1893, A. C. 638.

See also an article on the subject, 28 C. L. J. 99.

Unless otherwise expressly provided, there is no appeal from an order refusing leave to appeal: *Ex p. Stevenson*, 1892. 1 Q. B. 609; *Lane* v. *Esdaile*, 1891, A. C. 210; see, however, *Moore* v. *Peachey*, 8 T. L. R. 406; nor from an order granting leave: *Re Central Bank*, 17 P. R. 395; *Re Sarnia Oil Co.*, 15 P. R. 347; *Kay* v. *Briggs*, 22 Q. B. D. 343; or extending time for appealing: *Moore* v. *Peachey*, 8 T. L. R. 406.

Where, pending an appeal in a redemption action, it is desired to extend the time for redemption until after the disposition of the appeal, an application to the Court of first instance under this *Rule* is proper: *Manks* v. *Whitely*, 1913, 1 Ch. 581; 108 L. T. 450. Rule 176.

Other Cases.—In *Wilkins* v. *Bedford*, 35 L. T. 622, Bacon, V.C., refused to extend time for delivering a counter-claim. It had not been delivered, through the gross neglect of the defendant's solicitor, and the application was made six months after a decree had been obtained, but immediately after the defendant discovered his solicitor's neglect.

In *Hastings* v. *Hurley*, 16 Ch. D. 734, the time for indorsement of the date of service under *Rule* 17 was extended.

Where, within four days from a decision of a Master in Chambers, an appeal summons was taken out, and made returnable at a date after the expiration of the four days, but on the first day when a Judge would sit at Chambers, it was held that the time might be enlarged under this *Rule*: *Gibbons* v. *London Financial Association*, 4 C. P. D. 263.

By a Master's order an action was ordered to be dismissed, unless notice of trial should be given by a certain day. Through mistake of a solicitor's clerk, notice of trial was not so delivered. A Judge in his discretion refused to extend the time, and the Court of Appeal refused to interfere: *Gilder* v. *Morrison*, 30 W. R. 815.

Under this *Rule* the Court may order a plaintiff to deliver his statement of claim within a shorter time than that allowed by *Rule* 110; but such an order seems only proper where the plaintiff is asking an indulgence or for some other cause, is subject to be put on terms. The order should not direct a dismissal of the action in case of default; in case of default a substantive application for dismissal may be made under *Rule* 323, which expressly provides that an application for dismissal is not to be made till after the expiration of the time within which the plaintiff is bound to deliver his statement of claim: *Armstrong* v. *Toronto & Richmond Hill St. Ry. Co.*, 15 P. R. 449.

Where a third party notice was served too late, the Court in the circumstances refused to extend the time: *Parent* v. *Cook*, 2 O. L. R. 709; 3 O. L. R. 350; but it was extended: *Swale* v. *Can. Pac. Ry.*, 25 O. L. R. 492; *Dominion Bank* v. *Armstrong*, 4 O. W. N. 105.

Where an order was made under *Rule* 323, dismissing an action for want of prosecution, unless a statement of claim should be delivered within a week, and no statement was delivered in the week so limited, it was held that the action was at an end, and that there was no jurisdiction to make an order subsequently extending the time for delivery of the statement of claim: *Whistler* v. *Hancock*, 3 Q. B. D. 83; and see *Dunn* v. *McLean*, 6 P. R. 156; *Hollender* v. *Ffoulkes*, 16 P. R. 225; *The Crown Corundum & Mica Co.* v. *Logan*, 3 O. L. R. 434; *sed vide Carter* v. *Stubbs*, *infra*, p. 638.

An order was made on the 6th of May, dismissing an action for want of prosecution if the statement of claim was not delivered within fourteen days, and on the 19th of May, the plaintiff took out a summons returnable the next day, the last of the fourteen days, for further time to deliver the statement of claim. The summons was, on the 20th, adjourned, by the consent of the parties in writing indorsed thereon, till the 21st, and on the 21st a Master made an

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order giving seven days more for delivery of the statement of claim. The Court rescinded the order on the ground that there was no jurisdiction to make it, the action being at an end on the 20th of May: *King* v. *Davenport*, 4 Q. B. D. 402.

On the 25th of March a Master made an order dismissing an action for want of prosecution, unless an affidavit in answer to interrogatories was filed on the 31st. The affidavit was not filed on that day; but on the day following a summons was taken out for further time to answer the interrogatories; it was held that it was still competent to the Court or a Judge to enlarge the time for moving to set aside or vary the order of the 25th of March: *Burke* v. *Rooney*, 4 C. P. D. 226.

The Court of Appeal decided that a Judge had jurisdiction under C. R. 353 to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order had taken effect, and the action had therefore become dismissed; and that he had also jurisdiction, when he had so enlarged the time for appealing, to vary or amend the order dismissing the action, and in the exercise of such jurisdiction his discretion was not limited by fixed or arbitrary rules: *Carter* v. *Stubbs*, 6 Q. B. D. 116; see also *Welpy* v. *Buhl*, 3 Q. B. D. 80, 253, and note to *Rule* 323.

In the above cases, *Whistler* v. *Hancock*, *supra*, p. 637, is recognized as correctly decided. In that case there was no jurisdiction to make the order asked, because the motion was to take some step in the cause, and was not directed to modifying the order for dismissal. There had been no order or application within the week to set aside or vary the order of dismissal, or to enlarge the time for appealing against the order of dismissal, and, that order existing and having taken effect, the cause was dead.

The last five above-mentioned English cases were considered and approved in *Hollender* v. *Ffoulkes*, 16 P. R. 225; and in *Newcombe* v. *McLuhan*, 11 P. R. 461, were not considered to stand in the way of a motion to vacate a judgment (signed on default of delivery of a statement of claim on a day previously fixed by order for its delivery), and to extend the time for delivering statement of claim: see also *Bank of Minnesota* v. *Pogue*, 14 Ont. App. 347; *The Crown Corundum Co.* v. *Logan*, 3 O. L. R. 434, and *Muir* v. *Guinane*, 9 O. L. R. 324.

Where an order for taxation of costs between solicitor and client limited a time within which it was to be acted on, and provided that in default it was to be of no effect: it was nevertheless held that the time for acting under the order might be extended: *Re McIntosh*, 1903, 2 Ch. 394; 88 L. T. 820.

Time for vacations.

177. The Vacations shall be:

(*a*) The Long Vacation consisting of the months of July and August.

(*b*) The Christmas Vacation consisting of the period from the 24th day of December to the 6th day of the following January, both days inclusive. C.R. 354.

Office hours in vacation.

(1) Office hours during vacation shall be from 10 a.m. to 12 noon. This *Rule* to be known as 177 (1), and to take effect immediately.

This sub-section 1 has not been officially printed. The above is its form according to information received from the Registrar of the Appellate Division, and is according to the note in his book.

By sec. 83 of the Jud. Act the office hours of the Court are regulated "subject to the *Rules* as to office hours during vacations."

Unless under any *Rule* (such as *Rules* 178, 179), proceedings are prohibited during vacation they may lawfully be taken, *e.g.*, taxation: *Cousineau* v. *City of London F. Ins. Co.*, 13 P. R. 36; proceedings before an Official Referee: *Morples* v. *Roseburgh*, 17 P. R. 104; service of notice of trial: *Thompson* v. *Howson*, 16 P. R. 378.

Examinations and pleading in vacation.

178. An examination shall not be held nor shall pleadings be amended or delivered in the Long Vacation, except by consent or by direction of the Court, but when a writ is to be served out of the jurisdiction, and in Mechanic's Lien proceedings, the statement of claim may be delivered in vacation. C.R. 351 and 439.

See Eng. (1883) R. 964.

A pleading may be delivered without consent or order in the Christmas vacation: *Thompson* v. *Howson*, 16 P. R. 378; but the opposite party cannot, without order, be compelled to deliver a pleading in answer during Christmas vacation: see *Ib.* and *Rule* 179.

The part of C. R. 439 covered by this *Rule* is that which prohibited examinations for discovery, without leave during the Long Vacation. The *Rule* now presumably covers all examinations of parties or witnesses.

Vacation, time of, when not to be reckoned.

179. Unless otherwise directed by the Court, the time of the Long Vacation, or of the Christmas Vacation, shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, or in the times allowed for the following purposes:

(*a*) Appeals to a Judge in Chambers;

(*b*) Reports becoming absolute.

(*c*) Moving to discharge an order adding a party;

(*d*) Moving to add to, vary, or set aside a judgment by a party served therewith;

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(*e*) Doing an act or taking a proceeding in appealing to a Divisional Court of the Appellate Division. C.R. 352.

As to delivery of pleadings, and examinations for discovery, in vacation: see *Rule* 178.

A notice of trial given in vacation is regular: *Thompson* v. *Howson*, 16 P. R. 378.

Appeals to a Judge in Chambers.—Although the time of the Christmas or Long Vacation is not to be included in the time limited for appealing to a Judge in Chambers, yet when any judgment, order or decision so appealable is made or given in vacation, any party affected might appeal therefrom, if he pleased during vacation to the vacation Judge under former C. R. 767 (6), but that provision is not continued in these *Rules*.

Masters' reports, when confirmed.

Masters' Reports.—In order to confirm a Master's report, it must be filed as directed in *Rules* 428, 429, fourteen days: see *Rule* 502. No part of this period must fall in vacation. As to the procedure in appeals from a Master's report: see notes to *Rules* 502, 505.

Drainage Appeals.—The *Rules* apply as far as possible to appeals from reports of the Drainage Referee under R. S. O. c. 198, and Christmas Vacation is excluded in the computation of the time limited by s. 116, for appealing: *Re Raleigh and Harwich*, 18 P. R. 73.

Motions to discharge orders to continue proceedings. Time for.

Moving to Discharge Order Under Rule 303.—Where an order of revivor was formerly issued, the practice is now to issue an order to continue the proceedings. Ten days from service are allowed for moving against an order to continue proceedings: *Rule* 302, C. R. 352, was confined to motions of that kind, but this *Rule* as now worded, applies to all orders adding a party.

Motions to add to, or vary judgments.

Moving to add to, or Vary, or Set Aside a Judgment.—This *Rule* applies to motions to add to, or vary, judgments, by parties served therewith, by direction of the Master, whether on being added as parties to an action under *Rules* 404 or 470, or merely for the purpose of binding them by, and enabling them to attend the proceedings in the action under *Rules* 79-87. The time allowed for moving against a judgment by any party so served is ten days from the day of service: see *Rules* 87, 405, 471.

Appeals to App. Div.

Appeals to the Appellate Division.—The time of the vacations is not to be reckoned, under clause (*e*), in any time fixed by statute or *Rule*, for "doing an act or taking a proceeding" in appealing to the Appellate Division; formerly appeals from County Courts were excepted, but they are not now.

Vacation Judges.

180. One or more of the Judges shall be selected for the hearing in Toronto during Long and Christmas Vacations of all such applications as may require to be promptly heard. C.R. 114.

No business is heard by the vacation Judges, except such as requires "to be promptly heard" within the meaning of the above *Rule*.

As to what is vacation business: see *Re Wigan Junction Railway Co.*, L. R. 10 Chy. 541. No Judges except the vacation Judges, or those sitting for them, can dispose of business in vacation: *Per* Lush and Lopes, JJ., 24th September, 1877. *Sed quære.* Rules 181, 182.

181. All applications within the jurisdiction of the Master in Chambers which require to be immediately or promptly heard during Long Vacation shall be heard by one of the following officers, viz., the Master in Ordinary, the Master in Chambers, and the Registrars, who shall arrange among themselves before the commencement of each Long Vacation on what days and for what period each shall act; and in the absence of such arrangement the duty shall devolve upon them in rotation, beginning with the junior officer in order of appointment, and they shall sit at least one day in each week. C.R. 115. Chambers during long vacation.

182. The præcipe for any cheque to be issued during the Long Vacation shall be lodged in the Accountant's Office on or before the 20th day of July, unless otherwise directed by a Judge. C.R. 413 and 1257. Vacation.

CHAPTER X.

MISCELLANEOUS PROVISIONS.

(i) *Effect of Non-compliance and Errors.*

Amendment of defects or errors.

183. A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case. C.R. 309 and 312.

See Eng. (1883) R. 1037.

This *Rule* is in regard to amendment of defects and errors generally, and is supplemental to *Rule* 137, respecting amendment of pleadings, and *Rule* 521, respecting clerical errors and slips.

Under *The Administration of Justice Act*, 1873 (36 Vict. c. 8), it was held that if the Court comes to the conclusion that an amendment is "necessary for the advancement of justice, the prevention and redress of fraud, the determination of the rights and interests of the respective parties, and of the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case," the granting or refusing of the amendment ceases to be a matter of discretion: *Peterkin* v. *McFarlane*, 4 Ont. App. 45; *Gilleland* v. *Wadsworth*, 1 Ont. App. 82; *Muir* v. *Guinane*, 10 O. L. R. 370.

The Court is required by this *Rule* to allow any amendment which is "necessary for the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case" and "justice," includes justice to both parties.

In *Cropper* v. *Smith*, 26 Ch. D. at p. 710, Bowen, L.J., said:—"I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party . . . Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or of grace. . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to the decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. . . . The question seems to me to be this, can you by the imposition of any terms place the other side in as good a position for the purpose of having the question of right determined as they were in at the time when the mistake of judgment was committed? It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to over-reach." The other L.JJ. do not

seem to have agreed with these observations so far as they include a mistake of judgment, and they refused leave to amend on the ground that the party had deliberately chosen a course inconsistent with that afterwards sought to be taken by amendment; but see *Ecklin* v. *Little*, 34 Sol. Jour. 546; see also *Kurtz* v. *Spence*, 36 Ch. D. 774; *Collette* v. *Goode*, 7 Ch. D. at p. 847; *Laird* v. *Briggs*, 19 Ch. D. 22, 29. Rule 183.

In Ontario it has been held that an amendment may be allowed under this *Rule* at any stage of the proceedings before final judgment, wherever any prejudice it may occasion to the opposite party can be compensated by costs: *Williams* v. *Leonard*, 16 P. R. 544; 17 P. R. 73; *Siven* v. *Temiskaming Mining Co.*, 2 O. W. N. 129.

Under this *Rule*, a plaintiff who had by his pleading accepted money paid into Court by the defendant, was allowed to amend by withdrawing the acceptance and substituting a refusal to accept; and where he had claimed too little, he was allowed to increase his claim by amendment: *Chevalier* v. *Ross*, 3 O. L. R. 219.

Amendment of Writs of Summons:— Amendment of writ.

An order to amend has been held to be necessary, even though the writ has not been served: *per* Lush, J., *Anon.*, 60 L. T. Jour. 32; 1 Charl. Ch. Ca. 34; and this decision has been followed by Mr. Dalton in Chambers: see *Globe*, 6th Oct., 1881, and (H. & L. Forms, No. 467); see *contra* under the former practice. *Worthington* v. *Boulton*, 6 P. R. 68.

When a statement of claim has been delivered, containing an extension of the claim made by the writ, an amendment of the indorsement on the writ seems to be unnecessary: *Large* v. *Large*, W. N. 1877, 98; *Johnson* v. *Polmer*, 4 C. P. D. 262; and now *Rule* 109 (2) requires such a statement of claim to be personnlly served where the defendant has not appeared. See under the previous practice: *Conybeare* v. *Lewis*, W. N. 1881, 31; 44 L. T. 242; 29 W. R. 391; *Re Jones, Eyre* v. *Cox*, 24 W. R. 317.

An action may, by amendment of the writ and statement of claim, be turned into an information without prejudice to a pending motion in the action, the necessary sanction of the Attorney-General being obtained: *Coldwell* v. *Pogham Harbour Reclamation Company*, 2 Ch. D. 221.

An amendment of the indorsement on the writ, by increasing the amount claimed, was allowed after verdict: *The Dictator*, 1892, P. 64; 66 L. T. 863; and see *Wyatt v. Roshcrville*, 2 T. L. R. 282; *Chottel* v. *Daily Mail*, 18 T. L. R. 165; and other cases in notes to *Rule* 321, p. 369.

A writ of summons served out of Ontario may like any other writ be amended, but, it would seem, not so as to introduce any claim in respect of which service out of Ontario would not be allowed under *Rule* 25: see *Holland* v. *Leslie*, 1894, 2 Q. B. 346.

Where a writ has been amended, the amended writ must be served, if the writ had been served and the time for appearance had elapsed, and the defendant has not appeared, it would seem that the service may be in the manner mentioned in *Rule* 200, at least in a case where no new claim, but only an amplification of the original one, is made: *Re Hartley*, 1891, 2 Ch. 121; 64 L. T. 786; *Jamaica Ry. Co.* v. *Colonial Bank*, 1905, 1 Ch. 677; 92 L. T. 548; there is no hard and

Rule 183. fast rule that an amended writ must be served personally on a defendant who has not appeared: *Ib.*; or the writ may he served in the same way as the original was served: *The Cassiopeia*, 4 P. D. 188 (where a new claim was introduced); *Guess* v. *Perry*, 12 P. R. 460 (where a claim for damages was struck out by amendment); see also *Bryans* v. *Hughes*, 14 L. R. Ir. 62. Under *Rule* 109 (2) personal service is necessary if the amendment has been a substantial one; and see *Jamaica Ry.* v. *Col. Bank*, *supro*, p. 643. If the defendant has appeared it would seem to be sufficient to serve his solicitor with the amended writ; but see *Rules* 16 and 199.

Where a statement of claim has been delivered and it is amended, it will not in general be necessary to amend and re-serve the writ. It will be sufficient to serve the amended pleading: see *Rules* 127 and 132, and notes.

Where the writ of summons was amended by correcting a clerical error in the indorsement after a statement of claim had been filed, it was held that the statement of claim should have been refiled, though it required no amendment, and a motion for judgment was refused: *Southall* v. *Dunsdon*, 96 L. T. 109.

Irregularities amended.

Irregularities in a writ of summons may be amended either on motion by the plaintiff, or leave to amend may be granted where the defendant moves to set aside the writ. The following irregularities have been allowed to be amended:—A writ signed by a Process Clerk issued after the appointment of his successor: *Stevenson* v. *Williams*, 7 P. R. 358; a writ issued without the signature of the proper officer: *Labadie* v. *Darling*, 7 P. R. 355; a writ tested in the name of a retired Chief Justice after the appointment of his successor had been gazetted, but before he had taken the oath: *Nelson* v. *Roy*, 3 P. R. 226; and a writ tested in the name of a Lord Chancellor after his resignation and the appointment of his successor: *Pleasants* v. *East Derehom, etc.*, 47 L. T. 439; a writ issued in the name of a deceased sovereign: *Bank of Homilton* v. *Boldwin*, 28 O. L. R. 175; a mistake in the date of the *teste* as "eighty" for "eighty-two": *Wesson* v. *Stalker*, 48 L. T. 444. But the absence from the Province of the Judge in whose name writs are tested does not render it improper to *teste* a writ in his name: *Brett* v. *Smith*, 1 P. R. 309.

An amendment was not allowed where it would defeat the Ststute of Limitations: *Hudson* v. *Fernyhough*, 61 L. T. 722; S. C. 88 L. T. Jour. 253, in appeal; but see *Challinor* v. *Roder*, *infra*, p. 645.

The plaintiff will have to pay the costs of an amendment of the writ.

Amendments of Pleadings.—See notes to *Rules* 127-138.

Amendments as to parties.

Amendments Respecting the Parties are treated of in *Rules* 130, 134, 183.

Amendments which require the addition of parties as well as the restatement of allegations in pleadings are made by the combined action of *Rules* 134, 137, 183; *Ashley* v. *Taylor*, 10 Ch. D. 772; *Scear* v. *Lawson*, 16 Ch. D. 121.

Misnomer.

Where a person was intended to be sued as an executor, but by mistake was misnamed in the writ, an amendment was allowed substituting the true name of the defendant intended to be sued, notwithstanding that in the meantime the Statute of Limitations would.

but for such amendment, have been a defence to the action against such party: *Challinor* v. *Roder*, 1 T. L. R. 527. Rule 184.

Amendment after Judgment.—The writ of summons and subsequent proceedings may, in a proper case, be amended after judgment to correct some defect or error: *Clarke* v. *Cooper*, 15 P. R. 54; see *Wilgress* v. *Crawford*, *Ib.* 658; but the judgment in such case must be vacated and proceedings taken afresh from the point at which the defect occurred; 15 P. R. 54; and see formerly *Barrett* v. *Gardner*, 1 Chy. Ch. 344; *Laurason* v. *Buckley*, 2 Chy. Ch. 334; *Bank of Montreal* v. *Power*, 2 Chy. Ch. 47; and any such amendment will probably be only of *defects* and *errors*, not of pleadings or as to parties necessitating relitigation: see *Durham* v. *Robertson*, 1898, 1 Q. B. 774. Thus where the judgment was in favour of the defendant, an amendment reconstituting the suit by adding the Attorney-General, and turning the action into an information and action, was refused: *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297; and see *Durham* v. *Robertson*, *supra*.

An amendment made affecting a person not a party, was, at his instance, rescinded: *Glass* v. *Comeron*, 9 Ont. 712.

Amendment of Slips, etc.—As to the correction of slips, omissions or clerical errors, generally: see *Rule* 521; and as to clerical errors in reports and certificates of Masters: see notes to *Rule* 502.

A notice of motion which did not show any interest in the relator as required by *The Municipal Act*, 1913 (R. S. O. c. 192), s. 163, was held amendable: *Reg. ex. rel.. Percy* v. *Worth*, 23 Ont. 688.

A notice of motion in a *quo warranto* proceeding in which there was a discrepancy between the day of the week and the day of the month mentioned as that on which it was returnable, was amended in accordance with a notice subsequently given stating the day on which the motion would be brought on: *Rex ex rel. Roberts* v. *Ponsford*, 3 O. L. R. 410.

Where judgment had been pronounced for sale of property as described in a claim, but afterwards it was discovered to have been mis-described, the claim was by consent of all parties amended, and the judgment post-dated, so as to appear to have been made after the amendment: *Winkley* v. *Winkley*, 44 L. T. 572; 29 W. R. 628. In general, however, an order ought not to bear a fictitious date: *Ashley* v. *Taylor*, 10 Ch. D. 773.

184. Non-compliance with the Rules shall not render the writ or any act or proceeding void, but the same may be set aside, either wholly or in part, as irregular, or may be amended, or otherwise dealt with, as may seem just.

This *Rule* is based on C. R. 310. See notes to preceding *Rule*.

Proceedings not Curable.—Service of a writ of summons instead of a notice, on a foreigner abroad (see *Rule* 29) is a nullity: *Hewitson* v. *Fobre*, 21 Q. B. D. 6: and service of a writ without shewing the original when demanded: *Phillipson* v. *Emanuel*, 56 L. T. 858, and service on a wrong person, whether void or only irregularities, have been held to be not remediable. The service will be set aside: *Ib.*; *Nelson* v. *Pastorino*, 49 L. T. 564. Proceedings not curable.

Rule 184.

As to the difference between an irregularity and a nullity: see further *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15.

"If unwarranted by any enactment or *Rule*, it (the joinder in one action of several plaintiffs having different causes of action) is in my opinion more than an irregularity": per Lord Herschell, in *Smurthwaite* v. *Hannay*, 1894, A. C. 501.

A writ purporting to be issued out of the District Court of Thunder Bay and Rainy River, after the district of Rainy River had been created a separate provisional judicial district, was held to be a nullity and not curable by amendment: *Hewgill* v. *Chadwick*, 18 P. R. 359.

A judgment purporting to be signed under *Rule* 37, but not properly so, the writ not having been specially indorsed, is a nullity: *Hoffman* v. *Crerar*, 18 P. R. 473; 19 P. R. 15; *Appleby* v. *Turner*, 19 P. R. 145, 175.

A judgment irregularly signed is not a matter which can be remedied under this *Rule*: *Anlaby* v. *Pretorius*, 20 Q. B. D. 764; the defendant has a right to have it set aside: *Ib.*; *Voight* v. *Orth*, 5 O. L. R. 443; *Muir* v. *Jenks*, 1913, 2 K. B. 412; there, however, the plaintiff refused to amend.

Defects in proceedings taken under an Act of Parliament cannot be overlooked: see *Lawson* v. *Can. Farmers, etc.*, 9 P. R. 309; *Re Ostrom and Sidney*, 15 Ont. App. 372; *Smith* v. *Baker*, 2 H. & M. 500.

See also *Ferrand* v. *Mayor of Bradford*, 8 D. M. & G. 93.

Proceedings curable.

Irregularities Curable.—Where short notice of motion had been irregularly given, but the opposite party had not been injured by the irregularity, the Court exercised its discretion under this *Rule*, disregarded the irregularity, and heard the motion: *Dawson* v. *Beeson*, 22 Ch. D. 504; see also *Williams* v. *De Boinville*, 17 Q. B. D. 180; *Re Coulton*, 34 Ch. D. 22. In *Re McRae*, 25 Ch. D. 19, it was held that objection to a short notice of an appeal was waived by appearing upon it.

An irregularity may be condoned, in the discretion of the Court, even on a motion for attachment: *Petty* v. *Daniel*, 34 Ch. D. 172; *Litchfield* v. *Jones*, 25 Ch. D. 64; see *Re Pilcher*, *Pilcher* v. *Hinds*, 11 Ch. D. 905; *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271. It was said in *Taylor* v. *Roe*, 68 L. T. 213, that the Court will not condone a direct non-compliance with the *Rules* upon an application affecting the liberty of the subject; but see *Rendell* v. *Grundy*, 1895, 1 Q. B. 16, 21.

The following irregularities have not been allowed to prevail to defeat a proceeding: The non-service of affidavits with notice of motion to set aside an award: *Re Wyggeston Hospital* v. *Stevenson*, 33 W. R. 551; or with a notice of motion for attachment (see Eng. (1883) R. 699): *Rendell* v. *Grundy*, *supra*; or with notice of motion under *The Overholding Tenants Act*: *Re Dewar & Dumas*, 8 O. L. R. 141; service of a writ issued in the name of a deceased Sovereign: *Bank of Hamilton* v. *Baldwin*, 28 O. L. R. 175; the service of a writ out of the jurisdiction without the indorsement given in the N. B. (Form 2), and issued upon an order granted without an affidavit being filed under *Rule* 26; *Dickson* v. *Law*, 1895, 2 Ch. 62; service of a writ

omitting the address of plaintiff's solicitor: *Hoerler* v. *Hanover Coout-chouc, etc.*, 10 T. L. R. 22, 103; date of service not indorsed under *Rule* 17: *Steers* v. *Rogers*, 7 T. L. R. 183: *Foat* v. *Bossett*, W. N. 1888, 255; service of pstition instead of summons: *Re Bethlehem and Bridewell Hospitols*, 30 Ch. D. 541; *Re Stofford's Charity*, 57 L. T. 846. Rule 185.

See *Taylor* v. *Delancy*, 3 O. L. R. 380, *supra*, p. 136.

Waiver.—Irregularities may bs waived by appearance: *Re McRae*, 25 Ch. D. 19; see also notss to *Rule* 46; but not necessarily where ths liberty of tbs subject is affectsd: *Monder* v. *Falcke*, 1891, 3 Cb. 488; *Taylor* v. *Roe*, 68 L. T. 213; *Rendell* v. *Grundy*, 1895, 1 Q. B. 16, 21; nor whers tbe appearance is merely to take the objection to the regularity of tbe proceedings: see *Mander* v. *Folcke*, 1391, 3 Ch. 488; *Firth* v. *De las Rivas*, 1893, 1 Q. B. 768; 69 L. T. 383.

See also notes to *Rules* 185 and 219.

A nullity cannot be waived by any act of tbs party against wbom it bas been taken, nor by lapse of time: *Hoffman* v. *Creror*, 18 P. R. 473, 19 P. R. 15; *Appleby* v. *Turner*, 19 P. R. 145, 175.

135. An application to set aside any proceeding for irregularity shall be made within a reasonable time, and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity. C.R. 311. Irregularity, motion to set aside proceedings for to be made promptly.

Ths same in effect as Eng. (1883) R. 1038.

If an objection can be waived, it amounts to an irregularity, if not, it is a nullity: *Bonk of Upper Conoda* v. *Van Voorish*, 4 U. C. L. J. 232. The tendency of the cases is to consider defects as irregularities, ratber tban nullities: *Herr* v. *Douglos*, 4 P. R. 102; *Bank of Homilton* v. *Boldwin*, 28 O. L. R. 175. A strangsr cannot set asids proceedings for irregularity: *Perrin* v. *Bowes*, 5 U. C. L. J. 138; *Balfour* v. *Ellison*, 8 U. C. L. J. 330; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Nicholls* v. *Nicholls*, 3 P. R. 201; see, bowsver, *Bonisteil* v. *McMaster*, 6 O. S. 32; unless they are, in effect, fraudulent: *McDonald* v. *Boice*, 12 Gr. 48; and ses *Martin* v. *Boulanger*, 8 App. Cas. 269. Ses also notes to *Rule* 184.

Ths notics of motion must specify ths irregularity: *Rule* 219; *George* v. *Green*, 14 O. L. R. 578; 42 S. C. R. 219.

A writ joining causes of action which under former C. R. 341 (now abrogated), could not be joined without leave, was beld to be sn irregularity, and entering an appearance to sucb a writ was a "fresh step," witbin tbis *Rule;* and a defendant wbo appeared, instead of spplying to striks out tbe irregularity, was beld not to be entitled to insist upon it: *Mulckern* v. *Doercks*, 51 L. T. 429; 53 L. J. Q. B. 526; *Re Derbon*, 36 W. R. 667; see, however, *Hunt* v. *Worsfold*, 1896, 2 Ch. 224; 74 L. T. 456, wbere North, J., refused to follow *Mulckern* v. *Doercks*, *supro*, considering it to bave been overruled by *Smurthwaite* v. *Honnoy*, 1894, A. C. 494; 71 L. T. 457.

See also *Fry* v. *Moore*, 23 Q. B. D. 375, and *Boyle* v. *Sacker*, 39 Ch. D. 249, in notes to *Rule* 24, p. 349; and *Tozier* v. *Hawkins*, 15 Q. B. D. 650.

An order setting aside proceedings must be served promptly, or it will he deemed to bave heen abandoned: *Molsons Bonk* v. *Dillobaugh*, 13 P. R. 313.

Rules 186 186.

But where a Divisional Court sets aside the judgment at the trial, and orders a new trial, delay in issuing the order cannot be set up as a waiver by either party: *Kelly* v. *Wade*, 14 P. R. 66. There is a distinction in this respect between interlocutory orders, and judgments or orders going to the merits of the action: *Ib.*: see also *Re Leslie*, 23 Ont. 143.

Where, on the return of a motion, an enlargement is granted for the purpose of remedying an objection to the regularity of the proceedings, and the motion is afterwards heard and disposed of on the merits, the objection to the irregularity of the proceedings is not open on appeal: *Rendell* v. *Grundy*, 1895, 1 Q. B. 16.

Amendment at trial.

186. Where an amendment is directed or allowed at the trial, it shall not be necessary to issue an order therefor. The amendment, unless otherwise directed, shall be at once made on the record. C.R. 314 and 1445.

The reference to C. R. 1445 is probably intended to refer to R. 1445 of 1 Jan., 1896, on which C. R. 314 was partly based.

Where a plaintiff is allowed to amend at the trial by setting up a new case, the defendant is *ex debito justitiæ*, also entitled to put in a defence thereto: *Elmsley* v. *Harrison*, 17 P. R. 525.

Where an amendment is directed under this *Rule* the Clerk attending the sittings of the Court should make the amendment on the record at the trial: *Rule* 187 does not apply to such an amendment.

The party on whose application the amendment is allowed should see that it is actually made. Where a judgment was pronounced on the assumption that an amendment had been in fact made, and it was not, an appeal from the judgment was dismissed without costs because the amendment had not been actually made: *Hyams* v. *King*, 1908, 2 K. B. 696.

No physical alteration of records.

187. Where an amendment of any record of the Court or document filed, other than a pleading, is directed, no physical alteration of the record or document shall be made, but a note shall be made, in the margin or other convenient place, of the amendment directed. C.R. 315.

This *Rule* adopts the practice laid down in *Fox* v. *Bearblock*, 45 L. T. 469; 46 L. T. 145. It applies more particularly to judgments and orders in which, if physical alterations were made in the books of the Court, the entries might in the event of the amendment being struck out, and restored, on successive appeals, leave the records of the Court more or less illegible. Under this order the amending order is entered at length and a note of it inserted in the entry of the judgment or order amended. The judgment or order issued, which is amended, should be similarly dealt with, and not otherwise altered.

(ii) *Form of Documents, Size of Paper, etc.*

Pleadings, etc., how to be printed or written.

188.—(1) All pleadings, affidavits, judgments, orders and other documents shall be printed, typewritten, or

written in a clear and legible manner, with a margin upon the left hand side, upon foolscap paper of good quality. C.R. 319, *amended*. Rules 189, 190.

(2) When documents are printed, pica type, leaded, shall be used.

As to printing pleadings: see *Rule* 139.

189. No notice shall he given orally. C.R. 316. Notices to be written or printed.

A verbal notice to produce is insufficient: *Provincial Ins. Co.* v. *Shaw*, 19 U. C. Q. B. 537.

190.—(1) In all proceedings in an action, except pleadings, and judgments, and reports, the following short style of cause shall he sufficient: Short style of cause.

"Between John Smith and others,—*Plaintiffs*,

and

Richard Roe and others,—*Defendants*."

(2) In case of proceedings which it has been the practice to entitle more shortly thus: "Smith *v.* Roe," such practice shall continue. Con. Rule 451.

(3) In proceedings under any particular Act (*e.g.* the Mechanics' Lien Act), the style of cause shall be "In the matter of—(*naming the statute*), "Between A.B., Plaintiff, and C.D., Defendant" (or "A.B., Applicant" and "C.D., Respondent"). C.R. 320 and 1235.

The reference to C. R. 451 at the end of clause (2) refers to the Rule on which C. R. 320 was based. C. R. 451 is now *Rule* 339.

In all pleadings, judgments and reports, the full style of the action or matter is to be set out: in other proceedings, including affidavits, interlocutory orders, notices of trial, to produce, to admit, notices of motion, and of appeal, the shortened style first given in the *Rule* may be used. Notwithstanding this *Rule* all vesting orders should be entitled in the full style of cause, or a difficulty may arise in making title thereunder.

The shorter title, *e.g.*, *Smith* v. *Roe*, is usually confined to appointments for settling minutes of judgments or orders, Master's warrants, notices of taxation, or other notices and appointments not already mentioned, which are required to be taken out or served in the progress of a cause. There is, however, no authority for styling affidavits in this way.

Where an action is dismissed as against one of several defendants, it would seem that it is not irregular thereafter to leave that defendant's name out of the title of the action: see *Prince Albert* v. *Strange*, 2 D. G. & Sm. at p. 709.

Rules 191, 192.

(iii) *Copies and Service of Papers.*

Service of office-copies of affidavits and other proceedings dispensed with in certain cases.

191. Where service of affidavits and other documents is required, true copies, legibly written, typewritten, or printed, are to be served. C.R. 322.

An "office copy" of a document is a copy authenticated by the proper officer, usually the one in whose custody the original record of the proceedings is deposited. Under *Rule* 192, office copies of judgments and orders are to be certified by the officer in whose office the same are entered. Office copies of other proceedings should be certified by the officer in whose office they are filed. Office copies of judgments are expressly required to be served in certain cases: see *Rules* 87 and 404; and where according to the former practice an office copy of a decree, or order, was required to be served, in like cases an office copy of the judgment, or order, would seem to be necessary under the present practice, except where a different practice is expressly provided.

Under the former Chancery practice, the first proceeding in the cause served upon a defendant was usually required to be an office copy; *e.g.*, bills, or decrees, or orders served on parties added in the Master's office, and orders of revivor. But under the present practice, it would seem sufficient to serve a plain copy of an order adding parties upon a change of interest, instead of an office copy as formerly: see *Rule* 302.

As to what is "a true copy:" see *Walker* v. *Niles*, 18 Gr. 213; *Sharp* v. *McHenry*, 38 Ch. D. 427.

Habeas Corpus.—A writ of *habeas corpus ad subjiciendum*, can only be properly served by delivering the original writ to the person to whom it is addressed: *Reg.* v. *Rowe*, 71 L. T. 578. It must be signed by the Judge who grants it, and notice must also be served giving the person to whom the writ is addressed, notice of the consequences of failure to obey it: *Re Hallock*, 30 C. L. J. 770. See 15 C. L. T. 9.

Orders.—Where an order directs the doing of an act within a limited time, the order should be served on the person required to obey it before the limited time has expired, and in time to give him a reasonable opportunity to comply with its terms. Where an order was not so served a motion to commit for disobedience was refused: *Berry* v. *Donovan*, 21 Ont. App. 14. Where the limited time expires without service, it will not be necessary to apply for an order limiting a further time, before the order can be enforced: see *Rule* 176.

Office copies.

192. Where an office copy of an order or judgment is directed to be served it shall be certified by the officer in whose office the order or judgment is entered. C.R. 323.

An office copy is made by comparing it with the original or with the entry thereof in the judgment book, marking it "examined" (appending the signature of the officer), and stamping it with the seal of the Court or of the officer who certifies it.

Copies of documents to be demanded in writing.

193. A party requiring a copy of any affidavit, exhibit, or document not directed to be served shall serve a demand for the same and a copy shall be served with all convenient speed. C.R. 324 and 325.

Pleadings are required to be served on all parties concerned therewith without a demand: *Rule* 140.

An irregularity in the indorsement of a pleading was formerly waived by demanding a copy of it, and was ordered to be amended without costs: *Bennett* v. *O'Meara*, 2 Chy. Ch. 167.

This *Rule* is imperative, and the Court will enforce compliance with it: *Totten* v. *Macintyre*, 2 Chy. Ch. 80; *Burrows* v. *Hainey*, 2 Chy. Ch. 186. Formarly the costs of furnishing copies were part of the costs of the cause, or application, and payment of the costs of the copies could not be required as a condition of furnishing them. Whether the *Rules* are intended to make any change in this respect is not very clear: see *Rule* 194.

Under tha *Rules* as now framed, it would seem that where copies of documents aro demanded, if payment therefor is required as a condition precedent to delivery, an application is necessary under the following *Rule*:

Copies of documents in possession of another party.

194. A party entitled to copies of or extracts from. any document in possession of another party, may be directed to pay for such copy at the rate of 10 cents per folio, if the request for such copy is deemed unreasonable, or the solicitor of the party producing the document shall be at liberty to give notice that the party requiring such copy is at liberty at some reasonable time and place to himself make it, in which case the party producing shall not be entitled to any fee in respect thereof. C.R. 326, *amended*.

In practice, the costs of furnishing copies of affidavits on a motion have been regarded as part of the costs of the motion; and it has not been usual to demand payment for copies so demanded as a condition of furnishing them.

But a solicitor desiring copies of documents produced for inspection by the opposite party, was held to be entitled to make the copies himself, without first giving the opposite solicitor an opportunity to make them: *Ormerod* v. *St. George's Iron Works*, 1905, 1 Ch. 505, 92 L. T. 541.

Semble, that copies of documents may by leave of the Court be taken by photography: *Lewis* v. *Londesborough*, 1893, 2 Q. B. 191; 69 L. T. 353.

If payment for copies demanded is required, an application under this *Rule* is necessary.

The former C. R. 321 provided that "a folio shall be 100 words": although that provision has not been included in the present *Rules*, it is presumed that no change has been made. A folio under the Eng. *Rules* is 72 words: Ord. LXV., r. 27 (14).

Rules 195-197.

Solicitors' and agents' book.

195. A book to be called "The Toronto Solicitors' and Agents' Book," shall be kept in the Central Office to be there inspected by any party or solicitor or his clerk without fee; and every solicitor having an office or carrying on his business within the said city, shall cause to be entered in such book (in alphabetical order) his name and place of business or some other proper place within the city where he may be served, and as often as any such solicitor changes his place of business or the place where he may be so served as aforesaid, he shall cause to be made the like entry thereof in the said book. C.R. 90.

The entries required to be made under this *Rule* are compulsory. *Essery* v. *Grand Trunk Ry. Co.*, 13 P. R. 219.

For the consequences of not complying with this *Rule*: see *Rule* 199 (3).

Entry of Toronto Solicitors as agents.

196. Every other practising solicitor shall cause to be entered in the said book (in alphabetical order) his name and place of business, and also in an opposite column the name of some solicitor having an office and carrying on business in the city of Toronto as his agent. C.R. 91.

The entry of a Toronto agent by solicitors practising out of Toronto is compulsory: *Essery* v. *G. T. Ry. Co.*, *supra*. See also *Rule* 199.

Solicitors' and agents' book in County Towns.

197. Every Deputy or Local Registrar shall keep in his office a book to be called "The County Solicitors' and Agents' Book," in which each solicitor residing within the County elsewhere than in the County Town, and not having an office there, shall specify the name of an agent, being a solicitor of the Supreme Court, and having an office in such County Town, as his agent with respect to business carried on in the local offices in the said town. C.R. 92.

The Deputy Clerk of the Crown is not mentioned in the *Rule*, and he is therefore not authorized to keep the book referred to in the *Rule*.

The entry of the name of an agent in the books required to be kept under C. R. 92 was optional: *Essery* v. *G. T. Ry. Co.*, *supra*; but under this *Rule* it would seem to be compulsory. If the entry is made, services may be effected accordingly: see *Rule* 199; but service on an agent is not good service on the principal, unless the agent is booked as agent under this *Rule*: *Robinson* v. *Robinson*, 13 P. R. 51. *Semble*, if no entry is made service may be effected as provided in *Rule* 199 (3).

In England a town and a country firm, having certain partners in common, are treated as the same firm, and not as principals and agents: *Re Borough Com. & Bdg. Soc.*, 1894, 1 Ch. 289.

There is also to be kept by the Deputy Clerks of the Crown at Ottawa and London a "Consent Register" as provided by *Rule* 243. Rules 198, 198.

198. Admissions and acceptances of the service of an order, notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. C.R. 328. Solicitor's acceptance need not be verified.

See *Rules* 15, 36, as to acceptance of service of writs of summons.

Under *Rule* 36 acceptance of service of writs of summons, and undertakings to appear, are required to be verified by affidavit in order to be used for signing a judgment by default; but all other acceptances and admissions of service may under this *Rule* be received and acted on, without verification.

In practice the signature of solicitors to consents, undertakings, admissions, letters, and other documents in an action when used before the Court do not usually need verification, but, unless disputed, are assumed to have been duly signed by the solicitor or firm of solicitors by whom they purport to be signed; and any attempt to impose on the Court by a false or unauthorized signature of a solicitor would probably be regarded as a contempt of Court.

199.—(1) Documents which do not require personal service shall be served upon the solicitor of the party to be served or his agent entered in the Toronto or County "Solicitors' and Agents' Book." Agent when to be served.

(2) Such service may be made by leaving the document to be served with any clerk in the solicitor's office.

(3) Where a solicitor has not caused such entry to be made, the posting up of a copy of any document in the office in which the proceedings are being carried on is to be deemed sufficient service. C.R. 329.

By *Rule* 195, it is imperative upon every solicitor residing in Toronto to enter his name and address in the Solicitors' and Agents' Book; and it is also imperative on every solicitor not residing in Toronto to appoint an agent in Toronto, and have his name entered as such agent in the Solicitors' and Agents' Book kept at Osgoode Hall; and under *Rule* 197 it is also necessary for every solicitor to have a booked agent in every county town. If a solicitor does enter an agent's name in the books kept in a county town where proceedings are being carried on, then service can be effected on such agent, but if he does not, then service can be effected by serving the solicitor himself, or by posting up a copy of the document required to be served in the office where the proceedings are being carried on under cl. (3) of this *Rule*. Service can only be effected on a solicitor by posting up copies, when there is no entry of an agent in the books at the place where the proceedings are being carried on: see *Essery* v. *Grand Trunk Ry. Co.*, 13 P. R. 221.

Service of papers on a solicitor as agent for another solicitor is not good, unless the solicitor served is the booked agent of the other, even though he has acted as agent in the same suit: *Robinson* v. *Robinson*, 13 P. R. 51.

Rule 200.

This *Rule* only applies to the service of documents, which do not require personal service: see *Rule* 16 as to writs of summons. Proceedings affecting the liberty of the person, unless in cases where service on a solicitor is expressly authorized, usually require personal service, and also, as a rule, initiatory proceedings in a cause or matter.

A solicitor cannot, as agent for one principal, serve himself as agent for another principal: *Horseman* v. *Coulson*, 6 P. R. 263; *Ontario Bank* v. *Fisher*, 4 P. R. 22.

Service on the clerk of a solicitor elsewhere than at the office of the solicitor, is good only from the time it reaches the solicitor: *Hermann* v. *Mandarin, etc.*, 18 P. R. 34.

Where parties have solicitors, papers and documents must in the absence of special arrangement be served by the party's solicitor: *Yeatman* v. *Snow*, 28 W. R. 574, and served either upon the solicitors, or their agents under this *Rule*: *Omnium Securities* v. *Ellis*, 18 C. L. J. 143; 2 C. L. T. 216; see *Kellewell* v. *Watson*, 52 L. J. Chy. 818, where a notice served by a new solicitor before an order changing the solicitor had been obtained was held good, no one being misled.

Special arrangement is sometimes made between solicitors for service of papers upon one another through the post office, and in such case a question may arise as to whether service is to count from the date of mailing, or the date of receipt. This will be determined, according to the agreement, if any, between them, or if there be no special agreement on this point the date of receipt will be the date of service as it is the general practice to admit service as of the day of receipt: *McDonough* v. *Alison*, 9 P. R. 4.

Service of solicitor on record good though he have ceased to act.

Until an order has been made and served, changing the solicitor of any party to an action, or authorizing such party to sue, or defend, in person, service on the solicitor originally named is sufficient, even though such solicitor have ceased to act for such party: see *Rule* 389; *Davidson* v. *Leslie*, 9 Beav. 104; *Wright* v. *King*, 9 Beav. 161; and see *Newton* v. *Thompson*, 16 Jur. 1008; *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. 457; *Muir* v. *Guinane*, 9 O. L. R. 324; but not after the proceedings for which the solicitor had originally authority to act have come to an end, so that in law his authority has ceased: *Reg.* v. *JJ. of Oxfordshire*, 1893, 2 Q. B. 149; 69 L. T. 368; *Jones* v. *Ricknell*, 20 Q. B. D. 164; *Re Gray, Gray* v. *Coles*, 65 L. T. 743. Where a solicitor had absconded, a notice of motion left at his unoccupied place of business was held properly served: *Newton* v. *Thompson*, 22 L. J. Chy. 10; and see *Re Templeman*, 20 Beav. 574; *Re Wisewold*, 16 Beav. 357; *Re Catlin*, 18 Beav. 508; *Re Dufaur*, 16 Beav. 1; *Re Thompson*, 20 Beav. 545; *Wilson* v. *Emmett*, 19 Beav. 232; *Ex parte Belton*, 25 Beav. 368; *Re Wolton* 4 K. & J. 78; and see *Rule* 201.

For the proceedings on the death of a solicitor to compel the appointment of another: see *Dean* v. *Lethbridge*, 26 Beav. 397, and *Rule* 392 *post*.

Service, where no address for service given.

200.—(1) Where a party sues or defends in person and no address for service of such party is given, or where a party has ceased to have a solicitor, or where a defendant served with a writ of summons or notice in

lieu thereof has not appeared thereto, all documents not requiring personal service shall, unless the Court otherwise directs, be deemed to be sufficiently served by posting up a copy in the office in which the proceedings are being carried on. Rule 200.

(2) If an address for service is given, then all documents shall be sufficiently served upon such party if left for him at such address. C.R. 330.

See Eng. (1883) R. 1015.

Defendant who has not Appeared.—A defendant who does not appear is not entitled to notice of further proceedings, unless specially so provided by any *Rule*, or by any special order of the Court: see *Rule* 35, and notes. In the cases where it is by *Rule* or order so provided that such a defendant is to be served with notice, or in any case where the plaintiff desires to serve such a defendant, service may be effected by posting up under this *Rule*, if no address for service has been given, unless personal service is made necessary by any *Rule* or order, or the practice of the Court; but proof of service of the writ of summons must be first filed: *Appleby* v. *Turner*, 19 P. R. 145; *Rule* 36.

A notice of motion for judgment is a document which may be delivered by posting under this *Rule*: *Dymond* v. *Croft*, 3 Ch. D. 512; *Morton* v. *Miller*, *Ib.* 516; *Parsons* v. *Harris*, 6 Ch. D 694; *Burritt* v. *Murdock*, 9 P. R. 191; *Williams* v. *Cardwell*, 25 W. R. 646, not following *Cook* v. *Dey*, W. N. 1876, 122; so a notice of assessment of damages under *Rule* 247; *O'Connor* v. *Hogan*, 10 L. R. Ir. 262; a writ of summons after amendment; *Re Hartley*, 1891, 2 Ch. 121; 64 L. T. 786; an order to continue proceedings under *Rule* 301; *Jackson* v. *Kilham*, W. N. 1891, 171; a notice of motion for an attachment: *Re Morris*, 44 Ch. D. 151; *Re Evans*, 1893, 1 Ch. 252; but *semble*, only where personal service cannot be effected: *Re Bossett*, 1894, 3 Ch. 179, because proceedings whereby the liberty of the person is intended to be affected: *e.g.*, proceedings upon which to found an application for an attachment, are usually required to be personally served on the party, even though he have appeared, or sued, by a solicitor. Applications to commit for non-production of documents are, however, an exception to this rule: see *Rule* 353.

The *Rule* applies where a person not originally a party is made a defendant to a counter-claim and fails to appear: *Verney* v. *Thomas*, 58 L. T. 20.

The omission of a defendant's address, or address for service when necessary, in an appearance by a defendant in person, is expressly provided for by *Rule* 47.

Where several parties are served with a document under this *Rule*, a copy must be posted up for each. The posting of one copy only of a statement of claim and notice of motion for judgment for two defendants was held not to be service on either: *Haacke* v. *Ward*, 17 P. R. 520.

The *Rule* only applies to proceedings before judgment, proceedings after judgment requiring to be served on a non-appearing defendant

Rules 201, 202.

cannot be served in the manner described by this *Rule*. Thus a notice of motion for a receiver by way of equitable execution cannot be served in the manner mentioned in this *Rule*, but must be served personally or, by leave, substitutionally: *Tilling* v. *Blythe*, 1899, 1 Q. B. 557.

As to service of proceedings in the Master's Office, upon a non-appearing defendant: see *Rule* 403.

Service where solicitor's office closed or no one in.

201. Where at the time of attendance to serve any document, the office of the solicitor for the party upon whom the service is sought to be made is closed or no one is in attendance therein for receiving documents served, service of the document may be effected by mailing the same, at any time during the same day, addressed to the solicitor, at his office, by registered post, and the service shall be deemed to have been effected at the time of the attendance for that purpose at the office of the solicitor. C.R. 331.

This *Rule* was passed to meet the case of *Raphael* v. *Davis* (before Mr. Cartwright, M.C., 15th January, 1897).

It is presumed that service may be effected in the manner mentioned in this *Rule*, after an attendance to serve after 2 p.m. on Saturday, or after 4 p.m. on other days, but, as the service will only count as of the next day, it will be better to serve at the office on the next day: see *Rule* 204.

Service of proceedings may be made on solicitor of execution creditor.

202. Service upon an execution creditor may be effected by serving the solicitor issuing the execution. C.R. 332, *amended*.

C. R. 332 was restricted to the service of execution creditors in actions for foreclosure, or sale, to enforce a charge on real property. The present *Rule* is unlimited, and applies to all cases where an execution creditor is required to be served.

It is a matter of some doubt how far a solicitor's retainer continues after judgment has been recovered: see 79 L. T. Jour. 208; *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. 457; *James* v. *Ricknell*, 20 Q. B. D. 164; 58 L. T. 278; and *Reg.* v. *JJ. of Oxfordshire*, 1883, 2 Q. B. 149; *Re A Debtor*, 1914, 2 K. B. 758.

The question has recently received consideration in *Millar* v. *Kanady*, 5 O. L. R. 412, 418, where it was held that the retainer of a solicitor to bring or defend an action does not terminate on the giving of a judgment so long as anything remains to be done by the solicitor for the client's protection, *e.g.*, taxation of the opposite party's costs, and preparing any bill of his client's costs to be set off under the judgment.

Whether the retainer continues or not, this *Rule* makes the service of the solicitor who has issued the execution sufficient service on the client for whom he acted.

Rules 203, 204.

203. It shall not be necessary to regular service that the original document shall be shown, unless sight thereof is demanded. C.R. 333.

Original order need not be shown unless demanded.

C. R. 333 made an exception in cases of arrest or attachment, but this exception has not been continued.

Unless it is demanded, it is not necessary that the original order to examine a judgment debtor should be shown to him when serving him with a copy of it, in order to found an application for a *ca. sa.*, in the event of his disobeying it: *Imperial Bank* v. *Lickey*, 8 P. R. 246.

It is not a ground for setting aside an execution that the order on which it issued had not been previously served: *Cranston* v. *Blair*, 15 P. R. 167; and see *Hopton* v. *Robertson*, 23 Q. B. D. 128.

As to service of orders, and of a writ of *habeas corpus*: see note to *Rule* 191.

See also notes to *Rule* 184.

Time for service of pleadings, etc.

204. Service shall, unless otherwise ordered, be effected during vacation and on Saturdays before two o'clock in the afternoon, and on other days before the hour of four o'clock in the afternoon, and service effected after those hours shall be deemed to have been made on the next juridical day. C.R. 349.

The *Rule* applies only to interlocutory proceedings in the course of an action or matter. It does not apply to writs of summons or other initiatory proceedings, and speaking generally it only applies to proceedings which may properly be served on a solicitor for a party.

Where service was admitted by a solicitor a few minutes after the hour *per incuriam*, and was repudiated by him as soon as he discovered the nature of the paper served upon him, it was held not to bind: *McTavish* v. *Sympson*, 7 P. R. 145; *Wright* v. *Woy*, 8 P. R. 328.

Service of a paper effected within proper hours but by leaving the paper in the office of the solicitor, after he and his clerks had left for the day, is good service only from the time when the paper comes to the knowledge of the solicitor: *Davis* v. *Hubbard*, 20 C. L. J. 32; following *McCollum* v. *Prov. Ins. Co.*, 6 P. R. 101; but service may also be effected under *Rule* 201 so as to have the service count from the time of attendance to serve.

A specially indorsed writ is not a pleading within this *Rule*, and may be served at any hour of the day: *Murray* v. *Stephenson*, 9 Q. B. D. 60; see also *Veale* v. *Automotic Boiler, etc., Co.*, 18 Q. B. D. 631; see also in the case of a notice of motion to quash a by-law, *Re Davis & York*, 10 C. L. T. 8.

See *Lloyd* v. *Word*, in note to *Rule* 121.

Rule 205.

CHAPTER X.

MOTIONS IN COURT AND CHAMBERS.

Powers of Court, how to be exercised.

205. The power conferred upon the Court may be exercised by a Judge sitting in Court, and, when so provided by the Rules, by a Judge in Chambers or the Master in Chambers, or a Local Judge in Chambers, or any Master or Referee to whom any cause or matter is referred. *New.*

Under former Rules an attempt was made to distinguish how the jurisdiction of the Court in various matters was to be exercised by the use of the words "Court," "Court or a Judge" or "Judge."

In the present Act and *Rules* an attempt is made more explicitly to define what business is to be taken in Court, what before a Judge in Chambers, and what before the Local Judges in Court or in Chambers, and what before the Master in Chambers, or before any Master or Referee to whom a cause or matter is referred. According to the strict reading of this *Rule* all business is to be taken in Court, except such as the *Rules* provide may be taken in Chambers or otherwise.

Motions for Judgment.—If that is the correct interpretation of the *Rule*, it seems to follow that unless the *Rules* expressly provide that a judgment may be entered for default of appearance or defence; or may be obtained on motion in Chambers, it must be moved for in Court, *i.e.*, at its weekly sittings: *Rule* 356, or at the trial: *Rule* 358.

Further Directions.—Where further directions, or a question of costs, have been reserved, then, unless the reservation is expressly to a Judge in Chambers, the motion must be made to a Judge in Court.

Evidence taken in the Master's office cannot be read on a hearing on further directions: *Gould* v. *Burritt*, 11 Gr. 234; *Curling* v. *Austin*, 2 Dr. & Sm. 129; *McGill* v. *Courtice*, 17 Gr. 271; and, as a rule, affidavits will not be received on any matter covered by the report: *Re Lea, Lea* v. *Lee*, 124 L. T. Jour. 335. But on the question of costs reserved, the Court will look at an order made on appeal from the report, and also at the pleadings, and other orders made in the cause: *Downey* v. *Boaf*, 6 P. R. 89.

Court on F. D. may refuse to act on report, or to carry out an erroneous judgment.

The Court may, on a hearing of the cause on further directions, refuse to act upon a report, although it be confirmed, if it appears to be improper, or unsatisfactory: *Taylor* v. *Craven*, 10 Gr. 488; *Baldwin* v. *Crawford*, 1 Gr. 202; *Harrison* v. *McSheehan*, 80 L. T. Jour. 75; and it may also refuse to carry out the original judgment pronounced in the action, if it appears to have been improvidently granted: see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80. Where the original judgment is defective, the Court may as far as possible supply the defects: *Robertson* v. *Meyers*, 1 Gr. 560; but where a judgment restraining the infringement of a *de facto* patent, and

ordering an account was not appealed from, the Court will not stay the account or refuse to carry out the judgment merely because the patent in question has been subsequently revoked: *Poulton* v. *Adjustable Cover & B. B. Co.*, 1908, 2 Ch. 430; 99 L. T. 647. Rules 208, 207.

The Court may on further directions award interest on an amount found due by the Master, though the judgment declaring the liability is silent as to interest, and the statement of claim does not ask it; but it is a matter of judicial discretion both as to the allowance of interest and the time from which it should run: *Burland* v. *Erle*, 1905, A. C. 590; 93 L. T. 313.

C. RR. 613, 618, provided that where the party having the carriage of the cause did not within 14 days after report or after the determination of issues of fact, set down the cause for hearing on further directions, or on motion for judgment, then any other person interested might do so. Those Rules have not been continued; but possibly under the present *Rules* any party may set the cause down as soon as the report is confirmed, or the cause is ready to be heard: see *Rule* 246.

Where a reference had been ordered to the Master to inquire whether a partition alleged in the pleadings was binding upon the parties thereto, and the Master found in the affirmative; a motion for judgment was held to be proper, and judgment was directed to be entered according to the report: *Consolidated Bank* v. *Wallbridge*, 13 C. L. J. 205. See also *Larkin* v. *Lloyd*, 64 L. T. 507.

206. Any power conferred upon the Court may be exercised upon such terms as to costs and otherwise as may be deemed just. *New.* Discretion as to costs, etc.

This *Rule* appears to give to the Judge or judicial officer authority to dispose of the question of the costs of any application which may be made before them respectively: see sec. 74, *supra*, p. 238; and also authority to impose terms, wherever terms may properly be imposed, i.e., usually where a party is asking an indulgence.

A sum in gross may be allowed: *Rule* 652, but not more than $30 except by a Judge: *Ib.*

This *Rule*, however, is subject to *Rule* 658, which prohibits any award of costs on *ex parte* motions.

207. The following applications shall be disposed of in Chambers: Business to be transacted in Chambers

1. For the sale, lease or mortgaging of the estates of infants.
2. As to the custody, guardianship, maintenance, and advancement of infants;
3. For administration or partition without action;
4. Relating to the conduct of actions or matters;
5. For the payment into Court of moneys under The Trustee Act.

Rule 207.

6. To vacate certificates of *lis pendens*.

7. Appeals from the Master in Chambers and Local Judge.

8. Motions for judgment under Rules 57 to 62.

9. Applications under the Lunacy Act.

10. Applications for and on the return of a writ of Habeas Corpus.

11. Motions for mandamus, prohibition, or interpleader.

12. Motions to wind up companies under the Dominion and Ontario Acts.

13. Motions for payment of money out of Court.

14. Originating motions under Rule 600, clauses (*c*), (*d*), (*f*) and (*i*). C.R. 366. *Amended.*

The matters which may be disposed of in Chambers are too numerous to specify in detail. Most of them are enumerated in this *Rule* and the following notes. Those applications which may be entertained by the Master in Chambers, and Local Judges and Masters, are specified in *Rules* 208, 209.

A Judge has jurisdiction to make any order which can be made in Chambers, when sitting in his private room: *Hartmont* v. *Foster*, 8 Q. B. D. 82; 45 L. T. 429.

The foregoing *Rule* contains a more complete enumeration of matters which may be disposed of in Chambers than C. R. 366. Clauses 7-14 were not in that Rule, but it does not appear to be exhaustive. Under *Rule* 243 the Court has a wide discretion as to hearing matters in Chambers.

It is to be noted that although the matters enumerated in this *Rule* are to be disposed of in Chambers yet many of them are by *Rule* 208 expressly excluded from the jurisdiction of the Master in Chambers, and by *Rule* 209 from the jurisdiction of Local Judges, and Local Masters.

When Master in Chambers has no jurisdiction, matters may be brought before a Judge.

Applications in Chambers, to whom to be made:—

Applications proper to be made in Chambers, but which are excluded from the jurisdiction of the Master in Chambers, Official Referees, Local Masters, and Local Judges acting under *Rule* 209, may be made before a Judge of the High Court Division in Chambers, and under *Rule* 210 in some cases before a Local Judge. A Judge sits in Chambers on Tuesday and Friday, at Toronto, in each week (except in vacation, when special arrangements are made): see *Rule* 234 (1).

Applications which can be made in Chambers should be made there, and not in Court: *Moffatt* v. *Ruddle*, 4 Gr. 44; *Anon.*, *Ib.* 61; or the costs may be refused: *Murney* v. *Courtney*, 16 Gr. 52; or allowed only as of a motion in Chambers: *King* v. *Connor*, 10 Gr. 364.

As to the adjournment of motions from Chambers to Court, and *vice versa*: see *Rule* 223. Rule 207.

Matters coming before any officer of the Court having jurisdiction in Chambers, should not be referred to a Judge because the parties desire it, but only when the officer can certify that it is a proper case to be heard before a Judge; and matters improperly referred to a Judge will not be entertained: *Hughes* v. *Rees*, 9 P. R. 86. Matters not to be unnecessarily brought before a Judge.

Clause 1.—Sale of Infants' Estates.—As to the mode of proceeding for sale of infants' estates: see *The Infants' Act* (R. S. O. c. 163), ss. 5, 13, and *Rules* 618 *et seq.*, and notes. The motion must be made to a Judge: see *Rule* 208 (7). Sale of infants' estates.

Clause 2.—Guardianship, and Maintenance, etc., of Infants.—As to the mode of proceeding for appointment of guardians: see *Rule* 619. Guardianship of infants.

Applications respecting the guardianship of the person, or property, of infants, are excluded from the jurisdiction of the Master in Chambers: see *Rule* 208 (7), and also from that of the Local Judges: *Rule* 209; and Local Masters: *Rule* 209. The authority of the High Court is not excluded by *The Infants' Act* (R. S. O. c. 153), s. 26: *Re Stannard*, 1 Chy. Ch. 16.

Applications respecting the custody of infants under *The Infants Act* (R. S. O. c. 163), s. 2, may be made to a Judge in Chambers: see *Re Davis*, 3 Chy. Ch. 277; *Re Keith*, 7 P. R. 138; *Re Eves*, 16 Gr. 580; *Re Murdock*, 9 P. R. 132; *Re Smith*, 8 P. R. 23; *Re Scott*, *Ib.*, 58; *Re Ferguson*, *Ib.*, 566; but not to the Master in Chambers: see *Rule* 208 (7); nor (subject to *Rule* 210) to the Local Judges: *Rule* 209; nor to the Local Masters: *Rule* 209.

Clause 3.—As to procedure on motions for administration: see *Rule* 608, *et seq.*, and notes. Administration, and partition.

As to the procedure on motions for partition: see *Rules* 615, 616 and notes.

Semble the Master in Chambers has jurisdiction under this clause, unless the application is opposed, in which case the motion must be disposed of by a Judge: see *Rule* 208 (8); but see *Rule* 212. The Local Masters' jurisdiction is similar: see *Rule* 209, but as to Local Judges: see *Rule* 212.

Clause 4 embraces all interlocutory motions concerning practice or procedure necessary in the course of an action or matter, and which, generally speaking, except so far as the exceptions of *Rule* 208 apply, are within the jurisdiction of the Master in Chambers, Local Judges, and Local Masters: see *Rules* 208, 209, 210. Motions relating to conduct of actions.

This clause is probably not intended to include motions involving an adjudication on the rights of the parties, *e.g.*, applications for injunctions, etc.; or under *Rule* 600.

Clause 5.—As to the procedure on applications to pay money into Court under *The Trustee Act* (R. S. O. c. 121): see the Act, s. 39. Motions under Trustee Act.

The Master in Chambers, Local Judges and Local Masters may entertain such applications.

Rule 207.

Under that Act applications may also be made by trustees, guardians or personal representatives to the Court for advice; how far such applications will be entertained in Chambers, may depend on the nature and importance of the question involved; but if brought on in Chambers it is always open to the presiding Judge to adjourn the application into Court: *Rule* 223. The same observation applies to applications under the Act to appoint a new trustee: see s. 18, or for a vesting order: see s. 15. Applications under these sections should be made to a Judge: see *Rule* 600 and notes.

Vacating lis pendens.

Clause 6.—The jurisdiction under this clause cannot be exercised by the Master in Chambers, or Local Masters, being excluded from their jurisdiction by *Rule* 208 (13): see Jud. Act. s. 37.

Appeals.

Clause 7.—As to the procedure on appeals from a Master in Chambers, and Local Judges: see *Rules* 505, 506. Local Masters should have been included in this clause: see *Rule* 505. The matters mentioned in this clause are excluded from the jurisdiction of the Master in Chambers: see *Rule* 208 (2), and consequently are also excluded from the jurisdiction of Local Judges, and Local Masters, under *Rule* 209.

Motions for judgment on specially indorsed writs.

Clause 8.—The jurisdiction under this clause may be exercised by the Master in Chambers, Local Judges, and Local Masters, not being excluded therefrom by *Rule* 208. Motions for judgment under *Rule* 222 are, apparently, not excluded in business which may not be taken in Chambers; but in addition to the motion for judgment specifically referred to in clauses 3 and 8, motions for judgment in mortgage actions in cases where there are adult defendants who are in default of appearance or defence, and there are infant defendants, may be made in Chambers: *Rule* 400.

Lunacy applications.

Clause 9.—Applications under *The Lunacy Act* (R. S. O. c. 68), s. 6, to declare a person a lunatic must be made to a Judge in Chambers: see *Rule* 208 (5); *Re Paton*, 1 Chy. Ch. 192; *Re Fleming*, 13 C. L. J. 197; *Re Kelly*, 6 P. R. 220, or for a commission *de lunatico*: *Re Stuart*, 4 Gr. 44.

The supposed lunatic is entitled to notice of the application: *Re Miller*, 1 Chy. Ch. 215, unless the Court, on proper evidence of its being dangerous, or useless, to serve him, dispenses with service: *Re Newmon*, 2 Chy. Ch. 390; *Re Mein*, *Ib.*, 429.

Where an order has been made declaring the lunacy, the Master in Chambers has jurisdiction to entertain applications respecting the property of the lunatic, under *The Lunacy Act*, s. 14, *et seq.*

Where the next of kin intervene on a lunacy application they are not allowed costs out of the estate, unless it can be shewn that the fact that they intervened has proved financially beneficial to the estate, when, upon the principle of salvage, costs may be allowed: *Re Brown*, 2 O. W. N. 924.

The custody of the lunatic need not be interfered with, unless it is shown that, in the interest of the lunatic, it should be: *Re Clark*, 14 P. R. 370. Where the custody of the lunatic was the only object of a motion for a declaration of lunacy, and it was not thought proper to alter the existing custody, a declaration was refused, though there was no doubt about the lunacy: *Ib.*

A husband of a married woman lunatic has no absolute right to be appointed the committee of her person either eolely or jointly: *Re Davy*, 1892, 3 Ch. 38. Rule 207.

The righte of creditors against the property of a lunatic will not be interfered with by the Court until an order has been made shewing that the Cnurt has taken control of the lunatic's estate: *Re Clarke*, 1898, 1 Ch. 336; *Re Brown*, *Llewellin* v. *Brown*, 1900, 1 Ch. 489. After the estate has so become subject to the control of the Court, it cannot he seized under an execution; hut the execution creditor is entitled upon application to be paid out of it, subject to the maintenance of the lunatic, but not of the lunatic's wife: *Re Winkle*, 1894, 2 Ch. 519. The maintenance of the lunatic is a first claim both on the capital and income of his estate under the control of the Court: *Re Plenderleith*, 1893, 3 Ch. 332; but, subject to this, the Court will not restrain a creditor from exercising his legal rights: *Didisheim* v. *London & Westminster Bank*, 1900, 2 Ch. 15.

Clause 10.—Applications for writs of *hobeas corpus* in a civil or criminal proceeding may be made to a Judge in Chambers under *The Habeas Corpus Act*, 29-30 V. c. 45; see R. S. O. c. 84; or *The Habeas Corpus Act* (31 Car. 2, c. 2), (see R. S. O. 1897, vol. 3, p. xxxvi): *Re Paton*, 4 Gr. 147. As to whether a Judge can in Chambers rescind his own order for a writ of *habeos corpus*, or qnash the writ itself on the ground that it iseued improvidently: see *Re Ross*, 3 P. R. 301. The Master in Chambers, and Local Masters, cannot entertain applications of this kind: *Rule* 208 (1), nor Local Judges, unless *Rule* 210 applies. Habeas corpus.

A person confined or restrained of his ilberty is limited to one writ of *habeas corpus* to he granted hy any Judge of the High Court Division returnahle heforo himself or another Judge in Chambers, with a right of appeal to the Appellate Division from the judgment given on the return of the writ. The judgment of the Appellate Division is final, and where no such appeal is taken, the order which might have been appealed against becomes final, and no other writ of *habeas corpus* can issue in the matter; and such order is a good answer to an action in which the same question is raised: *Taylor* v. *Scott*, 30 Ont. 475. This wss a civil proceeding, hut the decision would seem also to he applicahle where a *hobeas corpus* is required in a criminal matter, hecause in Ontario an appeal lies to the Appellate Division from a refusal to release: eee *The Habeas Corpus Act* (31 Car. 2, c. 2) and *The Conoda Supreme Court Act* (R. S. O. c. 139), ss. 62-65; and *The Ontario Habeas Corpus Act* (R. S. O. c. 84), s. 8; and *Cox* v. *Hokes*, 15 App. Cas. 506.

Clause 11.—Applications for mandamus or prohihition are excluded from the jurisdiction of the Master in Chambers: *Rule* 208 (9) and also under *Rule* 209 from that of the Local Judges and Local Mssters; hut as to Local Judges: see *Rule* 210. Mandamus or prohibition.

The applications intended to he covered hy this *Rule* are summary spplications without action: see *Rule* 622, and not applications in sctions where a mandamus is a part of the relief claimed, and the right to which depends on the result of the action.

As to the procedure on applications for mandamus and prohihition: see *Rules* 622-624, and notes.

Rule 207.

Winding-up ordar.

Clause 12.—Winding-up Ordar. — An order for winding-up a company upon a petition under *The Winding-up Act* (R. S. C. c. 144), may be made by a Judge in Chambers: *Re The Toronto Brass Company*, 18 P. R. 248.

Thie is ons of those mattars not in tarms axcluded from tbe jurisdiction of the Master in Chambers and Local Judges and Local Masters, hut wbich seeme to come under the exception of *Rule* 208 (13), as being a matter which is expreesly required to be done by a Judge. But as to Local Judges: see *Rule* 210.

Motions for payment out of Court.

Clause 13.—The motions refarred to in thie clause are not ooly interlocutory applications for payment out of Court, hut also orders for distribution of funds in Court in administration and partition actions or matters. These latter are excluded from ths jurisdiction of the Master in Chambers: *Rule* 208 (10) and also from that of the Local Judge and Local Masters under *Rule* 209; hut ae to Local Judges: eee *Rule* 210; hut other motions for payment out of Court may be eotertained by the Master in Cbambers, Local Mastere, and Local Judges, but tbeir orders cannot be acted on until approved of by a Judge of the Supreme Court: see *Rule* 732.

Originating notices.

Clause 14.—This clause, it will be noted, does not include all mattere commenced by originating notice, hut ie confined to tbose specified.

Besides tbe matters mentioned in tbie *Rule*, there are others wbich may be taken in Chambers.

Additional Cases to which Jurisdiction in Chambers extends.—Tbe jurisdiction in Chambere extende to other matters, in addition to tbe bueiness enumerated in *Rule* 207, e.g.:—

Motions for judgment in mortgage cases.

1. As already mentioned, motione for jndgment in ordinary mortgage actions, for aale, or forecloenre, or for redemption, wbere infants are concerned: see *Rule* 466. The Mastar in Chambers, Official Refereee when eitting for bim, and Local Judges, and in the caeee meotioned in *Rule* 209 tbe Local Masters, bave jurisdiction to entertaio auch applications.

To convey free from dower.

2. Applicationa to enable the owner of land to convey free from tbe dower of bie wife, under *The Dower Act* (R. S. O. c. 70), ee. 14, 15, 16 and 17, may be made in Cbambera: *Re Eogles*, 7 P. R. 241; *Re Campbell*, 25 Gr. 187, 480; but it eeems probable that applicatioos of this kind can only be entert: iued by a Judge as a *persono designata*.

To appoint or dispense with appointment of, representative of estate.

3. Applications to appoint, or to dispense with tbe appointment of a pereon to repreaent tbe eetate of a deceased person under *Rule* 90; or to represent a claes under *Rules* 75 or 77, or tbe heir at law, or next of kin; or a clasa, or an unborn person, under *Rule* 76. The Master in Chambers, Local Judges, and Local Maeters, have juriediction to enter:: in eucb applications: eee *Collver* v. *Swayzie*, 8 P. R. 42.

Thie would eeem to come under tbe business intended to be included hy tbe general worde of clauee 4.

Motions to commit.

4. *Motions to Commit.*—Motione to commit for contempt, by reaeon of dieobedience of an order in Chambers, or a *præcipe* order, may be made in Chambers, hut where tbe dieobedience ie of a Court order, tbe motione eboulc be made in Court: *Verrall* v. *Hordy*, 9 C. L. T. 310, following *Klein* v. *Union Fire Ins. Co.*, 3 C. L. T. 601.

And so also it should be made in Court, where the object is to commit a stranger to the action for contempt in interfering with the due course of justice: *Southwick* v. *Hore*, 15 P. R. 331. Such a matter is to be dealt with as a criminal matter, not affected by the practice and procedure under the *Rules*: *Ib.*; and see *Seaward* v. *Paterson*, 1897, 1 Ch. 545; 76 L. T. 215; and notes to the Jud. Act, sec. 17, pp. 72, 73; but all contempts in civil proceedings are not criminal within the meaning of the Jud. Act, s. 151: see *Scott* v. *Scott*, 109 L. T. 1; 1913, A. C. 417. Rule 208.

In that case the order on which the alleged contempt was based, was held to be illegal, but Haldane, L.C., said: "Even if the order had been validly made. . . . a breach of the order would have in substance been punishable only on the same footing as the breach of an ordinary order in a civil case for an injunction, and a punitive order made with reference to the breach, falls in such cases, outside the language of sec. 47 of the Judicature Act, 1873, which provides that no appeal shall lie from the judgment of the High Court in any criminal cause or matter": see also the judgment of Lord Atkinson.

Such applications are not within the jurisdiction of the Master in Chambers or Local Masters: *Rule* 208 (1; but as to Local Judges: see *Rule* 210.

5. *Motions for Physical Examination of Plaintiff.*—Under the Jud. Act, s. 70, "the Court which, or the Judge, or the person who, by consent of parties or otherwise, has power to fix the amount of damages" may order the physical examination of a plaintiff suing for damages for bodily injury. Where the application is made to a Judge; under *clause* 4, it would seem to be proper to make it in Chambers, but the Master in Chambers, Local Judges, and Local Masters, do not appear to have any jurisdiction to entertain such applications: see *Rule* 208 (13); but as to Local Judges: see *Rule* 210. Applications for physical examination of plaintiff.

6. *Issue of Subpœnas as to Province of Quebec.*—Under C. S. C. c. 79, ss. 4-11, subpœnas may be ordered to issue to the Province of Quebec in actions pending in the Supreme Court of Ontario: see *The Evidence Act* (R. S. O. c. 76, p. 986). A Judge in Chambers can entertain such applications, but not the Master in Chambers, Local Judges, or Local Masters: see *Rules* 208 (13), and 209. Subpoenas to Quebec.

7. Vacating the registration of certificates of *lis pendens* where the action is not disposed of: see Jud. Act, ss. 36-37, *supra*, and *Rule* 208 (13). Vacating lis pendens.

8. Whether motions for replevin orders are within this *Rule* is not very clear: see *Rules* 359 *et seq.* Replevin.

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

1. Matters relating to criminal proceedings, or the liberty of the subject; Criminal matters, etc.

2. Appeals and applications in the nature of Appeals; Appeals.

3. Extending the time for appealing to a Divisional Court of the Appellate Division; Extending time to appeal.

Rule 208.

Arrest. 4. Applications for arrest;

Lunacy. 5. Proceedings as to Lunatics;

Originating notices. 6. Originating notices other than applications for administration, partition or interpleader.

Infants or their estates. Settled estates. 7. Applications as to the custody, maintenance or guardianship of infants, or the sale, lease, mortgage of or dealing with infants' estates or settled estates.

Administration. Partition. 8. Opposed applications for judgment for partition or administration.

Mandamus and prohibition. 9. Applications for Prohibition or Mandamus.

Payment out of Court. 10. The payment of money out of Court, or dispensing with payment of money into Court, in administration and partition matters.

Granting taxed costs in lieu of commission. 11. Allowing taxed costs in lieu of commission under the provisions of Rule 653.

Striking out jury notice. 12. Striking out a jury notice except for irregularity.

Matters required to be done by a Judge. 13. Any matter which is expressly required to be done by a Judge.

Removal of causes. 14. The removal of causes from Inferior Courts.

References under Arb. Act. 15. The making of orders for references under *The Arbitration Act.*

Staying proceedings after judgment. 16. Staying proceedings after verdict, or judgment at a trial. C.R. 42, *amended.*

This *Rule* appears to be intended to confer on the Master in Chambers all the jurisdiction of a Judge in Chambers at the time of this *Rule* coming into force, i.e., 1st September, 1913; except as to the matters above excepted: see *In re Donisthorpe*, 1897, 1 Q. B. 671; *Watson* v. *Dandy*, 18 C. L. T. 164. Any powers hereafter conferred by Rule or Statute will not by force of this *Rule* be exercisable by the Master in Chambers. The propriety of extending any such after conferred powers to the Master in Chambers, or Local Judges or officers, is thus reserved for consideration by the Judges.

Where a statute hereafter passed merely enlarges the power of a Judge in Chambers, in a case in which the Master in Chambers has previously exercised jurisdiction, it would seem that the Master in Chambers can exercise the additional powers conferred by the statute upon a Judge in Chambers: see *Collver* v. *Swayzie*, 8 P. R. 42.

Jurisdiction of a Judge as a persona designata.

Jurisdiction Intended to be Reserved to Judges.—While the Master in Chambers may thus, speaking generally, exercise (except as to the matters excepted) the jurisdiction which a Judge in Chambers had on 1st September, 1913, yet this *Rule* is subject to some

exceptions. It would not seem to enable the Master in Chambers to act in a matter in which a Judge in Chambers acts by virtue of any statute as a *persona designata* (*e.g.*, under *The Dower Act* (R. S. O. c. 70), ss. 14, 15, 17, in making orders dispensing with a wife's joining in a conveyance by her husband: *Re Nolon*, 6 P. R. 115); nor does it give the Master in Chambers powers which it has been the policy of the Court to retain in the hands of the Judges. Thus in *Hendricks* v. *Hendricks*, 13 P. R. 79, it was held that the mere consolidation of the *Rules* could not work a construction which was not in accordance with the policy upon which *Rule* 653 [originally promulgated along with *Rule* 615 (4)] was framed. It would, therefore, seem to be still contrary to *Rule* 615 (4), that the word "Judge" therein should by the aid of *Rule* 208 be made to extend to the Master in Chambers, and by force of *Rule* 209 to Local Judges and Local Masters also; and it would seem that the Master in Chambers has still no power to make orders for distribution in partition actions under *Rule* 615 (4): see *Rule* 208 (13). Rule 208. Partition.

Applications to the summary jurisdiction of the Court against solicitors were held to be excluded from the jurisdiction of the Master in Chambers and like officers: *Re L. & M.*, 6 P. R. 21; *Re Bridgmon*, 16 P. R. 232; *Re Ross*, *Ib.* 482; but see *Re Carroll*, 2 Chy. Ch. 323; *Re Walker*, *Ib.* 324; *Re Toms*, *Ib.* 381; *Re Attorney*, 7 P. R. 174; also applications by parties claiming adversely to a receiver, or sequestrator: see *Brown* v. *Dollard*, 6 P. R. 113; also an application by a person claiming adversely to the heirs or next of kin in an administration suit to be made a party in the Master's office and for leave to establish his claim there: *Re Tobin*, *Tobin* v. *Tobin*, 7 P. R. 67; and an application for payment into Court by an executor or administrator of money admitted by him to be in his hands: *Re Curry*, 8 P. R. 340; but see now *Rule* 222; *semble*, under that *Rule* the motion for judgment should be made in Court. Summary jurisdiction over solicitors.

The Master in Chambers has no jurisdiction on conflicting evidence to strike out pleas, raising questions of liability preliminary to an account, and to order an account to be taken: *Ryan* v. *Fish*, 20 C. L. J. 114; nor to set aside a judgment of a creditor against an absconding debtor to enable another creditor to defend: *Wills* v. *Corroll*, 10 P. R. 142. Other cases.

References to Masters.—The right of the former Referee in Chambers to direct a reference to a Master was denied: *Brown* v. *Dollard*, 6 P. R. 113; this case was affirmed on rehearing, on another ground, however, viz.: that the relief should have been sought under Chy. Ord. 398, *et seq.*; see also *Queen* v. *Smith*, 7 P. R. 429; and since *The Judicature Act* the right of the Master in Chambers to direct such a reference under the Dominion Winding-up Act has also been denied: *Re Queen City Refining Co.*, 10 P. R. 415; *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485; and see *Fraser* v. *Buchanan*, 25 Ont., *per* Rose, J., at p. 5. References to Masters.

But whatever may be the case in regard to interlocutory orders, it would seem clear that when the Master in Chambers has jurisdiction to award a judgment, he has power, for the purpose of carrying out such judgment, to direct a reference to the Master: see *Rules* 466, 519, 611, and notes.

Clause 1.—Liberty of the Subject.—All matters affecting the liberty of the subject are excluded from the jurisdiction of the Master Liberty of subject.

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in Chambers, under clause 1, and also from the jurisdiction of Local Judges and Local Master: *Rule* 209, but as to Local Judges: see *Rule* 210. Consequently the Master in Chambers cannot entertain motions to compel obedience to an order for production by committal: *Keefe* v. *Word*, 13 C. L. J. 166; and he has no jurisdiction to order the discharge of a defendant held in custody under a *ca. sa.*: *Cochrane* v. *Lamon*, 11 P. R. 351.

Appeals, etc.

Clause 2.—Appeals.—An application impeaching the propriety of a filing, is not an appeal or in the nature of an appeal from the officer who filed the document, so as to exclude the jurisdiction of the Master in Chambers: *Waterous* v. *Forran*, 6 P. R. 31.

Where a reference in an action had been made to a County Court Judge, who died before entering upon it, an application to set aside (as having been issued without jurisdiction), an appointment to proceed with the reference, issued by the deceased's Judge's successor was held to be in the nature of an appeal: *Toronto* v. *Toronto Ry. Co.*, 5 O. W. R. 403.

Extending time for appealing.

Clause 3.—Applications to extend the time for appealing whether it be to the Appellate Division, or to a Judge in Court, or in Chambers, are excluded from the jurisdiction of the Master in Chambers, and under *Rule* 209, from the jurisdiction of Local Judges, and Local Masters; but as to Local Judges: see *Rule* 210. Such applications are proper to be made in Chambers: *Rule* 207 (4); but must be made before a Judge.

Fraudulent Debtors' Act.

Clause 4 excludes all applications under *The Fraudulent Debtors' Arrest Act* (R. S. O. c. 83), s. 3, from the jurisdiction of the Master in Chambers, and under *Rule* 209, from the jurisdiction of the Local Judges and Local Masters.

Lunacy proceedings.

Clause 5.—*Proceedings as to lunatics.* Under the former C. R. 42, this exception was considered to prevent merely applications for declarations of lunacy from being entertained by the Master in Chambers, but not, after such declaration had been made, applications concerning the property of a lunatic.

Originating notice.

Clause 6.—This clause has the effect of excluding from the jurisdiction of the Master in Chambers, Local Judges and Local Masters, all jurisdiction to entertain any originating notice whatever, except in the three cases specified, viz.: (1) administration; (2) partition, and (3) interpleader; and originating notices for administration, or partition, can only be entertained by them when unopposed: see cl. 8.

As to the proceedings for administration: see *Rules* 608 *et seq.*, and as to proceedings for partition: see *Rule* 615 *et seq.*, and as to interpleader: see *Rules* 625 *et seq.*

Infants — maintenance, custody.

Clause 7.—Several matters are included in this exception, viz.:

(1) Applications regarding the custody, maintenance or guardianship of infants. As to this: see *The Infants' Act* (R. S. O. c. 153), ss. 2-4, and notes to Jud. Act, s. 3, p. 12, *supra*, and *Rule* 207 (2).

Sale of property.

(2) Applications for the sale, lease, or mortgage of infants' estates. As to this: see *The Infants' Act*, ss. 5 *et seq.*, and notes to *Rule* 207 (2).

Settled estates.

(3) Sale, leasing, or mortgaging of settled estates. As to this: see *The Settled Estates Act* (R. S. O. c. 74), ss. 3-14.

All of these applications are excluded from the jurisdiction of the Master in Chambers, Local Judges, and Local Masters. Numbers 1 and 2 are, however, proper to be made before a Judge in Chambers: *Rule* 207 (2); but applications for the lease, sale, or mortgaging of settled estates, are usually made to a Judge in Court; and are not enumerated in *Rule* 207 among the business which may be disposed of in Chambers. As to the jurisdiction of Local Judges in such matters: see *Rule* 210. Rule 208.

Clause 8.—See clause 6, *supra*, and note.

Clause 9.—Applications for mandamus or prohibition are proper to be made in Chambers before a Judge (*Rule* 207 (11)). But by this clause are excepted from the jurisdiction of the Master in Chambers, and under *Rule* 209, from that of the Local Judges and Local Masters. Mandamus and prohibition.

Clause 10.—Payment out of Court in partition matters is a matter expressly reserved to a Judge: see *Rule* 615. This exception has the effect of preventing the Master in Chambers, Local Judges, and Local Masters, from either ordering payment out or dispensing with payment into Court of any money in any administration or partition proceeding. Payment out in administration and partition actions.

Clause 11.—The power to order tax costs in lieu of commission under *Rule* 615 can only be exercised by a Judge, it is possible under *Rule* 207 (4), such an application might be entertained in Chambers. Costs in administration actions.

Clause 12.—By this exception the power of the Master in Chambers, Local Judges and Local Masters to strike out jury notices is limited to applications on the ground of irregularity. In all other cases the application must be made to a Judge in Chambers: see *Rule* 207 (4), and see *Rule* 398. But as to Local Judges: see *Rule* 210. Striking out jury notices.

Clause 13.—This exception is probably intended to apply to all matters where, either by the *Rules*, or any statute, a Judge is required or empowered to do anything: *e.g.*, see the Jud. Act, s. 73, as to ordering medical examination of a plaintiff. C. S. C. c. 79, s. 4, as to authorizing the issue of a subpœna to the Province of Quebec. As to such matters neither the Master in Chambers, Local Judges, nor Local Masters, have any jurisdiction. But as regards Local Judges: see *Rule* 210. Matters required to be done by a Judge.

Clause 14.—Applications for the removal of causes from Inferior Courts for the purposes of mandamus or prohibition, are matters excluded by this exception from the jurisdiction of the Master in Chambers, Local Judges, and Local Masters, but are matters which may be properly made to a Judge in Chambers: *Rule* 207 (11), and see supra, clause 9. Removal of causes from Inferior Courts.

Clause 15.—The reference to *The Arbitration Act* in this exception is probably erroneous, and what is really intended is the making of references under s. 65 of the Jud. Act. References under Arbitration Act.

Clause 16.—Staying Proceedings after Verdict or Judgment. This clause prevents the Master in Chambers, Local Judges and Local Masters from having jurisdiction, after a decision of the Appellate Court, to order a stay of proceedings till such time as leave to appeal to the Supreme Court of Canada can be moved for, in a case requiring Staying proceedings after verdict or judgment.

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such leave; or to require the defendant to undertake to refund damages and costs in the event of the judgment proposed to be appealed from being reversed: *Tabb* v. *G. T. Ry. Co.*, 8 O. L. R. 514; and from making any order staying proceedings either on a reference, or execution pending an appeal. Such applications can only be entertained by a Judge in Chambers: but the Master in Chambers and other officers having the like jurisdiction may, notwithstanding this clause, make an order for security for costs, or for increasing such security, and staying proceedings as a matter incidental to such an order: *Stow* v. *Currie*, 20 O. L. R. 356. As to the power of Local Judges: see *Rule* 210.

Quo warranto applications.

Quo Warranto.—The Master in Chambers has jurisdiction in *quo warranto* proceedings under *The Municipal Act* (R. S. O. c. 192), s. 160. He has also power to direct a reference to a County Judge to take evidence in such a matter under *The Municipal Act*, see ss. 173 and 161; *Reg* v. *McCloy*, 13 P. R. 96. His decision respecting a municipal election is appealable: see *The Municipal Act*, s. 179.

The jurisdiction of the Master in Chambers in Quo Warranto Proceedings is confined to those under *The Municipal Act* and does not extend to applications provided for by the Jud. Act, ss. 146-150, *supra*.

Costs.

Jurisdiction to Dispose of Costs of an Action where no other Question Remains.—See note to sec. 74, *supra*, p. 243.

Changing venue in C.C.

Changing Venue in C. C. Actions.—The jurisdiction to entertain motions to change the venue in County Court actions was doubted: *Brigham* v. *McKenzie*, 10 P. R. 406; but is now settled by *Rule* 767.

As to changing the venue where the Judge of the County Court is a defendant: see *Anon.*, 4 P. R. 310.

Adjourning from Chambers.

Adjournment of Motions before Court or Judge.—An application made to an officer in Chambers, which he has no power to entertain, may be adjourned before a Judge: *Rule* 223 (2).

Vacation.

Long Vacation.—As to the officers empowered to hold Chambers during the Long Vacation: see *Rule* 181.

Local Judges and Local Masters.

Local Judge's jurisdiction in Chambers.

209. A Local Judge and a Local Master who does not practise as a Barrister or Solicitor or take out a certificate entitling him to practise shall in all causes and matters in his county and in interpleader proceedings where the goods in respect of which interpleader is sought are situate in his county, have concurrent jurisdiction with, and the same power and authority, as the Master in Chambers at Toronto. C.R. 45.

See notes to *Rules* 207 and 208.

The jurisdiction of a Local Judge in Chambers is made co-extensive with that of a Judge of the High Court in all cases within the provisions of *Rule* 210.

The jurisdiction of Local Judges, and Local Masters, under this *Rule*, is limited to causes and matters in their respective counties, whereas the jurisdiction of the Master in Chambers is Provincial. Rule 210.

The power of the Local Judges is extended by the following *Rule*, subject to the conditions, and exceptions, therein mentioned, to matters which, in Toronto, can only be heard before a Judge in Court, and also in certain cases to matters which in Toronto can only be heard by a Judge in Chambers.

All orders for payment of money out of Court or dispensing with payment of money into Court by a Local Judge or Local Master, under this *Rule*, must be approved by a Judge before being acted on: *Rule* 732.

210.—(1) A Local Judge shall, in actions brought and proceedings taken in his county, possess the like powers as a Judge sitting in Court or Chambers with regard to:— Local Judges' jurisdiction generally.

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

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

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

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

i. Applications for taxed or increased costs under Rule 653. Exceptions.

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

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

(2) Where an infant or lunatic or person of unsound mind is concerned the powers conferred by this Rule shall not be exercised without the consent of the Official Guardian, or of the committee or guardian of or the person authorized to act on behalf of the lunatic or person of unsound mind. C.R. 47. *Amended.* Where infants or lunatics concerned.

Since this *Rule* a Local Judge has no power to hear a motion to continue an injunction until the trial, except by consent as provided by *Rule* 211; see formerly *Dougall* v. *Hutton*, 19 C. L. T. 190; 35 C. L. J. 368.

C. R. 47, excepted from the matters which a Local Judge may dispose of "trials of actions." This exception though omitted from this

Rules 211, 212.

Rule, is probably still an exception from his jurisdiction, as not being a "a motion or application" within the meaning of this *Rule*.

The jurisdiction conferred by this *Rule* can be only exercised by a Local Judge: (*a*) where the solicitors for all parties reside in his county, or (*b*) where the solicitors for all parties agree that he shall exercise jurisdiction, subject in both cases to the proviso, that if any infant, lunatic, or person of unsound mind, is concerned, the Official Guardian must consent, whether he is acting for such infant, or lunatic, or not.

Subject to these qualifications a Local Judge has the like jurisdiction as the Master in Chambers: *Youldon* v. *London Guarantee Co.*, 2 O. W. N. 1135.

Where the solicitors do not reside in the county of the Local Judge, or do not consent to his acting, he has no jurisdiction: *Wendover* v. *Nicholson*, 5 O. W. R. 645, and he has no power to make an order affecting persons not formally before him without their consent; the fact that they have been notified and do not attend, and object, is not sufficient to give him jurisdiction; an order for the representation of absent parties under *Rule* 75 cannot be made by a Local Judge: *Chisholm* v. *Herkimer*, 19 O. L. R. 600.

All orders made by a Local Judge for payment of money out of Court, or dispensing with the payment of money into Court, are subject to *Rule* 732, and must be approved by a Judge before being acted on.

Local Judge's jurisdiction as to injunctions.

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

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

Under the first clause of the *Rule*, the Local Judge can only grant an injunction for eight days. Usually where an interim injunction is granted in Toronto, it is granted *ex parte* for a specified time, "and until any motion which may on that day be made to continue the said injunction shall have been disposed of," but where a Local Judge makes the order, it will be necessary to see that the addition of such a clause does not amount to an extension of the injunction beyond the limit of eight days. Where an interim injunction is granted by a Local Judge, it will always be advisable to bring on any motion to continue it before the expiration of the eight days, unless there is a real emergency it would seem that the Local Judge has no jurisdiction to grant an injunction: see *Capital Manufacturing Co.* v. *Buffalo Specialty Co.*, 3 O. W. N. 553.

Motions for partition and administration.

212. Motions for partition or administration may be made before a Judge in Chambers or the local Judge of

the County where the land (or if more than one parcel, any parcel) is situate or the testator or intestate died. C.R. 956. Rule 213.

This covers only part of C. R. 956, the other provisions of th .t Rula are embraced in *Rule* 615, *post*.

On reference to that *Rule* it will be seen that only motions for partition on behalf of adult parties are authorized. If any infant is interested, he must be made a defendant,—if partition is sought by an infsnt: see *Rule* 616.

As to the persons entitled to make summary application for administration: see *Rules* 608, 610.

In spplications for partition, or administration, any local Judge in whose county the land, or some part of the land in question is situste, or in whose county the testator or inteatate died, has jurisdiction, therefore where the estate consists entirely of personalty and no land is in queation; the only Local Judge who would have jurisdiction would be tha Judge of the county in which the testator or inteatste died.

Motions under thia *Rule* are to be by originating notice: see *Rules* 608, 615.

General Provisions as to Motions.

213. Any application in an action or proceeding shall be made by motion, and notice of the motion shall be given to all parties affected by the order sought. C.R. 355 and 356. *Amended.* Application to Court or Judge to be by motion.

See Eng. (1883), RR. 696, 697.

A notice of motion for attachment atating that the Court would be moved *at the Royal Courts of Justice* was held sufficient: *Petty* v. *Daniel*, 34 Ch. D. 172.

Where a motion haa been made and refused, it cannot he renewed as a general thing without leave: *Regina* v. *Richardson*, 13 P. R. 303; *Reg.* v. *Mayor of Bodmin*, 8 T. L. R. 553; but see *Payne* v. *Newberry*, 13 P. R. 392, where the motion when first made was held to be technically irregular; formerly n motion for a *habeas corpus* waa an exception; but see now *Re Hall*, 8 Ont. App. 135; but where an interlocutory motion is refused on a ground which is aubsequently removed by an amendment of the proceedings, a second motion for the same purpose may he made, and the doctrine of *res judicata* will not apply: see *Dombey & Son* v. *Playfair*, 1897, 1 Q. B. 368; 75 L. T. 676.

The Court may, under *Rules* 89, 215, 216, dispense with service of a notice of motion.

Where the notice of motion ia the first proceeding in a cause, or is to be served on a defendnnt who has not appeared, or the motion relates to the liberty of the person, *e.g.*, a motion to commit for contempt, it should, as a general rule, be personally served.

Rule 213.

These *Rules*, unless otherwise expressed, merely relate to civil proceedings and consequently *Rules* 215, 216, do not extend or apply to proceedings for, or in relation to, the quashing of convictions or orders in criminal proceedings.

In most cases where a suitor is prosecuting proceedings in person he is entitled to be heard in person in support of, or opposition to, any motion in the course of such proceedings; there are, however, some motions which the Court will not entertain unless made by counsel; *e.g.*, a motion for a prerogative mandamus: *Ex p. Wollocc*, 1902, 2 K. B. 488, where *Re Lewis*, 1884, 14 Q. B. D. 474, was held to be no authority for a contrary practice; so also in the case of complaints against a barrister, or solicitor, for alleged misconduct: see *Re Solicitor*, 1903, 1 K. B. 857; and *Re Solicitor*, 1903, 2 K. B. 205, where the complaint had been investigated by a committee of the Law Society, and the solicitor acquitted.

As to motions by way of appeal: see *Rule* 218.

A motion, on which, before the *Rules*, no one but the applicant was entitled to be heard, may still be made *ex parte*: *Re City of Toronto, Leader Lane Arbitration*, 13 P. R. 166.

The rights of an applicant cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service: see *Preston v. Tunbridge Wells*, 1905, 2 Ch. 323; 88 L. T. 53.

Motions to quash by-laws.

Motions to Quash By-laws.—A motion to quash a municipal by-law should be made to a Judge in the Weekly Court, and from his decision either granting, or refusing, the motion, an appeal lies to the Appellate Division: see Jud. Act, s. 26 (1).

Under *The Municipal Act* (R. S. O. c. 192), a notice of motion to quash a by-law must be served 7 clear days before the day on which the motion is to be made: s. 283 (2).

The Court has no power under *Rule* 176 to shorten this period of 7 clear days, as it is fixed by the statute, and the powers given by *Rule* 176 only extend to periods of time fixed by the *Rules*: *Re Sweetman & Gosfield*, 13 P. R. 293. By analogy to the case of a writ of summons it would seem that *Rule* 204, providing for the hours for effecting certain services does not apply to the service of the notice of motion, it being the first proceeding in the matter.

Where an applicant collusively discontinues his application to quash a municipal by-law, other parties interested may be authorized to intervene and continue the proceedings in the applicant's name, on giving him proper indemnity as to costs: *Re Ritz & New Hamburg*, 4 O. L. R. 639.

As to the procedure to be followed on such motions: see *The Municipal Act*, ss. 283-286.

Persons interested in supporting a by-law which is attacked may be allowed to intervene on a motion to quash, on the terms of submitting to be answerable for the costs of the applicant: *Re Henderson & W. Nissouri*, 23 O. L. R. 651.

Substituted service of notice of motion.

Substitutional Service of Notice of Motion.—C. R. 334 provided: "Where it appears, upon the hearing of any matter, that by reason of absence, or for any other sufficient cause, the service of notice of the application or of the appointment, cannot be made, or ought

to be dispensed with, such service may be dispensed with, or any substituted service, or notice, by advertisement, or otherwise, may be ordered;" but that *Rule* has not been continued; and it may be a question whether the power to dispense with service of a notice of motion any longer exists: by analogy *Rule* 16 would probably authorize substitutional service: and *Rule* 89 might probably authorize the Court proceeding in the absence of a party, but saving his rights: but whether it could as in the case of *Rex* v. *Wigand*, 1913, 2 K. B. 419; 109 L. T. 111, dispense with service altogether, on a person against whom an order is proposed to be made, is by no means clear: see *Rules* 213, 214. *Rule* 216 it will be observed only provides for making an interim order in such a case. Rule 213. Dispensing with service.

If an order for substituted service of a notice of motion to commit can be made at all, it should not be made except in a case where no doubt exists as to the notice coming to the knowledge of the person against whom the motion is to be made: *Re Chatham Horvester Co.* v. *Campbell*, 12 P. R. 666.

By analogy to C. R. 334, service of a warrant and all subsequent proceedings in the Master's Office upon certain absent defendants was dispensed with, other defendants in the same interest being represented: *Smith* v. *Houston*, 15 P. R. 18; but it would seem that a Master, *qua* Master, had no jurisdiction under that *Rule* to order substitutional service of proceedings in his Office; though possibly Masters may now make such orders under their jurisdiction in Chambers under *Rules* 209, 433: see *Re Hynes; Hodgins* v. *Andrews*, 19 P. R. 217.

Where it was not shewn that defendant could not be served, the Court refused to dispense with service of notice of motion for judgment for default of defence: *Dominion Bank* v. *Doddridge*, 12 P. R. 655. But if a defendant has not appeared: see *Rule* 35; and *Burritt* v. *Murdock*, 9 P. R. 191.

By the Common Law no judgment could be given against a defendant until he had appeared; but modern legislation has enabled the Court to adjudicate notwithstanding a defendant does not appear. By the Common Law a defendant could not be required to appear except by writ of summons issued in the King's name, modern legislation has authorized the Court to exercise jurisdiction upon notice of motion without any writ being issued: *Rule* 10.

Prior to The Judicature Act, notices of motion were unknown in Common Law and in Chancery could only be served after bill filed. In Chancery the subpœna to appear and answer, originally necessary, had been dispensed with, and a notice substituted.

It would seem that, except as altered by the *Rules*, or Statutes, the principles on which the ancient practice was based would continue operative.

By C. R. 361, it was provided:

"The plaintiff may, without leave, serve a notice of motion for an injunction, and may, by leave of the Court or a Judge to be obtained *ex parte*, serve any other notice of motion upon any defendant with the writ, or at any time after service of the writ and before the time limited for appearance of such defendant; and any notice of motion may be served on the plaintiff by any other party at any time after service of the writ upon such other party." Service with writ or before time for appearance.

Rule 213.

See Eng. (1883) R. 704. That Rule has not been continued, and it may perhaps be open to doubt how far the practice thereby authorized can now be continued.

Eng. (1883) R. 662, provided that notice of motion by a defendant might be served at any time after appearance by the defendant.

C. R. 361 made a distinction between notices of motion for an injunction, and other notices of motion, authorizing the former to be served before appearance, without leave, but requiring leave for such service in the case of other notices of motion. The English Rule requires previous leave, in all cases in which notice is served before the time limited for appearance, but the corresponding Irish *Rule* was held in *French* v. *Colles*, 17 L. R. Ir. 238, not to apply to injunction motions.

Where an affidavit was sworn before the issue of the writ, an injunction was granted *ex parte* on the undertaking of counsel to have the affidavit re-sworn and filed: *Green* v. *Prior*, W. N. 1886, 50.

Under the Eng. (1883) R. 704, it was intimated that leave to serve notice of motion with the writ could not be given where the defendant was out of the jurisdiction until an appearance had been entered: *Manitoba & N. W. Land Co. Corporation* v. *Allan*, 1893, 3 Ch. 432; *sed quære* in Ont., and see *Hersey* v. *Young*, W. N. 1894, 18, where leave was given, without prejudice to what might arise thereafter.

Where leave is given, that fact should be stated in the notice of motion: *Dawson* v. *Beeson*, 22 Ch. D. 504; and see notes to *Rules* 184, 215. An objection that leave to serve short notice should not have been given cannot be successfully urged as a preliminary objection: *Mander* v. *Falcke*, 1891, 3 Ch. 408; 65 L. T. 454.

Quashing convictions.

Motions to Quash Convictions.—For the procedure on such motions for breach of Provincial Laws: see The Jud. Act, s. 63 *supra*, p. 223.

And for the procedure on such motions for breach of the Criminal Law of Canada: see C. RR. 1279-1287. Those *Rules* are passed under the authority of the Criminal Code and are not intended to be affected by *Rule* 2. They are to be found, *supra*, p. 140.

Evidence on Motions.—See *Rules* 226-230, and notes.

Affidavits to be read in support of a notice of motion must be filed before the notice is served: *Rule* 298. Affidavits in answer to a motion must be filed before they can be read, but not necessarily filed the day before, as was formerly the practice in Chancery.

Where a party obtained an enlargement on terms, to file affidavits but did not comply with the terms, he was not allowed to read the affidavits: *Campbell* v. *Martin*, 11 P. R. 509.

A party to a motion may read in support of his own case, the affidavits filed by his opponent: *Re Margetson & Jones*, 1897, 2 Ch. 214; 76 L. T. 805.

As to proof of service where the opposite party does not appear: see *Scear* v. *Webb*, 25 Ch. D. 84, and note to *Rule* 298.

Motion by Person not a Party.—A notice of motion, other than a notice which originates proceedings, can ordinarily only be given by a party: *Re Knight*, 32 Sol. Jour. 166; but see the special

provisions of *Rules* 358 and 920. An application by a person not a party was formerly usually made by petition; but now, *semble* it should be by originating notice: see *Rule* 10. Rules 214, 215.

Length of Notice.—See notes to *Rules* 215 and 184.

214. If on the hearing of a motion it appears that any person to whom notice has not been given ought to have had notice, the Court may either dismiss the motion or adjourn the hearing thereof in order that notice may be given. C.R. 360. Where proper parties not served.

215.—(1) Except where otherwise expressly provided unless leave is given there shall be at least 2 days between the service of a notice of motion in an action and the day for hearing. Two clear days' notice.

(2) Unless leave is given there shall be at least 7 days between the service of an originating notice and the day for hearing. C.R. 348. *Amended.*

See Eng. (1883) R. 701.

Clause 1.—"At least." The day of service and day of return of the motion are both to be excluded: see *Rule* 173 (2). Holidays are also to be excluded: *Rule* 172; and for the days on which the offices are closed: see Jud. Act, s. 83, *supra*, p. 273. "Clear days," how computed.

Motions for judgment are held to be within this *Rule*: *Parsons* v. *Harris*, 6 Ch. D. 694; *Pearce* v. *Spickett*, W. N. 1876, 109; *Martins* v. *Birney*, 10 P. R. 368, and note to *Rule* 222. Notice of motion.

A notice of motion need not state under what *Rule* the party proposes to move: *Re Barker's Estate*, 10 Ch. D. 165-6.

Where a motion is made by leave of the Court or a Judge, the notice should so state, otherwise it is irregular: *Hill* v. *Rimell*, 8 Sim. 632. The Court should also be informed of the fact on the return of the motion; but the Court has a discretion to disregard the irregularity: *Dawson* v. *Beeson*, 22 Ch. D. 504. Under *Rule* 184 affidavits were allowed to be read, though not served until after the notice of motion: *Re Wyggeston Hospital* v. *Stevenson*, 33 W. R. 551. So, where, without leave, a motion is made returnable on a day on which the Court does not sit: *Armstrong* v. *Cayley*, 13 Gr. 558, or in vacation: *Maullin* v. *Rogers*, 34 W. R. 592; 55 L. T. 121; 55 L. J. Q. B. 377; or the notice is too short: *Daubney* v. *Shuttleworth*, 1 Ex. D. 53; *Deykin* v. *Colemon*, 25 W. R. 294, it is irregular; but the Court may disregard the irregularity: see *Williams* v. *De Boinville*, 17 Q. B. D. 180; *Forrest* v. *Davies*, 26 W. R. 534, and *Re Coulton, Hamling* v. *Elliott*, 34 Ch. D. 22; 55 L. T. 464. When given by leave.

Objection to a notice of appeal, as being short, was considered waived by appearing on the appeal: *Re McRae, Forster* v. *Davies*, 25 Ch. D. 19; and by obtaining an enlargement of the motion, and demanding affidavits: *Re Forlinger & Morrisburg*, 9 C. L. T. 109. Waiver of irregularity.

Rule 215.

But appearance on a motion to commit, in order to take an objection that the service is irregular, is not a waiver of the irregularity: *Mander* v. *Falcke*, 1891, 3 Ch. 488; 65 L. T. 454.

Where notice of motion has not been given in sufficient time owing to a *bond fide* mistake, the Court may, in its discretion, allow the party in default to shew the reason of the mistake by affidavit, and allow the motion to be made on a later day: *Smith* v. *Smacksmen Ins. Co.*, 32 W. R. 184.

Amendment.

In *Williams* v. *De Boinville*, 17 Q. B. D. 180, notice for a day not in the sittings was amended by inserting the proper day, the case apparently having been entered by the Clerk in the list of opposed motions for the first day of the sittings. The notice was held bad, but the amendment was allowed, the amount in question being large. In *Mullin* v. *Rogers*, *supra*, p. 677, the Court thought it best for the parties not to permit an amendment, the amount being small: see *Williams* v. *De Boinville*, 34 W. R. 702.

As to the case of a motion against a defendant who has failed to appear in the action, or who has given no address for service, or has ceased to have a solicitor: see note to *Rule* 200.

Costs, when party giving notice does not appear.

Where the party who has given notice of motion fails to appear, the party served and appearing is entitled to an order for his costs, on filing an affidavit proving service of the notice: *Berry* v. *Exchange Trading Co.*, 1 Q. B. D. 77; *Reg.* v. *Armstrong*, 13 P. R. 306; *Denison* v. *Devlin*, 11 Gr. 84; in the case of motions required to be set down, special provision for such an event is made: see *Rule* 660. Costs of affidavits prepared, but not filed at the date of the abandonment, were allowed in *Harrison* v. *Leutner*, 16 Ch. D. 559.

Affidavit of service.

Under *The Judicature Act*, where an order is made in default of appearance on a motion, the former practice is still in force, and it is still necessary to produce an affidavit of service to the Registrar before the rising of the Court; it is not sufficient if it be produced in time to draw up the order: *Secar* v. *Webb*, 28 Ch. D. 84; *Jones* v. *Bartholomew*, W. N. 1883, 205; *Re Rosier*, *Jones* v. *Bartholomew*, 49 L. T. 442.

When notice irregular.

If the notice of motion is invalid, the party served not being bound to appear, is not entitled to costs of he does appear: *Daubney* v. *Shuttleworth*, 1 Ex. D. 53. In *Re Coulton*, *Hamling* v. *Elliott*, 34 Ch. D. 22, it was held that notice for a day not in the sittings is not bad, perhaps because the parties appeared on the motion: and see *Fisken* v. *Smith*, 3 Chy. Ch. 74.

When party appears unnecessarily.

As to the costs of a person who appears, though unnecessarily served, and merely to ask costs, and of one who appears *quia timet* an order would be made against him: see *Lucas* v. *Fraser*, 9 P. R. 319.

Where Court has no jurisdiction.

As to when costs will be given, where the Court decides that it has no jurisdiction: see *supra*, p. 241.

Tender of $5 costs to formal respondents.

Under C. R. 1153, formal parties might, with a notice of motion, or petition, be tendered $5 for costs, and if they appeared unnecessarily they would get no more costs: *Re Sutton*, 46 L. T. 740; *Re Mitchell*, 17 Ch. D. 515; 45 L. T. 60; but that provision has been dropped in the present *Rules*.

Clause 2.—Originating Notice.—These are an exception to ordinary notices of motion, and whether made returnable in Chambers or

in Court, must be given seven days before the return in which holidays are to be reckoned, unless special leave is first obtained to serve a shorter notice: see *Rule* 172. The seven days are to be reckoned exclusive of the day of service, but inclusive of the day on which the motion is returnable: *Rule* 173 (1). Rule 216.

Appeals to the Appellate Division.—A notice of motion by way of appeal from a judgment at a trial to the Appellate Division is also an exception to the ordinary notice of motion, and must be seven days: *Rule* 491. Two days' notice of motion in other appeals is sufficient: *Rule* 492.

Motions to Quash Convictions.—Motions of this kind must be made on six days' notice: see Jud. Act, s. 63, *supra*, pp. 140, 223.

216. If satisfied that the delay necessary to give notice of motion might entail serious mischief, the Court may make an interim order *ex parte*. C.R. 357. When orders ex parte can be made.

See Eng. (1883) R. 698.

As to what motions are *ex parte*: see Dan. Pr. 5th ed., 1441, 1909; and see *Rules* 376, 486.

Where the opposite party though not served with a notice of motion nevertheless appears upon the motion, he is entitled to be heard, and the motion should not, in that case, be entertained *ex parte*: *McLeod* v. *Noble*, 24 Ont. App. 459.

No order of any moment should be made *ex parte* except in a case of emergency: *Thomas* v. *Storey*, 11 P. R. 417. An *ex parte* order is always taken at the peril of the party, and is liable to be moved against, if improperly made, or if material facts are suppressed on the hearing of it: *Sturgeon* v. *Hooker*, 1 De G. & S. 484; *Re Gedye*, 15 Beav. 254; *Cortwright* v. *Hinds*, 3 Ont. 384; *Hynes* v. *Fisher*, 4 Ont. 60; *Rep. of Peru* v. *Dreyfus*, 55 L. T. 802; *Schmitten* v. *Foulks*, W. N. 1893, 64; *Re McCarthy, Pepler & Co.*, 15 P. R. 261; *Re Collyer, etc., Co.*, 81 L. T. 110.

A party moving *ex parte* must make a frank disclosure of all material facts; his omission to do so may entitle the opposite party to have any order made on his application set aside with costs: see *Collins* v. *North British & M. I. Co.*, 1894, 3 Ch. 228; *Republic of Peru* v. *Dreyfus*, 55 L. T. 802; *In re Burlond, Burland* v. *Broxburn Oil Co.*, 41 Ch. D. 542; *Atkinson* v. *Plimpton*, 6 O. L. R. 566; *Mair* v. *Comeron*, 18 P. R 484.

Motions for leave to appeal from a report: *Hamilton* v. *Tweed*, 9 P. R. 448; to stay execution: *Grand Trunk Ry. Co.* v. *Ont. & Quebec Ry. Co.*, 9 P. R. 420; to dismiss an abandoned appeal: *Ormerod* v. *Bleasdale*, 54 L. T. 343; or under *Rule* 271; *Hoocy* v. *Gilbert*, 12 P. R. 114, 118, should not be made *ex parte*.

A motion for leave to effect substituted service of a notice of motion is *ex parte*: *Hamilton* v. *Davies*, W. N. 1880, 82.

An *ex parte* order for the examination of a witness dangerously ill was upheld as being in accordance with the former Chancery practice: *Baker* v. *Jackson*, 10 P. R. 624.

Where the party moving does not appear, the motion is called an abandoned motion. As to costs in such case: see notes to *Rule* 215.

As to moving against *ex parte* orders: see *Rules* 217 and notes.

Rule 217.

Service of ex parte order.

Service of Ex Parte Orders.—*Ex parte* orders should be served as soon as possible: *Church* v. *Marsh*, 2 Ha. 652; Dan. Pr. 5th ed., 1436. An order made on a motion on which a party affected appeared does not necessarily require to be served on such party: *Farden* v. *Richter*, 23 Q. B. D. 124; see also *Hopton* v. *Robertson*, 23 Q. B. D. 126 (*n*); and *Cronslon* v. *Blair*, 15 P. R. 167; except orders setting aside proceedings which, though made on notice, must be served promptly, or they will be deemed to have been abandoned: *Molsons Bank* v. *Dillabaugh*, 13 P. R. 312; but see *Kelly* v. *Wade*, 14 P. R. 66; and orders sought to be enforced by attachment must also be served.

Costs.

Costs.—Costs are not to be awarded on an *ex parte* motion: *Rule* 658, and see *McLeon* v. *Allen*, 14 P. R. 84. But presumably such costs are intended to be in the discretion of the Taxing Officer; but the awarding of costs, is a judicial function.

Ex parte orders may be moved against.

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

This *Rule* was passed in 1888 to meet the objections and difficulties raised in *Ryon* v. *Canada Southern Ry. Co.*, 10 P. R. 535; *McNabb* v. *Oppenheimer*, 11 P. R. 214, and *Taylor* v. *Sisters of Charity*, *Ib.*, 496; see *Hughes* v. *Field*, 9 P. R. 127.

See also *Boyle* v. *Sacker*, 39 Ch. D. 249.

All *ex parte* orders are *periculo petentis*: *Re McCarthy*, *Pepler & Co.*, 15 P. R. 261. See also notes to *Rule* 216.

In *Reid* v. *Trimmer*, 9 C. L. T. 391, it was held that where an order was made after an enlargement had been refused, and the opposing party had no material in answer to the motion, the order was not an *ex parte* one, and a motion against it should be by way of appeal.

As to *ex parte* orders for arrest: see R. S. O. c. 83, s. 25; *Jury* v. *Jury*, 16 P. R. 375.

An application to rescind an *ex parte* order made by a Local Judge was entertained by the Master in Chambers: *Williams* v. *Harrison*, 40 C. L. J. 80.

"Party affected."

"Party Affected."—Where a garnishee does not, pursuant to *Rule* 596, bring to the notice of the Court the claim of a third party, such third party is a "party affected," within this *Rule*: *Porker* v. *McIlwain*, 16 P. R. 555; 17 P. R. 84.

An execution creditor, prejudiced by an amendment of a judgment, and writs of execution issued in an action to which he was not a party, may, on application, have the order rescinded; but *quære*, whether this *Rule* applies to limit the time for making the application to rescind: see *Glass* v. *Comeron*, 9 Ont. 712; it must at any rate be made promptly: *In re Deakin*, 1900, 2 Q. B. 889.

The general administrator of a deceased defendant was held to be a party affected by an *ex parte* order appointing a judgment creditor to

be receiver of defendant's interest in an estate, and another person to be administrator *ad litem*, although the grant of general administration was subsequent: *McLean* v. *Allen*, 18 P. R. 255. Rule 217.

"Party Failing to Appear through Accident, Mistake, etc."— See *Flett* v. *Way*, 14 P. R. 122; *Cousins* v. *Cronk*, 17 P. R. 348. Party failing to appear.

Procedure on Motion.—On an application under this *Rule* a Judge, or the Master in Chambers, has power to reconsider a matter which has been brought before him *ex parte*, and to receive additional evidence both for and against the order impeached: *Flett* v. *Way*, 14 P. R. 123; and an *ex parte* order so brought up for reconsideration will not stand or fall upon the sufficiency of the affidavits on which it was made: *Cairns* v. *Airth*, 16 P. R. 100. Procedure on motion to set aside ex parte order.

For the purpose of a motion under this *Rule* to set aside a judgment obtained by default, the action is still pending, so as to make service of the solicitor on the record, good service: *Muir* v. *Guinane*, 10 O. L. R. 367.

The motion to rescind or vary may be supported, or opposed, by matter not before the Judge or officer when the order was made. The motion is not an appeal, but is a substantive motion, and the question is not alone whether the order should have been made, but whether, having been made, it should, in view of any change in the state of affairs, or position of the parties, be rescinded: *Howland* v. *Dominion Bank*, 15 P. R. 63; *Cairns* v. *Airth*, and *Cousins* v. *Cronk*, *supra*; *Allison* v. *Breen*, 19 P. R. 119, 143.

But the right of the party supporting the order to go into further evidence, will not prevent the order from being set aside if it should appear that there was not a fair disclosure of all material facts at the time the order was obtained.

Orders made from time to time *ex parte*, renewing a writ of summons (thus preventing the application of the Statute of Limitations) were rescinded, where the plaintiff knew, but did not disclose, that he knew where the defendant could be served: *Muir* v. *Cameron*, 18 P. R. 484. But an application to rescind an order renewing a writ of summons was refused where it appeared that nothing had been withheld from the officer who made the order, and that he had been satisfied with the efforts shown to have been made to effect service, though it appeared that the defendant had not changed his address, and that it might have been ascertained from a directory: *Canadian Bank of Commerce* v. *Tennant*, 5 O. L. R. 524.

Where costs were awarded against a non-appearing defendant by a Divisional Court, under the impression that he was represented on an appeal, a subsequent application by such defendant to vary the order of the Divisional Court, by striking out the order for payment of costs, was entertained and allowed: *Cousins* v. *Cronk*, 17 P. R. 348.

Costs of the application may be refused though it is successful: *Jackson* v. *Gardiner*, 19 P. R. 137; *In re Kitson*, 1911, 2 K. B. 109.

In *Brown* v. *Pepall*, 23 O. L. R. 630, it was held that an order purporting to be made on consent, but which did not in fact follow the terms of the consent, is not an *ex parte* order though made in the absence of the opposite party, and could only be varied on appeal: *sed quære*, if every order is not *ex parte* which is made in the presence of only one of the parties, unless made with the consent of the

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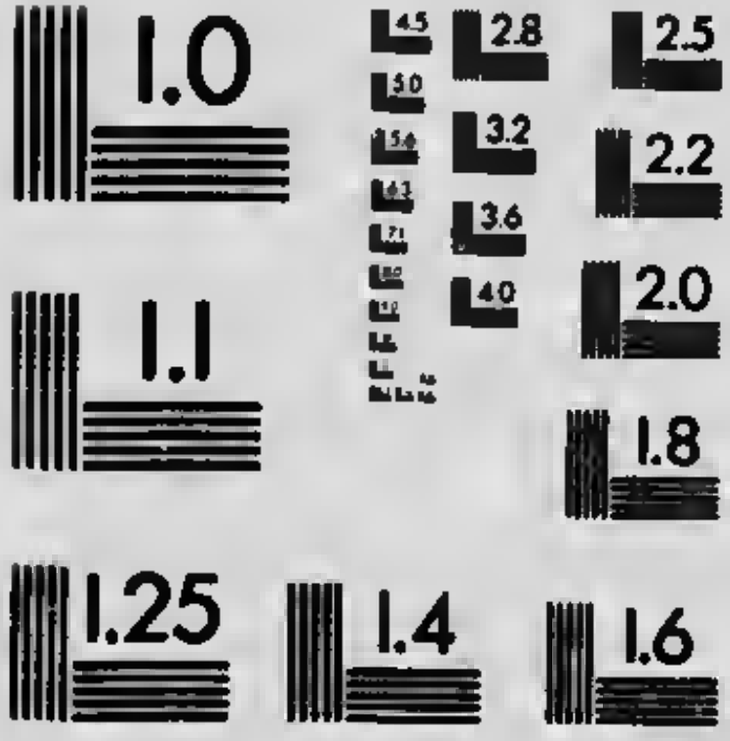

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absent party; an order improvidently made contrary to the terms of a consent is not a consent order, and appears to be as much *ex parte* as if there were no consent at all. If such an order could only be corrected on appeal, then affidavits to show that the Court had misinterpreted the consent would be inadmissible, which might in some cases work injustice..

Motion by way of appeal.

218. Every notice of motion by way of appeal shall specify the grounds intended to be argued. C.R. 363.

C. R. 363 only applied to motions by way of appeal from, or to set aside an award. The present *Rule* includes those, and all other motions by way of appeal.

As to irregularities: see *Rule* 219.

Irregularity to be stated in notice.

219. A notice of motion to set aside a proceeding for irregularity shall specify the irregularity complained of and the objections intended to be insisted on. C.R. 362.

See Eng. (1883) R. 1039; *Poole* v. *Poole*, 2 Chy. Ch. 379; *Donelly* v. *Jones*, 4 Chy. Ch. 48; *O'Reilly* v. *Moore*, 1 C. L. T. 565.

It may be sufficient if the notice refers to grounds of irregularity appearing in the affidavits. Where an irregularity complained of was not thus specified, the motion was dismissed, though the irregularity was proved: *Dominion S. & I. Co.* v. *Kilroy*, 12 P. R. 19; see also *Blain* v. *Bloin*, 9 P. R. 269; and *Petty* v. *Daniel*, 34 Ch. D. 172; *Wright* v. *Wright*, 13 P. R. 268; and *Vonsickle* v. *Boyd*, 14 P. R. 469, in the note to *Rule* 291, where an irregularity in an affidavit was held to be waived, objection not having been taken as required by this *Rule*: and see *Wood* v. *Worth*, 5 O. W. N. 452.

A party moving against an irregularity must himself be regular, and is not entitled to any indulgence: *Scott* v. *Burnham*, 3 Chy. Ch. 399; *Waterous* v. *Forron*, 6 P. R. 31; *Poole* v. *Poole*, 2 Chy. Ch. 379; *Donelly* v. *Jones*, 4 Chy. Ch. 48; he must move promptly: *Miller* v. *Miller*, 9 U. C. L. J. 132; and before taking a fresh step in the action: *Manning* v. *Birely*, 2 C. L. J. 331; *Lorkin* v. *Armstrong*, 1 Chy. Ch. 31; *Mulkern* v. *Doerks*, 51 L. T. 429; *Fry* v. *Moore*, 23 Q. B. D. 395; or making any demand respecting the alleged irregular proceedings which would put the opposite party to expense: *Carpenter* v. *Hamilton*, 2 Chy. Ch. 282; *Bennett* v. *O'Meoro*, 2 Chy. Ch. 167; *Re Forlinger and Morrisburg*, 9 C. L. T. 109; or he may be held to have waived the irregularity; but see *Hunt* v. *Worsfold*, 1896. 2 Ch. 224; 74 L. T. 456, where North, J., refused to follow *Mulkern* v. *Doerks*.

Proceedings that are merely irregular are valid until set aside, but a nullity has no effect whatever: *Fuller* v. *McLean*, 8 P. R. 549. See also notes to *Rule* 184.

An amendment of the notice of motion for the purpose of setting up an irregularity, will not be allowed after the time for remedying the irregularity has elapsed: see *Dunlop P. T. Co.* v. *Actien-Gesellschaft*, &c., 1902, 1 K. B. 342; 86 L. T. 472.

Application turned into motion for judgment.

220. The Court may direct any application to be turned into a motion for judgment. C.R. 617.

There is no corresponding English *Rule*.

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The Court may direct a motion for an interim receiver, or injunction, to be turned into a motion for judgment, where it is satisfied that there is no other question to be tried; and the consent of parties is not necessary: *Merritt* v. *Nissen*, Divl. Court, 12 Dec., 1900; *King* v. *Toronto*, *per* Britton, J., 29 Dec., 1902.

See this *Rule* applied in *Byrne* v. *Box*, 2 C. L. T. 47; but in *Solmes* v. *Stafford*, 16 P. R. 264 (revereing S. C., 16 P. R. 78), it was held by the Court of Appeal that this *Rule* could not be applied to turn an appeal from the Master in Chambers refusing a motion under C. R. 603, into a motion for judgment under this *Rule*.

This *Rule* was applied, with the consent of parties, on an appeal to the Appellate Division from an order made on appeal from the Master's report, which, by consent of parties, was turned into a motion for judgment on further directions: *Re Nichols & Hall*, 26 June, 1913.

Court may order speedy trial and change venue.

221. When upon an application for an interim injunction or upon any other motion it appears expedient to direct an early trial, the Court may make such order as may be deemed necessary to secure an early hearing, either at the place named for trial or such other place as may be convenient. *New. See* English Rule 657*a*.

The Eng. Rule referred to is 657 (1a.). This *Rule* virtually permits the Court to change the venue *sua sponte* if it shall appear expedient so to do, and to direct a trial in any County it may see fit, notwithstanding *Rule* 245. This may not only be done on a motion for an interim injunction, but upon "any motion." The *Rule*, however, will probably only be acted on in cases where it appears for some special reason to be in the interests of justice that the trial should be expedited, or the venue changed.

Summary relief on motion upon admissions in pleadings, etc.

222. A party may, at any stage of an action, apply for such judgment or order as he may, upon any admissions of fact in the pleadings, or in the examination of any other party, be entitled to; and it shall not be necessary to wait for the determination of any other question between the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination, or where infants are concerned, and evidence is necessary so far only as they are concerned, for the purpose of proving facts which are not disputed. C.R. 616.

See Eng. 1883, R. 376.

Scope of Rule.—The object of this *Rule* is to enable a plaintiff or defendant to get summary relief in the action, or as to so much of the action as there is no controversy respecting. If the whole matter of the action is not in controversy, either party may be entitled to move on the admission as to the part not in controversy: *Thorp* v. *Holdsworth*, 3 Ch. D. at p. 640.

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Under this *Rule* the admieeion on which the motion is founded must be either in the pleadings, or the examination of the party.

There cannot be en admiseion under thie *Rule* in the pleadings, until both claim and defence (*Jurmer* v. *Davis*, 23 Sol. Jour. 462), have been delivered: *McLeod* v. *Sexsmith*, 12 P. R. 606; the indorsement on a writ was held to be not a pleading within the *Rule*: *Wallis* v. *Jackson*, 23 Ch. D. 204, followed by Boyd, C., in *Fell* v. *Williams*, thongh not mentioned in the report: 3 C. L. T. 358: eee also *Gillott* v. *Ker*, 24 W. R. 428; and the reference to pieadings in the *Rule*.

The admissions muet be clear and definite: *Landergan* v. *Fcost*, 55 L. T. 42; 55 L. J. Chy. 505; and the Court will not under this *Rule*, order money to be paid into Court upon an interiocutory application, except upon a cleer admission that the party required to pay hes it in hand: *Neville* v. *Matthewman*, 1894, 3 Ch. 345; an admission that the party ie responsible therefor is not enough: *Nutter* v. *Holland*, 1894, 3 Ch. 408; *Crompton & E. Union Bank* v. *Burton*, 1895, 2 Ch. 711; 73 L. T. 181; hut see *Re Benson*, 1899, 1 Ch. 39; 79 L. T. 590; hut where a defendant admitted that ehe held in her hende funde of an infant, but claimed a discretionary trust therein, which was heid not to be the fact, she was ordered to bring the fund into Court: *Whitewood* v. *Whitewood*, 19 P. R. 183.

Admissions not in pleadings.

Admissions in lettere written hy a trustee before, and after, action brought, that he has received trust funde, and the recital of that fact in the eettlement, the execution of which by the trustee has been proved, are under the English Rule eufficient admissions to support an order for payment into Court, although there is no formal admission in the pleadings: *Hampden* v. *Wallis*, 27 Ch. D. 251; see also *Porrett* v. *White*, 31 Ch. D. 52; and eo are admissions in a letter by the defendant'e solicitor: *Ellis* v. *Allen*, 1914, 1 Ch. 904; *sed quære*, if they would he sufficient under this *Rule*, which requires the admission to be in the pleadings, or examination of the party.

Jurisdiction of Court on motion for judgment on admissions.

The Court can, on an interiocutory application, when it has before it the parties to an account, look at all the facts of the cese, and use ite discretion as to dieellowing chargee to which the party making them is clearly not entitled, and may order peyment into Court of the sum which it thue decidee to be pieinly due to the other party: *Wanklyn* v. *Wilson*, 35 Ch. D. 180.

Ordinarily an action will not be tried piecemeal: but where the claim of the plaintiff against the defendants ie severeble, and one defendant does not eppear, or doee not deliver a defence, and enother delivers a defence in which the plaintiff's right to relief is admitted, the plaintiff mey proceed againet the letter under thie *Rule*, and against the former by defeult: *Re Smith's Estate*, *Bridson* v. *Smith*, 24 W. R. 392; *Parsons* v. *Horris*, 6 Ch. D. 694; see, however, *Warner* v. *Dovies*, 79 L. T. Jour. 136; but *semble* the motion ageinst both parties should ordinerily he made et the same time. See also *Jenkins* v. *Davies*, 1 Ch. D. 696, where a statement of defence, purporting to be the defence of a husband and wife, raised no defence as regarded the hushend, end the plaintiff wes held entitled under the English rules of pleading (though it would be otherwise here under *Rule* 144) to judgment against the husband as edmitting the plaintiff's claim, without waiting for the determination of the case against the wife. Where the plaintiff'e claim againet several defendants is not severable, the

action should be brought to a trial or hearing against all of them at the same time: see notes to *Rule* 354. Rule 222.

The *Rule* is applicable at any stage of the action, after pleadings: *McLeod* v. *Sexsmith*, *supra*, and therefore it was held that the plaintiff was entitled to judgment on an admission under this *Rule*, though he had delivered a reply, and the action was set down for trial: *Brown* v. *Pearson*, 21 Ch. D. 716; and the *Rule* may be acted on at the trial: *Tildesley* v. *Harper*, 7 Ch. D. 403. After a judgment obtained without pleadings, the *Rule* was held to be applicable on a motion under *Rule* 105 for leave to issue execution against a person who had been served as a partner under a judgment against the firm, the necessary admissions appearing in an examination of the person upon an affidavit made by him on the motion: *Tennont* v. *Manhard*, 12 P. R. 619; but there is no power under this *Rule* to determine summarily the liability of an alleged partner who was not served with the writ, and who disputes his liability: *Standard Bank* v. *Frind*, 14 P. R. 355; and see S. C. in appeal, 15 P. R. 438. Motion for judgment on admissions at any stage.

The entering of a dispute note under *Rule* 50, limiting the defence to a part of the sum claimed, and admitting the remainder, was held to be an admission under this *Rule*: *Crawford* v. *Gemmell*, 7 C. L. T. 117; but see now *Rule* 50.

It is in the discretion of the Judge whether to give relief on the motion or not, and the Appellate Division will not review his discretion: *Mellor* v. *Sidebottom*, 5 Ch. D. 342.

On a plaintiff's motion for judgment where all the facts are before the Court, and the conclusion is against the plaintiff, the action, and not merely the motion, may be dismissed: *Hill* v. *Hill*, 2 O. L. R. 289, 541; 3 O. L. R. 202. So also on a defendant's motion, where, in an action for libel against a newspaper, it appeared by the pleadings and the admission of the plaintiff in his examination for discovery that no notice had been given as required by *The Libel and Slander Act*, (R. S. O. c. 71), s. 8, the action was dismissed with costs: *Benner* v. *Mail Printing Co.*, 24 O. L. R. 507. Action may be dismissed.

A defendant may move upon an admission entitling him to the "relief" of having the action dismissed: *Pascoe* v. *Richards*, 50 L. J. Chy. 337; 44 L. T. 87; *The Naples*, 35 W. R. 59; *Coyle* v. *Coyle*, 19 P. R. 97; *Herman* v. *Wilson*, 32 Ont. 60.

The Court acting under this *Rule* has decided, on the pleadings, the question whether the facts set up by the defence constituted a legal defence: *Ontario Bank* v. *Young*, 2 O. L. R. 761; but it has since been held that the *Rule* does not apply to the case of the alleged insufficiency in law of statements of fact pleaded in the defence: and that in such case the procedure provided by *Rules* 122 or 124 should be followed: *Edwards* v. *Cole*, 8 O. L. R. 140.

In an action for infringement of a patent, the defendant admitted the infringement in ten instances, but denied any other infringement. On a motion for judgment on the pleadings the plaintiff was held bound to take the denial as well as the admissions, and was entitled to an inquiry as to damages limited to the ten instances admitted: *United Telephone Co.* v. *Donohue*, 31 Ch. D. 339. Admissions must be taken as pleaded.

An admission by defence must be taken just as it is pleaded: *Demorest* v. *Midland Ry. Co.*, 10 P. R. 640. Thus in an action on a policy of insurance for £1,000, a defence that on an apportionment of the loss under a certain condition in the policy, the defendants were liable

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for £82 only, was set up. The plaintiffs were not allowed to have judgment for thie, and proceed for more; the defendants' contention being that the admiasion was, that £62 was due as the result of an entire defence shewing that no more was due: *Andrews* v. *Patriotic Assurance Co.*, 18 L. R. Ir. 115; and eee *Barrie* v. *Toronto & N. P. Co.*, 11 O. L. R. 48.

Admission by partner.

The statement of one partner on hia examination (in a suit against the firm), aa to transactions which occurred during the partnership, binds all the partners, unless they seek by examination of some of themselvea to contradict or qualify the statements of the partner whoae evidence they object to: *Taylor* v. *Cook & Co.*, 11 P. R. 80.

Mortgage actions.

In a forecloeure action, the statement of defence craved leave to refer to deeds mentioned in the etatement of claim, and, eave as by such deeds when produced ahould appear, the defence did not admit that they were to the effect mentioned in the statement of claim. Upon motion for judgment under thie *Rule*, the deeds being produced, it was held that there was a sufficient admission of the execution of the deeds, as they appeared to be of the dates, and made between the partiee, mentioned in the statement of claim: *Barnard* v. *Wieland*, W. N. 1882, 103; 30 W. R. 947.

Judgment for poasession was given against a mortgagor who admitted the mortgage and default eimply: *Truet & Loan Co.* v. *Hill*, 9 P. R. 8; so where he admitted that his mortgage was in defeult and that plaintiff was mortgagee, merely eaying, in addition, that aome one else was in posseesion: *Padgett* v. *Binns*, W. N. 1884, 10; see also *Croft* v. *Collingwood*, *Ib.*, 33.

In *Coddington* v. *Jacksonville, Peneacola and Mobile Railway Co.*, 39 L. T. 12, the plaintiff claimed a charge upon certain honds of a foreign state which were depoeited in the hank to the credit of the cause. The defendants, in their answer, admitted the plaintiff's title, and an order wae made, hefore the hearing, for the eale of the honds as periahable goode within the meaning of *Rule* 371.

Examples of relief given on motion.

Under thia *Rule* in a partition action, an inquiry wae directed as to the persona interested in the property: *Gilbert* v. *Smith*, 2 Ch. D. 688; an order for sale was made: *Burnell* v. *Burnell*, 11 Ch. D. 213; an order was made for taking the accounte of partnership dealings: *Turquand* v. *Wilson*, 1 Ch. D. 85; the agent of the trusteee of a will was ordered to deliver up all eecurities relating to the testator's eetate, and to account for all euma received on hehalf of the estate: *Rumsey* v. *Reade*, 1 Ch. D. 643; and an order wae made for a dissolution of a partnership: *Thorp* v. *Holdsworth*, 3 Ch. D. 637; aee also *Bennett* v. *Moore*, 1 Ch. D. 692; *Martin* v. *Gale*, 4 Ch. D. 428. Probahly also the common application for payment into Court by an accounting party of a sum admitted to be in hia hands may now, at any rate hefore judgment, he made in Chamhera under this *Rule*, though formerly made in Court: *Re Curry*, 8 P. R. 340. As to what la a eufficient admission for thia purpoae: see *Re Curry*, *supra*; *Re Babcock*, 8 Gr. 409; *Collins* v. *Orme*, 3 Chy. Ch. 70; *London Syndicate* v. *Lord*, 8 Ch. D. 84; *Freeman* v. *Cox*, *Ib.*, 148; *Symonds* v. *Jenkins*, 34 L. T. 277; *Re Beeny*, *Ffrench* v. *Sproston*, 1894, 1 Ch. 499; *Hollis* v. *Burton*, 1892, 3 Ch. 228; *Nutter* v. *Holland*, 1894, 3 Ch. 408; *Crompton & E. Union Bank* v. *Burton*, 1895, 2 Ch. 711; 73 L. T. 181; *Neville* v. *Matthewman*, 1894, 3 Ch. 345; *Re Benson*, 1899, 1 Ch. 39; 79 L. T. 590.

A foreclosure decree was refused where the defence did not admit the mortgage deed: *Davies* v. *Smith*, 29 Sol. Jour. 115, [or *Smith* v. *Davies*, 29 Sol. Jour. 132]: see W. N. 1884, 242; 52 L. T. 19. Rule 222. Insufficient admission.

Where a solicitor put in a fraudulent defence for his client, without the knowledge of the client, making admissions on which judgment was obtained against the client, the judgment was set aside and the client allowed to withdraw the defence and put in a fresh one: *Williams* v. *Preston*, 20 Ch. D. 672.

Practice on Motion.—Notice of motion need only be served upon the defendant who makes the admission, where the cause of action is severable: *Macmillan* v. *Australasian, etc.*, 76 L. T. 182. Practice on motion for judgment on admissions.

Those provisions of this *Rule*, which are not contained in the English Rule, are taken from the former Chancery order regulating hearings on motion for decree (see Chy. O. 270), and on bill and answer.

Both those methods of hearing a case were formerly employed in cases involving the consideration of important questions of law. Suits for the construction of wills are familiar examples: see for instance, *Fuller* v. *Macklem*, 25 Gr. 455; *Robson* v. *Argue*, 25 Gr. 407; *Patton* v. *Hickson*, 25 Gr. 102; *Clarkson* v. *Scott*, 25 Gr. 373. In such cases this *Rule* is no doubt applicable, and the motion will be properly made in Court: *Rogers* v. *Wilson*, 12 Ont. 322. In simpler cases similar to those in which the English Rule was intended to apply, the application may in England be made in Chambers: see *Gough* v. *Heatley*, W. N. 1884, 14; 32 W. R. 385; 49 L. T. 772; *Cook* v. *Heynes*, *Ib.* 75; *London, etc.*, v. *Digby*, 36 W. R. 497; 58 L. T. 724; 57 L. J. Chy. 505; *Allen* v. *Oakley*, 2 L. T. 724. Applications under C. R. 616 were formerly entertained by the Master in Chambers: see *Trust and Loan Co.* v. *Hill*, 9 P. R. 8; *Cook* v. *Lemieux*, 10 P. R. 577; *Taylor* v. *Cook*, 11 P. R. 60; *Heneberry* v. *Turner*, 2 Ont. 284; and see *Ladies Tailoring Assoc.* v. *Clarkson*, 27 C. L. J. 501. But it is open to doubt whether under the present *Rules* any motion for judgment can be made in Chambers except in the cases specified: see *Rule* 207 (8).

All the plaintiffs on the record must join in, or be parties to, the motion under this *Rule*: *Re Wright*, *Kirke* v. *North*, 1895, 2 Ch. 747; 73 L. T. 396.

Formerly in Chancery on a motion for decree the examination of a defendant might be read, with his answer, against him: *Proctor* v. *Grant*, 9 Gr. 31; *Mathers* v. *Short*, 14 Gr. 255; see also *Powell* v. *Lea*, 20 Gr. 521; and *Rogers* v. *Wilson*, 12 P. R. 322, 545; and on a motion for judgment under this *Rule* the defendant's examination for discovery may be read: *Coyle* v. *Coyle*, 19 P. R. 97. Affidavits proving exhibits might formerly be read on motion for decree under Chy. O. 270, or on a hearing on bill and answer: see *Killaly* v. *Graham*, 2 Gr. 281; *Chalk* v. *Raine*, 13 Jur. 981. And this would seem to be admissible under this *Rule* unless the documents in question are disputed: see *Cook* v. *Lemieux*, 10 P. R. 577. It may be found that, upon the documents which may be referred to, the questions raised in the action cannot satisfactorily be disposed of, in which case the action may be directed to be brought on for trial in the usual way: *Gardner* v. *Brown* (before Galt, C.J., 28th October, 1889). What may be read.

In England an application may be made where the judgment asked for is in the nature of a final judgment, and not merely interlocutory:

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Gilbert v. *Smith*, 2 Ch. D. 686; *Jenkins* v. *Davies*, 1 Ch. D. 696; *Re Borker's Estate*, 10 Ch. D. 162, 165; but it has been held that the party moving must have a clear case, and if he claims a right which does not exist at law, the fact that it is not denied in the other party's pleadings will not entitle him to judgment: *Chilton* v. *London*, 7 Ch. D. 735; see *Rule* 261.

It seems that in England, as a matter of form, further directions cannot be reserved; but the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett* v. *Moore*, 1 Ch. D. 692; *Gilbert* v. *Smith*, 2 Ch. D. 686; *Brassington* v. *Cussons*, 24 W. R. 881. No difficulty of that kind would seem to arise here, and where the motion is made in Chambers the motion on further directions should also be made in Chambers: *McGillicuddy* v. *McCarthy*, 7 C. L. T. 165.

Where the plaintiff makes no case the action, and not merely the motion, should be dismissed: *Hill* v. *Hill*, 2 O. L. R. 541; 3 O. L. R. 202; *Hermon* v. *Wilson*, 32 Ont. 60.

In an action on a foreign judgment where the only defence was a denial of the judgment, it was held that the plaintiff was not entitled to judgment, under this *Rule*, upon the pleadings and an exemplification of the judgment, as it was necessary for the plaintiff to give evidence to connect the defendant with it, and support its genuineness, the defendant having put the judgment distinctly in issue: *Henebery* v. *Turner*, 2 Ont. 284.

In reply the plaintiff admitted that a collision was not due to default of the defendant, or those on board, and submitted to a decree that it was due to inevitable accident. On motion by the defendant on the admission, the action was dismissed with costs: *The Naples*, 35 W. R. 59.

In an action by the payee against the maker of a note the defendant, on examination, said that the note had been made and delivered to a trading company for a purpose other than that for which the company had deposited it with the plaintiffs, but did not allege notice to the plaintiff. Judgment for the plaintiff was granted: *Ontario Bank* v. *Young*, 2 O. L. R. 761.

Where the plaintiff's case is not conclusively made out, the motion will be refused: *Cook* v. *Lemieux*, 10 P. R. 577, where it was held that much care must be taken in cases under this *Rule* not to take away the right of trial on *viva voce* evidence: see also *Gardner* v. *Brown*, *supra*, and *Bornum* v. *Henry*, 9 O. L. R. 319.

The whole of an admission in a pleading must be looked at, and the sense, and not merely the grammatical construction or the form thereof, is to be regarded as the criterion of the extent and scope of the admission: *Dovey* v. *Irwin*, 4 Ont. 8; *Borrie* v. *Toronto & N. P. Co.*, 11 O. L. R. 48; and it must be clear and distinct: *Londergan* v. *Feost*, 34 W. R. 691; 55 L. T. 42.

Counter-claim as an answer to a motion.

Where the plaintiff's claim is admitted, but the defendant sets up a counter-claim for damages for a larger amount, the plaintiff is not necessarily entitled to judgment upon the admission of his claim. The proceeding upon the plaintiff's claim may be stayed on proper terms pending the disposition of the counter-claim: *Rule* 117 (1). *Semble*, if the counter-claim is apparently frivolous or unsubstantial, the plaintiff would be entitled to have the amount of his claim

brought into Court to await the result: *Mersey Steamship Co.* v. *Shuttleworth*, 10 Q. B. D. 468; 11 Q. B. D. 531. A judgment for the plaintiff was granted, where the counter-claim was in fact an independent claim for damages as to the quality of other goods than those for the price of which the plaintiff was suing; but execution was directed to be stayed till after the trial, on the defendant paying the amount of the judgment into Court: *Showell* v. *Bowron*, W. N. 1883, 30; 31 W. R. 550; 48 L. T. 613; 52 L. J. Q. B. 284; *Sheppards* v. *Wilkinson*, 6 T. L. R. 13; *Court* v. *Sheen*, 7 T. L. R. 556. Rule 223.

Terms.—And where a plaintiff had obtained judgment on the pleadings against the defendant under this *Rule*, and the defendant appealed therefrom, and at the same time applied for leave to amend his defence, and set up a counter-claim, leave was granted, and the judgment recovered by the plaintiff was directed to stand as a security for what might ultimately be found due to the plaintiff: *Auerbach* v. *Hamilton*, 19 O. L. R. 570, and the term of payment of the amount into Court was refused. Terms, etc., where there is a counter-claim.

Withdrawing or Abandoning Admissions.—Where admissions were made not in pleadings, or in any document filed, but in a statement of facts agreed to by both parties, the plaintiff was held to be at liberty to abandon the admissions without any motion to be relieved from them, and to proceed with the action by statement of claim in the usual way, countermanding a notice of motion given by him for judgment on the statement of facts: *Post* v. *O'Connor*, 19 P. R. 301. Withdrawing admissions.

As to allowing an admission to be withdrawn: see *Hollis* v. *Burton*, 1892, 3 Ch. 226.

223.—(1) The Court may adjourn for consideration in Chambers any motion or matter brought before it which should have been brought on in Chambers or which, though properly brought on in Court, may, in the opinion of the Court, be disposed of more conveniently in Chambers; and any motion or matter brought or in Chambers which should have been brought on in Court may be adjourned into Court. Matters may be adjourned from Court to Chambers, and vice versa.

(2) Any motion or matter improperly brought before the Master in Chambers or a Local Judge may be adjourned by him before the Court or a Judge in Chambers. C.R. 367. *Amended.*

Quære, whether a Judge in Chambers can refer matters properly before him to the Appellate Division: see *Hood-Borrs* v. *Cothcart*, 72 L. T. 184; and see Jud. Act, s. 43, *supra*, p. 205.

Under C. R. 44, the Master in Chambers had power to refer any matter pending before him to a Judge, but that Rule has not been continued; and *semble*, there is no longer any such power, unless where the case is improperly brought before him. Under this *Rule* it would seem to be the duty of the officer to dispose of every application properly made to him: *Hughes* v. *Rees*, 9 P. R. 86; see also *Hood-Barrs* v. *Cothcart*, *supra*.

Rules 224-227.

A Local Judge has not power to transfer a motion, which may properly be heard by him, to be heard by the Master in Chambers, though the latter officer would have had jurisdiction to hear the motion had it been made originally before him: *Mahoney* v. *Welsh*, 6 O. W. R. 18.

When guardian to be notified.

224. Where an infant or lunatic is a defendant or interested in a fund in Court, no order in any way affecting his interest shall be made without notice to his guardian *ad litem* or committee. C.R. 359. *Amended.*

Half an hour's attendance on a summons, or appointment is sufficient.

225. An attendance on a motion in Chambers, or on an appointment before a Master, Registrar, or other officer, for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance, and no such motion shall be made or matter be proceeded with *ex parte*, before the expiry of such half-hour. C.R. 350.

Evidence on motion.

226. Evidence upon a motion may be given by affidavit. C.R. 489.

An applicant who has failed to make out his case on his own affidavits, may read the affidavits of his opponent if they supply what is lacking: *Re Margetson & Jones*, 1897, 2 Ch. 314; 76 L. T. 805, and see notes to *Rule* 298.

It was held that a Judge could not, on an interlocutory motion, properly decide the matter in controversy by a personal inspection of the subject matter in dispute, in lieu of taking evidence orally, or by affidavit: *London General Omnibus Co.* v. *Lovell*, 1901, 1 Ch. 135; 83 L. T. 453. See notes to *Rule* 267.

It has been held in England, that affidavits in reply may bring forward additional evidence in support of the original case, and are not restricted by this *Rule*, to the points raised by the defendant's evidence: *Peacock* v. *Harper*, 7 Ch. D. 648; see also *Adair* v. *Young*, W. N. 1879, 8; *Roe* v. *Davies*, 2 Ch. D. 731; but see *Re Ferris & Eyre*, 18 Ont. 395, and *Gilbert* v. *Comedy Opera Co.*, *infra*.

Affidavits filed by a plaintiff in reply will not, upon an interlocutory motion, be ordered to be taken off the files, upon an allegation by the defendant that they are not confined to matters strictly in reply, though at the argument, if it should turn out to be so, the Court will not regard them, or may give leave to the defendant to answer them: *Gilbert* v. *Comedy Opera Company*, 29 W. R. 169; 43 L. T. 665.

This *Rule* has been held applicable to proceedings under *The Winding-up Act* (R. S. C. c. 144): *Re Boynes Carriage Co.*, 27 O. L. R. 144.

Cross-examination on affidavit.

227. A person who has made an affidavit to be used upon a motion or at a trial or on a reference, may be cross-examined thereon, before any officer having jurisdiction in the county in which the witness resides, upon being served with a subpœna for that purpose. C.R. 490.

Based upon Chy. O. 268. C. R. 490 expressly excepted affidavits on production. That exception though not in this *Rule*, nevertheless appears still to exist, as such affidavits do not appear to come within the *Rule*, not being made to be used on a motion at a trial, or on a reference; and a party cannot be cross-examined on an affidavit on production in support of a motion for a better affidavit on production: *Dryden* v. *Smith*, 17 P. R. 500; but, although a party is not liable to cross examination on an affidavit on production, this does not preclude the opposite party, on an examination for discovery, from inquiring as to the existence of material documents not referred to in the affidavit: *MacMahon* v. *Railway Passengers Assur. Co.*, 26 O. L. R. 430. Rule 227.

This *Rule* is held not to apply to proceedings to set aside a municipal election: *Rex* e. r. *Beck* v. *Sharp*, 16 O. L. R. 267; in such cases the leave of the Judge, or Master in Chambers, must be first obtained before a cross-examination on affidavits can be had: *Ib.* Whether the Master in Chambers has jurisdiction to make such an order is not quite clear: see *The Municipal Act* (R. S. O. c. 192), ss. 171, 173 (2), and *Rule* 208 (13).

C. R. 490 was held not to apply to proceedings in a Divisional Court: *Trethewey* v. *Trethewey*, 10 O. W. R. 893; but see *Rushton* v. *Grand Trunk Ry.*, 6 O. L. R. 425; nor to proceedings in the Master's office: *Plenderleith* v. *Parsons*, 10 O. L. R. 436, but in its present form *Rule* 227 appears to apply to any affidavit filed on any motion, or on any reference. It may be noted that the collocation of the Rules, on which the latter case is based is not the same in these *Rules*, and C. R. 668 has been dropped: C. R. 669, however, is retained: see *Rule* 411, and it may probably be held that even under this *Rule* if a cross examination on any affidavit used on a reference is desired, that it must be taken before, and subject to the direction of, the Master before whom the reference is pending.

A party cannot withdraw an affidavit which he has given notice of reading, so as to avoid a cross-examination of the deponent: *Clarke* v. *Law*, 2 K. & J. 28; *Pike* v. *Dickinson*, 21 W. R. 862; W. N. 1873, 178; *Re Quartz Mining Co.*, 47 L. T. 644; 21 Ch. D. 642.

The opposite party may cross-examine witnesses who have made affidavits though they are not read: *Re Ottaway* W. N. 1882, 9; 30 W. R. 282; *Re Quartz Hill, etc., Co., supra;* but see *Mosson* v. *Thorley's Food Co.*, W. N. 1879, 181.

The party cross-examined cannot insist on the passage in his affidavit being read, or shewn, to him, before he answers: *Gwynne* v. *Watney*, 31 L. T. O. S. 231.

Cross-examination on affidavits filed in answer to a motion not properly made may be refused: *Canada Bank of Commerce* v. *Bricker*, 1 C. L. T. 729, until the question of the propriety of the motion has been determined.

As to the mode of compelling attendance for cross-examination: see *Rules* 338-347.

The right to re-examine necessarily follows upon cross-examination: *Rex* v. *Noel*, 6 O. L. R. 385; even as to matter elicited during cross-examination, which is inadmissible or volunteered, unless the cross-examiner submits to such matter being expunged.

Rule 228.

The *Rule* has been held to apply to proceedings under *The Winding-up Act* (R. S. C. c. 144): *Re Baynes Carriage Co.*, 27 O. L. R. 144.

Upon an examination of a witness under this *Rule* he may be required to produce documents in his possession, but where he is the servant of a company, and a witness on its behalf, the company can only be required to produce its books for his examination so far as may be necessary to contradict or test the accuracy of the witness's evidence: *Re Baynes Carriage Co.*, 27 O. L. R. 244.

The affidavit of justification of a surety in an appeal bond filed, was held to be an affidavit used in a proceeding within Chy. O. 263: *Hughes* v. *Hughes*, 17 C. L. J. 110; 1 C. L. T. 189; but would not appear to be within this *Rule*.

When the proceeding for which the affidavit has been filed has been disposed of, the right of cross-examination is gone: *Catholic Printing Co.* v. *Wimon*, 11 W. R. 399; *Felan* v. *McCill*, 3 Chy. Ch. 56; *Clendinning* v. *Varcoe*, 7 P. R. 61.

Deponents making affidavits in reply, are liable to cross-examination: *Re Foster*, 6 P. R. 95; 9 C. L. J. 313.

As to the extent to which the affiant may be cross-examined: see *Wilson* v. *Fleming*, 19 P. R. 203.

Attendance of witnesses for examination in motions how procured.

228. Any party may by subpœna require the attendance of a witness to be examined, before any officer having jurisdiction in the county in which the witness resides, for the purpose of using his evidence upon any motion. C.R. 491.

C. R. 491, enabled evidence to be taken not only for use on any motion, but also on "any other proceeding." The present *Rule* is confined to evidence required upon any motion.

Motion must be pending.

A motion must be pending to enable a party to proceed under this *Rule*: *Traders' Bank* v. *Kean*, 13 P. R. 60. Depositions taken when no motion is pending, are irregular, and cannot be read: *Stovel* v. *Coles*, 3 Chy. Ch. 362; and an appointment to examine in such circumstances will be set aside: *McLaren* v. *Tew*, 3 O. W. N. 1376.

A party cannot, under cover of a motion for particulars, proceed to examine a party for discovery: *D.* v. *W.* 3 O. W. N. 993.

An *ex parte* motion is a "motion . . . before the Court" within the *Rule*: *Dunlop* v. *Dunlop*, 9 O. L. R. 372.

Subpœna, date of.

Where the evidence of a person who refuses to make an affidavit is sought in support of an *ex parte* motion, the motion must be mentioned, and an adjournment obtained for the purpose of procuring the desired evidence under this *Rule*; or else an order for the examination of the witness must be obtained under *Rule* 271.

A subpœna for the examination of a witness, dated prior to the time at which the party issuing the same was entitled to examine the witness, was held to be irregular: *McMurray* v. *Grand Trunk Ry. Co.*, 3 Chy. Ch. 130.

A party as well as a stranger may be examined as a witness under this *Rule*, and the consequence of default in attendance is to put

him in contempt: *Clark* v. *Campbell*, 15 P. R. 338; and where the evidence of the party in default is required in support of a motion to set aside, or vary, an order obtained by such party, the operation of such order may in the meantime be suspended: *Ib.* Rule 228.

Evidence may be taken under this *Rule* in support of a motion for a new trial: *Rushton* v. *Grand Trunk Ry.*, 6 O. L. R. 425.

The witness, though not a party to the action, may move to set aside the subpœna and appointment served on him: *Dunlop* v. *Dunlop*, 5 O. W. R. 258, 305; and see *London & Globe* v. *Kaufman*, 48 W. R. 458; 1899, W. N. 240.

This *Rule* was held to apply to proceedings under *The Winding-up Act* (R. S. C. c. 144): *Re Baynes Corriage Co.*, 27 O. L. R. 144; and see S. C. 27 O. L. R. 244.

The *Rule* does not apply to criminal proceedings, *e.g.*, motions to quash convictions: *Reg.* v. *Hayword*, 32 C. L. J. 30; or to a summary proceeding under *The Assignments and Preferences Act* (R. S. O. c. 134), s. 11, to remove an assignee, which is not a proceeding in an action: *Re Wilson*, 6 O. L. R. 564; nor to proceedings in controverted municipal elections: *Rex, e. r.*, *Beck* v. *Sharp*, 16 O. L. R. 267. *The Municipal Act* (R. S. O. c. 192), provides a special code of procedure in such matters: see ss. 171, 173 (2).

229. Witnesses may by leave of the Court be examined *viva voce* before the Court upon any motion. C.R. 493. Viva voce examinations.

In re Fraser, 24 O. L. R. 222, a Divisional Court on an appeal from a judgment at the trial of an issue, ordered an examination of witnesses before itself, and retried the case, but this course was held not to be warranted by the former Rules: S. C. 26 O. L. R. 508: but see now *Rule* 265.

C. R. 493 also provided for the production of documents: see now, *Rule* 349; but production could only be ordered under C. R. 493 for the purposes of a pending motion, and the Court had no power under that Rule to order a person, not a party to the action, to produce documents in his possession merely for the purpose of enabling a party to the action to inspect the same before trial: see *Straker* v. *Reynolds*, 22 Q. B. D. 262; 60 L. T. 107; *Central News Co.* v. *Eastern Telegraph Co.*, 53 L. J. Q. B. 236; *Elder* v. *Carter*, 25 Q. B. D. 194.

A person called on to produce documents under this *Rule* is entitled to take the same objection to produce them as he would on being served with a subpœna *duces tecum*: *Re Smith*, 1891, 1 Ch. 323; 64 L. T. 253. The fact that a document has been deposited with the witness in a sealed packet does not privilege it from production: *Rex* v. *Daye*, 1908, 2 K. B. 333; 99 L. T. 165.

A witness who objects to produce a document is not entitled to be heard by counsel: *Doe d. Rowcliffe* v. *Egremont*, 2 Moo. & Rob. 386; *Carson* v. *Davidge*, 34 C. L. J. 429.

Where a number of documents are produced by a witness who is not a party, the proper course is to obtain an adjournment to ascertain which of them are material. They should not be put in *en bloc*, and the witness questioned as to them *seriatim*: *Re Maplin Sands*, 71 L. T. 56, 594.

Rules 230-232.

How prisoners may be brought to give evidence.

230. The Court may order the sheriff, gaoler, or other officer having the custody of any prisoner, to produce him for any examination authorized hy these Rules or as a witness at a trial. C.R. 495.

See note to *Rule* 273.

Default in payment, how to be proved.

231. Where money is directed to he paid into a Bank, the certificate of the cashier, manager, agent, or like officer of the Bank, of default in making such payment, shall he sufficient evidence of such default. C.R. 497.

Certificate of non-payment, how to be signed.

The certificate should be signed hy the cashier, manager, or agent, or like officer. The certificate of an accountant in the hank is not sufficient: *Campbell* v. *Garrett*, 1 Chy. Ch. 255. A certificate of default, according to the present practice, should state that the money was not paid on the date of the taking of the account or since: see formerly: *Farrell* v. *Stokes*, 1 Chy. Ch. 201. The certificate does not prove itself, but must be verified hy an affidavit.

The affidavit of the plaintiff of non-payment is usually required on the motion for a final order for sale, or foreclosure, in addition to the certificate of the bank: see *Rule* 486, note.

Power given to receive further evidence in all appeals, etc.

232.—(1) On all appeals, or hearings in the nature of appeals, and on all motions for a new trial, the Court or Judge appealed to shall have all the powers as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence, either hy affidavit, oral examination before the Court or Judge appealed to, or as may he directed.

(2) Such further evidence may he given without special leave as to matters which have occurred after the date of the judgment, order or decision from which the appeal is hrought.

(3) Upon appeals from a judgment at the trial, such further evidence (save as mentioned in subsection (2)) shall he admitted on special grounds only, and not without leave of the Court. C.R. 498.

Semble, that this *Rule* does not apply to evidence newly discovered after the trial: *Bank of B. N. A.* v. *Western Assurance Co.*, 11 P. R. 434. It is confined to cases where the evidence is sought to be introduced for the purposes of the appeal: *Dueber Watch Case Mfg. Co.* v. *Toggart*, 19 P. R. 233; the Court may entertain an application to admit new evidence on, and for the purposes of, a County Court appeal: *Butler* v. *McMicken*, 32 Ont. 422.

New evidence to be admissible under this *Rule* must be practically conclusive, merely corroborative evidence, or evidence obtained under suspicious circumstances will not be admitted. As a rule the evidence

must be of some fact essential to the case of the existence of which there is no reasonable doubt, or no room for serious dispute, and there must have been no remissness in adducing all possible evidence at the trial: *Rothbone* v. *Michael*, 20 O. L. R. 503. Rule 232.

New evidence was admitted, in *Leoch* v. *Grand Trunk Ry.*, 13 P. R. 467; *Burfoot* v. *DuMoulin*, 21 Ont. 583; *Dean* v. *Ont. Cotton Mills*, 14 Ont. 119; *Dolen* v. *Metropolitan L. A. Co.*, 26 Ont. 67; *Warren* v. *Van Norman*, 29 Ont. 84, 508; see also notes to *Rule* 257.

It would seem that a special motion for leave is not necessary, but leave may be obtained on the argument of the appeal. It will in general be advisable, however, to notify the opposite party of the intention to ask leave to give the further evidence.

See *Sanders* v. *Sanders*, 45 L. T. 637; 51 L. J. Chy. 276; 18 C. L. J. 236; *Re Compton, Norton* v. *Compton*, 27 Ch. D. 392; *Robinson* v. *Bradshaw*, 32 W. R. 95; *Leach* v. *Grand Trunk Ry.*, *supra*; *Wood* v. *Reesor*, 22 Ont. App. 57; *Re Rouse*, 59 L. T. 887.

Evidence that a foreign corporation had been licensed to do business in Ontario was admitted after the argument of an appeal: *Semi-Ready* v. *Tew*, 19 O. L. R. 227; further evidence was admitted after judgment on an appeal, but before the order on appeal was issued, and upon such further evidence, the judgment on appeal was recalled, and a new one pronounced: *Rathbone* v. *Michael*, *supra*; and evidence of the by-law of a company authorizing the sale of its shares at a discount, was admitted on an appeal from the judgment at the trial, no objection having been made at the trial to the want of such evidence: *Gowganda-Queen Mines* v. *Boekch*, 24 O. L. R. 293; 46 S. C. R. 645; and see 27 O. L. R. 643.

For remarks as to the caution to be observed in giving leave to adduce further evidence in appellate Courts: see *Merchants Bank* v. *Lucas*, 12 P. R. 526; *Arnison* v. *Smith*, 41 Ch. D. 98; and *Shoe Machinery Co.* v. *Cutlan*, 1896, 1 Ch. 108; and the remarks of Cotton, L.J., against allowing fresh evidence to meet defects in the case, seen after trial: *Re Leonard & Ellis Trade Mark*, 26 Ch. D. 289. Where evidence is allowed to be adduced, the opposite party has the right to cross-examine thereon: *Spencer* v. *Ancoats V. R. Co.*, 84 L. T. Jour. 440.

Leave to adduce further evidence on an appeal, with a view to the reduction of damages, or a new trial, was refused, where the Court appealed from had reduced the damages if the plaintiff would consent (which he had done), but the defendants were still dissatisfied: *Fraser* v. *London Street Ry. Co.*, 18 P. R. 370; but *semble*, where the Court finds the damages excessive in a case tried by a jury, it must order a new trial, it cannot reduce the damages, except by consent of both parties: *Watt* v. *Watt*, 1905, A. C. 115.

Where an assignment of a policy was lost, but it was doubtful whether sufficient evidence of the loss had been given to warrant the admission of secondary evidence, at the trial, further evidence by affidavit was allowed by the Divisional Court to be given on a motion against the judgment: *Dolen* v. *Metropolitan Life Ins. Co.*, 26 Ont. 67; and see *Warren* v. *Van Normon*, 29 Ont. 508.

Where a Divisional Court, on an appeal from a judgment made on the trial of an issue, directed witnesses to be examined before itself,

Rules 233, 234.

and in effect re-tried the issue, it was held to be a procedure not warranted by the former Rules: *Re Fraser*, 24 O. L. R. 222; 26 O. L. R. 508.

The Supreme Court of Canada does not allow fresh evidence to be used on an appeal: *Montreal* v. *Hogan*, 31 S. C. R. 1.

Pending an appeal to the Supreme Court the appellant applied for leave to give evidence that a copy of a document put in as an exhibit was not a true copy, but it not appearing that such evidence would necessarily affect the judgment of the Court, the application was refused: *Dueber Watch Co.* v. *Taggart*, 19 P. R. 233; and see *Birch* v. *Birch*, 1902, P. 130.

233. Upon any motion the Court shall have power to direct the trial of an issue upon oral evidence and may enlarge the motion before the Judge at the trial of the issue. *New.*

A somewhat similar power was given by C. R. 615, which has been dropped from this revision; but see Jud. Act, s. 27 (2), *supra*, which to some extent embodies the provision of C. R. 615. The power to direct an issue would appear to be a part of the inherent jurisdiction of the former Court of Chancery, now vested in the Supreme Court of Ontario: see Sm. Pr. (6th ed.), 787-788. Where an order was taken, by the consent of the parties, to determine certain issues of fact in a manner which the Judge afterwards held to be beyond the powers of the Court, Jessel, M.R., refused to proceed with the trial, on the ground that any decision founded upon this consent order would not be binding upon the parties: *Republic of Bolivia* v. *National Bolivia Nav. Co.*, 24 W. R. 361.

Weekly sittings in Chambers and in Court.

234.—(1) A Judge shall sit in Chambers on Tuesday and Friday, and in Court on Monday, Wednesday and Thursday in each week, except in vacation. C.R. 99.

Court motions.

(2) All papers for use in the Court at Toronto shall be filed in the Registrar's office and all papers for use in Chambers shall be filed with the Clerk in Chambers, and when no longer required all such papers and all papers forwarded for use on the motion shall be transmitted to the office in which the proceedings were commenced. C.R. 102. *Amended.*

Chambers motions.

(3) All papers to be used on a Chamber motion to be heard by a Judge in Chambers shall be left with the Clerk in Chambers on the day before that on which the motion is to be heard, and shall be marked with the name of the office where the proceedings were commenced. *New.*

Transmission from local offices.

(4) All documents sent from local offices to Toronto shall be sent to The Central Office, and the necessary return postage or express charge shall be transmitted therewith.

(5) Unless otherwise directed by the Judge, *ex parte* and unopposed motions in Chambers shall be heard before contested motions and appeals. C.R. 369. Rule 239. Ex parte motions.

(6) Motions and other matters to be heard in Court, except *ex parte* applications, shall be set down for argument, in the Registrar's office, on *præcipe*, at least on the day before the day of argument, and a list of the cases set down shall be posted up the day before the day for which the same are set down, and a copy shall be furnished to the Registrar or other officer who is to attend the sittings of the Court. C.R. 364. Court motions to be set down.

The Registrar's office referred to in this *Rule* is that of the High Court Division.

Affidavits before the Court on a motion and mentioned in the order made thereon, were held to be taxable, though filed in the office of the Clerk in Chambers instead of in the Registrars' office: *Sturgeon Falls P. Co.* v. *Sturgeon Falls*, 19 P. R. 286.

No. 8 of the Regulations of the High Court, passed on 17th Dec., 1904 (and which would appear to be still in force except as to Divisional Courts), is as follows:

"(8) When a case is required to be set down for a Divisional Court, Weekly Court or Chambers, the officer shall require the party desiring the case to be set down to indorse on the notice of motion the name of the office in which the action or proceeding was commenced, and the officer shall not set down any case without such indorsement, unless otherwise ordered by the Court or a Judge."

Motions which may be made in the Weekly Court, or in Judge's Chambers, in Toronto may also in certain cases be made at sittings for trials as provided by *Rule* 244.

N.B.—There are no *Rules* **235-238.**

239. Sittings shall be held at Ottawa and London on at least one day in each week, except during vacation; and all proceedings in any action or matter which may be heard before a Judge may be heard and determined at such sittings:— Sittings of Court at Ottawa and London.

(*a*) Where the motion is *ex parte;* Matters which may be heard at such sittings

(*b*) Where the solicitors for all parties reside in the county in which the sittings are held;

(*c*) Where such solicitors who do not so reside consent to the proceeding being heard at such sittings; or register their names in the book to be kept as hereinafter provided; or

Rules 240-243.

(*d*) Where a Judge may direct any proceedings to be heard at such sittings. C.R. 104.

This *Rule* is not intended to apply to sittings for the trial of actions, but merely to such business as may be disposed of by a Judge in the Weekly Court, or in Chambers.

The register referred to in clause (*c*) is that mentioned in *Rule* 243. C. R. 106 expressly provided that the procedure in the Weekly Courts at Ottawa and London should *mutatis mutandis* be the same as in the Weekly Courts, or in Judges' Chambers, in Toronto, but though that *Rule* has been dropped that does not indicate that there is any change in the practice in this respect, as in the absence of any *Rule* to the contrary, that is the only procedure provided.

Duties of Deputy Clerks.

240. The Deputy Clerks of the Crown at Ottawa and London respectively, shall act as registrar and clerk of the Court. C.R. 107.

Notice of matters to be heard at sittings.

241. All proceedings to be brought on at any such sittings shall be entered for that purpose with the Deputy Clerk of the Crown on or previously to the day next but one before the day appointed for the sittings; and it shall be the duty of the Deputy Clerk on the evening of that day to telegraph the Senior Registrar at Toronto, advising him what business has been so entered, and the Registrar shall forthwith inform the Judge appointed to attend at such sittings; and if no business has been so entered it shall not be necessary for any Judge to attend. C.R. 109.

Where Judge unable to attend on the day fixed.

242. Where the Judge appointed is unable to attend, such sittings may be presided over by any other Judge or by a Judge of any County Court, upon such Judge of a County Court being requested by a Judge to attend for that purpose. C.R. 110.

Form of declaration by solicitors desiring to be registered.

243.—(1) Any solicitor may file with the Deputy Clerk of the Crown at the place of such sittings a request to the effect following:—

I, desire to be registered as consenting to the hearing and disposal at the sittings at Ottawa (*or* London *as the case may be*) of all proceedings in which I may be acting as solicitor.

"Consent register."

(2) A book to be called "The Consent Register," which shall be open to inspection by any solicitor or his

clerk without fee, shall be kept by the Deputy Clerk of the Crown at Ottawa and London respectively, wherein shall be recorded such requests and the names of the local agents (if any) of the solicitors filing the request. Rule 243.

(3) A solicitor who files such request may at any time withdraw the same by giving to the same officer notice in writing to that effect, and the Deputy Clerk upon receiving such notice shall forthwith make an entry thereof in the said book. C.R. 111 and 112.

The Register referred to in this *Rule* appears to be in addition to that referred to in *Rule* 197.

Rules 244, 245.

CHAPTER XI.

TRIALS.

244. At any sittings appointed for the trial of actions any motion which may be made before a Judge in Court or in Chambers may be made if:—

(*a*) The solicitors for all parties consent; or

(b) The matter in controversy arise in the county; or

(*c*) The party opposing or showing cause or his solicitor resides in the county. C.J.A., sec. 91.

The letters "C.J.A." should be O.J.A., the reference intended being to the former Jud. Act.

Place of trial.

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

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

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

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

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

See Eng. (1883) R. 425.

Special statutory venues.

"**Subject to any Special Statutory Provisions.**"—The exception preserves the provisions under particular statutes by which certain kinds of action are directed to be tried in some particular place.

The exception contained in the present *Rule* operates in favour of local venues created by Dominion Acts, and Provincial Acts contained in the Revised Statutes, or passed subsequently thereto. See *Buckley* v. *Hull Docks*, 1893, 2 Q. B. 93; 69 L. T. 347; *Howard* v. *Herrington*, 20 Ont. App. 175.

The following are instances of actions governed by Dominion Statutes which fix the venue—actions for infringements of patents under *The Patent Act* (R. S. C. c. 69), s. 31; see *Goldsmith* v. *Walton*, 9 P. R. 10; *Aitcheson* v. *Mann*, Ib., 253, 473; *Alsop* v. *Cullen*, 4 O. W. N. 114; actions under *The Customs Act* (R. S. C. c. 48), s. 162; actions for anything done in the administration of the criminal law: see *Criminal Code* (R. S. C. c. 146), s. 1143. Rule 245.

Most of the restrictions formerly contained in certain Provincial Statutes respecting the place of trial of actions in particular cases have been repealed in the recent revision of the Statutes. Actions against municipalities for default in keeping highways and bridges in repair must be tried in the county in which the municipality is situate: see Jud. Acts, s. 54 *supra*.

Where no special statutory provision as to the place of trial applies, this *Rule* prescribes a particular place: (1) In actions where the cause of action arose and the parties reside in the same county: clause (b); (2) In actions for, or including, a claim for recovery of land, other than mortgage actions: clause (c). In other cases the plaintiff makes choice of such place as he thinks fit, though it must not be vexatiously chosen.

Clause (a).—The forms of specially indorsed writs in mortgage actions do not state a place of trial. This omission should be supplied as required by this *Rule*: see Form 5.

The mention of a place of trial in the indorsement of a writ, not specially indorsed, does not preclude the plaintiff from naming some other place of trial in his statement of claim: *St. Mary's & W. O. Ry.* v. *Webb*, 18 O. L. R. 336.

Under the Eng. R. similar to the former C. R. 653, it was held that no new jurisdiction was conferred, and that therefore actions for damages for trespass to lands out of the jurisdiction could not be maintained: *British S. African* v. *Companhia Mocambique*, 1893, A. C. 602; and see *Brereton* v. *Canadian Pacific Ry. Co.*, 29 Ont. 57.

An action to cancel a lease of a mining location, and to recover possession of the location, and to restrain the defendant from entering thereon, was held not to be an "action of ejectment" within the former Con. Rule: *Kendell* v. *Ernst*, 16 P. R. 167.

Clause (b).—This clause applies to County Court cases, and the venue may be changed and the action transferred to the Court of the County in which the cause of action arose and the parties reside: *Leach* v. *Bruce*, 9 O. L. R. 380; *Corneil* v. *Irwin*, 2 O. W. R. 466, and see *Rule* 767.

"**Cause of Action.**"—Means the whole cause of action. Where part of the cause of action arises in the county in which the parties reside, and part in another country, the *Rule* does not apply, and the question of venue must be determined by the consideration of convenience: *Conner* v. *Dempster*, 6 O. L. R. 354.

"**Parties Reside.**"—The residence of the plaintiff at the time of the delivery of his statement of claim, and not at the time of the issue of the writ, is the time referred to in this clause: *Edsall* v. *Wray*, 19 P. R. 245; unless the writ be specially indorsed: see clause (*a*).

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This clause will govern a case in which the cause of action has arisen in a county in which all the parties to it, other than those who are out of the jurisdiction, reside: *Saskatchewan Land, etc., Co.* v. *Leadley*, 9 O. L. R. 556. The county town of that county should therefore be named in the statement of claim as the place of trial. *Ib.*

Clause (c).—This clause is intended to apply to all actions for the recovery of land, except where such relief is part of the relief claimed in mortgage actions.

Actions for recovery of land.

In actions for recovery of land the trial must *primâ facie* take place in the county where the land lies, but the writ may issue from the proper office in any county: *Canada Permanent L. & S. Co.* v. *Foley*, 9 P. R. 273; so also an action for assignment of dower, which is an action for the recovery of land: *McCullough* v. *McCullough*, 4 C. L. T. 252.

An action by a mortgagee for foreclosure, payment, and possession, is not an action for recovery of land within this *Rule*, and the venue in such cases, therefore, need not be in the county where the lands lie: *Seymour* v. *De Morsh*, 11 P. R. 472; and see *Kendell* v. *Ernst*, 16 P. R. 167.

It is the duty of the plaintiff's solicitor to conform to clauses (*b*), and (*c*), and name the place of trial as there indicated. If it be not the most convenient place for the trial, the plaintiff may apply to change it to a more convenient place: *Brown* v. *Hazell*, 2 O. W. R. 784; *Pitze* v. *Cork*, 3 O. W. N. 401.

County Court cases.

Venue in County Courts.—Under *The County Court Act* (R. S. O. c. 69), s. 30 (1), unless the venue is changed, or the parties consent, actions for recovery of damages for trespass or injury, to land, brought under sec. 22 (1) *c*, actions for obstruction to easement under sec. 22 (1) *d*, are to *brought* and *tried* in the county where the land is situate; partnership actions under sec. 22 (1) *g*, in the county where the partnership had, or has, its principal place of business; and actions by legatees under sec. 22 (1) *h*, in the county where letters probate or of administration have issued, or where the deceased resided at the time of his death, unless by consent of the parties, or unless the place of trial is changed: and actions for the recovery of land are to be brought and tried in the county where the land is: sec. 30 (2).

Contract as to place of trial.

Place of Trial Fixed by Contract.—The parties formerly might agree that in case of litigation the action is to be carried on, or tried, in a Court having jurisdiction in a particular locality: see *The Noxon Co.* v. *Cox*, 6 O. L. R. 637; or that the trial shall be at a particular place: *Dulmage* v. *White*, 4 O. L. R. 121; and the Court gave effect to such a condition: *Ib.*; *Wright* v. *Ross*, 11 O. L. R. 113; but it would seem that such contracts or agreements do not affect the practice of the Court on motions to change the venue: see: *Bell* v. *Goodison Thresher Co.*, 12 O. L. R. 611; and see *The Division Courts Act* (R. S. O. c. 63), s. 74.

Former practice.

Clause (d).—Changing Place of Trial.—In Chancery no actions were local, all were transitory. At Common Law some actions were local, and some transitory. In a local action the venue had to be laid in the county in which the cause of action arose, though the trial might

be ordered to take place elsewhere. In a transitory action the plaintiff might lay his venue where he pleased, subject to the power of the Court or a Judge to order it to be changed. The practice as to changing the venue was, that either party might apply for an order for that purpose. The plaintiff, if the application was his, had to shew reasonable ground for the change, and if the application was the defendant's the defendant had to shew distinctly a preponderance of convenience in favour of trying where he proposed, instead of where the venue was laid: *Church* v. *Bornett*, L. R. 6 C. P. 116. Rule 245.

Now, the Court or a Judge may change the place of trial on motion for that purpose, in all cases not governed by special statute, including actions for recovery of land; see *Can. Pac. Ry.* v. *Manion*, 11 P. R. 247, and including actions within clauses (*b*) or (*c*) of *Rule* 245. Change of place of trial.

Under the present *Rule*, on a motion to change the place of trial, while the matter is largely in the discretion of the Court, or Judge, and one question is where can the action most conveniently be tried (see *Greey* v. *Siddall*, 12 P. R. 557; *Taylor* v. *Grant*, 9 C. L. T. 140), it is now settled by two decisions of Divisional Courts that the discretion is to be exercised subject to two restrictions, viz.:—

(1) The plaintiff, where clauses (*b*), or (*c*), do not apply, has a right to select the place of trial, a right which is not lightly to be interfered with, where the place has not been vexatiously chosen; and

(2) The onus is upon the applicant to shew that the preponderance of convenience is against the place named in the statement of claim: *Stondord Drain Pipe Co.* v. *Fort William*, 16 P. R. 404; *Hollidoy* v. *Stanley*, *Ib.*, 493; see also *Noad* v. *Noad*, 6 P. R. 48; *Plum* v. *Normanton*, W. N. 1876, 105; *Wood* v. *Koy*, W. N. 1879, 206; *Shroder* v. *Myers*, 34 W. R. 261; *Green* v. *Bennett*, 32 W. R. 848; 50 L. T. 706; *Bridcut* v. *Duncan*, 7 T. L. R. 514; *Walton* v. *Wideman*, 10 P. R. 228; *Ross* v. *Con. Pac. Ry. Co.*, 12 P. R. 220; *Nicholson* v. *Linton*, *Ib.*, 223; *Madgon* v. *Ferland*, 17 P. R. 124. This was in effect the practice in Chancery formerly: *Noad* v. *Noad*, 6 P. R. 48; *Bridcut* v. *Duncan*, 7 T. L. R. 514; and was held by the Court of Appeal to be the settled practice: *Compbell* v. *Doherty*, 18 P. R. 243.

There has not been unanimity amongst the Judges in this Province as to the weight to be given to the place where the cause of action arose, in determining the place which is most convenient. This had formerly little weight in Chancery: *Noad* v. *Noad*, *supra*; but was an important element at Common Law: *Harper* v. *Smith*, 6 P. R. 9; *Gilmour* v. *Stricklond*, 6 P. R. 254; *Phippen* v. *McLeod*, 7 P. R. 377. The reported cases, and the opinions of the majority of the Judges, are in favour of adopting the former Chancery practice, and of determining the convenience by a consideration of the expense, and the witnesses' facilities of travelling: see cases *supra*, and *Davis* v. *Murray*, 9 P. R. 222; *Robertson* v. *Dagoneou*, 3 C. L. T. 266; *Walton* v. *Wideman*, 10 P. R. 228; *Slater* v. *Purvis*, 10 P. R. 604; *Ross* v. *Con. Pac. Ry. Co.*; *Nicholson* v. *Linton*, *supra*; *Taylor* v. *Grant*, 9 C. L. T. 140; *Odell* v. *Mulholland*, 14 P. R. 180; *Berlin Piano Co.* v. *Truoisch*, 15 P. R. 68; *Brethour* v. *Brooke*, 15 P. R. 205.

"The facts in each case must be considered, but it is a safe general rule that the venue will not be changed unless the defendant shews that some serious injury and injustice to his cause will arise by trying it where the plaintiff proposes to have it tried": per Boyd, C., in *Dowie* v. *Partlo*, 15 P. R. 314.

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The fact that a view by the jury, or the Court, might be necessary, is a circumstance to be considered: Odell v. *Mulholland*, 14 P. R. 180; *Canada Carriage Co.* v. *Down*, 46 C. L. J. 139; see also *Jenkins* v. *Bushby*, 1891, 1 Ch. 484; *Mangan* v. *Metropolitan Electric Supply Co.*, 1891, 2 Ch. 551.

The Court, or Judge, will not enter into an inquiry as to the personal inconvenience of witnesses: *Standard D. P. Co.* v. *Fort William*, 16 P. R. 404; *Higgins* v. *Coniagas Reduction Co.*, 2 O. W. N. 953; and it is impossible, as a general rule, to enter into the investigation whether one class of witnesses will be more injured than another, by absence from home: *Noad* v. *Noad*, and *Davis* v. *Murray*, *supra*, p. 703; *Berlin Piano Co.* v. *Truolsch*, 15 P. R. 68; except in the case of a public officer: *Fisken* v. *Smith*, 2 Chy. Ch. 49; *Fogg* v. *Fogg*, 12 P. R. 249.

Change of place of trial.

As to witnesses who are out of the jurisdiction, the place of trial may be of comparatively little importance: *Saskatchewan Land*, etc., *Co.* v. *Leadley*, 5 O. W. R. 449.

The preponderance of convenience to be shewn by the defendant must be considerable. A change will not be made on account of a trifling difference in expense: see *Peer* v. *N. W. Transportation Co.*, 14 P. R. 381; *Stewart* v. *Johnstone*, 4 U. C. L. J. 21; *Mooney* v. *Mooney*, 6 P. R. 267; *Keyes* v. *McKeon*, 2 O. W. N. 899; and *Walton* v. *Wideman*, and other cases *supra*, p. 703, even though the cause of action arose at the place to which the change is asked to be made: *McDonold* v. *Dawson*, 8 O. L. R. 72; *Campbell* v. *Doherty*, *supra*, p. 703; especially if the plaintiff undertakes to pay the difference in expense: see *Brigham* v. *McKenzie*, 10 P. R. 406; but an undertaking by defendant to pay the difference in expense to the plaintiff if the place of trial is changed is not a ground for making a change: *McDonald* v. *Dawson*, *supra*.

But difference of expense is of more importance in an alimony action, as the defendant has to bear in any event all the disbursements: *Fogg* v. *Fogg*, 12 P. R. 249.

An affidavit giving names of witnesses and the nature of their evidence, will outweigh one that merely deals in generalities: see *Dickenson* v. *Toronto Ry.*, 2 O. W. N. 832.

Where the parties reside in the county in which the cause of action arose and the venue is laid, a very strong case will have to be made out to obtain a change: see *Pollard* v. *Wright*, 16 P. R. 505; *Servos* v. *Servos*, 11 P. R. 135.

The fact that a change will delay the trial considerably is a circumstance to be considered: *Servos* v. *Servos*, *supra*.

A direction to the parties to disclose the names and evidence of the witnesses, in order to consider whether the witnesses are material, is not proper: *Arpin* v. *Guinane*, 12 P. R. 364.

Where the plaintiffs resided at Montreal, and the defendants' officers at Picton, and the plaintiffs had some witnesses resident at Toronto, the place of trial was changed from Ottawa to Toronto: *Cooper* v. *Central Ontario Ry. Co.*, 4 Ont. 280.

Where owing to conflicting affidavits it is impossible to decide which would be the most convenient place of trial, the Court may decline to interfere, leaving it to the trial Judge to apportion the cost as may be proper if it shall appear that the wrong place has been selected:

McArthur v. *Michigan Central*, 15 P. R. 77, as explained in *Brethour* v. *Brooke*, 15 P. R. 205; and see *Roberts* v. *Jones*, 1891, 2 Q. B. 194. Rule 245.

Delay in applying may, apart from all other considerations, be sufficient to justify the dismissal of a motion to change the venue; as where the action is just about to be tried, and application might sooner have been made: *Phillips* v. *Beall*, 26 Ch. D. 621; 32 W. R. 665.

The affidavits on such motions should be made by the parties themselves, and not by their solicitors: *Hood* v. *Cronkrite*, 4 P. R. 279; *Baker* v. *Waldon*, 2 O. W. R. p. 434; *Leach* v. *Bruce*, 9 O. L. R. 380.

An application is not necessarily premature because issue is not joined, if the issues can be determined from the pleadings: *Powell* v. *Cobb*, 29 Ch. D. 488-9.

Semble, this *Rule* does not give a Judge a right to interfere with the procedure in the action (*e.g.*, to change the venue of his own motion), except at the instance of a party: *Bull* v. *North British, etc., Co.*, 11 P. R. 83. Such motions should not be made at the Assizes; it is too late then to consider the balance of convenience, as the parties have to be prepared for trial: *Sarnia Agricultural Implement Co.* v. *Perdue*, 11 P. R. 224.

The plaintiff having named a place of trial in a specially indorsed writ, cannot name a new one in the statement of claim: *Segsworth* v. *McKinnon*, 19 P. R. 178; *Turcotte* v. *Finkelstein*, 2 O. W. N. 952; nor having named one in his statement of claim, can he change his mind and name a new one by amendment of the statement of claim under *Rule* 127: *Bull* v. *North British, etc., Co.*, 10 P. R. 622. As to whether the omission to name a place of trial in the statement of claim can be supplied by amendment: see note to *Rule* 127. Change on plaintiff's motion.

Where the writ is not specially indorsed the plaintiff may, in his statement of claim, name a different place of trial to that indorsed in the writ: *St. Mary's & W. O. Ry.* v. *Webb*, 18 O. L. R. 336.

The place of trial may be changed in actions to recover land, as well as in other cases: see clause (*d*), *Can. Pac. Ry. Co.* v. *Monion*, 11 P. R. 247.

In the cases mentioned in clauses (*b*) and (*c*) of the *Rule*, viz., actions where the cause of action arose, and the parties or those who are within the jurisdiction, reside in the same county, and actions for recovery of land, the plaintiff is obliged to name a particular place, whether the most convenient or not: *Saskatchewan* v. *Leadley*, 9 O. L. R. 556. In such case the plaintiff may, nevertheless move, like the defendant, to have the place changed; the onus will be upon the applicant of shewing a preponderance of convenience in favour of the change proposed.

In the cases where the plaintiff has the right of selection, he cannot have the place settled by him changed, if the defendant objects, except upon shewing some cogent reason. If the place chosen by him is manifestly an improper one, he may be ordered to pay the costs of the motion to change: *Martin* v. *Ross*, 6 P. R. 264. If, however, the plaintiff is obliged by clause (*b*), or (*c*), to name a place which is not the most convenient, he cannot be said to have named an improper place, and where he applies for a change, the circumstance that he has named a place should not weigh against him. The

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plaintiff may probably, however, as formerly, obtain a change to hasten the trial, where he is in danger of losing his debt, particularly if by some unforeseen circumstance he has been prevented from going to trial at the place originally named by him: see *Lucas* v. *Taylor*, 4 P. R. 99; *Mercer* v. *Vogt*, 3 P. R. 94; *James* v. *James*, 3 Chy. Ch. 54; *McDonell* v. *Prov. Ins. Co.*, 5 U. C. L. J. 186 (where the Judge appointed to take the Assizes refused to try the case, being interested in the defendant company).

On ground that fair trial cannot be had, etc.

On other extraordinary grounds the place of trial may be changed. For instance, the existence of circumstances which may render it impossible to have a fair trial, such as political excitement: *Roche* v. *Patrick*, 5 P. R. 210; the interests of the locality being involved: *Municipal Council of Ontario* v. *Cumberland*, 3 U. C. L. J. 11; or its prejudices or sympathies enlisted on one side so as to render a fair trial impossible: *McDonagh* v. *Prov. Ins. Co.*, 2 C. L. J. 104; *Blackburn* v. *Cameron*, 5 P. R. 341; see also *Davis* v. *Murray*, 9 P. R. 229; *Shafto* v. *Bolckow*, 35 W. R. 686; 57 L. T. 17; *Crossham* v. *Leach*, 32 L. T. 665; *Shroder* v. *Myers*, 34 W. R. 261; *Queen* v. *Appleby*, 13 C. L. T. 375; *Unger* v. *Brennan*, 14 P. R. 294; *Allen* v. *Turk*, 2 O. W. N. 43. But the mere fact that one of the parties is personally widely known or popular in any county, is not a reason for having the trial elsewhere: *Oakville* v. *Andrew*, 2 O. W. R. 608; *Brown* v. *Hazell*, *Ib.* 704.

Quære, whether the pendency of other similar suits, and the fact that a large number of persons are interested in the county in the matters involved, and that in the opinion of a number of residents a fair trial cannot be had, will be sufficient: see *Abell* v. *Leadly*, Abell v. *Kirk*, 2 C. L. T. 555, 557; see also *Moor* v. *Boyd*, 3 P. R. 374; *Unger* v. *Brennan*, 14 P. R. 294. See also where the Sheriff is a party: *Brannen* v. *Jarvis*, 8 P. R. 322; or the County Judge: *Anon.*, 4 P. R. 310.

The place of trial was changed in a collision suit in the Maritime Court, on the sole ground that the local Judge would be in a better position to try the case from his practical or easily obtainable knowledge of the locality in which the collision occurred: *The Wiarton Belle*, 2 C. L. T. 360.

Appeals.—The discretion of the Court or Judge, exercised on a motion to change the place of trial, is an appealable discretion: *Philips* v. *Beall*, 26 Ch. D. 621; 32 W. R. 665; *Saskatchewan, etc.*, v. *Leadley*, 9 O. L. R. 556; and see C. R. 1275, which has not been continued; and though a Judge in Chambers may, perhaps, freely review the decision of a subordinate judicial officer in Chambers, the discretion of a Judge in Chambers, unless a clearly mistaken view has been taken by him, will not be interfered with by a Divisional Court, even though the Court think the discretion might have been exercised differently: *per* Meredith, C.J., in *Standard D. P. Co.* v. *Port William*, 16 P. R. at p. 406-7, citing *The Assyrian*, 4 T. L. R. 694; see also *Benyon* v. *Larabe*, 6 T. L. R. 146; *Solby* v. *Lage*, 12 T. L. R. 191.

An order in Chambers affirmed by a Judge will not be interfered with, though the Appellate Division should not be satisfied that there is a preponderance of convenience in trying the case at the place named in the order: *Peer* v. *N. W. Transportation Co.*, 14 P. R. 381.

Changing place of reference.

Changing Place of Reference under Judgment.—A reference to a Master is *primâ facie* to the Master at the place where the proceedings were instituted: *Macara* v. *Gwynne*, 3 Gr. 310; *McNab* v. *McInnis*, 4 Chy. Ch. 53; but the place is subject to be changed, upon

motion, applying the same principles as in the case of the place of trial: see *Jackson* v. *Harriman*, 9 C. L. J. 29; *McNab* v. *McInnis*, *supra*, p. 706. The policy of *The Judicature Act* in decentralizing business introduces a further element, and, as far as possible, local matters are to be sent to the local Masters; a reference was therefore changed and sent to the Master of the county in which a partnership business in question was carried on: *Aitken* v. *Wilson*, 9 P. R. 75. Rule 246.

A reference was also changed where it became necessary to add as a party the Master before whom the matter was pending: *Weldon* v. *Templeton*, 1 Chy. Ch. 360; and where the Master's illness unfitted him from attending to business: *Re Kirkpatrick*, 13 C. L. J. 121; 2 C. L. T. 204.

In administration matters, however, the reference should *primâ facie* be to the place where the person whose estate is to be administered resided; in such matters *Macara* v. *Gwynne*, 3 Gr. 310, is not applicable: *Thompson* v. *Fairbairn*, 10 P. R. 533. See also notes preceding *Rule* 402.

Cross Actions.—Where cross actions, with different places of trial named, are consolidated, the place of trial will be ordered as the balance of convenience requires: *Gonce* v. *Leitch*, 11 P. R. 255.

246. After the close of the pleadings either party may give notice of trial. C.R. 530. Notice of trial.

Close of Pleadings.—See notes to *Rules* 120 and 325. Close of pleadings.

As to when the pleadings are closed: see *Hore* v. *Cawthrope*, 11 P. R. 353; *Malcolm* v. *Race*, 16 P. R. 330; and notes to *Rules* 118, 120. Notice of trial given before the pleadings are closed, within the meaning of *Rule* 120, as against all the defendants, is irregular: *Long* v. *Long*, 7 O. L. R. 526; *Schneider* v. *Proctor*, 9 P. R. 11; *Robinson* v. *Caldwell*, 1893, 1 Q. B. 519; 68 L. T. 218; and a defendant against whom the pleadings are closed may take the objection, and have the notice of trial set aside, though the other defendants are content to accept it: *Long* v. *Long*, *supra*.

Where an overdue defence was filed on the last day for giving notice of trial, and a joinder of issue and jury notice were filed on the same day, but after the filing of the defence, the service of notice of trial with the joinder of issue and jury notice on the same day, but before the filing of the defence, was held to be regular: *Broderick* v. *Broaich*, 12 P. R. 561; but service of notice of trial and jury notice before the filing or delivery of defence on the last day, defendant being in no default, is irregular: *McIlroy* v. *McIlroy*, 14 P. R. 264; followed in *Hermann* v. *Mandarin, etc., Co.*, 13 P. R. 34, in preference to *Broderick* v. *Broaich*, *supra*, and the issuing of an order to produce at the time defence was delivered was held not to waive irregularity in the notice of trial: *Ib.*

Where no reply is delivered the plaintiff cannot give notice of trial until the lapse of 10 days from the delivery of the defence: *Robinson* v. *Caldwell*, *supra*; *Rules* 118, 120. Where the reply is something more than a joinder of issue, *quære*, can the notice of trial be given without giving defendant time to file a joinder of issue: see *Rule* 119; *Piper* v. *Benjamin*, 17 P. R. 267.

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Where after notice of trial haa heen given, a third party notice is given, and directiona mads thereon aiiowing ths third party to put in a dsfence, and directing the issues hetween the defendant and third party to he tried at the trial of ths action, that has the effect of re-opening the piendings, and they ars not re-cioscd until after the sxpiration of the tims for deiivering a repiy to the third party's defence; and a new record must then hs prepared inciuding the third party proceedings, and the case must be again entered for trial, and a new notice of trial given to the defendant, and third party: *Confederation Life* v. *Labott*, 18 P. R. 238; so where, nfter notice of trial given by defendant, the plaintiff ohtained ieave to amend and add a new defendant necessitating further pieadings, the notice of trial was set aside on the appiication of the piaintiff: *Brennan* v. *Bank of Hamilton*, 2 O. W. N. 91.

Notice of triai given prematureiy is a voidahie proceeding, and where a motion to set aside such a notice was adjourned tiii the trial, and was dismissed hy the Judge at the trial, who proceeded with the trial in the ahsence of the defendant, it was heid that a motion hy way of appeai against ths decision of the Judge on the motion, and aiso to set aside the judgment, might properiy he made to the Divisionai Court: *Campou* v. *Rondall*, 17 P. R. 525; *Qua* v. *Canadian Order of Woodmen*, 5 O. L. R. 51.

Assessment of damages.

Assessment of Damages.—Where a plaintiff indorsed his writ for a iiquidated demand, and signed interiocutory judgment for default of appearance, and thereafter fiied a statement of ciaim varying the ciaim for reiief asked hy the writ, and, without ciosing ths pieadings on the statement of ciaim, set the cause down for assessment of damages on the reiief ciaimed hy ths statement of ciaim, it wns heid that the proceedings were irregular and the assessment of damages could not he made: *Alexander* v. *Alexander*, 1 O. L. R. 639.

Notice of assessment of damages must he given, thought defendant has not appeared: see *Rule* 247, and notes.

Notice of trial.

Notice of Trial.—For forms of the notice of trial, see Forms Nos. 34, 35; H. & L. Forms Nos. 829, 830 and 633, and see *Rules* 248, 250.

Where notice of trial did not state ths piacs where the triai was to take piace, a motion to set aside the notice was refused, in the ahsence of an affidavit stating that the party moving was therehy misled: *O'Brien* v. *Wells*, 20 C. L. J. 369. See aiso *Wolker* v. *Terry*, 7 P. R. 340; *Bank of Montreal* v. *Cameron*, 7 P. R. 188.

The notice may be given, in non-jury cases, for either the jury, or non-jury, sittings, at the place named for trial: see *Rule* 248 (*d*), except in Toronto cases, as to which see *Rule* 250.

Either party may give notice of trial.

"**Either Party.**"—Any one of the parties plaintiffs, or defendants, may givs notice of triai; *Tinning* v. *Grand Trunk Ry.*, 11 P. R. 438; and if one of severai defendants does so he should serve his co-defendants as weii as the plaintiff: *McLeon* v. *Thompson*, 9 P. R. 553. If some of the defendants have not appeared, and it is necessary, or desired, to give them notice of motion for judgment, such notice should he for the samc time and place ns thc notice of trial: *McGill* v. *McDonell*, 14 P. R. 483; hut see now *Rulcs* 35, 354.

Where the plaintiff served an insufficient notice of triai on defendants, and third parties, and it was set asido on defendant's motion.

it was held that it was the plaintiff's and not the defendant's duty to notify the third parties that the trial could not proceed on the notice, and third parties appearing at the trial were held entitled to costs of the day from plaintiff: *Knight* v. *Ridgetown*, 14 P. R. 81. Rules 247, 248.

Where a defendant exercises the power conferred by this *Rule*, and gives a regular notice for the sittings next approaching, the plaintiff cannot interfere with defendant's right, by giving notice for more distant sittings: *Shaw* v. *Crawford*, 13 P. R. 219; *McGill* v. *McDonell*, 14 P. R. 483; see also *Hogaboom* v. *Lunt*, 14 P. R. 480.

Failure to give Notice of Trial.—The plaintiff in all actions (other than non-jury actions in the County of York) is liable to have his action dismissed for want of prosecution if he fails to give notice of trial, where the pleadings have been closed six weeks before the commencement of any sittings for which he might give notice: *Rules* 248 *d*, 324, 325. Failure to give notice of trial.

As to non-jury actions in the County of York: see *Rules* 324, 250.

Where a case is to be tried in the County of York without a jury, the plaintiff (notwithstanding *Rule* 248 *d*) will not be in default under *Rule* 325, by reason of his not giving notice for a sittings for which he might have given notice, if it is not the non-jury sittings: *Leyburn* v. *Knoke*, 17 P. R. 410.

247. Where interlocutory judgment has been signed against any defendant for default of appearance or pleading, ten days' notice of assessment of damages shall be given to him. Such notice and proof of service shall be filed when the action is set down. C.R. 537. *Amended.* Notice of trial to be given where interlocutory judgment signed.

See notes to *Rule* 35.

The notice may be served by posting up, as mentioned in *Rule* 200.

Where the action is to be tried as against other defendants it is advisable to give notice of assessment for the same time and place as notice of trial is given. As to the assessment of damages: see note to *Rule* 39.

248. Except in actions to be tried at Toronto, without a jury; Ten days' notice required before entry, except in Toronto cases.

(*a*) Ten days' notice of trial shall be given before entering an action for trial;

(*b*) After notice of trial is given, either party may enter the action for trial, and if both parties enter the action for trial at the same sittings it shall be tried in the order of the plaintiff's entry; Entry of action for trial.

(*c*) Actions shall be entered for trial not later than the sixth day before the commencement of the sittings; but a Judge may permit any action to be entered after the time above limited; Time for.

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(*d*) An action which is to be tried without a jury, may be entered for trial at any sittings appointed for the place named for the trial of such action. C.R. 538. *Amended.*

See Eng. (1883), RR. 438, 439.

For Form: see No. 34; H. & L. Forms Nos. 829, 830, 633.

C. R. 538 provided that "short notice of trial" should be five days, but this provision has not been continued in this or any other *Rule*.

The ten days are computed in the usual way, exclusively of the first day and inclusively of the last, under *Rule* 173: see *Horper* v. *Morse*, 3 C. L. T. 309. The *Rule* does not expressly provide that the notice of trial is to be filed with proof of service before the case is entered; but the officer seems entitled to require it before making the entry: see clause (*a*). See note to *Rule* 253.

This *Rule* does not apply to non-jury actions to be tried at Toronto: *Rule* 250 applies to such cases.

Amendment of notice of trial.

Notice of trial was amended *nunc pro tunc* where given for trial at Belleville, naming the day fixed for the Assizes at Picton, the Belleville Assizes being over, and the party served not having been misled: *Wolker* v. *Terry*, 7 P. R. 340; so where "September" was inserted instead of "October," as the mistake could not mislead: *Bank of Montreal* v. *Comeron*, 7 P. R. 188; ses also *O'Brien* v. *Wells*, 20 C. L. J. 369; and *McBride* v. *Corroll*, 14 P. R. 70.

Where, after notice of trial given by plaintiff, the defendant obtained an order postponing the trial on payment of costs, this was held to be a conditional order not staying the plaintiff's proceedings, and one which the defendant was at liberty to abandon without being liable to pay other than the costs of the application: *Allen* v. *Mathers*, 9 P. R. 477.

As to both parties giving notice of trial: see notes to *Rule* 246.

Opposite party entitled to full notice.

A defendant is entitled to the full ten days' notice, and there is no power to compel him to take less, unless he has consented to take shorter notice, or unless shorter notice can be imposed as a term of granting an indulgence to the defendant: *Hamilton Prov. & L. Soc.* v. *McKim*, 13 P. R. 125; *Whitney* v. *Stark*, *Ib.*, 129. See also *Laskier* v. *Tekeian*, 67 L. T. 121; *Qua* v. *Can. Order of Woodmen*, 5 O. L. R. 51; but where a special order as to trial is being made it may provide for a notice of trial shorter than the usual 10 days: see *Baxter* v. *Holdsworth*, 1899, 1 Q. B. 266; 79 L. T. 434.

Service by mail.

Where, by arrangement, papers were served by mail, notice of trial posted in time, but received one day short of the ten, was set aside: *McDonough* v. *Allison*, 9 P. R. 4. But, except by consent, service cannot be effected by mailing; a notice sent by mistake to defendants' solicitors, the envelope of the letter being addressed to them instead of to the plaintiffs' solicitors' agents for service, and returned by mail on seeing that the letter was not intended for them, was held not to be good service: *Newsome* v. *Mutual Life Insurance Co.*, 3 O. L. R. 253.

Service too late.

On motion to set aside a notice of trial served a few minutes late, service having been admitted, but immediately afterwards repudiated, it was held that unless service of a good notice was negatived, the service should not be set aside: *Wright* v. *Way*, 8 P. R. 238.

Where notice of trial is set aside on the application of one of several defendants, the plaintiff should notify the others that it has been set aside, or he may have to pay their costs of the day: *Knight* v. *Ridgetown*, 14 P. R. 81. **Rule 249.** Setting aside.

Where, after notice of trial has been served, the pleadings are re-opened and new issues are to be tried, the notice of trials falls, and a new record must be prepared, and a new notice of trial given: see *Confederation Life* v. *Lobatt*, 18 P. R. 238. Reopening of pleadings.

Countermand of Notice not Allowed.—Eng. (1883) R. 443, provides that no notice of trial shall be countermanded, except by consent, or leave of the Court, or a Judge. This Rule has not been adopted in the Ontario *Rules*. By the former Common Law practice countermand was permitted, but not by the Chancery practice. Since *The Judicature Act*, notice of trial cannot be countermanded, by either party: *Friendly* v. *Carter*, 9 P. R. 41. Countermand not allowed.

Remanet.—In the case of a *remanet*, no notice of trial was formerly necessary: *Donovan* v. *Boultbee*, 10 P. R. 52; but must now be given, except in the case of non-jury actions at Toronto: *Rule* 252. A case postponed by order at the trial, on defendants' application, is a *remanet*: *Donovan* v. *Boultbee*, *supra*. Remanet, new notice required.

Entry of Action for Trial.—The present *Rule* requires the entry to be made not later than the sixth day next before the first day of the sittings, unless with the Judge's permission. It may be made on any earlier day, after the lapse of ten days from the giving of notice of trial: see *Rule* 248 (*a*) (*b*). Entry for trial.

Sunday is, under *Rule* 172, not to be excluded in computing "the sixth day," unless it is the last of the six days: see *Rule* 174.

The entry is made on *præcipe*: see H. & L. Forms, No. 381, to the proper officer, in Toronto in the office of the Registrar of the High Court Division, and in other places to the Local Registrar, or, where there is no Local Registrar, the Deputy Clerk of the Crown in jury cases, and the Deputy Registrar in non-jury cases.

The defendant can enter the action, or if the plaintiff fails to do so, the defendant may apply to the Judge under clause (*c*). The Master in Chambers has no jurisdiction to entertain an application for costs of the day for not proceeding to trial: *Hopkins* v. *Smith*, 9 P. R. 285. But where, after the plaintiff has given notice of trial, neither party enters the case, the defendant may, under *Rule* 325, move to dismiss the action for want of prosecution: see also *Crick* v. *Hewlett*, 27 Ch. D. 354; *Sievier* v. *Spearman*, 70 L. T. 132 (decided upon the terms of Rules 436 and 440, of the Eng. Rules of 1883). Action not entered.

Although clause (*d*) authorizes the entry of non-jury actions at jury sittings, a party is not in default who does not avail himself of that liberty, wherever there are also non-jury sittings at the same place: *Rule* 325 (2).

249. The party entering an action for trial shall, at the time of entry (or, in the cases to which Rule 250 applies, at or before the time when the notice of trial is to be filed), deposit a record containing a certified copy Record.

Rule 250.

of the pleadings and particulars and of any order containing directions respecting the trial. C.R. 539. *Amended.*

See Eng. (1883) R. 454.

Where no copy was delivered and the plaintiff did not appear, the action was dismissed with costs: *Forrell* v. *Wole*, 36 L. T. 95; see note to *Rule* 253.

Regulation as to passing records for trial.

The following regulation was made by the President, and Chief Justices, of the High Court of Justice, dated October 28th, 1899:—

"Whereas it is necessary for the due administration of justice, and avoidance of delays and unnecesaary expense, that records entered for trial should show the state of the action against all the defendants, including those who have not appeared, or as against whom the pleadings have been noted closed, or any interlocutory, or final, judgment has been signed;

Therefore, from and after the first day of January next (1900), all officers passing records are hereby directed, and required, to see that they contain, in addition to a certified copy of the pleadings, a note or memorandum stating the state of the action as against every defendant or defendants who has, or have, put in no defence, or as against whom the action has been discontinued.

No extra charge is to be made for such note or memorandum.

All officers and clerks when entering causes for trial, or for hearing on motion for judgment, are required to see that the same are in a proper state for trial, or hearing, and are not otherwise to enter the same; and for that purpose may require either the production of the record, or a certificate of the state of the action, when the necessary information cannot be obtained from their own books of office."

By a regulation of the Judges, made on 25th June, 1914, it is provided:—

Where case transferred from C. C. or Sur. Ct.

"Where an action has been transferred from a County or Surrogate Court to the Supreme Court, a memorandum should be added to the record, showing this fact and the authority for the transfer, *e.g.*

"This action was brought in the County (or Surrogate) Court of the County of . and was transferred to the Supreme Court under section 22, sub-section 3 of the County Courts Act—*or*, by order of the Honourable Mr. Justice A. B. under section 22, sub-section 5 of the County Courts Act—*or as the case may be.*"

After a transfer, the action is in the Supreme Court and the proceedings should be so entitled.

This *Rule*, it will be observed, also requires the particulars, if any, and also any order containing directions respecting the trial to be included in the record.

Where the record is lost a new one may be made up: see *White* v. *Hutchinson*, Tay. 305; if the pleadings are opened after the record has been entered for trial a new record must be made up and entered: see *Confederation Life* v. *Labatt*, 18 P. R. 238, *supra*, p. 711.

Setting down and notice of trial in non-jury cases, York.

250.—(1) Actions to be tried at Toronto without a jury may be set down for trial by either party immediately after the close of the pleadings.

(2) Notice of trial shall be given, by the party setting down the action for trial, within two days thereafter, and he shall within four days after so setting down the action, file the notice of trial and proof of the service thereof, with the officer with whom the action was set down. Rule 251.

(3) Where default is made in filing the notice of trial, any party who has been served therewith may within four days after such default, file in like manner the notice of trial served on him and proof of the service thereof.

(4) Where a notice of trial is filed, the action shall be placed upon the list of cases for trial upon the expiration of three weeks from the date of the setting down.

(5) If two or more parties have entered the action for trial, it shall be tried in the order of the first entry. C.R. 542.

For Form 35, see H. & L. Forms, No. 830.

Where the pleadings are re-opened after service of a notice of trial, see *Confederation Life* v. *Labatt*, 18 P. R. 238, *supra*, p. 711.

It will be seen that in regard to Toronto cases, the procedure for giving notice of trial, and entering cases for trial, is different from that in regard to cases to be tried elsewhere. Under *Rule* 248 (*a*) cases to be tried elsewhere than in Toronto cannot be entered for trial until ten days after notice of trial has been given; whereas in Toronto cases the case must be first entered for trial and then notice of trial must be given. In Toronto cases the notice of trial must be filed with proof of service before the case can be put on the trial list. Whereas with regard to cases tried elsewhere, there is no provision for filing the notice of trial or proof of service, although it is probably intended that they should be filed: see note to *Rule* 248.

251. An action may be withdrawn from trial, upon consent. C.R. 543. Withdrawal of record by consent.

Same as Eng. (1883) R. 291, which was framed to obviate the necessity of applying to the sitting Judge for leave.

As to discontinuance of the action after it has been entered for trial: see notes to *Rule* 321.

At Common Law, a plaintiff who had entered a cause for trial might withdraw the record at any time before the jury were sworn. This was often a hardship, where the defendant was ready with his witnesses and counsel. Under the present clause, leave is necessary for the withdrawal of a record, unless all parties consent, and in *Learnmouth* v. *Croll*, 1 Charl. Ca. (Court) 100, Huddleston, B., refused an application to postpone the trial fixed for a few days thereafter, though counsel for the plaintiff was not sufficiently instructed in the case; and he referred the plaintiff to the Judge who was to sit on the day appointed for trial, for leave to withdraw the record.

Rules 252, 253.

Any order made at the trial for withdrawal or postponement, and requiring to be issued, should be signed by the officer who acts as Registrar at the trial: *Waghorn* v. *Hawkins*, 12 P. R. 145; *Rule* 527; except in Toronto, where all orders made at the sittings are to be settled by the Senior Registrar: see C. R. 26 *d*, which though not continued in these *Rules*, has not been superseded by any other provision: see *Rule* 526.

Orders at the trial for amendment of pleadings do not require to be issued; the amendment is made on the record: *Rule* 186, and orders respecting postponements, not containing any special terms, may not require to be issued.

For the effect of withdrawal of a juror, see *Thomas* v. *Exeter Flying Post*, 18 Q. B. D. 822.

Actions not tried.

252. Actions not tried or disposed of after being once entered for trial shall not, except in the case of actions entered for trial without a jury at Toronto, be heard at any subsequent sittings unless a fresh notice of trial is given and the action has been again set down, but no fee shall be payable for such setting down. C.R. 544. *Amended.*

The object of the present *Rule* is to make it necessary (except in non-jury actions in the County of York) to give a new notice of trial, and re-enter the case for trial, wherever a case becomes a *remanet*: see "Nemunet" in note to *Rule* 248.

The effect of the *Rule* seems to be, that actions not reached at the jury sittings may not be entered for trial at the non-jury sittings (nor *vice versa*) without consent or leave: see *Ward* v. *Jackson*, 12 P. R. 225, and, if withdrawn, they must be re-entered and a further fee for entering at another sittings must be paid; but if not reached they must also be re-entered for trial, but in that case no further fee for entry will be required.

It has been held that where a Judge has no time to try a case, owing to his having to go to another circuit town, though he may make the case a *remanet*, he should not direct it to be tried at another place: *Fairburn* v. *Household*, 53 L. T. 513. This case seems to have turned on the circumstance that the Judge had not power to change the venue, which power he would have in Ont. See Jud. Act, s. 14, *supra*.

Non-appearance of plaintiff.

253. If, when an action is called on for trial, the defendant appears, and the plaintiff does not, the defendant shall be entitled to judgment dismissing the action, and if he has a counter-claim may prove such claim. C.R. 546.

See Eng. (1883) R. 456. C. R. 546 concluded with the words: "so far as the burden of proof lies upon him," but the omission of these words does not seem to alter the effect of the *Rule*: see *Rule* 261.

In such case the defendant is entitled to judgment dismissing the action with costs: *Farrell* v. *Wale*, 36 L. T. 95, and cases *infra*, without going into evidence, though the *onus* of proof may be on him:

Armour v. *Bate*, 1891, 2 Q. B. 233; 65 L. T. 137; it has been held in England that the defendant need not prove the service of notice of trial on him: *James* v. *Crow*, 7 Ch. D. 410; and *Re Palmer, Skipper* v. *Skipper*, 32 W. R. 83; 49 L. T. 553; following *Ex parte Lows*, 7 Ch. D. 160; not following *Cockle* v. *Joyce*, 7 Ch. D. 56; but see note to *Rules* 248, 250. But where notice of trial had been given by the plaintiff, and he filed a liquidation petition, under which a trustee had been appointed, and no one appeared at the trial for the plaintiff or trustee, proof of service of notice on the trustee was held to be necessary: *Eldridge* v. *Burgess*, 7 Ch. D. 411. Rule 254.

On application a judgment dismissing an action may be set aside, and the action restored to the list, upon proper terms: see *Birch* v. *Williams*, 24 W. R. 700; *Breed* v. *Jackson*, 10 T. L. R. 142, and notes to *Rules* 520 and 499. As to restoring cases struck out on account of the absence of counsel, see *Harvey* v. *Renon*, 12 Jur. 445; and as to costs so occasioned, *Godson* v. *Hall*, 7 Cl. & Fin. 549.

A judgment dismissing the action under this *Rule* is equivalent to a judgment on the merits, and is a bar to another action for the same cause: *Armour* v. *Bate*, 1891, 2 Q. B. 233, unless it is otherwise expressly provided.

The practice in England, where the plaintiff does not appear, is not to swear the jury, and any costs which the defendant may incur, by having the jury sworn in such case, the defendant may not be entitled to get taxed: *Lane* v. *Eve*, W. N. 1876, 86.

Where a test action came on for trial, and the plaintiff was not prepared to proceed and applied for a postponement, to which under the circumstances, so far as his own interest was concerned, he was not entitled, it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs: *Robinson* v. *Chadwick*, 7 Ch. D. 878; and see note *infra*, p. 784.

254. The Judge at the trial shall, at the request of either party, order a witness to be excluded from the Court until he is called to give evidence, and also, if the Judge deems it expedient, a party intending to give evidence; or he may require such party to be examined before the other witnesses on his behalf, and the Judge may, in his discretion, exclude the testimony of any witness or party who does not conform to such order. C.R. 547. Exclusion of witnesses.

See *Sievewright* v. *Sievewright*, 8 P. R. 81, and note *infra*, p. 804; note to R. 327.

A plaintiff calling defendant as a witness is not entitled as of right to re-examine in the nature of cross-examination. The Judge has a discretion to refuse to allow such cross-examination: *Price* v. *Manning*, 42 Ch. D. 372; 61 L. T. 537.

A party calling a witness is not thereby debarred from calling another witness to contradict him: *Stanley Piano Co.* v. *Thomson*, 32 Ont. 341.

In England, parties as well as witnesses may be excluded from Court during the examination of other witnesses: *Outram* v. *Outram*,

Rules 255, 256.

W. N. 1877, 75, but a witness will not be excluded during the reading of affidavit evidence: *Penniman* v. *Hill*, 24 W. R. 245. See also W. N. 1876, 297. In Ontario the exclusion of parties is in the discretion of the Judge under this *Rule*.

Hearing in camera.

A hearing *in camera* may be allowed in a proper case: *Mellor* v. *Thompson*, 31 Ch. D. 55, and 25 C. L. J. 597; 82 L. T. Jour. 297; 88 L. T. Jour. 40; and per Lord Fitzgerald, in *Macdougall* v. *Knight*, 14 App. Cas. 206-7; but *semble*, only where the interests of justice require it: see *Scott* v. *Scott*, 1913, A. C. 417; 108 L. T. 1; *Reid* v. *Aull*, 6 O. W. N. 372.

255. The Judge may in all cases disallow any question put to a witness which may appear to the Judge to be vexatious and not relevant to any matter proper to be inquired into at the trial. *New.* Eng. Rule 462.

This *Rule* applies both to an examination in chief and also to a cross-examination; apart from the *Rule* the Court has an inherent jurisdiction to prevent the examination or cross-examination of a witness from being abused: see *Re Mundel*, 1883, 52 L. J. Ch. 756.

Where the evidence given by a witness in answer to questions by the Judge is adverse to one of the parties, that party should be allowed to cross-examine the witness on that point, but not generally: *Coulson* v. *Disborough*, 1894, 2 Q. B. 316; 70 L. T. 617; *In re Keighley*, 1893, 1 Q. B. 405; but see *Re Enoch & Zoretzky*, 1910, 1 K. B. 327; 101 L. T. 801.

The Judge may himself ask a witness leading questions, if he thinks fit: *Connor* v. *Bront*, 31 O. L. R. 274.

Addresses of Counsel at trial.

256.—(1) At the trial, the addresses to the jury shall be regulated as follows:—

(*a*) At the conclusion of the case of the party who begins, if the opposite party states his intention to be not to adduce evidence, and he has not adduced evidence, the party who begins shall have the right to address the jury for the purpose of summing up the evidence, and the opposite party shall have the right to reply;

(*b*) If the opposite party does not state his intention to be not to adduce evidence, or if he has adduced evidence, he shall have the right to open his case, and (after the conclusion of such opening), to adduce such evidence as he thinks fit, and when all the evidence is concluded, to sum up the evidence, and the party who begins shall have the right to reply;

(2) Where a defendant claims a remedy over against a co-defendant, he shall have the right to address the jury after the co-defendant. Rule 256.

(3) Where a party is represented by counsel, the right conferred by this Rule shall be exercised by his counsel. C.R. 548.

See Eng. (1883) R. 460.

The right of defendant's counsel to sum up the evidence, is not a Common Law right, and cannot be insisted on in a Court (*e.g.*, a County Court in England), where it is not customary: see *Dymock* v. *Watkins*, 10 Q. B. D. 451.

Custom in England has established a distribution of the work on opening, examining of witnesses, and summing up, among the counsel engaged, which is not followed in Ontario: see *King* v. *Rudkin*, 6 Ch. D. 160; *Metzler* v. *Wood*, 26 W. R. 125.

Course of procedure at trials.

In Ontario usually the course of proceeding at a trial is as follows: The counsel having the right to begin opens the case by an address to the Court, and jury, if any, in which he states the facts of the case and the nature of the issue to be tried, and the evidence by which he proposes to prove his case. He then produces the evidence. If at the conclusion of his case, the opposite party desires to produce evidence, he is entitled to address the Court and jury, if any, stating the nature of his case and the evidence he proposes to produce in support of it; this right, however, is not generally exercised, but without any preliminary address, he adduces his evidence. Evidence in reply may be then adduced by the party who began, and at the conclusion of the evidence, the counsel who did not begin addresses the Court, and jury, if any, on the whole case, and the counsel who began then replies. If, however, the party who did not begin adduces no evidence, then the counsel who began addresses the Court, and jury, if any, on the whole case at the conclusion of the evidence, and the opposite party replies. In trials before a jury, therefore, there are usually but three addresses, viz.: the opening speech before any evidence is adduced, and the two addresses at the conclusion of the evidence. Where defendants are represented by different counsel, each defendant is entitled to be heard by his own counsel. Where two sets of defendants are represented by separate counsel, the counsel for the first set of defendants, opening their case and giving evidence, should sum up their case to the jury before the counsel for the second set of defendants who has opened his case and given evidence: *Medley* v. *London United Tramways*, 26 T. L. R. 315.

Where a trial take place before a Judge without a jury, the opening speech is frequently dispensed with, the reading of the pleadings being considered a sufficient statement of the case.

Right to begin.

The right to begin is not altered by this *Rule*. The party upon whom the burthen of proof lies is the party entitled to begin: Harr. C. L. P. Act, 2nd ed., 291. Generally the burthen of proof lies on the party who asserts the affirmative on the record, *i.e.*, *the* affirmative in substance, and not merely in form. If there is 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. Where there are conflicting presumptions, the *onus probandi*

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lies on the party having in his favour the weaker presumption of the two. But where the case of a party rests 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, even though there be a presumption of law in favour of his pleading; and where the plaintiff sues for damages and it is necessary for the plaintiff to show the amount of damages sustained, he is entitled to begin, even though the affirmative of the issue be on the defendant, but if the affirmative of the issue is on the defendant, and plaintiff's counsel will not undertake to offer proof of substantial damage, the defendant is entitled to begin: *Ib.*, 292, 293; Best on Right to Begin, 3, 5, 12, 21, 23.

An incorrect ruling as to the right to begin is no ground for a new trial unless the ruling "did clear and manifest wrong": Harr C. L. P Act, 2nd ed., 293.

Involves right to reply.

The right to begin is important, as it also involves, as we have seen, in some measure the right to reply. The right to reply, as far as the Attorney-General is concerned when appearing for the Crown, or any counsel appearing for the Crown having written authority from the Attorney-General for that purpose, is unaffected by this *Rule*, as he has always the right to reply, no matter who may have begun: see *Rule* 5 (2).

As to the reason for giving the right to reply: see per Lord Esher, in *Fletcher* v. *L. & N. W. Ry. Co.*, 1892, 1 Q. B. 122.

Where defendant claims relief over, etc.

The effect of clause (2) is to confirm the decision in *Stilliway* v. *Toronto*, 20 Ont. 98, as to the time when counsel for a third party defending the action shall address the jury. The object is to give the plaintiff a reply against both the original defendant, and the third party.

Evidence omitted by accident or mistake, how supplied.

257. Where, through accident or mistake or other cause, a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial, subject to such fact being afterwards proved at such time as the Judge shall direct; and, if the case is being tried by a jury, the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and if not so proved, judgment shall be entered for the opposite party, unless the Judge otherwise directs, but this Rule shall not apply to an action for defamation. C.R. 549.

No corresponding Eng. R. C. R. 549 provided that it should not extend to actions of "libel," the present *Rule* does not apply to actions of "defamation," which would appear to include actions of slander, as well as libel.

This *Rule* merely enables a party to supply proof of some fact omitted before the trial is concluded, the verdict of the jury, if any, being taken on the assumption that it will be proved before judgment is given.

As to the power of a Judge or a Divisional Court to receive new evidence on an appeal: see *Rule* 232 and notes.

As to obtaining a new trial on the ground of the discovery of fresh evidence; see notes to s. 28, *supra*, p. 155. Rule 258.

As to motions to reverse or vary judgments on discovery of new matter, etc.: see *Rule* 523 and notes.

The obtaining by a party from proof, under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is no ground for a new trial: *Andrews* v. *Stuart*, 1 C. L. T. 724. See also *Heath* v. *Pugh*, 6 Q. B. D. 355.

At the close of defendant's case plaintiff was not allowed to call a defendant whom he had expected to be called on his own behalf, the plaintiff's counsel admitting that he had not been misled by any misrepresentation, that this defendant would be called on his own behalf: *Barker* v. *Furlong*, 1891, 2 Ch. 172.

Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the appellate Court will, in a proper case, permit the fresh evidence to be adduced on the appeal: *Bigsby* v. *Dickinson*, 4 Ch. D. 24, and *Rule* 232.

In a suit for an injunction to restrain a nuisance caused by a chemical manufacturer, the plaintiff's counsel applied at the close of his speech for liberty to adduce evidence to explain (as the plaintiff's witnesses had had no opportunity of doing) certain evidence of the defendant's witnesses as to various vapour arising from a material (asphalt) stated to be used in the manufacture of varnish made by the plaintiff, and to show that the word asphalt had a double meaning; it was held that the evidence should be admitted: *Bigsby* v. *Dickinson*, *supra*.

A Judge may, at any period in a case allow further evidence to be called, for his own satisfaction, by either party, even though it is doubtful whether the party is entitled to put in such evidence as of right: *Budd* v. *Davison*, 29 W. R. 192.

The Court on argument of a motion by the plaintiff for a new trial, allowed the plaintiff to give in evidence the proclamation bringing into force the Ontario Factory Act: *Dean* v. *Ontario Cotton Mills Co.*, 14 Ont. 119; and see *Burfoot* v. *DuMoulin*, 21 Ont. 583; so in *Cooke* v. *McMillan*, 5 O. W. R. 507, an affidavit proving the dates of the deaths of two persons was allowed to be filed on an appeal, formal proof not having been given at the trial, though the dates were made known to the Judge.

In an action for false arrest and malicious prosecution, arising out of a false information laid by defendant, a certified copy of the information being objected to, leave was given to put in afterwards the original, and an exemplification of the judgment of acquittal: *Hamilton* v. *Brootch*, 17 Ont. 679.

258. Where equitable issues are raised by the pleadings, they shall, unless the trial Judge otherwise directs, be tried, and the damages, if any, incidental thereto, assessed by the Judge without the intervention of a jury. C.R. 550. Trial of equitable issues.

Rules 259, 260.

Where equitable issues alone are raised, a jury is not of right, but of grace, under this *Rule:* see *Adamson* v. *Adamson*, 12 P. R. [illegible] in such cases a jury notice would be irregular, and might be struck out.

Where both legal and equitable issues are raised, a jury notice may be given: *Rule* 259, and, if given, the action must be entered at the jury sittings, when the legal issues will be tried by a jury (unless the Judge otherwise directs), but the equitable issues must be tried without a jury, pursuant to this *Rule*, unless the Judge otherwise directs.

Where there are both legal and equitable issues, it is within the power of the Judge to direct the equitable as well as the legal issues to be tried by the jury: *Rae* v. *McDonald*, 13 Ont. [illegible] 64; see also *Wright* v. *Sun Mutual*, 29 C. P. 336.

It would now seem not to be in the power of a Judge in Chambers, or the Master in Chambers, or other like judicial officer, before trial, to make no order for the trial of equitable issues by a jury. The present *Rule* seems to have the effect of leaving the mode of trial entirely in the discretion of the Judge at the trial.

As to striking out a jury notice, and the discretion of the Judge at the trial: see further Jud. Act, s. 56, and *Rule* 398 and notes.

Where both legal and equitable issues.

259. Where both legal and equitable issues are raised, and notice for a jury has been given, the action shall be entered for trial at the jury sittings, and such issues shall be tried at the same time, unless the Judge presiding at the trial otherwise directs. C.R. 551. *Amended.*

See notice to *Rule* 258.

Assessment of damages

260. Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment. C.R. 552.

See Eng. (1883) R. 482.

A continuing cause of action is a cause of action arising from the repetition or continuance of acts or omissions similar to those in respect of which the action is brought: for example, pollution of a stream: *Hole* v. *Chard Union*, 1894, [illegible]Ch. 293; 7 R. 84; 70 L. T. 52; see also *Ratté* v. *Booth*, 10 P. R. 649; 14 Ont. App. 419; 15 A. C. [illegible]; obstruction to light: *Jenks* v. *Clifden*, 1897, 1 Ch. 694; 76 L. T. 382.

This *Rule* is merely declaratory of what was the practice in Equity prior to the Judicature Act: *Stalker* v. *Dunwich*, 15 Ont. 342; *Turner* v. *Burns*, 24 Ont. 28; *Hole* v. *Chard Union*, *supra*.

Where damage is caused to land, causing subsidence, there is a fresh cause of action on every fresh subsidence, and the recovery of damages for one subsidence is no bar to another action for damages occasioned by a subsequent subsidence: *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127; 54 L. T. 82; *Crumbie* v. *Wallsend*, 1891, 1 Q. B. 503; but such damages cannot be given in anticipation: *West Leigh Colliery* v. *Tunnicliffe*, 1908, A. C. 27.

Where damages were awarded in lieu of an injunction owing to building operations of the defendant, under this *Rule* they were allowed in respect of acts occurring after the writ issued but prior to judgment: *Fritz* v. *Hobson*, 14 Ch. D. 542; 42 L. T. 225.

Where an assessment of damages for nuisance was made by the Master three years after the date of the judgment, under this *Rule* it was held they were properly assessed up to the date of the certificate: *Read* v. *Wotton*, 1893, 2 Ch. 171; and see *Jones* v. *Simes*, 1890, 43 Ch. 607, at p. 612. Rule 261.

261. A party shall not be entitled to judgment at the trial or on motion on the ground of his pleading being true, if the facts proved are not sufficient in point of law to entitle him to judgment. C.R. 610. No judgment on true pleadings merely.

Taken from 44 Vict. c. 5, s. 44. There is no corresponding Eng. Rule.

Gray v. *Stait*, 11 Q. B. D. 668, illustrates this *Rule*. That was an action for wrongful distress by seizure of goods off the premises, after the expiration of the tenancy, and the tenant had given up possession. The defence set up was proved, viz.: that they had been fraudulently removed to prevent distress for rent; but nevertheless judgment was directed to be entered for the plaintiff for 1s.

In *McGee* v. *Kane*, 14 Ont. 226, this *Rule* was held not to be applicable. In that case the statement of claim had been held to be sufficient upon a demurrer, and the plaintiff having at the trial proved the material allegations in it, it was held that an objection that the facts proved were not sufficient in law to entitle the plaintiff to judgment, could not be entertained, and that the decision on the demurrer should be followed at the trial. See also *Weir* v. *Mathieson*, 11 Gr. 390.

Though the facts alleged by the plaintiff be true and be undisputed by the defendant, yet if they do not entitle the plaintiff to the relief claimed the action should be dismissed: *Society of Architects* v. *Kendrick*, 102 L. T. 526.

C. R. 545 provided: "If, when an action is called on for trial, the plaintiff appears, and the defendant does not, the plaintiff may prove his claim as far as the burden of proof lies upon him." And see Eng. (1883) R. 455. That Rule has not been continued, but probably no change in the practice is thereby made. Non-appearance of defendant.

Before the Jud. Act, 1881, in actions of ejectment, if the defendant did not appear at the trial, the plaintiff was entitled to a verdict without any proof: R. S. O. (1887) c. 51, s. 32. Now, ejectment suits are on the same footing in that respect as other suits: see *Guillet* v. *Clark*, referred to and discussed in 72 L. T. Jour. 398.

In the cases dealt with by C. R. 545, it has been held in England that the plaintiff need not prove service of the notice of trial: *Charlton* v. *Dickie*, 13 Ch. D. 160; *Dacres* v. *Foote*, W. N. 1890, 70; 88 L. T. Jour. 397; *Baird* v. *E. R., etc., Racecourse*, W. N. 1891, 144. See, however, *The Avenir*, 9 P. D. 84. This is in accordance with the former practice at Law. There had been a previous decision by Fry, J., the other way: *Cockshott* v. *London General Cab Co.*, 26 W. R. 31; W. N. 1877, 214; and see notes to *Rules* 248, 250, 253. But, in the absence of any decision to the contrary, it would seem proper that, where judgment has been pronounced in the absence of a defendant, the officer with whom the judgment is entered should require due proof of

Rules 262, 263.

service of notice of trial, or of motion for judgment, to be filed with him before entering the judgment, unless the proof has been given at the trial: see *Glasgow* v. *Glasgow*, 9 Ont. 511 (*n*). In actions tried at Toronto this is unnecessary, because the proof of service of the notice of trial is required to be filed when the case is set down: see *Rule* 250 (2).

The plaintiff's proof of his claim is of course limited to the allegations of his statement of claim: *Barker* v. *Furlong*, 1891, 2 Ch. 179, and he is entitled to the relief claimed, and such other relief as is consistent therewith: see *Stone* v. *Smith*, 35 Ch. D. 188; *Kingdon* v. *Kirk*, 37 Ch. D. 141.

If the defendant has a counter-claim and does not appear at the trial, the plaintiff is entitled to have judgment on his claim on proving it, and to have the counter-claim dismissed with costs: *Lumley* v. *Brookes*, 41 Ch. D. 323.

If plaintiff was entitled at service of writ, but not afterwards.

262. If in action to recover land the plaintiff is, at the time of the service of the writ, entitled to possession, but his right afterwards expires, he may by leave discontinue the action, and the costs shall be in the discretion of the Court.

Taken from C. R. 611, which was taken from R. S. O. 1877, c. 51, s. 31. There is no corresponding Eng. Rule.

In England a writ of possession will be allowed to issue although the plaintiff's estate terminated after action commenced, and before trial, unless it will be unjust and futile to issue the writ, and it is for the defendant to shew affirmatively that such will be the result of issuing the writ: *Knight* v. *Clarke*, 15 Q. B. D. 294; but where the action is discontinued as provided in this *Rule*, no writ of possession could be issued.

As to the ordinary procedure for discontinuing an action: see *Rule* 321.

List of exhibits.

263.—(1) Exhibits shall be numbered, and the Registrar attending the trial shall, at the conclusion thereof, make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in. The exhibits of each party shall be classified separately in such list. C.R. 555 and 556.

Exhibits to remain in Court till judgment.

(2) The exhibits shall remain in Court until judgment is given and during any stay of proceedings, and thereafter shall be delivered out, without order, upon the application of either party upon notice to the other,

Or pending appeal.

unless an appeal is taken, when the exhibits shall be retained until the appeal is disposed of. C.R. 557.

Exhibits may be destroyed if not applied for.

(3) Where exhibits have not been applied for within five years from the date of a trial the officer in whose

custody they are may notify the solicitors for the parties that unless they are applied for in three months they will be destroyed, and unless such exhibits are applied for within that period he may by leave of a Judge destroy them. *New.* Rule 264.

For Form of marking Exhibit. See No. 125 and H. & L. Forms, No. 833. Exhibits at trial, how to be marked.

For Form of Schedule of Exhibits, see No. 130 and H. & L. Forms, No. 834.

A regulation of the Judges passed on 17th December, 1904, provides as follows:

"6. When the Judge at a trial reserves judgment in any case, elsewhere than at Toronto, the Clerk of the Court shall forthwith forward the record and exhibits to the Central Office. Papers to be transmitted where judgment reserved.

"7. All local officers of the Court when sending papers or exhibits to the Central Office shall indorse on the wrapper enclosing such papers or exhibits, the short style of cause, the title of the officer sending them, and the purpose for which they are sent,—*e.g.*, '*Jones v. Smith.* From Local Registrar at Brantford, for Appeal to Divisional Court' *or* 'For Mr. Justice Magee'—*or as may be.*"

264. The verdict and judgment shall be indorsed on the Record, and shall also be recorded by the Registrar or officer acting as clerk at the sittings in a book to be kept for recording the proceedings thereat. C.R. 558. *Amended.* By whom entries of findings to be made.

See Eng. (1883) R. 465.

The practice under the English Rule is substantially the same as that which this *Rule* provides, except that the verdict and judgment are not required to be indorsed on the copy of the pleadings.

As to the effect of a judgment pronounced but not signed: see note to *Rule* 512.

The *Rule* is silent as to the person by whom the indorsement on the Record is to be made; but the practice hitherto prevailing has been that the Judge who tried a case himself always signed the indorsement, and also usually made it. By whomsoever made, it seems desirable that the Judge should continue to sign the indorsement in order to prevent mistakes, as it is upon this indorsement, and not on the written reasons, if any, that judgments are drawn up and settled. The indorsement of the Record is a perpetuation of the old Common Law procedure.

By C. R. 559, it was provided that the indorsement or a certificate of the officer should be sufficient authority to the proper officer to sign judgment, and see Eng. (1883) R. 466. Certificate of Judge or officer.

But that Rule has not been continued but probably no change in the practice has been made.

C. R. 553 expressly provided that the Judge might postpone or adjourn the trial. Adjournment of trial.

Rule 284.

Although that Rule has not been continued it would seem probable that such power still exists.

Where the hearing of an action was adjourned to allow the plaintiffs to add parties, the plaintiffs were ordered to pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day: *Lydall* v. *Mortinson*, 5 Ch. D. 780; *Smith* v. *Boyd*, 18 P. R. 76, and see 18 P. R. 296.

Where a plaintiff seeks relief in respect of matters not covered by his statement of claim, an amendment is necessary, which, in general, will only be granted on the terms of adjourning the trial to give the defendant time to consider the fresh claim, and the plaintiff paying all costs thrown away, including the costs of the day: *Cobb* v. *Stringer*, 100 L. T. Jour. 181; *Karunoratne* v. *Ferdinandus*, 1902, A. C. 405.

The trial of an action to recover damages for personal injuries was ordered to be postponed at the instance of the defendants, on the ground that sufficient time had not elapsed to enable the damages to be properly estimated: *Speers* v. *Great Western Ry.*, 6 P. R. 170.

Motions to postpone the trial may, of course, be made before the trial, and should be so made, where practicable, in Chambers, before expense in preparing for trial is incurred.

For terms imposed where defendant obtained an order for postponement on payment of costs, and then notified plaintiff's solicitor that defendant would not pay the costs and that the trial must go on, upon which plaintiff applied to postpone: see *Allen* v. *Mathers*, 19 C. L. J. 79.

The Master in Chambers, on a motion to postpone the trial, has under this *Rule*, power to impose terms, *e.g.*, giving security for the amount sued for: *Bank of Hamilton* v. *Stork*, 13 P. R. 13.

The costs of postponing a trial, on account of the absence of a material witness, will be costs in the cause, where diligent efforts have been made to secure attendance: *Brown* v. *Porter*, 11 P. R. 250; but where the application is not made promptly, the applicant may be ordered to pay the costs of the application and adjournment: *McMillan* v. *McDonald*, 22 Gr. 362.

As to costs of the day on a postponement of the trial: see *Outwater* v. *Mullett*, 13 P. R. 509.

See *Foirburn* v. *Household*, *etc.*, 53 L. T. 513, in note to *Rule* 252.

Judge may direct entry of judgment; or reserve judgment.

The Judge at the trial cannot against the will of the plaintiff's counsel, non-suit the plaintiff on the opening address, without hearing the evidence: *Fletcher* v. *L. & N. W. Ry.*, 1892, 1 Q. B. 122; but where there is some evidence adduced by the plaintiff, but it is not of such a nature as would warrant the jury in finding a verdict in his favour, the Judge may direct a non-suit: *Hiddle* v. *National F. & M. Ins. Co.*, 1896, A. C. 372; 74 L. T. 204.

Where at the trial it appears, at the close of a plaintiff's case, that there is no evidence against one of the defendants, it is within the discretion of the Judge whether he will then direct a verdict in such defendant's favour, or wait till the whole evidence in the cause closes: *Parnell* v. *Great Western Railway Company*, 34 L. T. 126; see 1 Q. B. D. 636.

In such a case, the action being for negligence, one of the defendants called witnesses, the effect of whose evidence was to throw the blame on his co-defendant, and they were cross-examined by the latter's counsel, a verdict being found against this defendant and in favour of the other; it was held that these circumstances did not entitle the unsuccessful defendant to object to the verdict: *Ib.* Rule 264.

Where there are several distinct issues to be tried, the Judge may, without the consent of the parties, accept the verdict of the jury upon those issues on which they agree, and discharge them upon the others, leaving the parties, if they think fit, to take down the undecided issues to a new trial; and the Court will give judgment on the decided issues, and has power to send down the undecided issues to a new trial: *Marsh* v. *Isaacs*, 45 L. J. C. P. 505. Disagreement of jury.

Where the jury, in answer to questions, gave answers which were not consistent with one another, they were sent back for re-consideration of the inconsistent answers: *Peuchen* v. *Imp. Bank*, 20 Ont. 325. Jury giving inconsistent answers.

Under the present *Rules* judgment in actions to recover land, as in all others, may be entered at once unless the Judge otherwise directs: see *Rudd* v. *Frank*, 17 Ont. 758.

Where a Judge, after trying a case without a jury, reserves judgment, and dies without having given it, the case must go down to trial again: *Clarke* v. *Trask*, 1 O. L. R. 207. Death of Judge.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement: *Attorney-General* v. *Tomline*, 7 Ch. D. 388; such a judgment creates an estoppel between the parties: *Re South American Co.*, 1895, 1 Ch. 37; 71 L. T. 594. As to appeals in such cases: see s. 26 of the Act and notes. After entry of judgment it cannot be varied.

Where the Judge does not at the trial direct judgment to be entered, he may indorse on the record at any time subsequent thereto his direction for judgment, upon which judgment may be entered as though the indorsement had been made at the trial; or he may, after the facts have been found by the jury, or by the Judge at or after the trial, indorse the finding, and leave the parties to move for judgment before him, usually such motion is made at the trial, and if necessary the Judge reserves judgment.

Where, at a trial by jury, a motion for a non-suit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the Judge adopts the course of taking a verdict, and of considering the motion afterwards, he may, if he considers that there was no evidence to go to the jury, dismiss the action: *Macdonald* v. *Mail Printing Co.*, 32 Ont. 163; 2 O. L. R. 278; the power to direct judgment to be entered for defendant on the ground that there was no evidence to go to the jury, was assumed in *Davies* v. *Felix*, 4 Ex. D. 33; see also *Rocke* v. *McKerrow*, 24 Q. B. D. 463; 62 L. T. 556; though there the Judge on consideration could not say that there was no evidence to go to the jury. The fact that the Judge refused the motion for a non-suit at the close of the plaintiff's case does not prevent his giving effect to it at the close of the whole case: *Skeate* v. *Slaters*, 1914, 2 K. B. 429; 110 L. T. 604. See also s. 43 of the Act, and *Daun* v. *Simmins*, 48 L. T. 343, and *Hamilton* v. *Johnson*, 5 Q. B. D. 263; but where the jury have found for the plaintiff and there is evidence to support the finding, it cannot be disregarded, and

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a judgment contrary to it cannot be entered: *Kelly* v. *Davidson*, 32 Ont. 8; 27 Ont. App. 687; *Perkins* v. *Dangerfield*, 51 L. T. 535; *Conn. Mutual* v. *Moore*, 6 App. Cas. 644; *Macdonald* v. *Mail Printing Co.*, *supra*; *Burns* v. *Clark*, 37 C. L. J. 32; unless the finding is on an immaterial issue, and the Judge is of opinion that, on the undisputed facts, the defendant is entitled to judgment: see *Horgrove* v. *Dominion Council of Templars*, 2 O. L. R. 79, 89.

Where the jury answers questions partly in favour of each party, so that no judgment can be entered for either party, the Judge may decline to enter any judgment, and the case then stands as upon a disagreement of the jury, and may be brought on again for trial as if the findings did not exist: *Rule* 501. If either party thinks that the findings justify a judgment in his favour, his course will be to move for judgment upon them at or after the trial; if the Judge declines to enter any judgment the motion will be dismissed, and an appeal may be had from the decision or order on the motion for judgment: see notes to *Rule* 501.

Under the Eng. R. 463, judgment was in *Peters* v. *Perry*, 10 T. L. R. 266, entered for the defendant where the jury had disagreed. Under s. 30, if the jury disagree and find no verdict, the Judge at or after the trial may dismiss the action; and see *Bank of B. N. A.* v. *Eddy*, Patterson, J.A., November, 1883. In that case the action was upon promissory notes: the defence relied on was the insolvency of the defendant and his discharge under a deed of composition and discharge duly confirmed. In reply the plaintiffs attacked the discharge on the grounds of fraud, and fraudulent preference. Objections were taken to the validity of the discharge upon facts which were undisputed, and as to certain other matters of fact which were disputed, evidence was gone into, to shew that the discharge had been obtained by fraudulent preference of a creditor, and by giving to that creditor a valuable security. At the trial the defendant objected that there was no evidence to go to the jury. Without deciding whether there was, or was not evidence, the question was left to the jury by the Judge, and this and all other questions were reserved for discussion on motion for judgment. The jury disagreed and therefore left the question unanswered. Nevertheless, both parties moved for judgment, the plaintiffs contending that on the undisputed facts, objections fatal to the discharge were established; the defendant contending that the discharge was good as against such objections, and that there was no evidence proper to go to the jury on the issue of fraud, or fraudulent preference. Both motions were refused though apparently considered proper in point of form, the Judge being of the opinion that the issue as to the validity of the discharge could not properly have been withdrawn from the jury, and that the undisputed facts were not, without the matters left to the jury for consideration, sufficient to decide the question as to the validity of the discharge.

As to the effect of the withdrawal of a juror: see *Thomas* v. *Exeter Flying Post*, 18 Q. B. D. 822.

Unanimity of the jury is no longer necessary, the verdict of 10 out of 12 is sufficient: section 58 (1), *supra*. If any juror is discovered to have an interest in the result, or to be a relative of any of the parties, he may be discharged, and the trial may proceed before the remaining 11, of whom the verdict of 10 is sufficient: *Ib.*, s. 59.

The judgment of the Court should not go beyond the relief claimed by the pleadings. In *Korunoratne* v. *Ferdinandus*, 1902, A. C. 405, the

Judicial Committee of the Privy Council animadverted on tho Court below having awnrded relief not covered by the issues raised on the pleadings. There the question raised on the pleadings was whether a will waa good or had *in toto*, and the jndgment found it was good as to personaity. Rule 266.

Staying Entry of Judgment, or Execution.—Unless the Judge at the trisi stays the entry of the judgment: see *Rule* 495, it may be eatered forthwith.

An application to stay the entry of judgment, or the issue of execution, is best made at the trini when all the facts are known to the Judge. If not made tlii later it may be necessary to shew on affidavit circumstances making a atay just: see *Tuck* v. *Southern Counties, etc., Bank*, 61 L. ⁊. 159.

Formerly, if a stay of execution had been refused hy the Judge at the trial, an application to the Court must be supported by special circumstsnces; and allegations that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or jndgment, or that there was misdirection, were not special circumstancea: *Monk* v. *Bartram*, 1891, 1 Q. B. 346.

As to stay of execution and further proceedings in the action in the event of an appeal to the Appellate Division: see *Rules* 495-498.

Record and Exhibits.—The exhibits are retained in Court until judgment has been given, and during any atay of proceedings: *Rule* 263 (2).

The Record is also retained in Court.

In the County of York records and exhibits are forwarded hy the Clerk of Assize to the Central Office, from which, when required before the Registrar settiing the judgment, they can be obtained on his requisition: see *Rule* 396 (2). The judgment, when settied, is entered in the office where the action was commenced: *Rule* 531. County of York.

In other counties, where judgment is given at the trial, the record and exhibits are *retained* by the officer who attends as Registrar at the trial, if he is the officer in whose office the proceedings were commenced, as in that case he is the proper officer to enter judgment: *Rule* 531; or when the judgment is settled hy him (*Rule* 527), they are *forwarded* by him to the officer in whose office the proceedings were commenced, and where the judgment is to he entered: *Rule* 531. Other counties.

Where judgment is reserved at the trial, the record and exhibits must be forwarded to the Central Office: see Regulation of 17th December, 1904, in note to *Rule* 263 (2); and aft judgment is given should be transmitted to the officer who is to settle the judgment.

When the record and exhibits are required on a motion before a Divisional Court, they may be forwarded to the Central Office, under *Rule* 396 (1).

265. The Judge by whom any cause or matter is tried with or without a jury, and the Court before which any cause or matter is brought by way of appeal, may inspect any property or thing concerning which any question arises therein, and where the sanity of a party is Judge may inspect.

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in question, may examine him for the purpose of determining his sanity. C.R. 570. *Amended.*

Where a Judge takes a view of premises or property in dispute, *semble*, he should do so in presence of the parties, so as to avoid any mistnke as to the property viewed being that in dispute.

This *Rule* applies (1) to trials, (2) to motions by way of appeal. It does not authorize a view on any interiocutory motions which are not hy way of appeal. The difficulty in the way of a Judge acting on a personal view, in an interiocutory motion, is that the evidence of his senses cannot be laid before an appellate tribunal in the event of an appeal from his decision; hut, of course, the same difficulty usually exists in any case where a view is had either hy Judge, or jury. The *Rule* authorizes a personal examination by an Appellate Court of a person whose sanity is in queation, as was done in *In re Fraser*, 26 O. L. R. 508.

In England it has been held that a Judge on the trial of an action of deceit cannot take a view of the property, or matter, in litigation, in lieu of taking the evidence of witnesses, e.*g.*, on a question of colourable imitation: *London General Omnibus Co.* v. *Lavell*, 1901, 1 Ch. 135; 83 L. T. 453; and see *Kessowji Issur* v. *Great Indian Peninsular Ry.*, 96 L. T. 859; *Re Fraser*, 26 O. L. R. 508; hut in an action to restrain the passing off of goods of the defendant as those of the plaiatiff, it is said that the Judge looking at the exhibits before him, and also paying due attention to the evidence adduced, must not surrender his own independent judgment to nny witness: *per* Lord Macnaghten. *Payton* v. *Snelling*, 1901, A. C. 311; and sea *Civil Service* v. *Dun*, 1897, 13 Ch. D. 512; *North Cheshire & M. B. Co.* v. *Manchester B. Co.*, 1899, A. C. 83; *Hecla F. I. Co.* v. *Walker*, 14 App. Cas. 555; *Houldsworth* v. *McCrea*, 1867, L. R. 2 H. L. 380; *Bonnie* v. *Swan*, 1903, 1 Ch. 211. *Sed quære*, if there is any distinction between the two classes of action, and whether under this *Rule* the function of the Judge is not the same in both, viz., to determine whether, in view of a comparison, there is any evidence.

Inspection of real or personal property by jury, parties or witnesses.

266. A party may apply for an order for the inspection 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. (See also Rule 370.) C.R. 571.

See Eng. R. (1883) 659.

Rule 266 is confined to casea in which the property of which inspection is sought is in the possession, custody or control of the party against whom the order is desired: *Hills* v. *Union Loan, etc., Co.*, 19 P. R. 1; *Semble*, inspection of property in which other persons not before the Court are interested cannot he ordered: *Coomes* v. *Hayward*, 1913, 1 K. B. 150.

This *Rule* is intended apparently to appiy to inspection for the purposes of a trial; further provision is made by *Rule* 370 for obtaining inspection in other cases.

Under the similar Eng. Rule, an order was made allowing defendants, at their own expense, to bring within the jurisdiction a ship

stranded at a piaca out of the jurisdiction, and for which tha pinintiffs claimed to recover against the defendants on a policy of insurance, as for a totai ioss: *S. S. New Orieons* v. *London Provinciol & Marine Ins. Co.*, 1909, 1 K. B. 943; 100 L. T. 595. Rules 267, 268.

Liberty was given under the similar Irish Rule to inspect a ship lying in harbour, on which it was alleged that certain timber, part of the subject matter of the action, had been placed by defendant for removal: *Morris* v. *Howell*, 22 L. R. Ir. 77.

Under Eng. (1883) R. 654, property has been ordered to be sent out of the jurisdiction for inspection by witnesses who are to be examined by commission: see notes to *Rule* 277, *infro*, p. 747.

In England there is no power to order the Sheriff of one county to bring a jury of that county to view lands in question in another county: *Stoke* v. *Robinson*, 6 T. L. R. 31; but see *The Jurors Act*, s. 86, in note to *Rule* 267 *infro*.

267. A view by the jury may be ordered by the Judge presiding at the trial. C.R. 572. *Amended.* Judge may order view at trial.

In order to obtain a view, C. R. 572 provided that evidence should be furnished shewing where the view is to be made, and the distance from the Sheriff's office, and that a deposit should be made to cover the expenses unless otherwise ordered; although these provisions are omitted from the present *Rule*, evidence of the kind indicated may still be required, and the deposit of a sum to cover expenses may be imposed as a term of granting a view.

By *The Jurors Act* (R. S. O. c. 64), it is provided as follows:—

"86.—(1) Where in an action, whether the same is to be tried by a Special or Common Jury, it appears to the presiding Judge that in order to the better understanding of the evidence, the jurors who are to try the issues ought to have a view of the place, or of the real or personal property in question, whether the same be within or without the county in which the trial is to take place, he may at any time after the jurors have been sworn and before they give their verdict, order that the jurors shall have such view. View by jurors.

(2) The order may be made on such terms as to costs and the adjournment of the trial and otherwise as may be deemed just, and shall contain directions to the Sheriff as to the manner in which, and the persons by whom, the place or the property in question shall be shewn to such jurors, and any other directions which under the circumstances the Judge may think proper." Terms of order.

Special Juries.—As to the provisions for trying actions by special juries: see *The Jurors Act*, ss. 78-85; and as to the Judge certifying for costs thereof: see *Ib.*, s. 84: *Barker* v. *Davis*, 1913, 3 K. B. 34; 108 L. T. 941.

268. The Court may obtain the assistance of merchants, engineers, accountants, actuaries, or scientific persons, in such way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding, and may act on the certificate of such persons. C.R. 94. Court may obtain service of experts.

Rule 266.

Master cannot employ experts.

It is only the Court that is authorized to obtain the assistance of experts. A Master to whom a cause is referred, has no authority to employ experts for the purpose of assisting him to come to a conclusion on matters referred to him: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555; *Mildmay* v. *Lord Methuen*, 1 Drew. 216; 16 Jur. 965; but see *contra*, *Re London & Birmingham Ry. Co.*, 6 W. R. 141; and see *Rule* 422, note.

Costs of expert may be allowed though improperly.

Where, however, the Master had, at the instance of the plaintiff, and with the consent of the creditors, in an administration suit, employed an expert, and the parties received the benefit of his services without objection, the Court on appeal by the creditors refused to disallow the costs incurred: *Re Robertson, Robertson* v. *Robertson*, *supra*.

This *Rule* gives a wide discretion to the Court as to the manner in which experts shall be employed; but apparently it does not give the Court power to direct experts to be employed for the purpose of giving evidence as witnesses; it appears merely to enable the Court to procure the assistance of experts for the purpose of getting their opinions, on the evidence adduced by the parties, or upon a view of the *locus in quo*: see *Enderwick* v. *Allden*, 88 L. T. Jour. 12.

In *Broder* v. *Soillord*, 25 W. R. 456, the Judge at the trial, appointed an independent surveyor to make a report, and at the adjourned hearing his report was handed to the Judge; the Judge thought that two points should be stated more fully, and he directed the surveyor to make an addition to his report, observing that he preferred not to allow the surveyor to be sworn as a witness, as he was acting in a *quasi*-judicial capacity.

Cases in which expert appointed.

Where there is contradictory evidence on a scientific question the Court is at liberty to employ an independent expert to give advice upon which the Court may form its judgment: *Badische Anilin, etc.*, v. *Levinstein*, 24 Ch. D. 156.

An expert has been employed to ascertain the effect of a dam on the water penned back: *Dickson* v. *Burnham*, 14 Gr. 601; 17 Gr. 265; *Hawkins* v. *Mohoffy*, 29 Gr. 326; and the amount of encroachment of alluvium on a sea shore: *Attorney-General* v. *Chambers*, 4 DeG. & J. 55, 58; and as to the effect of using steamboats on a canal: *Case* v. *Midland Ry. Co.*, 27 Beav. 247; as to the mental condition of a person alleged to be a lunatic: *Re Fraser*, 24 O. L. R. 222. As to the circumstances under which the Court will send an expert, to report in the case of a suit to abate a nuisance: see *Slavin* v. *North Boncepeth Coal Co.*, L. R. 9 Chy. 705; *Enderwick* v. *Allden*, *supra*.

Court cannot refuse to grant relief against nuisance until inquiry made by expert how it may be best abated.

Where a plaintiff proves himself entitled to an injunction against a nuisance, or other injury, the Court cannot, before pronouncing judgment, order an expert to be employed, for the purpose of ascertaining the best mode of removing the nuisance, etc., even though the injunction to which the plaintiff is entitled be a difficult one for the defendant to obey: *Attorney-General* v. *Colney Hatch Asylum*, L. R. 4 Chy. 146; and a general inquiry as to what ought to be done to preserve the plaintiff's light and air was refused: *Stokes* v. *City Offices Co.*, 13 W. R. 537. But after judgment, the opinion of an expert may be taken, as to the time which ought to be allowed for carrying it into effect: *Attorney-General* v. *Methyr Tydfil*, 5 W. R. 148.

Rule 263.

In the *Baltic Co.* v. *Simpson*, 24 W. R. 390, it was held that the Court ought not, under ss. 64, and 65 of the Jud. Act, [illegible] an order before trial, appointing a scientific person to report on a question of fact.

Where a matter is referred by the Court to an expert for report, a formal order of reference to him should be drawn up; but where an expert acted, and made his report, without this having been done, the Court acted on the report notwithstanding the objection: *Enderwick* v. *Alden*, 88 L. T. Jour. 12.

Appointment may be ex parte.

Where an expert is employed, it is not absolutely necessary that the appointment should be made in the presence of the parties: *Re London & Birmingham Ry. Co.*, [illegible] W. R. 141.

Expert cannot call witnesses.

An expert cannot call witnesses: *Morris* v. *Llanelly Ry. Co.*, W. N. 1868, 46; and his report is not conclusive: *Ford* v. *Tynte*, 2 D. J. & S. 127; *Adamson* v. *Gill*, 16 W. R. 306.

Assessors.

The Court cannot after the evidence has been taken in an action call in the aid of experts as assessors, and base its judgment on their opinion as to the result of conflicting testimony of a technical character: *Wright* v. *Collier*, 19 Ont. App. 298; not even though the assessors are so called in with the consent of the parties: *Ib.*

Reference to experts under Jud. Act., ss. 64, 65.

Under The Jud. Act, s. 64, any question arising in any cause or matter may be referred to an official referee, or to any special referee agreed on by the parties, for inquiry and report, and in this way the assistance of experts may be obtained. And under s. 65 a cause or matter may, in certain cases therein mentioned, be referred to a special referee (if the parties so agree) for trial.

No power it will be seen is given to the Court under s. 64 or 65, to refer a cause to anybody but an official referee, except by consent of the parties. Where, therefore, a reference is required under those sections to an expert, it would seem that the parties must agree on the referee to be named. It is possible, however, that this *Rule* may be held so to amplify the power of the Court as to enable it to refer causes for the purposes mentioned in ss. 64 and 65, to special referees of its own nomination, independently of the consent of the parties.

Where a referenee is directed to an expert for inquiry or report under s. 64, or for trial under s. 65, that is, of course, an exception to the rule laid down in *Morris* v. *Llanelly Ry. Co.*, *supra*, that he cannot call witnesses: see *Rules* 270, 400.

Where a question, or a cause or matter, is referred to a special referee under s. 64 or 65, his report is appealable in the same way and within the same time as a Master's report: see *Rules* 400, 503.

Expert evidence.

Where an expert is required to give evidence, his evidence should be given *viva voce*, as the Court as a general rule discourages the taking of such evidence by commission: *The Attorney-General* v. *Gooderham*, 10 P. R. 259.

It is provided by *The Evidence Act* (R. S. O. c. 76), s. 10, that not more than three expert witnesses on each side shall be examined without leave, to be obtained before the examination of any of the three which may be called without leave, in any action, arbitration, or other proceeding.

Rule 248.

Tho neglect of the Judge at the trini to enforce this provision was held to he ground for granting a new trial: *Rice* v. *Sockett*, 27 O. L. R. 410.

In the caso of proceedings within the jurisdiction of the Dominion Parliament, five may he called suhject to the like provision: *Canada Evidence Act* (R. S. C. c. 145), s. 7.

Where parties adduce *quasi* expert evidence, it is not open to the Court, upon a trial by jury, to withdraw the case from the jury, hecause, in the opinion of the Court, the witnesses are incompetent to give expert evidencc, hut the evidence must be suhmitted *quantum valeat*; *e.g.*, in an issue in which the mental capacity of a testator was in question, the evidence of witnessos who spoke to his mental capacity was held to he admissihle, even though the witnesses were not, in the opinion of tho Court, experts: *Regan* v. *Waters*, 10 Ont. App. 85. As to the weight to he attached to the conclusions of scientific witnesses: see *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Chy. 349.

Where the opinions of experts on foreign law nre conflicting, the Court may examine for itself the text hooks and judicial decisinns of the foreign country, in order to arrive at a satisfactory cnnclusion: *Rice* v. *Gunn*, 4 Ont. 579; *The Stettin*, 14 P. D. 142. The Court will not receive the opinions of experts as to the proper construction of a Canadian statute: *e.g.*, the evidence of surveyors as to the correct mode of making a survey under a statute is inndmissihle: *Stafford* v. *Bell*, 6 Ont. App. 273.

The costs incurred in order to qualify experts to give evidence are not tayahle hetween party nnd party: see *McGannon* v. *Clarke*, 9 P. R. 505.

Rule 266.

CHAPTER XIII.

EVIDENCE.

269. The witnesses at the trial of an action or an assessment of damages shall be examined *viva voce* and in open Court, but a Judge may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial, on such conditions as he may deem just, or that any witness whose attendance ought for some sufficient cause to be dispensed with, be examined before an examiner; but where the other party *bonâ fide* desires the production of a witness for cross-examination, and such witness can be produced, an order shall not be made authorizing his evidence to be given by affidavit. C.R. 483. Evidence on trial to be viva voce.

See Eng. (1883) R. 483. The use of affidavits at a trial was not permissible in the Common Law Courts; but in Chancery exhibits might formerly be proved at the hearing in that way.

Under Chy. O. 176, from which this *Rule* is derived, there were many decisions as to the matters which might, and might not, be proved by affidavit: see Dan. Pr., 5th ed., 777, 1236; *Devey* v. *Thornton*, 9 Ha. 233; *Fowler* v. *Reynal*, 15 Jur. 1019; *Re Delevante, Delevonte* v. *Child*, 6 Jur. N. S. 118; *Bush* v. *Watkins*, 14 Beav. 33; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Bear* v. *Smith*, 5 D. & S. 92; *Follows* v. *Dillon*, 2 W. R. 507; *Botemon* v. *Margerison*, 2 W. R. 607; *Howard* v. *Chaffers*, 11 W. R. 585; *Evans* v. *Lewis*, 2 L. T. 559; *Fleming* v. *East*, Kay, App. iii.; *Macdonald* v. *Antelme*, W. N. 1884, 72. Evidence at trials, etc.

Affidavits as to trustees' conduct, between judgment and the hearing on further directions, may be read by the original plaintiff on the question of costs; but not affidavits as to their conduct before judgment; but it would seem that persons added as defendants in the Master's office, or who are served with the judgment under *Rule* 87, might read affidavits as to the trustees' conduct before, or after judgment, on the question of costs: *Re Revill*, 55 L. T. 542. Affidavits.

In an administration action, the Court may, under this *Rule*, if it thinks fit, receive fresh affidavit evidence on further consideration: *May* v. *Newton*, 34 Ch. D. 347; see, however, *Downey* v. *Roof*, 6 P. R. 89, and *Goodall* v. *Clarke*, 2 O. W. N. 1388 as to the usual material which may be used on further directions, viz., the pleadings, the judgment and orders, if any, and the Master's report.

Certain facts are expressly authorized to be proved by affidavits: *e.g.*, service of notice to produce documents: see *Rule* 272; the absence from Ontario of a witness or party whose evidence has been taken by commission: see *Rule* 287.

Rule 269.

The Court has no power on a motion for judgment for default of pleading to receive evidence by affidavit to prove the allegations of the statement of claim against infants, or parties *non compotes mentis*, or in any other case, except where *Rule* 222 is applicable: see *Ellis* v. *Robbins*, 50 L. T. 512; 17 C. L. J. 342; and *Re Fitzwater*, 32 L. J. Chy. 83.

Evidence at trial to be oral.

The Judge should, in every case of fairly contested or disputed facts coming on to be tried, take the evidence orally unless some good reason to the contrary is shewn: *Atty.-Gen.* v. *Metropolitan District Ry. Co.*, 5 Ex. D. 218; see also *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173; *Blackburn Union* v. *Brooks*, 7 Ch. D. 68; *Warner* v. *Mosse*, 16 Ch. D. 101.

In the absence of agreement, evidence must be taken *viva voce* at the trial, and affidavits used on a motion cannot be used at the hearing: *Perkins* v. *Slater*, 45 L. J. Chy. 224; but where an interlocutory motion had been ordered to stand over till the hearing, and a deponent had died in the meantime, the Court allowed his affidavit to be read at a trial, with evidence *viva voce*, although the deponent had not been cross-examined: *Elias* v. *Griffith*, 46 L. J. Chy. 806.

Where none of the parties cited had appeared in an action to prove a will in solemn form, Hannen, P., refused to allow the execution and attestation of the will to be proved by affidavit: *Cook* v. *Tomlinson*, 24 W. R. 851. In *Gornall* v. *Mason*, 12 P. D. 142, an action for revocation of probate, an affidavit made by the witness eight years previously to obtain probate was allowed to be read as evidence in support of the will.

In *Drewitt* v. *Drewitt*, 58 L. T. 684, an affidavit used on a motion in the cause, made by a witness who was unable to attend at the trial, was allowed to be put in as evidence. This was not allowed in *Blackburn Union* v. *Brooks*, 7 Ch. D. 68, where cross-examination of the witness was desired.

The depositions of a defendant taken on his own behalf in shorthand upon a reference, were held to be admissible in evidence, notwithstanding that he had died before the examination was concluded and before cross-examination: *Rondall* v. *Atkinson*, 30 Ont. 242, 620.

The Judge, at any period in a case, may allow further evidence to be called by either party for his own satisfaction, though it be doubtful whether it would be admissible, on the request of either party, as of right: *Budd* v. *Davison*, 29 W. R. 192. It was said by Lord Esher, M.R., that at the trial the Judge may call and examine a witness not called by the parties, and that the right of the parties to cross-examine such a witness is in the discretion of the Judge, who should as a rule allow cross-examination by any party adversely affected by the answers of the witness, but not a general cross-examination: *Coulson* v. *Disborough*, 1894, 2 Q. B. 316; 70 L. T. 617; and see *In re Keighley*, 1893, 1 Q. B. 405, but these *dicta* of Esher, M.R., as to the right of a Judge to call a witness, were disapproved by the C. A.: *Re Enoch & Zaretzky*, 1910, 1 K. B. 327; 101 L. T. 801.

As to proof of registered instruments: see *Barber* v. *McKay*, 17 Ont. 562.

Depositions of Deceased or Absent Persons.—In an action under *The Fatal Accidents Act*, the depositions of the deceased taken *de bene esse* in an action commenced by himself under *The Workmen's*

Compensation Act, were allowed to be read: *Erdman* v. *Walkerton*, 20 Ont. App. 444; and see *Elias* v. *Griffith*, *supra*, p. 734. Rule 369.

So also when a witness examined at a former trial cannot be found, his depositions in another judicial proceeding in which the opposite party had an opportunity to cross-examine him, may be used, on proof of his absence, and inability to find him: *Cuff* v. *Frazee Storage Co.*, 14 O. L. R. 263.

Telephone Conversations.—Evidence of a conversation over a telephone was admitted: *Warren* v. *Forst*, 22 O. L. R. 441; 24 O. L. R. 282; 46 S. C. R. 642.

Privilege of Witnesses.—A witness is not liable for slander in respect of statements made by him in the witness box: *Dawkins* v. *Rokeby*, 33 L. T. 196; not only is the evidence of a witness given under oath privileged, but so are also his preliminary statements made before trial to the litigant on whose behalf he is called, or the legal adviser of such litigant: *Watson* v. *McEwan*, 1905, A. C. 480; 93 L. T. 489.

Admissions.—A party may be called upon by any other party to admit any document, saving all just exceptions, by a notice to admit, which may be according to Form 39; H. & L. Forms, No. 686. Notice to admit documents.

This extends to all documents which a party proposes to adduce in evidence, and not merely those in his custody or control: *Rutter* v. *Chapman*, 8 M. & W. 388.

Among the "just exceptions" are the admissibility of the documents as evidence: *Phillips* v. *Harris*, Car. & M. 492, and their legal effect: *Hills* v. *London Gas Light Co.*, 1 F. & F. 346; but not an objection to their reception on the ground of interlineation: *Freeman* v. *Steggall*, 14 Q. B. 202.

Admissions between defendants cannot be used as evidence against the plaintiff: *Dodds* v. *Tuke*, 25 Ch. D. 617.

A notice to admit must be given a reasonable time before trial: *Tynn* v. *Billingsley*, 3 Dowl. 810; *Cary* v. *Cumberland*, 1 P. R. 140 and holds good upon a subsequent trial: Day, C. L. P. Act, 3rd ed., 103: *Wilson* v. *Baird*, 19 C. P. 98.

A notice to admit may be given, in respect of a document not in the possession or under the control of the party: *Rutter* v. *Chapman*, 8 M. & W. 388; *Conger* v. *McKechnie*, 1 C. L. Cham. 220; or a foreign judgment: *Smith* v. *Bird*, 3 Dowl. 641; or documents, the validity of which is directly in issue: *Spencer* v. *Barough*, 9 M. & W. 425.

C. R. 527 expressly authorized the giving of notice to admit, but though it is dropped, there is no alteration in the practice on this point.

For notices which may be given to enable secondary evidence to be given of wills, registered instruments, telegraphic messages, letters, etc.: see *The Evidence Act* (R. S. O. c. 76), ss. 42-49.

Section 50 of *The Registry Act* (R. S. O. c. 24), does not enable a party to use as evidence a certified copy of a registered probate: *Barber* v. *McKay*, 17 Ont. 562; 19 Ont. 50.

Rules 270, 271.

Admissions sufficiently signed by solicitor.

C. R. 528 provided that: "It shall be sufficient if written admissions are signed by the solicitor of the party by whom, or on whose behalf, they purport to be made."

Although that Rule has not been continued, it is to be presumed that no change is intended to be made in the practice. A solicitor is an officer of the Court and his signature is accepted as authentic, unless disputed.

The mere fact that documents are admitted in admissions signed by the solicitor, will not make them evidence unless put in at the trial: *Watson* v. *Rodwell*, 11 Ch. D. 150; and the admission of a copy does not entitle the plaintiff to put in the copy, without first accounting for the original: *Sharpe* v. *Lambe*, 11 A. & E. 805. The admission when made is conclusive: *Langley* v. *E. of Oxford*, 1 M. & W. 508.

Where the precaution of giving a notice to admit has not been taken, any extra expense occasioned thereby may not be taxable: see *Rule* 670. On the other hand where the notice has been given and admissions have been unreasonably refused, the party neglecting or refusing to make the admissions may be ordered to pay the costs thereby occasioned: *Rule* 671.

Evidence before a Master or Referee.

270. All witnesses in any matter pending before a Master, shall be examined *vivâ voce*, unless it is otherwise ordered by the Master or by the Court on special grounds. C.R. 484.

See notes to *Rule* 269. This *Rule* also applies to matters referred to special or official referees: see *Rule* 400.

A subpœna may properly be issued to compel the attendance of a witness before a Master: *Hannum* v. *McRae*, 17 P. R. 567; 18 P. R. 185.

Depositions.

271. The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination upon oath before an officer of the Court or any other person and at any place, of any person, and may permit such deposition to be given in evidence. C.R. 485.

See Eng. (1883), R. 487.

Construction of Rule.

Scope of Rule.—This *Rule* applies only where there is pending litigation between contesting parties: *Re Hewitt*, 15 Q. B. D. 159, 163; and for the taking of evidence for the purposes of the trial, or upon a hearing upon a reference: *Beaton* v. *Globe*, 16 P. R. at pp. 285, 286; and for that purpose may be applied wherever necessary for the purposes of justice: see *Warner* v. *Mosses*, 16 Ch. D. 100; *Nadin* v. *Bassett*, 25 Ch. D. 21. It cannot be used merely for the purpose of obtaining discovery: *Beaton* v. *Globe*, *supra*, and see *infra*, p. 738.

It is not necessary to apply under this *Rule* for an order to examine witnesses on a reference after judgment; the former practice of subpœnaing without leave is not abolished: *Raymond* v. *Tapson*, 22 Ch. D. 430; *Hannum* v. *McRae*, 17 P. R. 567; 18 P. R. 185.

In lieu of a Commission.—This *Rule* may be invoked if necessary to obtain the evidence of a witness for use at the trial, without the issue of a commission, whether the witness be without, or within the jurisdiction, wherever it may be necessary and just: see notes to *Rules* 277 *et seq.*; see also *Croft* v. *Middleton*, 9 Ha. App. xviii.; *London Bank of Mexico* v. *Hart*, L. R. 6 Eq. 467; (where a form of order is given); *Banque Franco-Egyptienne* v. *Lulcher*, 41 L. T. 468; 28 W. R. 133. Rule 271. Order for examination of a witness in lieu of a commission.

Examination abroad under this *Rule* will be ordered upon the same principles and under the same circumstances as a commission would be ordered, as to which see *Rule* 277, and notes, and *Delap* v. *Charlebois*, 15 P. R. 142.

There is a difference between a party seeking to have his own examination abroad, and that of a mere witness. In both cases it is a matter of judicial discretion, but the discretion will be exercised in a stricter manner in the case of a party: *Coch* v. *Allcock*, 2 Q. B. D. 178, 181.

An order for examination of a plaintiff, otherwise than before the Court and jury, was considered not proper, where the issue was forgery of the plaintiff's name, or a personation of the plaintiff: *Thomas* v. *Storey*, 11 P. R. 417.

In applying under this *Rule* to examine witnesses before trial, it is not sufficient to shew that the examination will materially benefit the applicant, some special reason must be given why the witness should be examined, out of the regular course, and not at the trial for the first time: *Hendrie* v. *Neelon*, 19 C. L. J. 18; 2 C. L. T. 599.

Examination de bene esse.—Under this *Rule* orders may be made for examination of a witness *de bene esse*, for use at the trial, or on a reference in the Master's office: *Re Dunsford*, 9 P. R. 172. Examination de bene esse.

Examination of a witness *de bene esse* is allowed where there is danger of losing testimony from death, or absence at the time of the trial. An order will therefore be made where a necessary witness is going abroad, or is from illness, age, or other infirmity, likely to be unable to attend the trial: *Warner* v. *Mosses*, 16 Ch. D. 100; and generally speaking wherever justice requires it, though, as a rule, only where the evidence is to be used for some definite judicial proceeding pending: *Whitehead* v. *Buffalo & L. H. Ry.*, 6 U. C. L. J. 232, where an order was made in contemplation of a reference to a Master not yet directed.

In a proper case, the evidence of a party plaintiff, or defendant, as a witness on his own behalf, may be ordered to be taken *de bene esse*: see *Can. Pac. Ry.* v. *Rosen*, 2 O. W. N. 375.

If the ground is that the witness is over 70 years or dangerously ill, or going immediately abroad, the application may be made *ex parte*: Dan. Pr., 5th ed., 817; 6th ed., 655; *Oliver* v. *Dickey*, 2 Chy. Ch. 87; *Crippen* v. *Ogilvey*, *Ib.*, 304; *Bidder* v. *Bridges*, 26 Ch. D. 1; *Baker* v. *Jackson*, 10 P. R. 624; *Crammond* v. *Thompson*, 11 T. L. R. 572; but the Court in its discretion refused to apply this rule to the extraordinary case of thirty witnesses over 70 years, in *Bidder* v. *Bridges*, *supra*.

Rule 271.

In other cases notice should be served: see *Anderson* v. *Anderson*, 1 Chy. Ch. 291; *Speors* v. *Daddell*, 7 P. R. 260; *Hooey* v. *Gilbert*, 12 P. R. 114.

If the only ground is that the witness is the only witness as to some facts, this should be clearly shewn: *Hope* v. *Hope*, 3 Beav. 317; *Jomeson* v. *Jones*, 3 Chy. Ch. 98; but the order may provide that the examination is not to be used at the trial unless the attendance of the witness cannot be procured: *Elliott* v. *Can. Pac. Ry. Co.*, 12 P. R. 593.

That the witness is going abroad is a sufficient ground. He need not be going permanently, or be the only witness: *Speors* v. *Waddell*, 7 P. R. 260; and where witnesses residing out of Ontario come within the jurisdiction, and are about to return, an order for their examination here before their departure may be made: *Delap* v. *Charlebois*, 15 P. R. 142.

Such orders are discretionary, and if witnesses have been examined, will not be reversed unless plainly erroneous: *Ib.*; and see *Beoton* v. *The Globe*, 16 P. R. 281.

As to what must be shewn at the trial before the deposition, when taken, can be used as evidence: see Dan. Pr., 6th ed., 656-7; 7th ed., 558-9.

For form of order for examination *de bene esse:* see Seton, 5th ed., 89; and see *Burton* v. *Staffordshire Ry. Co.*, 35 W. R. 536; 56 L. T. 601; *Solicitor of the Treasury* v. *White*, 55 L. J. Pro. 79; W. N. 1886, 144.

Any party to the action, whose interest may be affected by the examination of witnesses under this *Rule*, is entitled to have counsel present on such examination to protect his interests: *Dominion Bank* v. *Bell*, 13 P. R. 471.

Where evidence had been taken in shorthand of a party on his own behalf, and he had died before the examination was concluded, and before he could be cross-examined, the evidence was held to be admissible: *Randoll* v. *Atkinson*, 30 Ont. 242, 620.

Costs.

Costs.—In *Carty* v. *London*, 10 C. L. T. 3, the costs of an examination were allowed, though the evidence was rejected at the trial as inadmissible; so also in *Rondot* v. *Monetory Times*, 18 P. R. 141, where it became unnecessary to use the depositions, in consequence of admissions made in evidence by the opposite party.

Examination cannot be had for discovery.

Cases in which Rule not Applicable.—By a series of decisions prior to 1894, this *Rule* was applied to authorize examinations for the purpose of discovery not only of parties, before the time for doing so in the ordinary course: *Fisken* v. *Chamberlain*, 9 P. R. 283; *Boulton* v. *Blake*, 11 P. R. 196; *Tate* v. *Globe*, 11 P. R. 253; *Wallis* v. *Newton*, 7 C. L. T. 138; *Orpen* v. *Kerr*, 11 P. R. 128; *Thomson* v. *Gye*, 13 P. R. 273; *Campbell* v. *Scott*, 14 P. R. 203; *Beoton* v. *Globe*, 15 P. R. 473; but also of persons not parties: *Turner* v. *Kyle*, 18 C. L. J. 402; *Hendrie* v. *Neelon*, 2 C. L. T. 499; *McNally* v. *McDonold*, 9 C. L. T. 54; *Boulton* v. *Blake*, 11 P. R. 196; *Murray* v. *Worner*, 11 P. R. 440; *Gordon* v. *Phillips*, *Ib.* 540; *Carnegie* v. *Cox*, *Ib.* 311; *Smith* v. *Clarke*, 12 P. R. 217; *McMaster* v. *Mason*, 12 P. R. 278; *Brown* v. *Pears*, 12 P. R. 396; see also *Carnegie* v. *Federal Bank*, 10 P. R. 69; *Rosenheim* v. *Silliman*, 11 P. R. 7; *Hooey* v. *Gilbert*, 12 P. R. 114; *Henderson* v. *Blain*, 14 P. R. 308. All the decisions countenancing such examinations were

disapproved of, and overruled by the Court of Appeal, in *Beoton* v. *Globe Printing Co.*, 16 P. R. 281, in which it was held that this *Rule* does not apply to examinations for discovery. Ordinarily, such examinations must be had in the manner, and at the times provided, by *Rules* 327-337. There may be inherent jurisdiction in the Court or a Judge to make a special order for examination for discovery before the time for obtaining it in the ordinary way arrives, but there seems to be no express *Rule* on the subject: see note to *Rule* 336; and *Rules* 271, 349. Rules 272, 273.

The *Rule* was formerly held to apply to the examination of a witness on a pending motion who has not made an affidavit: *Monaghan* v. *Dobbin*, 18 C. L. J. 180; 2 C. L. T. 260; and a witness, from whom it is desired to obtain information, in order to serve a defendant with the writ: *Seoger* v. *Borber*, 27th August, 1881, Mr. Dalton.

It would seem that either this *Rule*, or *Rule* 228, may be applied where it is desired to examine a witness upon a pending *ex porte* motion: see *McMillan* v. *Wonsborough*, 10 P. R. 377, and notes to *Rule* 228.

Arbitration.—*Semble*, an arbitration pending before an arbitrator named under *The Municipol Act* (R. S. O. c. 192), s. 339, is not a "matter" within this *Rule*: *Re Mocpherson ond Toronto*, 16 P. R. 230.

Using Depositions in Another Action.—The Court has no power to make an order authorizing the use in a future action of evidence taken in a pending action: *Erdmon* v. *Wolkerton*, 14 P. R. 467. Using depositions in another action.

The depositions of a deceased person taken as a witness in a former suit were allowed to be read, the parties being in effect the same, the adverse party having had the opportunity to cross-examine, and the two actions substantially involving the same queations: *Erdmon* v. *Walkerton*, 22 Ont. 693; 20 Ont. App. 444; 23 S. C. R. 252. Depositions of a witness taken in another judicial proceeding in which the adverse party had power to cross-examine, may be admitted on proof that the witness after diligent search cannot be found: *Cuff* v. *Frazee Storoge*, 14 O. L. R. 263.

As to using depositions taken at a previous trial in the same action: see *Monro* v. *Toronto Ry. Co.*, 9 O. L. R. 299.

272. Service of a notice to produce may, in the absence of an admission of service, be proved by an affidavit of the solicitor in the cause, or his clerk. C.R. 487. Evidence of service of notice to produce.

See Eng. Rule (1883) 378.

Notice to produce given for one trial will be good for a new trial if one is ordered: *Hope* v. *Beadon*, 1851, 21 L. J. Q. B. 25.

As to the reason and necessity for giving notice to produce at the trial: see notes to *Rule* 351.

273. A subpœna may be issued at any time in blank and may be completed by the solicitor or party, and any number of names may be inserted in one subpœna. C.R. 478, *amended*. Subpoena.

Rule 274.

A subpœna should be issued from the office where the proceedings were commenced: *Rule* 762.

Though a subpœna be issued from the wrong office yet if served and conduct money paid, the witness should attend and then raise any objections he may have to the regularity of the subpœna: *Evel* v. *Bank of Hamilton*, 3 O. W. N. 336.

Formerly it was necessary when serving a subpœna to exhibit the original: *Woods* v. *Fader*, 10 O. L. R. 643; but that is necessary now only in case it is demanded: see *Rule* 203.

A witness cannot have a subpœna set aside, merely because he swears he can give no relevant evidence; but if it is shewn that the subpœna was not issued *bonâ fide* and that the witness can give no relevant evidence, it may be set aside: *Rex* v. *Baines*, 1909, 1 K. B. 258.

Where a person required as a witness is undergoing imprisonment for a crime in the Province, it is necessary to move for an order to the governor of the prison to produce the prisoner in Court at the trial: see form of order, Seton, 5th ed., 89. Such an order, however, will not be issued when the time for trial is uncertain, until the case is on the paper for trial: *Jenks* v. *Ditton*, 76 L. T. 591, and see *Rule* 230.

A subpœna dated before the time when the party issuing the same was entitled to examine the witness subpœnaed was held to be irregular: *McMurray* v. *Grand Trunk Ry.*, 3 Ch. Ch. 130.

Subpœna to produce original record not to issue without order.

274.—(1) No subpœna for the production of an original record, or of an original document from any registry office, shall be issued, but an order for its production or transmission may be made which shall be obeyed by the officer in whose custody it is.

(2) Except in special circumstances requiring or justifying the production of the original, no such order shall be made where the document may be proved by a certified copy. Any officer required to produce a document shall be entitled to be paid ordinary witness fees. C.R. 479, *amended*.

The application for the order may be made to the Master in Chambers, or other officer exercising the like jurisdiction in Chambers. The application should be supported by an affidavit showing the necessity for producing the original, and that the production of a certified copy will not be sufficient.

The *Rule* applies to records of the Court, and memorials in the offices of Registrars of Deeds; an assignment of a squatter's right filed in the Crown Lands Department was held not to be a record within the meaning of the *Rule*: *McGuire* v. *Sneath*, 2 U. C. L. J. 184.

Original papers filed in Court should not be sent away to be used in evidence at a trial, unless it is shown that the production of the originals is essential; and the party applying to have them transmitted has some right in them; or the interests of public justice require their transmission: *Gaynor* v. *Scott*, 24 U. C. Q. B. 180; and by a regulation of the Court, dated 16 Feb., 1905, directions are given

to office ... of the Court that, "subject to Rule 338 (now *Rule* 396 (2),) in case ... originals are required instead of examined or certified copies of affidavits, papers, and documents on file or of record in the Court, such originals shall not be taken away from the Court by any officer under a subpœna, unless authorized so to do by a Judge's order in that behalf." Rule 274.

Where original documents are produced in evidence under a subpœna by any public officer, the originals are not to be left in Court, but copies thereof, or of so much as may be necessary, certified by the officer, are to be put in: see *The Evidence Act* (R. S. O. c. 76), s. 48 (1); except where the genuineness of the document produced is in question: see *Ib.*, s. 48 (2).

In an action for malicious arrest, the production of an examined copy of the affidavit on which the arrest was made, and shown to have been used in the cause, is sufficient *primâ facie* proof of such affidavit, and that it was made by the defendant: *Spafford* v. *Buchanon*, 3 O. S. 391; *Wilson* v. *Thorpe*, 18 U. C. Q. B. 443. But in an action for malicious prosecution, the production of the original indictment indorsed "no bill" is not sufficient proof of its termination; a record must be drawn up, and an examined copy produced: *Hewitt* v. *Cone*, 26 Ont. 133; *Reg.* v. *Ivy*, 24 C. P. 78; *McConn* v. *Prenevcou*, 10 Ont. 573, and see *Gunn* v. *Cox*, 3 S. C. R. 296; *Henry* v. *Little*, 11 U. C. Q. B. 296; *Aston* v. *Wright*, 13 P. R. 14; but see O'*Horo* v. *Dougherty*, 25 Ont. 347. A conviction returned to the Sessions and filed by the Clerk of the Peace becomes a record, and may be proved by a certified copy: *Grohom* v. *McArthur*, 25 U. C. Q. B. 478. In action for malicious arrest

So also the books, indictments and records of the Court of General Sessions of the Peace, in the hands of the Clerk of the Peace, are public documents, and any person affected by them is entitled to a copy of a record of acquittal without the fiat of the Attorney-General: see sec. 132 *supro; Rex* v. *Scully*, 2 O. L. R. 315; 4 O. L. R. 394. Indictments and records of Gen. Sess.

Any public document filed in a public office of the government may be proved by a certified copy: *McLeon* v. *McDowell*, 1 U. C. Q. B. 13; *The Evidence Act* (R. S. O. c. 76), s. 26, but see *Longtry* v. *umoulin*, 7 Ont. 499. As to proof of orders of the Lieutenant-Governor in Council: see *The Evidence Act*, s. 23; and as to orders of the Governor-General in Council, *Ib.*, s. 22; registered instruments may be proved by certified copies. *Ib.*, ss. 45-49. Certified copies of registered memorials are sufficient evidence of such memorials: *Lynch* v. O'*Horo*, 6 C. P. 259; but a memorial is not always sufficient proof of the deed to which it relates: *Gough* v. *McBride*, 10 C. P. 166; *Ansley* v. *Breo*, 14 C. P. 371; for the cases in which the memorial proves the deed, see *The Vendors & Purchasers Act* (R. S. O. c. 122), s. 2 (*b*), and (*c*); *Re Higgins*, 17 Gr. 303. Public documents.

As to proof of wills: see *The Evidence Act*, ss. 42-44; where the probate is admissible as evidence under this statute, it is evidence of the testator's death, as well as of the will: *Dovis* v. *Von Norman*, 30 U. C. Q. B. 437. Wills.

A Crown patent must be proved by the production of the original, or an exemplification thereof: *Reid* v. *Banks*, 10 C. P. 202; *McCollum* v. *Dovis*, 8 U. C. Q. B. 150; a certified copy is not sufficient: *Prince* v. *McLeon*, 17 U. C. Q. B. 463. Under *The Quieting Titles Act*, certified copies of patents are, however, received. Patents.

Rules 275, 278.

By-laws.

As to proof of municipal by-laws: see *The Municipal Act* (R. S. O. c. 192), s. 258; *Robinson* v. *Gregory*, 1905, 1 K. B. 534.

Subpœna duces tecum.

A sealed packet deposited with a banker is not exempt from production under a subpœna *duces tecum*: *Rex* v. *Daye*, 1908, 2 K. B. 333; 99 L. T. 165, and *semble*, the Court may in a proper case direct the seal to be broken and the contents divulged: but *semble*, a servant cannot on a subpœna *duces tecum* be compelled to produce the documents of his master without the latter's consent; and it lies on the party demanding production to show that the master assents; there is no obligation on the servant to procure his consent: *Eccles* v. *Louisville & N. Ry.*, 1912, 1 K. B. 135; 105 L. T. 928.

Disobedience to a subpœna *duces tecum* may be punished by attachment even though the disobedience has not been wilful: *Rex* v. *Daye*, *supra*.

Calling opposite party.

275. Where a party desires to call an opposite party as a witness at the trial, if he is within the jurisdiction, he may either subpœna such party, or give him or his solicitor at least five days' notice of the intention to examine him as a witness in the cause, paying at the same time the amount proper for conduct money; and if such party does not attend on such notice or subpœna judgment may be pronounced against him, or the trial of the action may be postponed. C.R. 481, *amended*.

"At least five days" means five clear days: *Rule* 173 (2); Sundays and other holidays are excluded: see *Rule* 172.

It is to be observed that this *Rule* does not say that the notice is to be given five clear days before the commencement of the sittings. It, perhaps, therefore, may be sufficient if five clear days elapse before the case comes on; but see *Sierichs* v. *Woodcock*, 13 P. R. 260; *Girvan* v. *McLean*, 12 C. L. T. 357.

The *Rule* only applies to a party resident within the jurisdiction, and where a litigant is residing abroad the opposite party can not compel him to attend as a witness on notice, but must take his evidence by commission: see *Patchin* v. *Davis*, 10 U. C. Q. B. 639; *Tyre* v. *Wilkes*, 18 U. C. Q. B. 46; *Sefton* v. *Lundy*, 4 Chy. Ch. 33.

Payment of ordinary witness fees and conduct money is necessary: see *Ham* v. *Lasher*, 24 U. C. Q. B. 357.

Bench warrants.

276. Upon proof to the satisfaction of the presiding Judge of the service of a subpœna upon any witness who fails to attend or to remain in attendance in accordance with the requirements of a subpœna, and that a sufficient sum for his fees as a witness had been duly paid or tendered to him, and that the presence of such witness is material to the ends of justice, the Judge may by his warrant, directed to any sheriff or other officer of the Court, or to any constable, cause such witness to

be apprehended anywhere within Ontario, and to be forthwith brought before the Court and detained in custody as the presiding Judge may order, until his presence as such witness is no longer required, or, in the discretion of the Judge, he may be released on a recognizance (with or without sureties) conditioned for his appearance to give evidence. C.R. 482. Rule 277.

For Form of Warrant: see No. 59; H. & L. Forms, No. 706.

277. Where the testimony of a person who is residing out of Ontario is required and for any reason an order under Rule 271 is not sufficient the Court may order the issue of a commission for the examination of such person. C.R. 499. *Amended.* Witnesses out of Ont.

C. R. 499 expressly enabled a Master or Referee to order the issue of a commission in proceedings pending before them; but although that is omitted in this *Rule*, it does not appear to deprive those officers of that power: see *Rule* 411; *Brooks* v. *Georgian Bay, etc., Co.*, 16 P. R. 511.

This *Rule* provides for the issue of a commission only in the case of a "person who is residing out of Ontario," which will include any party, as well as a stranger to the action.

In the case of the examination *de bene esse* of aged or infirm persons resident within Ontario, or of persons about to withdraw therefrom, *Rule* 271 will now be applicable. Under it an order will be all that is necessary, without the issue of any commission.

A former Con. Rule 586 provided that the commission should be issued "in case the Court or Judge is satisfied that such commission is applied for in good faith and not for purposes of delay." These words have doubtless been omitted as unnecessary and the Court or Judge will still require to be satisfied, as formerly, of the propriety of granting the order: see *Berdan* v. *Greenwood*, 20 Ch. D. 764 *n*; 46 L. T. 524; *Re Boyse, Crofton* v. *Crofton*, 20 Ch. D. 760; *Langen* v. *Tate*, 24 Ch. D. 528.

Discretion of Court as to Granting Commissions to take Evidence.—There is no hard and fast rule as to granting, or refusing, a foreign commission. It is not granted as of course: *Price* v. *Bailey*, 6 P. R. 256; *Vivian* v. *Mitchell*, 13 C. L. J. 198; *Berdan* v. *Greenwood*; *Re Boyse, Crofton* v. *Crofton, supra*; *Coch* v. *Allcock*, 21 Q. B. D. 1, 178 (overruling *Kemp* v. *Tennant*, 2 T. L. R. 304). It is a matter of judicial discretion: *Mills* v. *Mills*, 12 P. R. 473; *Coch* v. *Allcock*, 21 Q. B. D. 1, 178; see also *Re Imperial Land Co. of Marseilles*, W. N. 1877, 236; 37 L. T. 588; *Kidd* v. *Perry*, 14 P. R. 364; an order was refused where it would cause delay, and the applicant had been dilatory in trying to obtain it: *Stewart* v. *Gladstone*, 7 Ch. D. 394; *Temperance Colonization Socy.* v. *Evans*, 7 C. L. T. 46; and it was said that a commission should never issue unless it appears that the evidence sought by it would be available upon some issue in the action: *per* Riddell, J., in *Hawes, Gibson Co.* v. *Hawes*, 3 O. W. N. p. 312. So, Discretion.

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where the Court was not satisfied on the materials adduced, that the evidence was material: *Longen* v. *Tate*, 24 Ch. D. 522; *Smith* v. *Grey*, 10 P. R. 531; *Morrow* v. *McDougald*, 16 P. R. 129; *Toronto Industrial Exhibition, etc.*, v. *Houston*, 5 O. W. R. 303; and where there was another action pending in the foreign country for the same cause: *Mair* v. *Anderson*, 11 U. C. Q. B. 160; and it was refused in a case where the evidence sought, though material, would be only corroborative: *Ehrmann* v. *Ehrmann*, 1896, 2 Ch. 611.

In *Grant* v. *Banque Franco-Egyptienne*, referred to in 27 W. R. p. 226, Brett, L.J., said: "I apprehend that the granting of a commission is a matter of discretion, and that the grounds upon which a commission is granted or refused is always a matter of comparison, namely, whether it is more convenient that the commission should go, than that witnessee should be examined before the tribunal here, and the exercise of that discretion depends upon the circumstances of each particular case." See the remarks of the same Judge in *Coch* v. *Allcock*, 21 Q. B. D. 181; see also *Robins* v. *The Empire Printing Co.*, 14 P. R. 488; and *Ferguson* v. *Millican*, 11 O. L. R. 35.

The order may be reconsidered on appeal where circumstances render it just to do so: *Emanuel* v. *Soltykoff*, 8 T. L. R. 331, but the discretion of the Court or Judge will not readily be interfered with: *Butterfield* v. *Finonciol News*, 5 T. L. R. 279; *Hunt* v. *Roberts*, 9 T. L. R. 92.

In *Re Boyse, Crofton* v. *Crofton*, 20 Ch. D. 760, it was held that upon an application for a commission to take evidence abroad the Court ought to be satisfied that the application is made *bonâ fide*. Where the Court thought the witnese should be subjected to a strict cross-examination on part of a claim in which he was interested, and the French practice was to have the examination take place through the Judge only, a commiseion was refused: see aleo *Berdon* v. *Greenwood*, 46 L. T. 524; 20 Ch. D. 764 (note), where the case turned on the fact that the person to be examined was the plaintiff himself, and the Court was not satisfied that he could not attend so as to be cross-examined *viva voce*, but on the contrary, was keeping out of the way: see *Langen* v. *Tate*, 24 Ch. D. 522; *Spiller* v. *Paris Skating Rink Co.*, W. N. 1878, 228; 27 W. R. 225; *Grant* v. *Banque Franco-Egyptienne*, *supra*; *Kidd* v. *Perry*, 14 P. R. 364; and *Thomas* v. *Storey*, and *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137, as explained in *Coch* v. *Allcock*, 21 Q. B. D. 1, 178.

In the absence of special circumstanees making it desirable that the plaintiff should face the Court or jury in person, there is no reason why his evidence should not be taken by commission where he is residing abroad: *Armour* v. *Walker*, 25 Ch. D. 673; *Banque Franco-Egyptienne* v. *Lutscher*, 28 W. R. 133; 41 L. T. 468; W. N. 1879, 183; *Coch* v. *Allcock*, 21 Q. B. D. 1, 178; see *Price* v. *Bailey*, 6 P. R. 256.

Commission for examination of the party moving.

Where, however, the person to be examined abroad is the party himself who asks for the commission, the Court will be more circumspect as to making an order than in the case of an ordinary witness: *Mills* v. *Mills*, 12 P. R. 473; *Light* v. *Anticosti*, 58 L. T. 25; *Price* v. *Railey*, 6 P. R. 256; *Kidd* v. *Perry*, *supra*.

A plaintiff's application to take his own evidence by commission in an action for libel, was refused, it being considered that the plaintiff's evidence ought to be given before the jury, the main question

being one of damages depending upon the plaintiff's testimony: *Keiley v. Wakley*, 9 T. L. R. 571. Rule 277.

There is however a difference between the case of a foreign plaintiff, and a foreign defendant, asking to be examined on commission in his own country. the Court will not regard a defendant's case with the same strictness as the case of a plaintiff who has chosen his own forum: *Ross* v. *Woodford*, 1894, 1 Ch. 38; 70 L. T. 22; *Hartmont v. Daly*, 12 T. L. R. 170; *Emanuel* v. *Soltykoff*, 8 T. L. R. 331. *Prima facie* a defendant resident abroad is entitled to the commission: *New v. Burns*, 43 W. R. 182; 71 L. T. 681; 11 T. L. R. 53; but greater strictness may be observed in the case of a defendant who had left Ontario after the action was commenced: *Ferguson* v. *Millican*, 11 O. L. R. 35. A defendant's application was refused where the matters in question were complicated accounts arising out of transactions between plaintiff and defendant, when both were residing in Ontario, and the expense of executing a commission would exceed the costs of a defendant's coming from England, and his only reason for not coming was engagements in England, and want of time and money: *Porter* v. *Boulton*, 15 P. R. 318; but see *Ferguson* v. *Millican*, *supra*.

The plaintiff, where there was a counter-claim, was viewed as a defendant so far as the counter-claim was concerned, and a commission to take his evidence on the counter-claim was granted: *Levi* v. *Edwards*, 5 O. W. R. 23.

A commission to examine as a witness a person who has absconded from the Province, will not be refused on the ground that he is alleged not to be a credible witness, and that his cross-examination in open Court is desired: *Nordheimer* v. *McKillop*, 10 P. R. 246. The proper course in order to impeach his veracity is to call witnesses at the trial for that purpose: *Id.* Evidence of a witness whose credibility is impeached.

The fact that the witness was a co-defendant with the party applying was considered no obstacle to the granting of a commission: *Wilson* v. *McDonald*, 13 P. R. 5.

In *The M. Moxham*, 1 P. D. 115, a commission to take evidence in Spain as to the law of Spain, was refused, as it was not shewn that competent Spanish advocates could not attend the trial without difficulty, and in the opinion of the Judge it would, under the circumstances, be more satisfactory to have the witnesses examined in Court. See also *Russell* v. *G. W. R. Co.*, 3 U. C. L. J. 115, and *Atty.-Gen.* v. *Gooderham*, 10 P. R. 259; where the object was merely to obtain scientific, or expert testimony: but see *The Edison Co.* v. *Hough*, 98 L. T. Jour. 374. Expert evidence.

Motion.—A motion for a commission is usually to be made after issue joined: *Smith* v. *Greey*, 10 P. R. 531; but it is not essential that the action be technically at issue. The motion may be made whenever it can be shown that some issue is raised on the pleadings which must be tried in the action: *Smith* v. *Greey*, 11 P. R. 38. When motion to be made.

For form of order: see No. 73, and for form of a commission, No. 60. See H. & L. Forms, Nos. 777, 779.

The latter forms are those given in C.R.R., and contain some clauses which are not now needed.

Evidence on Motion.—In case of an application for a commission, before issue joined, the nature of the evidence expected from Evidence thereon.

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the witness must be shewn, that the Court may see whether it is likely to be material and necessary: *Morrow* v. *McDougald*, 16 P. R. 129, explaining *Smith* v. *Greey*, 10 P. R. 531.

The affidavit on which the application is based, even after issue joined, should state that the witnesses proposed to be examined are material and necessary: *Kidd* v. *Perry*, 14 P. R. 364. An affidavit of the plaintiff stating that the witnesses to be examined were necessary for the plaintiff on the trial, and that he was advised and verily believed that he could not safely proceed to trial without their evidence, was held to be *prima facie* sufficient: *Robins* v. *Empire Printing Co.*, 14 P. R. 488.

The personal affidavit of the party applying may not be essential in support of the motion for a commission, but cogent reasons must be given, by some one who can speak with knowledge, why an applicant who seeks to have his own evidence taken in that way cannot attend in person: *Kidd* v. *Perry*, 14 P. R. 364.

Under the English practice it is a recognized, though not an absolutely rigid rule, to give in the affidavit the name of at least one of the witnesses proposed to be examined, and the excuse for not doing so, that the witness might be spirited away, was held untenable: *Howard* v. *Dulan & Co.*, 11 T. L. R. 451.

Where defendants contended that the evidence expected from the witnesses was unnecessary by reason of implied admissions in the pleadings, it was held, that it was for the defendants to make the evidence unquestionably unnecessary either by amending their pleadings so as to expressly make the admission, or by undertaking to do so at the trial: *Robins* v. *Empire*, *supra*.

In *Ehrmonn* v. *Ehrmonn*, 1896, 2 Ch. 611, it was said that a commission or letters of request for the examination of a witness abroad ought not to be issued, unless the evidence which it is proposed to obtain is evidence directly material to an issue in the cause, and not merely evidence which may be incidentally useful in corroboration of other evidence.

Where the application is to examine a witness who is travelling, it should be shewn that he will remain at the place to which the commission is directed, a sufficient time to allow of its due execution: *Singer* v. *Williams Manufacturing Co.*, 8 P. R. 483.

Order.

Order.—A commission issues only pursuant to the order, and should follow the order; where, therefore, an order provided for examination of one witness M., *viva voce*, and others upon interrogatories, it was held that the commission could not issue to examine M. only without amending the order: *Smith* v. *Babcock*, 8 P. R. 175.

An objection to a witness affirming instead of taking an oath, on a commission, ought to be taken at the time of his appearing before the commissioner: *Rickards* v. *Hough*, 30 W. R. 676; 51 L. J. Q. B. 361.

Terms.

In the discretion of the Court or Judge, terms may be imposed on granting an order for a commission, *e.g.*, that the plaintiff give security for defendant's costs of the execution of the commission, and undertake to speed the proceedings and not delay the trial: *Robins* v. *Empire P. Co.*, *supra*; *Coleman* v. *Bank of Montreal*, 16 P. R. 159; *Sheppard* v. *Dalbiac*, 80 L. T. Jour. 26; 30 Sol. Jour. 46; that no greater costs be taxable than if the witness had been subpœnaed

within the jurisdiction: *Watt* v. *Mackay*, 5 O. W. R. 93, 170; or that the expense of the commission be borne by the applicant, and that the examination be upon interrogatories: *Toronto Industrial, etc.*, v. *Houston*, 5 O. W. R. 349; or that a sum be paid by the applicant to the opposite party on account of the expense: *Ferguson* v. *Millicon*, 11 O. L. R. 35. Rule 277.

Terms as to reading the depositions at the trial were imposed, where the plaintiff applied to examine himself by commission: *Nadin* v. *Bassett*, 25 Ch. D. 21.

Commissions may provide for the examination of unnamed persons at a particular place: *Nodin* v. *Bassett*, 25 Ch. D. 21; *Armour* v. *Walker*, 25 Ch. D. 676.

Books and documents produced in an action may be sent out of the jurisdiction, for the purpose of examining witnesses on a foreign commission; but documents produced in another action which is *sub judice* will not be sent away: *Clarke* v. *Union* (*Chabot's Case*), 10 P. R. 213; *Chaplin* v. *Puttick*, *infra*.

An order may be made that the subject matter of the action shall be sent out of the jurisdiction for the purpose of identification by the witnesses: *Choplin* v. *Puttick*, 1898, 2 Q. B. 160; 78 L. T. 410; not approving of *Leader* v. *Smythe*, 8 T. L. R. 612, in which the Court refused to order a brooch to be sent abroad for identification.

Where a witness previously examined by commission stated that he had further evidence to give, to explain or correct his former evidence, a re-examination was allowed under a new commission. The witness in such a case should be considered the witness of the party applying to re-examine him: *Rogers* v. *Manning*, 8 P. R. 2.

Letters Rogatory.—In aid of a commission, where the assistance of a foreign Court is necessary in order to compel the attendance of a party for examination for discovery, or of a witness before the commissioner, letters rogatory may be ordered to issue. For form of letters rogatory: see H. & L. Forms No. 781. The letters are directed to a foreign Court within whose jurisdiction a witness whose evidence is desired is resident, requesting the aid of that Court in procuring such evidence. Such letters are necessary where a witness will not attend voluntarily for examination. It will be seen that they conclude with the statement "and we shall be ready and willing to do the same by you in a similar case when required." Express provision is made for thus aiding British Courts in other jurisdictions: see *The Canada Evidence Act* (R. S. C. c. 145, s. 41); and *Re Kirchoffer* v. *Imperial Loan & Investment Co.*, 7 O. L. R. 295; and see Imp. Stat. 48 & 49 Vict. c. 74; in Dom. Stats. 1886; *Ex* p. *Smith*, 2 Cart. 330; *Re Wetherell*, 3 Cart. 315; and express provision for aiding any foreign Court is made by *The Evidence Act* (R. S. O. c. 76), s. 50.

As to taking evidence in Ontario for use in a foreign Court: see *Re Wetherell*, 4 Ont. 713, and statutes above referred to: *Re Kirkchoffer* v. *Imperial Loon & Investment Co.*, *supra*.

Orders for letters rogatory to a foreign Court are not granted unless absolutely necessary for the purposes of justice: *Ehrmann* v. *Ehrmonn*, 1896, 2 Ch. 611; 75 L. T. 37.

Interrogatories.—Where the evidence is to be taken on interrogatories, the applicant frames his interrogatories at the risk of the

Rule 278.

evidence taken being rejected in whole or in part; the Master in Chambers cannot consider, or interfere with them, on motion for that purpose: *Toronto Industrial, etc.*, v. *Houston*, 9 O. L. R. 527.

Return of Commission.—Where the time for the return of a commission was extended to a certain day, and on that day the witnesses were examined, it was held, that, having been executed within the time, the necessary delay occasioned by its transmission did not render it irregular: *Darling* v. *Darling*, 9 P. R. 560.

See *Darling* v. *Darling*, 8 P. R. 391, for irregularities which were held not to invalidate the proceedings under a commission.

Opening Commission.—See *Rule* 289.

Commissions on a Reference.—

The Master, or Referee, may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey, Biddell* v. *Casey*, 1 Chy. Ch. 198.

The Master, or Referee, cannot grant an order for a commission *ex parte*: *McLennan* v. *Helps*, 3 Chy. Ch. 193; except where the reference is *ex parte*.

Where an application is made to the Master, or Referee, for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master, or Referee, cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townsend* v. *Hunter*, 3 C. L. T. 310; *Horlick* v. *Eschweiler*, 11 O. L. R. 140.

An order of a Master, or Referee, for a commission should, *mutatis mutandis*, follow, as nearly as may be, the form of order as given in the Appendix. See Form No. 120; H. & L. Forms, No. 777.

See also notes to *Rule* 411.

Costs.—As to the costs of commission: see *Dominion, etc.* v. *Stinson*, 9 P. R. 177; *Rondot* v. *Monetary Times*, 18 P. R. 141, in note to *Rule* 667.

Refusal to attend.

278. If a party for whose examination an order has been made or a commission has issued, refuses to attend before the examiner or commissioner, judgment may pass against him. C.R. 500.

Rule 277 enables a commission to be issued by either party to take the evidence of himself or of the opposite party, or of a stranger: *Rule* 278 is applicable where a party whose evidence is desired by his opponent does not attend for examination.

If a plaintiff is in default his action may be dismissed; and if a defendant is in default, notwithstanding any evidence that may be adduced, judgment may be given in favour of the plaintiff as if the plaintiff's cause of action was admitted: but see *Rule* 261.

The default of the party ought to be proved by the certificate of the examiner, or other proper evidence, including proof of due service of notice of the time and place appointed for the examination.

Rules 279-283.

279. The notice of a motion for a commission to take evidence shall state the name and address of the commissioner proposed. C.R. 501. Notice of motion.

280.—(1) Unless otherwise directed the examination shall be upon oral questions to be reduced into writing and returned with the commission and notice of the execution of the commission shall be given to the opposite party, if, within the time prescribed by the order, he gives the name and the address of a person resident within two miles of the place where the commission is to be executed, on whom such notice may be served. Examination to be viva voce unless otherwise ordered. Notice to be given of examination under Commission.

(2) If no agent is named or the name or address given proves to be illusory or fictitious, or if the party so notified fails to attend pursuant to the notice, the commission may be executed *ex parte*. C.R. 502, 504 and 506.

Under the present *Rule*, *prima facie*, the examination is to be wholly oral, but the order may still provide for an examination on interrogatories: see *Rule* 281; and see under the old practice, *Watson* v. *McDonald*, 8 P. R. 354; Taylor Ev. 451. The *Rule* requires both questions and answers to be reduced to writing by the Commissioner or his Clerk and returned with the commission.

281. Where the examination is to take place upon written interrogatories, the interrogatories in chief shall be delivered to the opposite party 8 days before the issue of the commission; and the cross-interrogatories shall be delivered to the opposite party within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the commission may be executed without cross-interrogatories. C.R. 503. Examination on written interrogatories.

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office: *Lockwood* v. *Bew*, 10 P. R. 655.

It is not proper to apply to strike out interrogatories for impertinence, the proper course is for the witness to demur to the impertinent questions: *Williams* v. *Corby*, 8 P. R. 83; see *Lockwood* v. *Bew*, 10 P. R. 655, and *Swabey* v. *Dovey*, 55 L. J. Chy. 631; *Toronto Industrial, etc.* v. *Houston*, 9 O. L. R. 527.

282. The witnesses shall be examined on oath, affirmation, or otherwise, in accordance with the law of the country in which the commission is executed. C.R. 505. Oath of witness.

283. Where a witness does not understand the English language the commission shall be executed with the aid Interpreter.

Rules 284-288.

of an interpreter nominated by the commissioner, and sworn to interpret truly the questions to be put to the witness, and his answers thereto, and the examination shall be taken in English. C.R. 507.

Copies of documents as evidence.

284. If a witness produces a book, document, letter, paper or writing, and refuses for good cause, to be stated in his deposition, to part with the original, a copy or extract certified by the commissioner shall be annexed to the deposition of the witness. C.R. 508.

Depositions may be taken in shorthand.

285. The depositions may be taken in shorthand either by the commissioner or a shorthand writer duly sworn. C.R. 509 and 510.

Depositions, how to be signed.

286.—(1) Unless the examination is taken in shorthand the depositions shall be subscribed by the witness and by the commissioner.

(2) Where taken in shorthand it shall not be necessary that the depositions be read over or signed by the person examined unless counsel attending on the Commission so desires. C.R. 511.

Where only one of two commissioners signed the return, this was held not to vitiate it: ***Milville Mutual, etc.***, v. ***Driscoll***, 11 S. C. R. 183.

C. R. 511 (3), provided that a copy of depositions taken in shorthand certified by the commissioner, if he took them, or by the shorthand writer who did take them, and signed by the commissioner, shall for all purposes have the same effect as the original depositions. It is presumed that the like effect will be given to copies so certified, notwithstanding that provision has been omitted from this *Rule*.

Return of commission and use thereof as evidence.

287. The commission, interrogatories, depositions and any documents or certified copies thereof or extracts therefrom, referred to therein, shall be sent to the proper officer, on or before the day named in the order for the commission, enclosed in a cover under the seal of the commissioner; and the same or certified copies thereof may be given in evidence, saving all just exceptions, without any other proof of the absence from Ontario of the witness therein named than an affidavit of the solicitor or agent of the party as to his belief of such absence. C.R. 512.

Parties joining in Commission to share costs.

288. Where the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, each party shall in the first instance pay the

costs of the commission consequent upon the examination of his witnesses. C.R. 513. Rules 289-291.

C. R. 513 (2), provided as follows: "If for any reason the commissioner named by either party refuses to act upon receiving 48 hours' notice in writing from the other commissioner so to do, the commission may be executed by the commissioner giving such notice." When commissioner of one party may act alone.

That provision has not been included in the present *Rules* and the effect of its omission remains to be determined.

289. A commission when returned shall at the request of either party be transmitted for use at the trial, and may be opened at the trial, or before trial at the instance of either party by the officer to whom it is returned on two clear days' notice to the other party. C.R. 515. Opening commission.

The Court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solicitors by such opening: *Smith* v. *Greey*, 11 P. R. 238.

290. Every order for a commission shall be read as if it contained the particulars mentioned in the next preceding ten rules, and shall not set forth the same, but may contain any variations therefrom, and any other directions which the Court sees fit to make. C.R. 514. Order for commission to be read as including above Rules 280-289.

Although the order for the commission is not to contain the particulars mentioned in *Rules* 280-289, A copy of these *Rules* is, nevertheless, to be indorsed on the commission: see Form No. 60.

291. An affidavit shall be drawn up in the first person, stating the name of the deponent in full, and his description and true place of abode, and shall be signed by him. C.R. 516. Form of affidavits.

See Eng. (1883) RR. 527, 528.

An affidavit should be entitled in the cause or matter in which it is to be used. The shortened style of "A. B. and others, plaintiffs, and C. D. and others, defendants," may be used: *Rule* 190; *Dickey* v. *Heron*, 2 Chy. Ch. 490; but not such as "Brown v. Jones." Style of cause in affidavits.

The Court may receive an affidavit, notwithstanding formal defects in it: *The Evidence Act* (R. S. O. c. 76), s. 40.

Affidavits erroneously entitled have been allowed to be taken off the files and resworn without a fresh stamp: *Pearson* v. *Wilcox*, 10 Ha. App. xxxv.; *Hawes* v. *Bamford*, 9 Sim. 653. Erroneously entitled, may be re-sworn.

In affidavits made by parties to the cause it was sufficient in Equity to describe the deponent as the above-mentioned plaintiff, or defendant, without specifying any residence, or other addition: *Crockett* v. *Bishton*, 2 Madd. 446; *Rogers* v. *Crookshank*, 4 C. L. J. Affidavits by parties to the cause.

Rule 291.

45. And the same rule prevailed at Common Law: *Poole* v. *Pembrey*, 1 Dowl. P. C. 693; *Brooks* v. *Forlar*, 5 Dowl. P. C. 361; *Lyman* v. *Brethron*, 2 C. L. Ch. 108; *Ewing* v. *Lockhart*, 3 U. C. Q. B. 248. But affidavits in which the plaintiff in a divorce proceeding gave no address, or an illusory one, were rejected by the Court, and the case was disposed of on the defendant's affidavits: *Hyde* v. *Hyde*, 59 L. T. 523. An affidavit as to the fitness of a proposed trustee in which the deponent was described as a "gentleman," was held insufficient: as the position in life or occupation of the deponent is in such case material in order to give effect to the affidavit: *Re Orde*, 24 Ch. D. 271; *Re Horwood*, 55 L. T. 373; but in other circumstances such a description is not necessarily insufficient so as to prevent the affidavit from being filed or used: *Re Dodsworth*, *Spence* v. *Dodsworth*, 1891, 1 Ch. 657; 64 L. T. 282.

An affidavit by a person who was a stockbroker was held not to state his description and true place of abode, by describing him as a "stock exchange stock broker": *Re Levy*, *Levin* v. *Levin*, 60 L. T. 317; 37 W. R. 396.

Affidavits received, though irregularly drawn.

The Court has sometimes received affidavits sworn abroad, although drawn in the third person: *Re Husband*, 12 L. T. 303; and see *Dryden* v. *Frost*, 8 Sim. 380; and not entitled in the cause: *Salvidge* v. *Tutton*, 20 L. T. 300; *Blaney* v. *Blaney*, 113 L. T Jour. 265. And an affidavit without the signature of the deponent was received: *Re Howard*, L. R. 9 C. P. 347; but see *contra*, *Anderson* v. *Stother*, 9 Jur. 1085.

Where the initial only of the deponent's second Christian name was given, the affidavit was held to be regular: *De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370.

An affidavit to obtain an order to arrest which began "I, Alberta Jane Boyd, the above named plaintiff," her name being Alberta Jane Vansickle, and was signed Berta Jane Vansickle, was held to be not a nullity, but an irregularity merely, which under the circumstances was waived: *Vansickle* v. *Boyd*, 14 P. R. 469.

An affidavit omitting the words "make oath" will be rejected: *Allen* v. *Taylor*, 10 Ex. 52; *Phillips* v. *Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

Before whom affidavits may be sworn.

Affidavits may be sworn in Ontario before commissioners appointed under *The Commissioners for Taking Affidavits Act* (R. S. O. c. 77), s. 9, or before a notary public of Ontario: see *The Notories Act* (R. S. O. c. 160), s. 4. As to affirmations, see *The Evidence Act* (R. S. O. c. 76), s. 15.

The notary need not affix his seal to the affidavit: R. S. O. c. 160, s. 8, which overrules the decision in *Boyd* v. *Spriggins*, 17 P. R. 331.

Affidavits may also be sworn before Justices of the Peace: see *Interpretation Act* (R. S. O. c. 1), s. 23 (3).

Affidavits sworn abroad.

Affidavits sworn out of Ontario may be sworn before any of the persons enumerated in *The Evidence Act* (R. S. O. c. 76), s. 38. Affidavits sworn before any other person than those mentioned in that statute cannot be read: *McEwan* v. *Boulton*, 3 Chy. Ch. 63.

Affidavits before whom to be sworn.

Affidavits sworn before the solicitor, or partner, or managing clerk, or agent, of the solicitor, of the party in whose behalf the affidavit is filed, cannot be read: *Dunn* v. *McLean*, 9 C. L. T. 212; 6 P. R. 95; *Duke of Northumberland* v. *Todd*, 7 Ch. D. 777; and see *Rule* 297.

But this *Rule* does not apply to the partner of a counsel engaged in the cause, but not otherwise connected therewith: *Wilde* v. *Crow*, 10 C. P. 406; nor to affidavits to obtain an order for arrest: *Rule* 297. Rule 292.

A commissioner ought not to take affidavits not made in any cause, nor authorized by statute to be taken by him. Such oaths are voluntary: *Jackson* v. *Kassel*, 26 U. C. Q. B. 341; *McIlroy* v. *Holl*, 25 U. C. Q. B. 303; and see R. S. C. c. 145, s. 36. Commissioner should not take voluntary affidavits.

The officer taking the affidavit should add after his signature the name of his office. The words "A Commissioner, etc.," or "A Commissioner," or "A Comr.," have been held sufficient: *Henderson* v. *Harper*, 2 U. C. Q. B. 97; *Brown* v. *Parr*, 2 U. C. Q. B. 98; *Murphy* v. *Boulton*, 3 U. C. Q. B. 177; *Pawson* v. *Hall*, 1 P. R. 294; *Brett* v. *Smith*, *Ib.*, 309; *Conoda Perm. L. & S. Co.* v. *Todd*, 22 Ont. App. 515. But the signature alone has been held insufficient: *Babcock* v. *Bedford*, 8 C. P. 527. "Sworn before, etc.," omitting "me," was held sufficient: *Martin* v. *McCharles*, 25 U. C. Q. B. 279; and see *De Forrest* v. *Bunnell*, 15 U. C. Q. B. 370; and *Eddowes* v. *Argentine L. & M. A. Co.*, 62 L. T. 514; 38 W. R. 629. Officer should add his name of office.

As to the mode of administering oaths: see *per* Kay, J., in *Bourke* v. *Davis*, 88 L. T. Jour. 103.

The addition of a deponent is only descriptive and not an allegation of fact: *Hood* v. *Cronkrite*, 4 P. R. 279. The usual form of oath, "you swear that the contents of this affidavit are true," however, would seem to pledge the deponent to the truth of the addition, as well as of the matters formally deposed to.

In drawing affidavits, the following observations of Wilson, J., in *Fisher* v. *Green*, 2 C. L. J. 16, may be useful to the student: "I regret to find, in several instances lately, that superlative words are used in stating facts in affidavits. There can be no stronger expression of the very truth than that it is stated on oath. If less certainty is intended, the statement should be qualified. The terms to which I object are, '*I most positively swear*,' etc. I can only show my disapproval of such language, by refusing to allow costs to be taxed for affidavits drawn in this style, when costs are in my discretion. In one of the affidavits before me I observe the expression, that the statement made by another person in another affidavit was 'false.' I suppose the affidavit was drawn by a young man of little experience, for the one had detailed a transaction in one light, and the other had stated the same transaction in another light, but the term 'false,' as applied by one to the other, could in no way verify the statement of him who used the offensive expression,"—and see *Davidson* v. *Grange*, 5 P. R. 258. Fisher v. Green. Superlative and needlessly offensive expressions not to be used in affidavits.

A solicitor introducing impertinent and irrelevant matter into his affidavit may be ordered to pay the costs of the application in which it is used: *Anon.*, 4 P. R. 242; and see *Corby* v. *Robbin*, 5 U. C. L. J. 225.

Where affidavits were badly written, scarcely legible, and difficult to decipher, the Court refused all costs connected with their preparation, although costs of the suit were given: *Burnham* v. *Garvey*, 27 Gr. 80.

292. In an affidavit made by two or more deponents the names of the persons making the affidavits shall be inserted in the jurat, but if the affidavit of all the deponents Affidavits made by two or more deponents.

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is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents. C.R. 517.

Same as Eng. (1883) R. 529.

An affidavit which omitted "before me" was (under Eng. O. 38, R. 14, which enables the Court to accept affidavits notwithstanding defects in form), see *The Evidence Act* (R. S. O. c. 76), s. 40, received, where from what appeared in the affidavit, such as signature of the Consul, and his initials affixed to alterations, the reasonable inference was that the affidavit was sworn before him: *Eddowes* v. *Argentine, etc., Co.*, 62 L. T. 514; 38 W. R. 629, and other cases in note to *Rule* 291.

For general form of affidavit: see No. 17; of jurat: see No. 16, and in case of illiterates: No. 18; H. & L. Forms, Nos. 784-783.

Affidavits how framed.

293. Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but on interlocutory motions statements as to his belief, with the grounds thereof, may be admitted. C.R. 518.

To the same effect as Eng. (1883) R. 523.

Under this *Rule* the grounds of statements made on "belief" are required to be stated, but not the means of knowledge for positive allegations: see *Bidder* v. *Bridges*, 26 Ch. D. 1; *Quartz Con. Gold Mine Hill Co.* v. *Beall*, 20 Ch. D. 501; *Edwards* v. *Dovis*, W. N. 1888, 59.

An affidavit on information and belief, founded on statements made to the deponent by an informant who declined to repeat them on affidavit unless subpœnaed, was not admitted on an interlocutory motion in a case where the informant might have been, but was not, subpœnaed, and no irremediable injury could result from the exclusion of the evidence: *Re Anthony, Doig* v. *Anthony*, 1899, 2 Ch. 50; 80 L. T. 188.

Affidavits on information and belief which fail to disclose the grounds thereof, are not evidence, either on an interlocutory or a final application, and need not be answered: see 104 L. T. Jour. 285; and *Re J. L. Young Manufacturing Co.*, 1900, 2 Ch. 753; 83 L. T. 418; *Nieminen* v. *Dome Mines*, 4 O. W. N. 301; and in England a solicitor may be refused costs of such affidavits: *Re J. L. Young, etc., supra.*

An affidavit in which the deponent stated that he was credibly informed and believed certain facts, without stating the name of his informant, or the ground of his belief, was held not to comply with this *Rule*, and was insufficient proof of the facts deposed to: *Gilbert* v. *Stiles*, 13 P. R. 121; *Robinson* v. *Morris*, 15 O. L. R. 649.

Evidence on information and belief, though generally admissible on interlocutory applications, is not admissible on a proceeding which, though interlocutory in form, finally decides the rights of parties; and the party against whom it is adduced, is not bound to contradict it; but if, in the Court below, he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal: *Gilbert* v. *Endean*, 9 Ch. D. 259.

Costs of setting out the contents of written documents were disallowed, in *Hirst* v. *Proctor*, W. N. 1882, 12.

Affidavits may be ordered to be taken off the files, if scandalous or irrelevant; *Sodlier* v. *Smith*, 7 P. R. 409; 15 C. L. J. 52; *Osmaston* v. *Association of Lond Financiers*, W. N. 1878, 101; *Kernick* v. *Kernick*, 12 W. R. 335; *Goddord* v. *Porr*, 3 W. R. 633; or the scandalous matter may be expunged: *Worner* v. *Mosses*, W. N. 1881, 69; *Re Fitch*, 2 Chy. Ch. 288; and see *Rule* 136, and note. Rules 294-296. Scandalous affidavits.

Costs of scandalous affidavits will be disallowed: *Vanstaden* v. *Vonstaden*, 10 P. R. 428.

294. In an action or proceeding to which a corporation is a party, any affidavit required by these Rules to be made by a party may be made by any officer, servant, or agent of the corporation having knowledge of the facts required to be deposed to, and he shall state therein that he has such knowledge. C.R. 519. Affidavits by officers for corporation.

295. An affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall not be used without leave unless the interlineation, alteration or erasure is authenticated by the initials of the officer taking the affidavit. C.R. 520. Alterations in affidavits.

See Eng. (1883) R. 532.

The former Rules on which C. R. 520 was based provided expressly that the leave is to be that of "the Court or a Judge or officer before whom the affidavit is to be used." The present *Rule* by implication has the same meaning.

A line drawn through words though leaving them legible is an erasure: *Williams* v. *Clough*, 1 A. & E. 376.

Where an interlineation was uninitialed by the Commissioner, it was held that under this *Rule* the affidavit could not be read, but leave was given to refile it properly sworn: *Boyd* v. *McNutt*, 9 P. R. 493; see *Re Clooke*, 65 L. T. 455; 61 L. J. Chy. 69.

No alteration can properly be made in an affidavit after it has been sworn: see W. N. 1882, Part 2, 81.

296. Where an affidavit is sworn by a person who appears to be illiterate, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, who seemed perfectly to understand it, and signed it in his presence; otherwise such affidavit shall not be used without leave. C.R. 521. Affidavits by illiterate persons.

See the Eng. 1883, R. 533. And see note to *Rule* 295.

From the form of jurat under this *Rule*: see Form 18; H. & L. Forms, No. 784.

Where an affidavit of an illiterate person did not appear to have been read over in the presence of the Commissioner, it was taken off the files: *Blenkharn* v. *Longstaffe*, 52 L. T. 681; 54 L. J. Chy. 516.

Rules 297, 298.

No affidavit to be sworn before solicitor of party.

297. An affidavit sworn before the solicitor of the party on whose behalf it is made, or before the clerk, or partner, of such solicitor, shall not be used; but this Rule shall not extend to an affidavit to obtain an order for arrest. C.R. 522.

See Eng. (1883) RR. 536, 537.

See notes to *Rule* 291.

Query, whether the *Rule* prevents the agent of the solicitor from taking an affidavit: *Re Lennox Provincial Election*, 4 O. L. R. 647.

This *Rule* only applies to affidavits made in actions or proceedings in Court: *Canada Perm. L. & S. Co.* v. *Todd*, 22 Ont. App. 515.

The corresponding Eng. Rule was held to apply to the affidavit of execution of a bill of sale under *The Bills of Sale Act*, 1882: *Baker* v. *Ambrose*, 1896, 2 Q. B. 372; and see *Archibald* v. *Hubley*, 18 S. C. R. 116; but the reasons for the decision would not seem to apply in Ontario.

Affidavits in chief, when to be filed.

298. Affidavits upon which a notice of motion is founded shall be filed before the service of the notice of motion and all other affidavits shall be filed before they are used. C.R. 524.

Taken from Chy. Order 261, which also provided that affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, or petition. That provision, however, is not embodied in these *Rules*, and no time whatever is prescribed for filing affidavits in answer, or reply. The reason of the *Rule* is that the party served with the notice of motion may have an opportunity of examining the affidavits intended to be used in support without demanding copies from the opposite party, which might amount to a waiver of objection to the regularity of the motion.

Affidavits in support to be mentioned in notice of motion.

The affidavits and papers intended to be used in support of a motion, must be mentioned in the notice of motion: *Farish* v. *Martyn*, 1 Gr. 300; and when the motion is intended to be supported by affidavits filed previous to the date of the notice of motion, the date of the filing of such affidavits should be stated in the notice: *Fraser* v. *Fraser*, 13 Gr. 183; *McMartin* v. *Dartnell*, 2 Chy. Ch. 322; *Mackenzie* v. *Carter*, 12 P. R. 544; documents referred to in the affidavits filed in support of a motion may be read without special reference to them in the notice: *Jonhson* v. *Ashbridge*, 2 Chy. Ch. 251. If a party gives notice of reading an affidavit in support of a motion, but declines to read it, the opposite party may, nevertheless, do so: *Clarke* v. *Law*, 2 K. & J. 28; *Canty* v. *Houlditch*, 14 Sim. 75, and may cross-examine the deponent though the party filing it offers to withdraw it: *Pike* v. *Robinson*, W. N. 1873, 178. So a respondent's affidavits may be read in support of a motion, though no case is made out by the applicant's own affidavits: *Re Margetson & Jones*, 1897, 2 Ch. 314; 76 L. T. 805.

Filing affidavits.

Affidavits of service must be filed at latest before the rising of the Court on the day on which the application is made: *Miltown* v. *Stuart*, 8 Sim. 34; but see *contra*, *Sear* v. *Webb*, 25 Ch. D. 84; 49 L. T. 94, where it was held that they were filed in time, if filed at any time before the

order was drawn up; but see *Re Rosier, Jones* v. *Bortholomew*, 49 L. T. 442. Rule 299.

See also notes to *Rule* 226.

Former C. R. 523 provided that: "Affidavits and other papers required to be filed shall be filed before being used."

Although this provision is not continued, it is not to be presumed that any change in this respect has been made in the practice.

It is the imperative duty of the solicitor of any party to proceedings to cause to be filed every affidavit sworn and used by such party in the course of the proceedings: *Taylor* v. *Gotes*, 72 L. T. 436.

The proper office for filing affidavits is (subject to *Rule* 234 (2)), the office in which the proceeding was commenced: *Rules* 761, 762. Place of filing.

Where the affidavit is the commencement of the proceeding it may, in counties other than the County of York, be filed with any officer in the county who is authorized to issue writs of summons, and his office thereby becomes the proper office for filing all subsequent papers: *Rules* 761, 762; except proceedings in Court, or Chambers, in Toronto: see *infra*. In the County of York the central office is the proper office for the commencement of proceedings.

In the High Court Division, papers for motions in Court are to be filed in the Registrars' office: *Rule* 234 (2); and for motions in Chambers are to be filed with the Clerk in Chambers: *Rule* 234 (2); C. RR. 341 and 525 provided that papers so filed were to be ultimately transmitted to the Central Office. The omission of that provision in these *Rules* is probably not intended to make any change in the practice. Motions in Court or Chambers in Toronto.

As to affidavits to be used before the Weekly Court at Ottawa, and London: see *Rule* 240. Weekly Courts.

As to affidavits to be used in the Weekly Court, or Chambers, in Toronto: see *Rule* 234.

299. Where properly marked exhibits are referred to in an affidavit filed, and are not annexed thereto, such exhibits need not be filed, but shall be left for the use of the Court, and shall be handed out on the disposal of the motion unless otherwise ordered. C.R. 526. Exhibits.

Exhibits to an affidavit are part of the affidavit, and inspection thereof cannot be withheld from the person against whom the affidavit is to be used: *Re Hinchcliffe*, 1895, 1 Ch. 117; 71 L. T. 532.

CHAPTER XIV.

PARTICULAR PROCEEDINGS IN ACTIONS.

(i) *Transmission of Interest.*

Death or assignment pendente lite.

300. If by reason of death (when the cause of action survives or continues) or by assignment or conveyance any estate, interest or title devolves or is transferred the action may be continued by or against the person to or upon whom such estate or title has come or devolved. C.R. 395.

See Eng. (1883) R. 180.

An order under *Rule* 301 is necessary to obtain the benefit of this *Rule*.

Where an action is carried on by a plaintiff after he has parted with his interest, it must be dismissed: *Roper* v. *Hopkins*, 29 Ont. 580; the action can only be properly carried on by the transferee first obtaining an order under this *Rule* making himself plaintiff.

Incumbrancers pendente lite.

Incumbrancers, or purchasers, becoming such after writ sued out, and a *lis pendens* registered, will be bound by the judgment, and need not be made parties whether the plaintiff have notice of them or not: Dan. Pr. 5th ed., 242; 6th ed., 290, 296; *Robson* v. *Argue*, 25 Gr. 407; see *Wallbridge* v. *Martin*, 2 Chy. Ch. 275; *Seear* v. *Lawson*, 15 Ch. D. 426; 16 Ch. D. 121; *Pooley's Trustee* v. *Whetham*, 28 Ch. D. 38; *Kino* v. *Rudkin*, 6 Ch. D. 160. But in cases where there has been a change in ownership of the legal estate, and a conveyance is required, it may be necessary to add parties: Dan. Pr. 243; and notes to *Rule* 404.

And a person who, after the institution of a foreclosure action, acquires an interest in, or a claim against, the mortgaged premises, may, on his own application, be added as a party defendant: *Gibson* v. *Nelson*, 2 O. L. R. 500.

Additional parties may be, in such cases, added by the plaintiff by a *præcipe* order under *Rule* 301: *Matthews* v. *Mears*, 21 Gr. 99; see *Lowe* v. *Watson*, 1 Sm. & Giff. 123; but not parties who acquired their interest before action: *McKenzie* v. *McDonnell*, 15 Gr. 442.

Where a defendant in a foreclosure action dies *pendente lite*, if his equity of redemption passes to his representatives, an order to continue proceedings against them under *Rule* 301 is necessary: *Kennedy* v. *Foxwell*, 11 O. L. R. 389.

Assignment of subject of action.

Whether an agreement respecting the assignment of the subject of an action made with persons not parties, *pendente lite*, renders the action defective, depends upon the nature of the agreement, and whether, according to its legal effect, the Court can give the relief claimed without the addition of the other persons: *Scott* v. *Benedict*, 9 C. L. T. 181.

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Where a plaintiff in an action brought by him on behalf of himself and all other creditors of a defendant assigns his debt *pendente lite*, the action may be dismissed unless the assignee obtains an order under *Rule* 301 to continue the proceedings: *Wolff* v. *Von Boolen*, 94 L. T. 502.

Assignment for the benefit of creditors.

An assignment under *The Assignments and Preferences Act* (R. S. O. c. 134), for the benefit of creditors, has not the effect of transferring to the assignee an existing cause of action, to which the assignor was entitled, to set aside a transaction as being in fraud of creditors: *Gage* v. *Douglas*, 14 P. R. 126; *sed vide Wolff* v. *Von Boolen*, *supra*.

Rule does not affect the law as to the survival of causes of action.

There is nothing in the *Rules* on this subject to alter the existing law as to what causes of action do, and what do not, survive; thus where the cause of action, or the interest of the party is terminated by death, etc., the action is at an end: *Twycross* v. *Grant*, 4 C. P. D. 40; *Kirk* v. *Todd*, 21 Ch. D. 484; *Ashley* v. *Taylor*, 10 Ch. D. 768; 27 W. R. 228; *Bowker* v. *Evans*, 15 Q. B. D. 565; 53 L. T. 801. See notes to *Rule* 301. Nor is there anything to preserve to any person a right of action, which, by the ordinary rules of law, has passed from him. Thus, on the bankruptcy of a plaintiff, where the right of action is one which passes to the trustee, the action cannot be carried on by the bankrupt, but only by the truetee: *Jackson* v. *North-Eastern Ry. Co.*, 5 Ch. D. 844; *Worder* v. *Saunders*, 10 Q. B. D. 114; see also *Emden* v. *Carte*, 17 Ch. D. 169; *Selig* v. *Lion*, 1891, 1 Q. B. 513. If, in such a case, there are two trustees, and one refuses to go on, the other may do so, and make his co-trustee a defendant: *Jackson* v. *North-Eastern Ry.*, *supra*.

An action for tort cannot be revived in the name of an assignee who obtains an assignment of the claim before judgment, though after verdict: *Bloir* v. *Asselstine*, 15 P. R. 211.

When action may proceed without order.

Where the cause of action survives to, or continues in some person who is before the Court: *Eldridge* v. *Burgess*, 7 Ch. D. 411; see *Aichin* v. *Buffolo, etc.*, 2 Chy. Ch. 45, no order to continue is necessary. Thus where five defendants were jointly and severally liable, two of whom became bankrupt, Fry, J., offered to allow the trial to stand, that the other three might serve notice on the trustees of the bankrupts if they wished to do so; as they declined, the suit was held not to be defective and the trial was ordered to proceed: *Lloyd* v. *Dimmack*, 7 Ch. D. 398; see also *Wolker* v. *Blockmore*, W. N. 1876, 112.

Where partners have recovered a judgment, and one of them dies, the action survives so that the surviving partner may issue execution: *Davies* v. *Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

In an action for damages for misrepresentations against several defendants, one defendant died after issue joined. It was held that the action could be proceeded with against the survivors: *Beatty* v. *Neelon*, 9 Ont. 385.

When order necessary.

Where, however, the cause of action does not survive to, or continue in, some person who is before the Court: *Re Shepherd*, 43 Ch. D. 136; 62 L. T. 337; *Norburn* v. *Norburn*, 1894, 1 Q. B. 448; 70 L. T. 511; *e.g.*, where a *sole* plaintiff, or defendant dies, or becomes bankrupt, the action abates or becomes defective: *Eldridge* v. *Burgess*, 7 Ch. D. 411; *Jackson* v. *N. E. Ry., Co.*, 5 Ch. D. 844; *Borter* v. *Dubeux* 7 Q. B. D. 413; *Emden* v. *Carte*, 17 Ch. D. 169; *Chorlton* v. *Dickie*, 13

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Ch. D. 160; *Warder* v. *Saunders*, 10 Q. B. D. 114, and an order to continue it must be obtained under the subsequent *Rules*, by the proper parties: *Walker* v. *Blackmore*, *supra*; *Stanhope* v. *Stanhope*, 11 P. D. 106; see *Rules* 300, 301.

Where, before the confirmation of the Master's report appointing a committee of a lunatic, and propounding a scheme for maintenance, the lunatic died, notwithstanding his death, an order was made, the executors of the deceased consenting, for the confirmation of the Master's report, the discharge of the committee, and the surrender of his bond: *Re Garner*, 1 O. L. R. 405.

Death before service of writ.

If the death or change of interest takes place before the writ is served, the action cannot be revived or continued: *Watson* v. *Ham*, 1 Chy. Ch. 295; and see *Foster* v. *Ward*, 9 L. R. Ir. 447.

The *Rule* applies where both parties die pending an action: *Sellors* v. *Goode*, 30 L. R. Ir. 298.

For the practice where a party dies pending an appeal; see note to *Rule* 301, *infra*, p. 767. And see also note to *Rule* 304, *infra*, p. 770.

Upon the death, before judgment, of the sole beneficiary on whose behalf an action is brought under *The Fatal Accidents' Act* the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative: *McHugh* v. *Grand Trunk Ry.*, 2 O. L. R. 600.

Duty of solicitor whose client dies pendente lite.

Where an action becomes defective by the death of a necessary party, or the dissolution of a corporation which is a necessary party, it is the duty of the solicitor who has acted for such party to notify the opposite party of the *defect*; and he may make himself personally liable to be ordered to pay costs lost in consequence of the proceedings being carried on after such defect has arisen, if he continues to act as solicitor, or fails to notify the opposite party of the defect: *Salton* v. *New Beeston Co.*, 1900, 1 Ch. 43; 81 L. T. 457.

Bankruptcy.

On the bankruptcy of plaintiff, the defendant, wishing to have the action dismissed for want of prosecution, was required to give notice to the trustee: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164; see also *Re Atkins*, 1 Ch. D. 82; *Cameron* v. *Eager*, 6 P. R. 117.

In an action by the indorser of a bill of exchange against the drawer who had become bankrupt, and suffered judgment by default, the trustee applied for leave to defend, complaining that judgment had been snapped. Quain, J., said, "It is only a question of terms. I will order the judgment to be set aside on payment of costs, and that the trustee be at liberty to defend in the name of the debtor:" *Goddard* v. *Poole*, W. N. 1875, 230; 1 Chanl. Ch. Ca. 126.

Assignment pendente lite.

Quære, whether an assignment of a verdict in an action for tort, before judgment, if made as provided by *The Conveyancing and Law of Property Act* (R. S. O. c.. 109), s. 49 (1), will now entitle the assignee to obtain an order to carry on proceedings in his own name. See under sec. 58 (5) of the Jud. Act (1897), as it was before the amendment by 60 V. c. 15, s. 5, *Blair* v. *Asselstine*, 15 P. R. 211; and notes to *Rule* 85, *supra*, p. 454, and 20 Law Quarterly Rev., p. 113.

Rule 134 has been also applied to add parties, for example, in *Kino* v. *Rudkin*, 6 Ch. D. 160, to add a person at his own request to whom an assignment *pendente lite* had been made by defendant; and in

Secar v. *Lawson*, 16 Ch. D. 121, on defendant's motion to add a person to whom the plaintiff had assigned his interest. In such a case as the last, the action may be stayed till security is given, or the suit continued in the name of the assignee: *Swan* v. *Adams*, 7 P. R. 147; see also *Ashley* v. *Taylor*, 10 Ch. D. 768. Rule 300.

An order adding a trustee in bankruptcy under this *Rule* as a defendant for discovery only, was set aside as improper: *Symonds* v. *City Bank*, 79 L. T. Jour. 175.

Where an assignee for creditors had made a compromise of an action commenced by him, and was subsequently removed, and a new assignee appointed in his place, it was held that such new assignee might obtain an order making himself plaintiff in the action, and continue it in his own name, leaving the defendant to move to stay it, or plead the compromise in bar; and that this course was preferable to directing an issue as to the validity of the compromise: *Davidson* v. *Merritton*, 18 P. R. 139.

Where the cause of action is transferred by the plaintiff, and the transferee makes himself plaintiff under *Rule* 301, the defendant may be entitled to amend by setting up any defence he may have against the new plaintiff: *Stavert* v. *Horton*, 3 O. W. N. 265, 348.

C. R. 395 in terms applied only to devolutions or assignments *pendente lite*, and it was held not to apply to assignments or devolutions of interest after final judgment: *Atty.-Gen.* v. *Birmingham*, 15 Ch. D. 423; where the action is at an end: *Arnison* v. *Smith*, 40 Ch. D. 570; but see *Phillips* v. *Fox*, 8 P. R. 51; but in a foreclosure action, where a party had assigned his interest after judgment, the assignee was made a party, after order for foreclosure absolute: *Campbell* v. *Holyland*, 7 Ch. D. 166; and see *Brigham* v. *Smith*, 2 Chy. Ch. 257; *Foresters* v. *Pegg*, 19 P. R. 254; where the assignment takes place *pendente lite* the order must be obtained before judgment: *Abell* v. *Parr*, 9 P. R. 564, where it was held that persons to whom defendants had assigned *pendente lite*, could not be added after judgment and declared bound by it, where they claimed to be entitled independently of the assignment: and see *Arnison* v. *Smith*, *supra*. Assignment after judgment.

The present *Rule* is not confined in terms to assignments *pendente lite* before judgment, and would seem to cover any assignment or devolution of interest taking place at any time after action, whether before, or after judgment, where it is necessary to bring before the Court the person in whom an interest in, or liability for, the subject of the action has devolved, and whose interest it is sought to bind by the proceedings, or who claims to enforce, or against whom it is claimed to enforce, a judgment recovered in the action. Rule not confined to assignments pendente lite before judgment.

Thus, where a defendant in a foreclosure action desired to open the foreclosure after the death of some of the plaintiffs, it was held that the proper procedure was to ask the surviving plaintiffs to issue an order to continue the action in the names of themselves and the representatives of the deceased plaintiff, and, on their refusal so to do, it would be open to the defendant to make a special application for an order to continue the proceedings in the names of the surviving plaintiff against the original defendants, and the representatives of the deceased plaintiff as defendants: *Pennington* v. *Cayley*, 1912, 2 Ch. 236; 106 L. T. 591. And where a defendant in a foreclosure action dies

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pendente lite before a final order has been obtained, an order to continue proceedings against the representative is necessary: see *Kennedy* v. *Foxwell*, 11 O. L. R. 389.

Execution.

Where only a part of a judgment debt is assigned, the assignee has no right to issue execution: *Forster* v. *Baker*, 102 L. T. 522, and see *S. C. Ib.* 29. In that case an order had been obtained by the assignee under *Rule* 566, and it was set aside. *Semble*, the proper course in such a case would be to obtain an order under *Rule* 301 to continue proceedings in the name of the assignors and assignee as plaintiffs.

In England it is held that a trustee in bankruptcy of a judgment creditor may obtain leave to issue execution (see *Rule* 568), without obtaining an order to continue proceedings: *In re Bagley*, 1911, 1 K. B. 317, but it seems a somewhat anomalous proceeding to permit a person to issue execution without his first being made a party to the record; and the better practice would appear to be to require him first to obtain an order under *Rule* 301 before applying under *Rule* 568: see *Norburn* v. *Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411.

The Court has no jurisdiction inherent, or otherwise, over any other person than those properly brought before it as parties, and it cannot, on any interlocutory application, make orders against the representatives of a deceased party, where such representative has not himself been made a party: *Brydges* v. *Brydges*, 1909, P. 187; 100 L. T. 744.

Where a trustee in bankruptcy, suing as such, is removed, and a new trustee appointed, the latter must obtain an order to continue the action: *Pooley's Trustee* v. *Whetham*, 28 Ch. D. 38.

Setting aside order.

Where a person issuing an order to continue proceedings is barred by the Statute of Limitations, the order will be set aside on motion. *Jay* v. *Johnstone*, 1893, 1 Q. B. 25.

Where a person claiming to be assignee of the plaintiff, obtains an order under this *Rule*, the original plaintiff, if he disputes the assignment, may move to set the order aside: *Fisken* v. *Ince*, 8 P. R. 147.

Order to add parties on change of interest, how obtained.

301. Where a change or transmission of interest or liability has taken place or where by reason of any person interested coming into existence after the commencement of the action, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and the new party, may be obtained on præcipe. C.R. 396.

See Eng. (1883) R. 181.

"Necessary or Desirable."—It has been said that it may in rare cases be "necessary and desirable" under this *Rule*, to add or substitute a person as plaintiff, *without his consent as required by Rule* 134 (2), on the application of the opposite party, but he should not be exposed without further action on his part, or adoption by him of the position into which he is forced, to liability for damages or costs: *Murray* v. *Wurtele*, 19 P. R. 286.

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But it may be open to doubt whether in any case a person can properly be added as a plaintiff without his consent; and it is submitted that the proper procedure, where the transferee of a plaintiff *pendente lite* neglects to take out an order under this *Rule* authorizing him to continue the proceedings, is for the defendant to move to limit a time for the transferee to take out such order, or in default that the action be dismissed, or that all proceedings be stayed; see *Rule* 305; Daniel Pr., 5th ed., 717; *Cameron* v. *Eager*, 6 P. R. 117; *Watson* v. *Watson*, 6 P. R. 229; *Chowick* v. *Dimes*, 3 Beav. 290; *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164; *Motion* v. *King*, 29 W. R. 73.

In foreclosure actions where a subsequent incumbrancer redeems the plaintiff, it has not been the practice for the defendant redeeming to take out any order to continue the proceedings, the judgment has been treated in such cases as a judgment for his benefit which he is entitled to prosecute without obtaining any such order: *Rule* 471, *Federal Life Assurance Co.* v. *Stinson*, 13 O. L. R. 230; 2 Madd. Ch. Pr. 495.

This *Rule* applies where the cause of action survives or continues to some person not already a party. Where the cause of action does not survive, the action cannot be continued under this *Rule*: see cases in note to *Rule* 304, and *Lowe* v. *Watson*, 1 Sm. & G. 12; *Dendy* v. *Dendy*, 5 W. R. 221; *Greenhough* v. *Rumney*, 5 W. R. 265; *Williams* v. *Williams*, 9 W. R. 296.

This *Rule* applies where the cause of action survives and to assignments, etc., before judgment.

The *Rule* only applies to devolutions of interest taking place before final judgment: *Atty.-Gen.* v. *Birmingham*, 15 Ch. D. 423, duties after the final judgment. It is necessary to take any proceedings in the action (other than execution, which is provided for by *Rule* 566), *e.g.*, where the plaintiff dies after final judgment by default, and defendant wishes to apply to set aside the judgment and to be let in to defend: *Chambers* v. *Kitchen*, 16 P. R. 219; 17 P. R. 3; see also *Arnison* v. *Smith*, 40 Ch. D. 570; *Brigham* v. *Smith*, 2 Chy. Ch. 257; *Campbell* v. *Holyland*, 7 Ch. D. 166; *Norburn* v. *Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411; *Kennedy* v. *Foxwell*, 11 O. L. R. 389, and *Re Parbola*, *Blackburn* v. *Parbola*, 1909, 2 Ch. 437; 101 L. T. 382.

When actions survive.

All actions survive which do not fall within the maxim, "*actio personalis moritur cum persona*," as modified by statute: see *Twycross* v. *Grant*, 4 C. P. D. 40. That maxim has no application to any breaches of covenant, except those which constitute a mere personal wrong, and, with that exception, all rights of action for breaches of contract pass to the executors: *Formby* v. *Barker*, 1903, 2 Ch. 539, *per* Vaughan Williams, L.J., at p. 550.

The rule of the Common Law as to the survival of causes of action was summed up in the maxim *actio personalis moritur cum persona*. This was first modified by 4 Ed. 3, c. 7, and in 1886, this maxim was to a large extent abrogated. The statute then passed with some slight amendment, is now *The Trustee Act* (R. S. O. c. 121), s. 41, and when the Imperial statutes in force in Ontario were revised this statute was deemed to have superseded 3 Ed. 3, c. 7, which was accordingly repealed: see 2 Ed. 7, c. 1, Sch.

Under *The Trustee Act*, s. 41, except in cases of libel and slander, all torts or injuries to the person, or to the real, or personal, estate of the deceased, survive to the personal representatives of the deceased, who have the same rights and remedies in respect thereof as the deceased would have if living, and the damages recovered form part of

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his estate; and in like manner the personal representatives of a deceased person are liable for torts, except libel or slander, committed by the deceased to any other person in respect of his person, or of his real, or personal property, but actions by or against the personal representatives in respect of any such torts must be commenced within a year of the death of the person by, or against, whose representatives the action is brought; and an order to continue an action already commenced must be obtained within that period in cases where the action survives only by virtue of the provisions of *The Trustee Act*, s. 40 (2).

This section of the statute is to some extent founded on the Imp. Stat. 3 & 4 Wm. 4, c. 42, s. 2, but goes very much beyond the provisions of that Act, which limits the survivni of actions in respect of torts, to those committed by, or against, the deceased, within six calendar months prior to his decease. Many causes of action, therefore, which would not survive under the English Act, would survive under the Ontario Statute.

Notwithstanding *The Trustee Act* (R. S. O. 121), sec. 41, the benefit of an action under *The Fatal Accidents Act* (R. S. O. c. 151), to which the beneficiaries named therein are entitled, does not survive in favour of their representatives: *McHugh* v. *Grand Trunk Ry.*, 2 O. L. R. 609; but the personal representatives of the deceased may have an original cause of action under *The Trustee Act*, s. 40, *supra*.

Under the statute, a right of action for seduction now survives against the seducer's personal representative: *Lince* v. *Faircloth*, 14 P. R. 253; and an action for crim. con.: *C.* v. *D.*, 10 O. L. R. 641; (*sed vide Brydges* v. *Brydges*, 1909, P. 187; 100 L. T. 744); before the Act, see *Udy* v. *Stewart*, 10 Ont. 591; and if an action for any tort which survives, has been commenced by the deceased, it may be continued by his representatives: *Mason* v. *Peterborough*, 20 Ont. App. 683.

Actions which survive.

Prior to *The Trustee Act*, s. 41, *supra*, under 4 Ed. 3, c. 7, certain personal actions survived: *e.g.*, actions of tort, where the injury had been done to the estate of the deceased: *Twycross* v. *Grant*, 4 C. P. D. 40; *Hatchard* v. *Mège*, 18 Q. B. D. 771 (a case of slander of title); *Jones* v. *Simes*, 43 Ch. D. 607; 62 L. T. 497; *Jenks* v. *Clifden*, 1897, 1 Ch. 694; 76 L. T. 382 (a case of obstruction of light); or where the deceased's estate had benefited by the tort; *Hambly* v. *Trott*, 1 Cowp. 374; *Ashley* v. *Taylor*, 10 Ch. D. 768; *Ookey* v. *Dalton*, 35 Ch. D. 700; 57 L. T. 18; but where the deceased wrongdoer had merely derived a negative benefit by his tort, by saving himself an expense which he would otherwise have been put to, the right of action did not survive under 4 Ed. 3 c. 7, against his personal representatives either at law: *Phillips* v. *Homfray*, 24 Ch. D. 439; 49 L. T. 5; or in equity: see *Hamilton Provident & L. Socy.* v. *Cornell*, 4 Ont 623; and see *Re Duncan*, 1899, 1 Ch. 387; 80 L. T. 322.

It has been laid down that the maxim *actio personalis moritur cum persona* "never extended to personal actions founded upon any obligation, contract debt, covenant, or any other duty to be performed, for there the action survived": 1 Wms. Saund. p. 240, and that the maxim did not extend to actions for tort arising out of breach of contract: see *Davis* v. *Hood*, 88 L. T. 19, (a case of negligence by a solicitor); but an action for breach of promise of marriage, though in form an action for breach of contract, is within the maxim and was not maintainable against the representatives of the deceased promissor:

Finlay v. *Chirney*, 20 Q. B. D. 494; 58 L. T. 664; *Chamberlain* v. *Wilson*, 2 M. & S. 408; query, whether such a cause of action would even now survive under *The Trustee Act*, s. 41, *supra*: see *James* v. *Morgan*, *infra*. Rule 301.

An action against a putative father of an illegitimate child, on a covenant made by him with the mother for its support, was held not to pass to the personal representative of the mother: *James* v. *Morgan*, 1909, 1 K. B. 564; 100 L. T. 238.

Cases of tort arising from breach of contract, which were an exception to the Common Law rule, probably still survive in Ontario, as at Common Law, and are not subject to the limitation of *The Trustee Act* (R. S. O. c. 121), s. 41 (3), *supra*, as to bringing an action therefor.

As to persons interested in the subject matter of the litigation who come into being after the commencement of an action: see *Peter* v. *Peter*, 26 Ch. D. 181; *Re Goold*, 51 L. T. 417; and see *Rule* 76, and *infra*, p. 766. Persons coming into being pendente lite.

Practice.—An order to add parties under this *Rule* is issued on *pracipe*: *Oshawa Cabinet Co.* v. *Note*, 18 C. L. J. 60; application in Court is not necessary: *Crane* v. *Loftus*, 24 W. R. 93; *Roffey* v. *Miller*, *Ib.* 109; *Dyer* v. *Painter*, W. N. 1881, 105. Practice.

For form of the order: see Form No. 62; H. & L. Forms No. 485. It continues proceedings in the plight and condition in which they were at the transmission of interest: see also *Chorlton* v. *Dickie*, 13 Ch. D. 160.

After an order under this *Rule*, the practice is, as formerly, that in the subsequent proceedings the title of the revived action shall be added to the original style: *Miller* v. *Huddlestone*, W. N. 1881, 171; *Secor* v. *Lawson*, 16 Ch. D. 121. Title of cause after revivor.

As to the effect of an order as regards costs: see *infra*, pp. 766, 769.

Where an action becomes defective, by the death, or transmission of interest, of any of the parties, whether before or after judgment, the plaintiff, or in the case of the death of a sole plaintiff, then his representatives; or in the case of the death of one of several plaintiffs, then the surviving plaintiff, or in the case of an assignment or transmission of the plaintiff's interest *inter vivos*, then his assignee, are the proper parties to apply for an order to continue the action; because the carriage of the action rests with them. If the plaintiff, or his representative, or a surviving plaintiff, or assignee, does not take out an order to continue the proceedings in due course, it is open to the opposite party to move to limit a time for him to do so, and, in default of his so doing, either to dismiss the action for want of prosecution, or, if after judgment, to stay all further proceedings: see *supra*, p. 763; but there does not appear to be any authority enabling a defendant to take out such an order, except in a case where he is entitled to assume the carriage of the action as plaintiff, or desires to obtain some relief therein: *Pennington* v. *Coyley*, 1912, 2 Ch. 236; 106 L. T. 59; or where he seeks to continue the action for the purpose of recovering costs: *Rule* 306. Who may obtain order.

Where a sole plaintiff in an administration action died, an order to continue the action was granted to a person who had been served with notice of the judgment, and had obtained liberty to attend the

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proceedings, he being held to be in the same position as a party to the action: *Burstall* v. *Feeron*, 24 Ch. D. 126. The personal representative of the plaintiff might obtain an order to continue the proceedings: *Dyer* v. *Painter*, W. N. 1881, 105. But a person, who has not obtained such liberty to attend proceedings, cannot obtain an order under this *Rule*, as he is not a party: *Delaney* v. *Delaney*, 27 Sol. Jour. 417. *Sed quære*, whether in either case such a person becomes party to the proceedings: see notes to *Rule* 87, p. 466. It has been held that in a case of transmission of interest of a party served with notice of judgment, an order under this *Rule* is not proper; and that the successor should be served with notice of the judgment: *Re Wicks*, W. N. 1888, 9.

Where two of several plaintiffs having separate causes of action died before trial, but, in ignorance of their death, the trial proceeded and the action was dismissed, an application by the executors of the deceased plaintiffs to continue the action was refused: *Arnison* v. *Smith*, 40 Ch. D. 567; and see *Solton* v. *New Beeston Co.*, *supra*, p. 760.

Liability for costs.

The effect of an order to continue the proceedings is to impose on an added plaintiff the ordinary liabilities of a plaintiff in an action, as if he were originally made a party: see *infra*, p. 769, and such liability cannot be imposed on a party thus added as plaintiff, against his will. Surviving plaintiffs, therefore, would have no right to issue an order to continue proceedings in the names of themselves and the representatives of a deceased plaintiff, without the consent of such representatives.

An executor continuing an action becomes, as formerly, when he obtained an order of revivor under the old practice, liable for costs: *Boynton* v. *Boynton*, 9 Ch. D. 250; 4 App. Cas. 733. So does an official liquidator continuing an action commenced by the company: *Re London Drapery Stores*, 1898, 2 Ch. 684.

Operation of order.

An order of revivor is in force from its service, although the party served therewith has 10 days to move against it; and notice of trial served within 10 days after such service, for a day after the expiration of the 10 days, was held good: *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

Where on the death of the sole defendant, after notice of trial, persons in whom his interest vested were added as defendants, it was held that new notice of trial to them was necessary: *Johnston* v. *English*, 55 L. T. 55; 35 W. R. 29; W. N. 1886, 131.

On the death of an accounting party the Court may, on an *ex parte* motion, order the action to continue between surviving parties and the executor of deceased, notwithstanding that the executor is resident out of the jurisdiction: *Jomeson* v. *Morsholl*, 46 L. T. 480; and see *Rule* 25 (2), and *Rule* 2; but see *Morrice* v. *Smart*, 73 L. T. Jour. 398.

Infants born pendente lite.

If an action becomes defective by the birth, since its commencement, of an infant who is a necessary party thereto, and proceedings, since its birth, have been taken in the action, the common order under this *Rule* will not render such proceedings binding on the infant. A special form of order to meet this case will be found in Seton, 4th ed., 1527, Form 3, 5th ed., 102, and *Peter* v. *Peter*, 26 Ch. D. 181. See also *Re Goold*, 51 L. T. 417.

Lunatic.

Where a party becomes a lunatic pending action, as to continuance of the action by his committee: see *Re Green*, 41 L. T. 30; 48 L. J. Chy. 681.

After the death of a judgment debtor, an order for a receiver of his estate cannot be made without representation of the deceased's estate: *Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131; *Norburn* v. *Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411. Rule 301. Receiver.

In *Wollis* v. *Smith*, 46 L. T. 473; 51 L. J. Chy. 577, a judgment creditor who had obtained an order attaching a judgment debt, was held entitled to be added under this *Rule* as co-plaintiff with his debtor, in the action in which the debtor had obtained the judgment, and to have notice of all proceedings taken in that suit to recover the debt. This decision proceeded to a great extent upon the terms of Eng. Ord. 60, R. 2 (1883, R. 179), which applied to the case of the devolution of an estate by operation of law, and has not been adopted in the Ontario Act, or *Rules;* but see *Rule* 2.

This *Rule* is not inapplicable to the case where there is a transmission of interest by reason of a subsequent incumbrancer having redeemed the plaintiff in a foreclosure suit. In such case, however, a new account may probably be taken under *Rule* 477 without order.

Where the plaintiff died after judgment, and the defendant desired to move to set aside the judgment, an order obtained by the defendant to continue the proceedings in the name of the executor of the deceased plaintiff, was upheld: *Chambers* v. *Kitchen*, 16 P. R. 219; 17 P. R. 3; *sed quære*, see *Pennington* v. *Cayley*, 1912, 2 Ch. 236; 106 L. T. 591; and *Rule* 305; *Farnham* v. *Millward*, 1895, 2 Ch. 730; *Watson* v. *Watson*, 6 P. R. 229; *Cameron* v. *Eager*, 6 P. R. 117; *Chowick* v. *Dimes*, 3 Beav. 290. The only case in which a defendant would seem entitled to obtain such an order after judgment is where he has an interest in enforcing the judgment, or is seeking some relief in the action; but in such a case, if he obtains the order, he should make himself plaintiff, and the representatives of the deceased plaintiff defendants: see *Burstall* v. *Feoron*, 24 Ch. D. 126; *Pennington* v. *Cayley*, *supra*, p. 765; but see Dani. Pr., 6th ed., 289.

Where an appeal to the Appellate Division becomes defective by death, transmission of interest, or other cause, proceedings to continue the appeal by or against the proper parties should be taken under this *Rule*, and in the High Court Division: *Grosett* v. *Carter*, 6 Ont. 584; see also *Ranson* v. *Patten*, 17 Ch. D. 767; *Re Knight, Knight* v. *Gardiner*, 84 L. T. Jour. 205; 32 Sol. Jour. 166. Appeal.

Costs of Order.—The costs of an order to continue proceedings are recoverable as part of the costs of the cause: *Girordot* v. *Welton*, 19 P. R. 201. Costs of order.

The costs of an order under this *Rule* were allowed in *Mitchell* v. *Barrett*, 3 C. L. T. 265.

Delay.—There is no time limited for reviving. If, therefore, the defendant does not move under *Rule* 305, *primâ facie*, an order to continue is regular: *Ardogh* v. *York*, 17 P. R. 184. It would seem however, that there is not an unlimited right to revive proceedings, and if undue delay takes place in obtaining the order it may be set aside: see *Lemesurier* v. *Macauley*, 20 Ont. App. 421; *Jay* v. *Johnston*, 1893, 1 Q. B. 25; see also *Curtis* v. *Sheffield*, 20 Ch. D. 398; 21 Ch. D. 1; *Mickelthwaite* v. *Vavosour*, W. N. 1893, 61; *Fussell* v. *Dowding*, 27 Ch. D. 237; *Re Leslie*, 23 Ont. 143; and where there is undue delay in taking out the order to continue the proceedings, the Delay in issuing order.

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defendant may move to limit the time for so doing, and in default to dismiss, or stay the action: see *supra*, p. 763, and *Rule* 305.

Dismissal of action.

Dismissal of Action on Failure to Revive.—See *Rule* 305 and note.

Actions against firms.

Actions against Partnership Firms.—Where a partner dies between service of the writ of summons and judgment, the action may continue without an order, but judgment can only be enforced against his surviving partners, and the partnership assets: *Ellis* v. *Wadeson*, 1899, 1 Q. B. 714, 719.

Counter-claims.

Counter-claims, etc.—A counter-claim may be revived, in the same way as an original action, by the representatives of the deceased counter-claiming defendant: *Andrew* v. *Aitken*, 21 Ch. D. 175; 46 L. T. 689; see also *Lumsden* v. *Winter*, 8 Q. B. D. 650.

As to the case of consolidated actions: see *Re Wortley, Culley* v. *Wortley*, 4 Ch. D. 180.

The *Rules* on this subject apply to petitions and originating notices as well as actions: *Re Atkins*, 1 Ch. D. 82; *Re Dynevor*, W. N. 1878, 199.

Execution.

Execution.—Where, after judgment, it is merely desired to issue execution, and rights or liabilities have become changed by death or otherwise, the person seeking to issue execution may proceed under *Rule* 566; *sed quære* whether even in that case, the persons applying for leave to issue execution should not first make themselves parties to the action under this *Rule*: see *supra*, p. 762. Where it is sought to appoint a receiver by way of equitable execution, the representatives of the deceased debtor must be brought before the Court, by order to continue proceedings under this *Rule*, before the motion for a receiver can be entertained: *Re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131; 62 L. T. 337; *Norburn* v. *Norburn*, 1894, 1 Q. B. 448; 70 L. T. 411.

Where the solicitor of a deceased plaintiff issued execution without reviving, it was held that a motion might be made by defendant to set it aside without first reviving the action: *Chambers* v. *Kitchen*, 16 P. R. 219; 17 P. R. 3.

Where it becomes necessary to enforce a judgment against persons who have subsequently acquired a title, an action must be brought for the purpose: *Atty.-Gen.* v. *Cor. of Birmingham*, 15 Ch. D. 423.

Examples.

Examples.—Where the plaintiff died within fourteen days from trial, the Court made an order, on the application of his executors, continuing proceedings, the executors undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained: *Hughes* v. *West*, 13 L. R. Ir. 224.

Two sons were, under their father's will, appointed trustees on attaining twenty-one, and an administration action was commenced on the elder attaining that age, in which the infant son was a plaintiff, and the other a defendant as trustee. Upon the infant attaining twenty-one and becoming a trustee, and thus changing his interest and liability, an order was made *ex parte* making the infant son a co-defendant: *Re Goold, Goold* v. *Goold*, 51 L. T. 417; W. N. 1884, 185.

In an action on a promissory note, where the defendant became bankrupt, it was held that the trustee should not be added, as the

judgment would not be for recovery, but would only amount to a declaration of a right to prove, which ought to be made in the bankruptcy proceedings: *Barter* v. *Debeux*, 7 Q. B. D. 413. Rules 302, 303.

Where a petitioner had died after an order directing inquiries, it was ordered that the petition be carried on by the executors: *Re Atkin's Estate*, 1 Ch. D. 82. See note to Jud. Act, sec. 2 (a).

Effect of order as to Liability for Costs.—The person by, or against whom, the action is continued, becomes liable to be ordered to pay the whole costs, both those incurred before, as well as those incurred after, the order: *Boynton* v. *Boynton*, 9 Ch. D. 250; 4 App. Cas. 733; *Watson* v. *Holliday*, 20 Ch. D. 780; *Vint* v. *Hudspith*, 30 Ch. D. 24; *Borneman* v. *Wilson*, 28 Ch. D. 53; *School Board, etc.* v. *Wall*, 35 Sol. Jour. 527; *Re London Drapery Stores*, 1898, 2 Ch. 684. Costs.

Where the action on the death of one of several plaintiffs survives to the others, they are liable for the whole costs to the defendant, without regard to the estate of the deceased: *Aspden* v. *Seddon*, W. N. 1877, 207.

Discharging Order.—As to the grounds for discharging an order: see Dan. Pr., 6th ed., 301; *Rule* 303 and note; *Burstall* v. *Feoron*, and *Jay* v. *Johnstone*, *supra*, p. 767.

302. Such order and a notice according to form No. 40, shall be served upon the continuing parties or their solicitors, and upon the new party. C.R. 397. Service of order.

See Eng. (1883) R. 182.

The Ontario *Rules* do not require an appearance to be entered by the person served.

303. A person served with such order may apply to the Court to discharge or vary the order at any time within 10 days from the service thereof. C.R. 398. Application to discharge order.

See Eng. (1883) R. 183.

This *Rule* is very similar in its terms to Chy. O. 339, under which it was held to be not sufficient to give notice of the motion to discharge within the time allowed, but the motion had to be made returnable within that time: *Harris* v. *Myers*, 16 Gr. 117; *Jackson* v. *Gardiner*, 2 Chy. Ch. 385; 15 Gr. 425; *McIlroy* v. *Hawke*, 3 Chy. Ch. 66; see *Fox* v. *Wallis*, 2 C. P. D. 45. The time may be extended: see *Smith* v. *Gunn*, 2 Chy. Ch. 230, and *Rule* 176. The motion was formerly made to the Court and set down for the proper day. It is not included in the business which may be taken in Chambers: *Rule* 207, unless it comes under clause 4.

A notice of trial served before the 10 days had expired, for a sitting commencing after the 10 days, was held good, no motion against the order having been made: *New York Piano Co.* v. *Stevenson*, 10 P. R. 270.

Rule 304.

Previous delay in the prosecution of the action is no ground for discharging the order, the defendant not having moved to dismiss: *Ardagh* v. *York*, 17 P. R. 184; but if the Statute of Limitations has barred the claim, the order may be discharged: see *Lemesurier* v. *Macaulay*; and *Jay* v. *Johnston*, in note to *Rule* 301.

Not only the party served with the order may move to set it aside, but any party who claims that the order has been improperly issued may also move to rescind it; *Rule* 217, and see *Pennington* v. *Cayley*, 1912, 2 Ch. 236; 106 L. T. 591.

Action not to abate by reason of death between verdict and judgment.

304. When death takes place after verdict or finding of the issues of fact but before judgment, judgment may be entered notwithstanding the death, whether the cause of action would, apart from this rule, survive or not. C.R.

This *Rule* is partly founded on C. R. 394.

See Eng. (1883) R. 178.

Death between argument and judgment.

Where, after argument before the Court, and before the delivering of judgment, a party dies, it would seem that no order to continue proceedings is necessary to enable the Court to give judgment; but the party in whose favour the judgment is, or his personal representative, if he be dead, is entitled to have judgment pronounced and entered as of the date on which the argument took place: *Eccard* v. *Coulthard*, 1897, 2 Ch. 554, and see 2 Williams' Saund., part II., pages 72*n*, 72*o*; *Evans* v. *Rees*, 12 A. & E. 175; *Miles* v. *Bough*, 3 D. & L. 105; *Miles* v. *Williams*, 9 Q. B. 47; *Cumber* v. *Wane*, 1 Str. 426; *Collinson* v. *Lister*, 20 Beav. 355; *Freeman* v. *Tranah*, 12 C. B. 406; *Moor* v. *Roberts*, 3 C. B. N. S. 844; *Belshom* v. *Percival*, 8 Ha. 157; and see *Couture* v. *Bouchard*, 21 S. C. R. 281.

Where, in ignorance of the death of the plaintiff, after the argument, a certificate of the Court of Appeal, was issued dated as of the day of pronouncing judgment, the certificate was, on the *ex parte* application of defendant, amended so as to bear date as of the day of the argument, and was ordered to be entered as of that date: *Gunn* v. *Harper*, 3 O. L. R. 693; *Young* v. *Gravenhurst*, 24 O. L. R. 467.

A special direction should be got from the Court to date and enter the judgment when delivered as of the date of the argument, otherwise it has to bear date as of the day it is pronounced (see *Rule* 512), which will make it apparently defective on its face. In *Huntington* v. *Attrill*, before the Judicial Committee of the Privy Council, 5th Aug., 1892, where the respondent died after argument of an appeal, but before judgment, the Committee directed the action to be revived before the Order in Council, embodying the judgment was issued, and an order of revivor was made by the Committee accordingly [*ex rel.* D. W. Saunders, of counsel for appellants]; but see *Grasett* v. *Carter*, 6 Ont. 584, 588, where it was said that any revivor required pending an appeal to the Court of Appeal should be effected in the Court below because the Court of Appeal had no machinery for reviving suits: and see *C.* v. *D.*, 10 O. L. R. 641.

Or before judgment issued.

Where a party dies after judgment, but before it has been drawn up and entered, the judgment must be drawn up and issued before the

ordsr to continue proceedings is issued: see *Bcomish* v. *Pomeroy*, 1 Chy. Ch. 32; *Golbraith* v. *Armstrong*, *Ib.*, 33. Rule 305.

The effect of the *Rule* appears to he that where a litigant dies after argument and hefore judgment, the judgment is to be given, ns if given before the death took place.

But for the purpose of enforcing the judgment, an order to continue the proceedings must he first ohtained; whether snch an order can be obtained will depend on whether or not the judgment is of such a nature as to be enforceahle hy, or against, the representatives of the deceased, as the case may be.

But it is to he remembered that under this *Rule* in the case of a judgment in respect of a tort, a deceased plaintiff's representatives would become entitled, not in respect of the tort, but in respect of the judgment recovered by the deceased; and though the right of action in respect of the tort which was the aubject of the action might not devolve on them, yet the right of deceased as a judgment creditor would.

305. Where a plaintiff has died and proceedings may be continued, the defendant may apply to the Court on notice to compel the person entitled to proceed with the actiou to proceed according to the provisions of these Rules within snch time as the Court may order, and that in default the action be dismissed for want of prosecution. C.R. 403. Right of defendant in action which may be so continued.

See Eng. (1883) R. 185, and *Duke* v. *Dovis*, 1893, 2 Q. B. 260.

The procedure pointed out hy this *Rule* appears to he the proper course for a defendant or his representative to take, and not (as wns suggested in *Murroy* v. *Wurtele*, 19 P. R. 288), himself to issue an order to continue proceedings; unless he is entitled to assume the position of plaintiff and take the carriage of the action: see *supra*, *Rule* 301, and note; or is seeking to recover costs: see *Rule* 306.

In *Wingrove* v. *Thompson*, 11 Ch. D. 419, the Court, acting under 15 & 16 Vict. c. 56, s. 44, appointed a person to represent the estate of a deceased plaintiff, who died insolvent and intestatc, so that the defendant might have somebody against whom to move to have the action dismissed for want of prosecution: *sed quare* if there is jurisdiction to make such an order in Ontario.

See *Oshawa Cabinet Co.* v. *Note*, in note to *Rule* 213.

Under the former Chancery Practice if the representatives of a deceased sole plaintiff did not revive when served with an order limiting a time for doing so. the action was dismissed *without costs*: *Pudge* v. *Pitt*, 3 W. R. 100; *Hill* v. *Gaunt*, 9 W. R. 68. Under *Rule* 305 an order may be made for payment of costs. If the defendant moving intends to press for a dismissal with costs his proper course would seem to he to include a claim to that effect in his notice of motion to compel the plaintiff to revive.

Where a sole plaintiff died after judgment, and defendant desired to move to set aside the judgment; see *Chambers* v. *Kitchen*, 16 P. R. 215, 17 P. R. 3.

Rules 306, 307.

Costs.

306. Where an action is so dismissed an order for payment of costs may be made and enforced against the goods and lands which were of the deceased plaintiff. C.R. 404. *Amended.*

Formerly in Equity a suit could not be revived for costs payable by the deceased party personally, unless the costs had been taxed before the abatement of the suit, or unless in addition to the costs a duty was decreed which remained unexecuted: Sm. Pr., 6th ed., 728. C. R. 404 expressly provided that it could; whether this *Rule* as now framed has the same effect remains to be determined.

Semble, where a defendant, under this *Rule*, seeks to continue proceedings for the purpose of recovering costs due by a deceased plaintiff, he should make himself plaintiff, and the representatives of the deceased plaintiff defendants, by the order to continue the proceedings; he cannot properly bring the latter into the action as plaintiffs, because that would be imposing on them a personal liability for past costs: see note to *Rule* 301, *supra*, p. 769.

In *Gunn* v. *Harper*, 3 O. L. R. 693, where the plaintiff died after argument of an appeal, but before the giving of judgment; on the appeal being dismissed with costs, it was held that the defendants were entitled to the appointment of an administrator *ad litem* to represent the plaintiff's estate, in order that the costs of the action and of the appeal might be recovered, the deceased plaintiff having no assets in the Province, but having given a bond, securing the costs of the appeal. See also *Young* v. *Gravenhurst*, 24 O. L. R. 467. But former C. R. 195, which enabled the Court to appoint an administrator *ad litem*, has not been continued.

(ii) *Payment into Court with a Pleading, in Satisfaction.*

When defendant may pay in.

307. A defendant may, either before or at the time of delivering his defence, or afterwards by leave of the Court, pay into Court a sum of money in satisfaction of the cause or a part of the cause of action, or of one or more of the causes of action for which the plaintiff sues, and the money when so paid in shall remain in Court subject to further order unless the plaintiff elects to take it out as hereinafter provided. C.R. 419.

See Eng. (1883), RR. 255-265;

Comparison of practice in Eng. and Ont.

(1) This *Rule* is not confined to any particular class of actions, but whether it applies to a claim which is not for recovery of money has not been decided. The English Rule has been held not to apply so as (1) to compel a plaintiff who accepts money paid in "in respect of the causes of action complained of," to accept it in satisfaction, not only of damages incurred, but also of his claim to establish his right to an injunction; or (2) to enable a plaintiff who accepts the money paid in, to do so, not only as a satisfaction of his own claim, but also as in effect discharging him from liability on a counter-claim by the defendant, who has paid the money in: *Coote* v. *Ford*, 1899, 2 Ch. 93; 80 L. T. 697.

(2) It enables the defendant to deny the plaintiff's causes of action, and, at the same time, pay into Court: see *Rule* 308; *Berdan* v. *Greenwood*, 3 Ex. D. 251; *Hawkesley* v. *Bradshaw*, 5 Q. B. D. 22, 302; *Harper* v. *Davis*, 19 Q. B. D. 170; even in actions for libel or slander; *Hawkesley* v. *Bradshaw*, *supra*, which are expressly excepted by the Eng. Rule; or to plead tender before action: *Davis* v. *National Ass. Co.*, 16 P. R. 116. *Quære*, whether this is so in all cases, such as actions to try a right, or to establish a character which is assailed, or where fraud is charged: *Berdan* v. *Greenwood*, *supra*. Rule 307.

The principle is, that the Court ought not "to preclude defendants in actions from saying and doing that which, as practical men, before the action, they might reasonably say and do, viz., say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace and for the prevention of further litigation:" *Berdan* v. *Greenwood*, 3 Ex. D. 259. In *Spurr* v. *Hall*, 2 Q. B. D. 615, an action for nuisance, the defendant was not allowed to plead payment into Court together with a denial of the right of action; but the subsequent cases make the propriety of that decision at least doubtful, and under the *Rule* the defendant's right so to do, seems plain. See also *Potter* v. *Home and Colonial Insurance Co.*, cited 2 Q. B. D. 622; and Jud. Act, sec. 71, *supra*.

(3) The payment into Court is not to be an admission of liability: *Rule* 308. Under the Eng. Rule payment in satisfaction is an admission of liability of the cause of action, in respect of which the money is paid into Court; but with his defence a defendant may (except in action for libel or slander: *Fleming* v. *Dollar*, 23 Q. B. D. 388) pay in money, and deny liability: *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597. See *Hennell* v. *Davies*, 1893, 1 Q. B. 367; 68 L. T. 220, where money was paid in generally, without specifying the cause of action. Under this *Rule* there is no exception of actions for libel or slander.

(4) Payment may be made in satisfaction of part of a cause of action, or of any one or more of several causes of action as well as of the whole action.

(5) The plaintiff may not take the money out, unless he accepts it in satisfaction of the cause of action in respect to which it was paid in: *Rule* 311.

The result will be that, notwithstanding any defence denying liability, the acceptance will satisfy the cause of action, and the action, except as to costs, will come to an end, if the payment in is in satisfaction of the whole cause of action: see *Re Earl of Stamford*, 33 W. R. 909, where plaintiff, after taking the money proceeded with the action, and was required to stop proceedings, or pay the money in again: see also *Kane* v. *Mitchell*, 13 P. R. 118. Practice in Ont.

The money will, under this *Rule*, remain in Court as the defendant's money, if not accepted by the plaintiff in satisfaction, to be dealt with by the Court in the judgment, or by other order in the action: see *Maple* v. *Earl of Shrewsbury*, 19 Q. B. D. 463; 35 W. R. 819. It will not be paid out on motion by the plaintiff, he not accepting it in full: *Kane* v. *Mitchell*, *supra*; and if the plaintiff fail to recover judgment for as much as the amount paid in, the defendant will be entitled to the surplus: *Veale* v. *Reid*, 117 L. T. Jour. 292.

It would seem also that it should be treated, while in Court, as the defendant's money, where it is paid in with a denial of liability, and

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plaintiff does not accept it, but proceeds to trial and recovers less: *Gillmor* v. *Cowan*, cited in *Davis* v. *National Ass.*, 16 P. R. 119; *Gray* v. *Bartholomew*, 1895, 1 Q. B. 209; 71 L. T. 867 (slander) and see under the dissimilar English Rules, *Dunn* v. *Devon*, 70 L. T. 593; 1895, 1 Q. B. 211 (*n*), (libel).

Where the plaintiff did not elect to take the money out within the time limited by *Rule* 313, and judgment was given in favour of the defendant upon the cause of action in respect of which the money was paid in, but the judgment did not dispose of the money in Court, it was held that it remained in Court subject to the final order of the Court after the determination of the action, and must be disposed of in accordance with such determination. Plaintiff was held to be not entitled, after such judgment, to an order under *Rule* 176, extending *nunc pro tunc* the time limited by *Rule* 313; *Mogann* v. *Ferguson*, 18 P. R. 201.

Even where liability is not denied the money must remain to be dealt with by the Court, if plaintiff does not elect to take it out under *Rules* 312 and 313; and, by reason of the plaintiff's not accepting at the proper time, the defendant may afterwards contend that the amount payable by him is less than the amount paid into Court: *Denison* v. *Woods*, 17 P. R. 549; see *Veale* v. *Reid*, *supra*, p. 773.

Where an action is constituted under *Rule* 65 by several plaintiffs having separate claims, a payment into Court of a lump sum is not irregular, but the plaintiffs may require the defendant to deliver particulars of the claims in respect of which the payment is made: *Benning* v. *Ilford Gas Co.*, 1907, 2 K. B. 290; 97 L. T. 102. Where a defendant denied that the contract sued on was binding on him, and paid into Court £50 to satisfy the plaintiff's claim, and further that if it was binding on him he paid into Court £250 which he alleged was sufficient to satisfy the plaintiff's claim, it was held that the pleading was irregular as not specifying the cause of action in respect of which the payments were made: *Chapman* v. *Westerby*, 136 L. T. Jour. 406.

Costs.

Where the money is not accepted in full, and the plaintiff recovers sufficient to carry costs, though less than the amount paid in, it would seem that the plaintiff is entitled to the general costs of the action down to payment in: *Powell* v. *Vickers*, in note to *Rule* 313, *infra*; but see *Wheeler* v. *United Telephone Co.*, 13 Q. B. D. 597; *Goutard* v. *Carr*, 13 Q. B. D. 598 *n*; *Wood* v. *Leethom*, 61 L. J. Q. B. 215; *Jones* v. *Whittoker*, 57 L. T. 216, and *Kane* v. *Mitchell*, *supra*, p. 773; but he may nevertheless be liable to pay the costs of issues on which he fails: *Powell* v. *Vickers*, *supra*, and *Hubback* v. *British N. Borneo Co.*, 1904, 2 K. B. 473.

And see *Bucston* v. *Higgs*, 4 Ex. D. 174; *Gretton* v. *Mees*, 7 Ch. D. 839; *Best* v. *Osborne*, 12 T. L. R. 419, where the plaintiff was given costs up to the time of payment into Court, and defendant costs subsequent thereto. The Judge at the trial doubtless has a discretion under Jud. Act, sec. 74, to give defendant the whole costs of the action: see also *Fowkes* v. *Fox*, 91 L. T. Jour. 30. In *Small* v. *Lyon*, 10 P. R. 222, where judgment was given for defendant with costs, it was held that the Taxing Officer had no alternative but to tax the defendant all his costs.

Payment in by one of two defendants.

Where two defendants are entitled to put in separate defences, and one has paid money into Court exceeding the amount ultimately recovered in the action, the other defendant cannot avail himself of the

payment into Court by his co-defendant as a satisfaction of the cause of action against himself, and, on failure of his defence, plaintiff is entitled to have judgment entered against him for costs: *Penny v. Wimbledon Urban District*, 1899, 2 Q. B. 72. Rules 308, 309.

Where on a motion for summary judgment defendant was allowed to defend, on payment of money into Court as part security for the plaintiff's claim, the defendant was not allowed to set up in his pleading that such payment into Court was in satisfaction of the plaintiff's claim: *Mendels v. Gibson*, 7 O. L. R. 611.

Where tender of amends in an action for tort is pleaded under Jud. Act, s. 71, the money must be brought into Court: see *Rule* 309. Actions of tort.

In an action against a husband and wife for a tort of the wife (a libel) it was held that the husband and wife could not put in inconsistent defences, and therefore the husband paying money into Court, the wife could not plead denying liability: *Beaumont v. Kaye*, 1904, 1 K. B. 292; but that was because in England a payment into Court is an admission of liability, which is not the case under Ont. *Rules*: see *Rule* 308.

Where a defendant in an action of libel or slander pays money into Court by way of amends with his defence under *The Libel and Slander Act* (R. S. O. c. 71), s. 9, he cannot in the event of his failing in his defence under s. 7 of that Act, treat the payment as made under *Rule* 307: *Oxley v. Wilkes*, 1898, 2 Q. B. 56.

As to payment into Court in actions for libel, see *The Libel and Slander Act*, *supra*, s. 9. Where a plaintiff in a libel action died before money paid into Court by defendant in satisfaction has been taken out, his executor was held entitled to obtain payment thereof: *Maxwell v. Wolseley*, 1907, 1 K. B. 274.

As to payment in by a third party: see *Bates v. Burchell*, W. N. 1884, 108. Third party.

308. Payment of money into Court shall not, unless expressly so stated, be deemed an admission of the cause of action in respect of which it is paid. C.R. 420. Payment not to be an admission.

See Eng. (1883) R. 255.

Where money is paid into Court in full satisfaction of the plaintiff's claim, the plaintiff cannot obtain leave to take it out in satisfaction of part only, with liberty to proceed for the balance claimed by him: *Barrie v. Toronto & Niagara Power Co.*, 11 O. L. R. 48.

309. With a defence setting up a tender before action, the sum alleged to have been tendered shall be brought into Court. C.R. 428. Tender.

Same as Eng. (1883) R. 257.

This *Rule* is similar to the former Common Law practice: see *Chapman v. Hicks*, 2 C. & M. 633, where it was held that if the sum tendered was not paid in, the plaintiff might sign judgment for the sum as to which tender was pleaded.

A defence may be set up denying liability as well as pleading tender: *Davis v. National Assur. Co.*, 16 P. R. 116.

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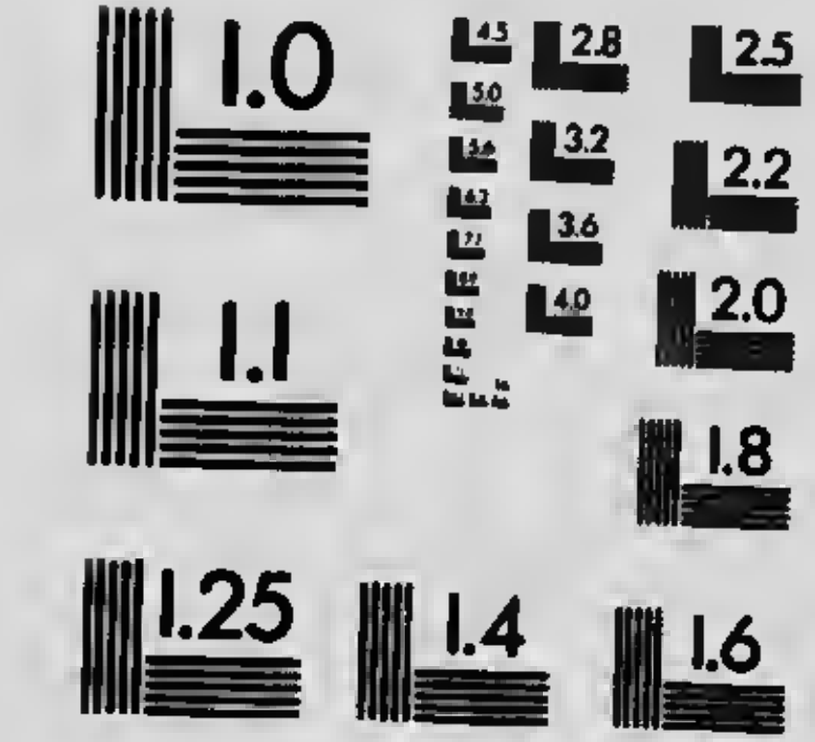

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Rule 310.

The *Rule* would seem to apply in a foreclosure suit, as well as in any other kind of action: see *Kinnaird* v. *Trollope*, 42 Ch. D. 610.

Payment into Court with a plea of tender before action is not an admission of the right of the plaintiff to bring the action: *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127.

Where a defence sets up a tender, it is not essential that the tender should be alleged to have been made before action, if the fact may be inferred from the other statements of the defence: *Griffiths* v. *Ystradyfodwg*, 24 Q. B. D. 307.

The plaintiff cannot take the money out in satisfaction, and tax his costs as of course; the plea of tender raises an issue, which remains unsettled on the record, and in respect of it the defendants are entitled to go to trial: *Ib.* If the plaintiff elects to take the money, he must take it in full of his claim, and the defendant thereupon becomes entitled to his costs: *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127; and see *Rule* 315.

Formerly a tender could not be pleaded in an action for unliquidated damages: see *Davys* v. *Richardson*, 20 Q. B. D. 722; 21 Q. B. D. 202; but under Jud. Act, s. 71, and *Rule* 307, *semble*, it may; and it is probably for that reason that the former special provisions of *The Municipal Act* and *The Justices of the Peace Protection Act* (R. S. O. 1897), c. 88, permitting a tender of amends, have not been continued in the present R. S. O.

Tender to a solicitor of a cheque, is not a good legal tender: *Blumberg* v. *Life Interests Corp.*, 1897, 1 Ch. 171; 1898, 1 Ch. 27.

To be signified in defence.

310. Payment into Court shall be pleaded, and in the pleading the cause of action or part thereof, in respect of which the payment is made, shall be specified. C.R. 421.

See Eng. (1883) R. 256.

A payment into Court in satisfaction of the whole, or part, of the plaintiff's claim may be made before, or after, the delivery of a defence: see *Rules* 307, 311.

In the case of a payment in before defence, if a defence is subsequently delivered, the payment in must be set up in the defence. Where the payment in is made after the delivery of the defence, the order granting leave should provide for the delivery of a supplementary defence, in order to set up the payment in as required by this *Rule*.

Where there are several causes of action, or different heads of claim, money should not be paid in generally, without specifying the amounts applicable to the different causes of action or heads of the claim, where it can be done; otherwise particulars may be ordered. Thus, where plaintiff claimed (1) *mesne* profits, and (2) damages for dilapidation and non-repair of premises leased, the defendant paying in generally was ordered to give particulars apportioning the money paid in to the different heads of claim: *Rowe* v. *Kelly*, 59 L. T. 139; W. N. 1888, 141; and see *Benning* v. *Ilford Gas Co.*, in note to *Rule* 307.

In *Paraire* v. *Loibl*, 49 L. J. C. P. 481; 43 L. T. 427 (discussed in *Rowe* v. *Kelly*), where plaintiff claimed for distinct services as defendant's architect, viz.: in preparing plans, acting as arbitrator, and

msking surveys, it was heid that payment into Court generally was sufficient in point of pleading, but the question whether particulars should bs ordered was not passed upon: see *Bank of London* v. *Guarantee Co.*, 12 P. R. 499; *Ocean Marine SS. Co.* v. *Ocean Marine Insurance Co.*, 2 T. L. R. 425.

Or in notice.

311. A defendant paying money into Court before delivering his defence shall serve upon the plaintiff a notice stating that he has paid in the money, and specifying the claim or cause of aetion in respect of which the payment has been made. C.R. 422.

Taken from Eng. (1883) R. 258.

For form of notice: see H. & L. Forms, No. 397.

A defence delivered subsequently and simply denying liahility was heid not embarrassing: *Anon*, 31 Sol. Jour., 136, 139; hut under *Rule* 310, the payment must bs pleaded.

Where a motion for judgment is pending when the payment is made, the defendant is liahle for the costs thereof: *Re Lomer* v. *Waters*, 1898, 2 Q. B. 326; 79 L. T. 81.

How plaintiff may take money out of Court.

312. The plaintiff may take the money out of Court in satisfaction of the cause of action, or part thereof, in respect of which it was paid in, upon filing and serving a memorandum (Form 27), which sball be equivalent to a satisfaction piece. C.R. 423.

The memorandum referred to in this *Rule* should he entered of record: see *Rule* 532.

For Form No. 27, see H. & L. Forms, No. 398. Where the money is accepted in satisfaction of the cause of action, or part of the cause of action, in respect of which it is paid in, no order for payment out is necessary: *Rule* 319.

If the money is not taken out hy the plaintiff, it is suhject to the order of the Court, and such order may be made in respect of it as the case may require, and the rights of the parties may ultimately appear: see *Brown* v. *Feeney*, 1906, 1 K. B. 563; *Maxwell* v. *Wolseley*, 1907, 1 K. B. 274; *Ramus* v. *Dashwood*, Mew's Dig. 1909, p. 480.

Election.

313. The plaintiff shall make his election to take the money out of Court within four days after the day on which be receives notice of payment in if the payment is made before defence, and if the money is paid in with the dcfence he shall elect before the expiration of the time for replying, and before replying. C.R. 424.

Where the plaintiff does not elect, within the time provided hy this *Rule*, to accept ths money, the defendant may contend thnt it is more than the plaintiff is entitled to recover: see *Denison* v. *Woods*, in note to *Rule* 307, p. 774.

Rule 314.

A plaintiff, who by mistake had accepted money paid in with a defence, was allowed to withdraw his acceptance: *Chevalier* v. *Ross*, 3 O. L. R. 219; and see *Emery* v. *Webster*, 9 Ex. 242; *Rule* 314, *infra*.

Where the plaintiff by mistake claimed less than was due to him, and the amount claimed was paid into Court, and taken out in satisfaction before the mistake was discovered, it was held that the plaintiff could not bring another action for the true amount due, less the amount so recovered in the former action: *Sanders* v. *Hamilton*, 96 L. T. 679.

If the plaintiff elects not to accept the money paid in, and fails at the trial to recover judgment for as much as was paid in, the defendant paying it in is entitled to the surplus: *Veale* v. *Reid*, 117 L. T. Jour. 292; *Gillmor* v. *Cowan*, cited in *Davis* v. *National Ass. Co.*, 16 P. R. p. 119; *Maguire* v. *Ferguson*, 18 P. R. 201. The money in Court is subject to the order of the Court, and must be dealt with as the rights of the parties ultimately appear: *Ib.*; *Rule* 316.

Where the money paid in is less than the amount claimed, and an amount within the jurisdiction of a County Court, the plaintiff accepting it is, nevertheless, entitled to costs on the Supreme Court scale: *Stephens* v. *Toronto Ry.*, 13 O. L. R. 107, 363.

Where the plaintiff elects not to take the money out of Court, and proceeds with the action, and recovers less than the amount paid in, he is *primâ facie* entitled to payment of the amount recovered out of the moneys in Court: *Rule* 316 (2); but it is open to the defendant to show, if he can, that his claim against the plaintiff for costs will exceed the amount recovered by the plaintiff, and so stay payment to the plaintiff until the true balance is ascertained: *Powell* v. *Vickers*, 1907, 1 K. B. 71; 95 L. T. 774.

Taxing costs.

314. Where the defendant does not allege tender before action and the plaintiff takes the money in satisfaction of all the causes of action, he may tax his costs of the action, and issue execution therefor, unless the defendant pays them within forty-eight hours after taxation. C.R. 425. *Amended.*

Whether this *Rule* gives the plaintiff an absolute right to the costs according to the scale of the Court in which the action is brought, irrespective of the amount brought into Court and accepted in satisfaction of the claim, and without any set-off of costs by the defendant, was the subject of a conflict of opinion; in the affirmative: see *Babcock* v. *Standish*, 19 P. R. 195 (a decision of a Divisional Court), followed by Britton, J., in *McKelvey* v. *Chilman*, 5 O. L. R. 263; and in the negative: see *Chick* v. *Toronto Electric Light Co.*, 12 P. R. 58, (Rose, J.), not referred to in *Babcock* v. *Standish*, and see *Rule* 649; and *Soloman* v. *Mulliner*, 1901, 1 K. B. 76. The point may now be considered to be settled affirmatively by the decision of the Court of Appeal: *Stephens* v. *Toronto Ry.*, 13 O. L. R. 363, approving *Babcock* v. *Standish*, *supra*.

Where money is paid into Court in satisfaction of one of several claims, with a denial of liability, and the plaintiff proceeds with the action, but ultimately accepts the money paid in in satisfaction of all claims sued for, he is entitled to the costs of the claim in respect

of which the money was paid into Court up to the time of payment, but must pay the defendant's costs of all other claims, and of all subsequent proceedings after payment in: *Smith* v. *Northleach, etc.*, 1902, 1 Ch. 197; and where in such a case the plaintiff proceeds to trial, and succeeds on some issues, he is entitled to the costs of those issues, though the amount recovered be less than the amount paid in: *Wagstaffe* v. *Bentley*, 1902, 1 K. B. 124; 85 L. T. 744; and see *Ridout* v. *Green*, 87 L. T. 679. Rule 314.

In an action for an injunction to restrain a nuisance, and for damages, the defendants denied liability, and paid money into Court in satisfaction of the claim for damages. The plaintiff accepting the money in satisfaction of the claim for damages, was held not entitled to tax his costs, as the entire cause of action was not satisfied: *Moon* v. *Dickinson*, 38 W. R. 278; 63 L. T. 371; *Coote* v. *Ford*, 1899, 2 Ch. 93; 80 L. T. 697; *Frost* v. *Leslie*, 27 O. L. R. 450.

It has been held that though only sixpence is paid into Court the plaintiff, if he takes it in satisfaction, is entitled to his costs: *McSheffrey* v. *Lonagan*, 20 L. R. Ir. 528; and on the scale of the Court in which the action is brought: *Stephens* v. *Toronto Ry.*, 13 O. L. R. 363; and if he accepts the money within the time allowed, he cannot be made liable for defendant's costs incurred between the dates of payment in and acceptance: *Lomer* v. *Waters*, 1898, 2 Q. B. 326.

See *Suckling* v. *Gobb*, in note to *Rule* 321, p. 789.

If the plaintiff does not accept the money in satisfaction, he may become liable to pay the whole costs: see *Bank of London* v. *Guarantee Co.*, 12 P. R. 499.

The costs may be taxed under this *Rule* without any judgment or order, unless it becomes necessary to enforce payment, in which case the plaintiff may sign judgment after the expiration of 48 hours from the granting of the certificate of taxation.

But if the plaintiff accepts the money in full satisfaction of his claim, he will be treated as having discontinued the action as to the causes to which the money does not relate, (though he should properly give notice of withdrawal of them), and may tax his costs of so much of the action as relates to the causes for which the money is paid: *McIlwraith* v. *Green*, 14 Q. B. D. 766; 52 L. T. 81; but it would seem that defendant would be entitled to the costs of the causes abandoned by plaintiff, as upon a discontinuance: *Smith* v. *Northleach, etc.*, 1902, 1 Ch. 197.

The plaintiff is not entitled to costs under this *Rule* where the money is paid in with a plea of payment and the plaintiff accepts it; but he must pay the defendant's costs: see *Griffiths* v. *Ystrodyfodwg*, 24 Q. B. D. 307: *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127.

If the plaintiff does not elect within the time given by *Rule* 313, probably his right to do so, and to tax costs, is gone: see *Spincer* v. *Watts*, 23 Q. B. D. 350; 67 L. T. 711. It was, however, held under original J. A. Rule 218, which gave the plaintiff 4 days after receipt of notice of payment within which to accept the money in satisfaction, that he might still apply under former C. R. Rule 1130 (now Jud. Act, s. 74), for costs: *Greaves* v. *Fleming*, 4 Q. B. D. 226; see also *Broadhurst* v. *Willey*, W. N. 1876, 21; but *quære*, whether that will be so under the present *Rules*, by which the plaintiff has no right to the money by the mere payment of it into Court, but only in the event of

Rules 315, 316.

his making an election under *Rule* 313; and see *Babcock* v. *Standish*, 19 P. R. 195.

For form of judgment for costs: see Form No. 100; H. & L. Forms, No. 859.

If the plaintiff recovers less than the amount paid in, the defendant is entitled to the excess: *Gillmor* v. *Cowan*, cited in *Davis* v. *National Ass.*, 16 P. R. 119; *Rule* 316 (2); and where the plaintiff recovered only 22c. more than had been paid in in satisfaction, he was held entitled to full costs of the action: *Henderson* v. *Bank of Hamilton*, 25 Ont. 641.

Where the plaintiff's solicitor, by mistake, accepted money paid in, and signed judgment for costs, the judgment, on application of the plaintiff, was set aside, upon payment of costs, and the plaintiff was allowed to proceed with his action: *Emery* v. *Webster*, 9 Ex. 242; *Chevalier* v. *Ross*, 3 O. L. R. 219.

Costs in case tender accepted.

315. Where the defendant alleges tender before action and the plaintiff elects to take the money in satisfaction unless otherwise ordered the defendant may tax his costs and the amount allowed him shall be paid to him out of the money in Court and the balance shall be paid the plaintiff. *New.*

This *Rule* in effect affirms the conclusion arrived at in *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127.

Payment in with denial of liability.

316.—(1) Where money is paid into Court and liability is not admitted and the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, the money shall remain in Court and be subject to the order, and shall not be paid out of Court except in pursuance of an order or upon the consent of both parties.

Application of money in case of recovery by plaintiff.

(2) If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into Court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall be repaid to the defendant, but if the defendant succeeds in respect of such claim or cause of action, the whole amount shall be repaid to him. *New.* *See* English Rule 260*c*.

Where the Plaintiff Recovers Less than the Amount Paid into Court.—Where by reason of the plaintiff recovering less than is paid into Court, he is ordered to pay costs to the defendant, *semble*, the

defsndant is entitled to an order for payment of such costs out of the monsys in Court, payahle to ths plaintiff, and payment to ths plaintiff may be staysd, until such costs have heen taxed: see *Powell* v. *Vickers*, 1907, 1 K. B. 71; 95 L. T. 774. Rules 317-320.

317. A plaintiff may, in answer to a counter-claim, pay money into Court in satisfaction thereof, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant. C.R. 427. When plaintiff may pay in.

Sams as Eng. (1883), R. 263; and see *Hutchinson* v. *Barker*, 71 L. T. 624.

318. A defendant paying money into Court shall in his præcipe state the rule under which he is paying it in. *New.* Defendant paying in to state Rule.

319. Money accepted by the plaintiff in satisfaction may be paid out to him without order, upon the pleadings and notice of acceptance being transmitted to the Accountant, who shall return the same to the proper office after having made the necessary entries in his books. C.R. 423. Acceptance of payment by plaintiff.

Although this *Rule* dispenses with the necessity of an order for psyment out; nevertheless the plaintiff must satisfy the Accountant that he has complied with *Rule* 312.

(iii) *Consolidation of Actions.*

320. Actions may be consolidated by order of the Court. C.R. 435. Consolidation of actions.

See Eng. (1883), R. 656.

Consolidation of actions may take place in several ways, and the term is used in different senses: see *Kuula* v. *Moose Mountain*, 26 O. L. R. 335-8.

(1) Actions by same Plaintiff against same Defendant.—If a plaintiff hrings two actions against ths sams defendant, for matters which might properly hs combined in ons action, and ths douhls proceeding is shswn to he vexatious, a Court of Law, in the exercise of its ordinary power to prevent any ahuse of its own process, might consolidate the actions; that is to say, stay proceedings aosolutely in one action, and require the plaintiff to include the whole of his claims in ths other; and this has been done with costs against the plaintiff: see *Cecil* v. *Brigges*, 2 T. R. 639; *Anon.*, 1 Chitty's Rep. 709 (n); *Beardsall* v. *Cheetham*, E. B. & E. 243; 2 Chitty's Archhold. 13th ed., p. 1085 *et seq.*: Dan. Pr., 6th ed., 1888: Dan. Forms, 3rd ed., 816; Sston, 5th ed., 700; and msy hs dons under this *Rule* upon the application of either party: *Martin* v. *Martin*, 1897, 1 Q. B., 429; 76 L. T. 44. Several actions by the same plaintiff against same defendant.

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Where an action is commenced that covers the same ground as one already existing, together with some further relief, it will be stayed as to the first part: *Morton* v. *Quick*, 26 W. R. 441; and see *Hamilton* v. *Hamilton Street Ry. Co.*, 5 O. W. R. 151.

An application to consolidate two actions by the same plaintiff, one for malicious prosecution, and the other for salary as a manager, was dismissed by Quain, J., with costs: 1 Chart. Ch. Ca. 127; 60 L. T. Jour. 86.

Where plaintiffs brought an action for the same cause of action as was set up by them in a counter-claim in an action in another Division, it was held that, though the case was not strictly within this *Rule*, because the plaintiffs had not brought two actions, yet there is inherent jurisdiction in the Court to prevent undue use of its process, and the plaintiffs' action was stayed till their counter-claim should be disposed of: *Taylor* v. *Bradford*, 9 P. R. 350.

Where the plaintiffs in a prior pending action, claimed $200,000, balance due upon a construction contract, and in another action, begun some time afterwards, claimed $3,000 for goods sold and delivered, and the cause of action arose before the commencement of the first action, it was held that the two claims should have been made in one action, and it was a proper exercise of discretion to refuse judgment, and leave the question till the determination of the first action, in which a large set-off was claimed, since, in the result of both actions, nothing might be due to the plaintiffs: *Conmee* v. *Can. Pac. Ry.*, No. 2, 11 P. R. 222.

Several actions by same plaintiff against different defendants.

(2) Actions by same Plaintiff against different Defendants.—But the term consolidation is more frequently used in a different sense. Where actions are brought by the same plaintiff against different defendants, but the questions in dispute in all are substantially the same, the Court, if the defendants apply, will stay proceedings in all the actions except one, until that one action has been determined, upon the terms that the various defendants agree to be bound by the event of the action which proceeds. This practice has been applied to the case of actions against several underwriters upon policies of insurance: *Hollingsworth* v. *Broderick*, 4 A. & E. 646, (see the form of order in that case, Chitty Forms, 9th ed., p. 788); actions against guarantors of separate parts of a debt by separate instruments: *Sharp* v. *Lethbridge*, 4 M. & G. 37; or against joint and several obligors of a bond conditioned for the good behaviour of another person: *Anderson* v. *Towgood*, 1 Q. B. 245; *Essex* v. *Wright*, 13 P. R. 474; or against principal and sureties on a replevin bond: *Bartlett* v. *Bartlett*, 4 Scott, N. R. 779; or against the several members liable upon a mutual insurance policy: *Lewis* v. *Barkes*, 4 C. B. N. S. 330; to several actions against different defendants for trespass in refusing to pay tolls, where the main issue, as to the right to tolls was common to all the actions: *Vaughan Road Co.* v *Fisher*, 14 P. R. 340; and to several actions in respect to the publishing of the same libel in different newspapers: *Colledge* v. *Pike*, 56 L. T. 124; in which last case the plaintiff was given liberty, if dissatisfied with the verdict, to select another action for trial.

In *Eddison* v. *Dalziel*, 9 T. L. R. 334, three such actions for libel by the same plaintiff were consolidated, though two defendants pleaded justification, and the third an apology, and payment into Court. So

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where a number of actions against different defendants may be reduced to classes, those of each class raising the same questions, the Court may allow one action of each class to proceed, and stay the rest: *Syers* v. *Pickersgill*, 27 L. J. Ex. 5.

This course of staying all but one of several actions, will only be allowed where the questions in dispute are substantially the same. Where questions, raised by defendants, of fraud and misrepresentation would necessarily be different, and depend on different evidence, a stay was refused; *Niagara Grape Co.* v. *Nelles*, 13 P. R. 179, 258; and see *Williams* v. *Raleigh*, 14 P. R. 50.

Libel actions may be consolidated.

Under *The Libel and Slander Act* (R. S. O. c. 71), s. 6, actions for the same libel may be consolidated so that they shall be tried together. If the plaintiff recovers damages, the same are to be assessed in one sum, and apportioned by the jury against the different defendants: *Ib.*, s. 6 (2). See Imp. Act, 51-2 Vict. c. 64.

Such a motion to consolidate should not be made until statements of claim have been delivered from which it may be seen whether the actions are for the same libel: *Crossley* v. *Ferguson*, 33 C. L. J. 461; but it has been made before the delivery of the defences: *Stone* v. *Press Assoc.*, 1897, 2 Q. B. 159; 77 L. T. 41.

Effect of staying actions at the defendants' instance.

The order for consolidation, when made on the application of the defendant, does not require the plaintiff's consent: *Hollingsworth* v. *Broderick*, 4 A. & E. 646. It binds the defendants in the actions which are stayed to abide the event of the one which proceeds; but it has been held not to bind the plaintiff to do so; and that, if the result of the first action is against him, he may proceed with another: *Doyle* v. *Anderson*, 1 A. & E. 635; *Doyle* v *Douglas*, 4 B. & Ad. 544. But see *Amos* v. *Chadwick*, 9 Ch. D. 459; and *Bennett* v. *Lord Bury*, 5 C. P. D. 339. A consolidation order may be obtained at any time after each action has become a *lis pendens*, *i.e.*, when the writ has been served: *The Helenslea*, 30 W. R. 616, see *Hollingsworth* v. *Broderick*, *supra*; *Ray* v. *Sherwood*, 1 Curt. 173, 193; 1 Moo. P. C. 353; but in the case of several actions for the same libel, see *Crossley* v. *Ferguson*, *supra*.

Re-opening consolidation.

The Court may re-open the consolidation order, and allow a second action to be defended, notwithstanding that the plaintiff has succeeded in the first action. But it will require a very strong case to induce it to do so. Probably a case must be shown at least as strong as would be required to procure a new trial: see *Foster* v. *Alvez*, 3 Bing. N. C. 896; *Cohen* v. *Bulkley*, 5 Taunt. 165.

Several actions by the same plaintiff against different defendants cannot be consolidated without the consent of defendants, on the plaintiff's application unless the issues to be tried are precisely similar: *Lee* v. *Arthur*, 100 L. T. 61.

Test action.

(3) Actions by Several Plaintiffs against the same Defendant.—Although consolidation, properly so called, is obtained at the instance of several defendants, where several defendants are sued by the same plaintiffs, a somewhat analogous proceeding has been adopted in the converse case, of several plaintiffs bringing several actions against the same defendant, to recover similar relief in reference to the same transactions. Malins, V.C., at the instance of the plaintiffs, enlarged the time for taking any further steps in all the actions but one, until that one should be tried: *Amos* v. *Chadwick*, 4 Ch. D.

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869; and his judgment was affirmed on appeal: 9 Ch. D. 459; see also *Hodson* v. *Richardson*, 3 Burr. 1478. A like course was taken in *Bennett* v. *Lord Bury*, 5 C. P. D. 339, where thirty-eight actions had been brought, and, on the plaintiff's application, the proceedings in thirty-seven were stayed until the trial of the thirty-eighth as a test action, though it was said that the incidents would or might vary in each case, and there would be differences of proof in each, but the gist of the charge was the same in all. See also *Fulmer* v. *Windsor*, 5 O. W. R. 589, 591, 772; *Campbell* v. *Sovereign Bank*, 3 O. W. N. 334.

Where issues in actions are not the same.

Where the issues in several actions are not the same, there cannot be a consolidation of them. Where, therefore, several actions had been brought against a municipal corporation for damages arising from the negligent construction of drains; consolidation was refused, as each plaintiff would have to prove that the negligence resulted in injury to his own particular land: *Williams* v. *Raleigh*, 14 P. R. 50; and it was doubted whether a common defendant could obtain a consolidation order against the will of the several plaintiffs: *Ib.*; but where husband and wife brought separate actions against the same defendant for damages arising out of the same act of alleged negligence, they were ordered to be consolidated: *Noyes* v. *Young*, 16 P. R. 254.

Consolidation of four actions by different plaintiffs against the same defendants for damages caused by the spread of fire, negligently set out on the defendants' land was refused: *Kuulo* v. *Moose Mountain*, 26 O. L. R. 332.

Judgment in test action, how far binding in other actions.

Where an action is ordered to be tried and the others are directed to abide the result, the judgment in the test action will not bind the parties in the other actions, unless the action has been tried out on its merits, upon evidence: *Amos* v. *Chadwick*, 9 Ch. D. 459. Where therefore, the plaintiffs in the test action, when it came on for trial, declined to proceed, and judgment was then given for defendants, it was held that, notwithstanding the *Rule* corresponding to former Ont. C. R. 779, which provided that a judgment of non-suit should unless otherwise directed, have the same effect as a judgment upon the merits, the Judge had jurisdiction to substitute another of the actions as a test action: *Ib.* In the absence of agreement, the plaintiff, in an action thus constituted a test action, has no right to be indemnified against costs by the other plaintiffs: *Ib.*

Where on a test action coming on for trial, the plaintiff was not prepared to proceed, and applied for a postponement, to which, under the circumstances so far as his own interest was concerned, he was not entitled; it was held that the Court could not regard the rights of the plaintiffs in the other actions, and must dismiss the action with costs: *Robinson* v. *Chadwick*, 7 Ch. D. 878. See notes to *Rules* 253 and 321.

A judgment on the merits in the test action will not preclude an appeal in any of the other actions, unless there is an agreement that the decision in one is to be final in all: *Coutts* v. *Dodds*, 16 P. R. 273.

Cross actions.

(4) Cross Actions.—A fourth kind of consolidation is where there are cross actions between the same parties, arising out of the same matter, and the Court stays one, directing the plaintiff in it to bring forward his case by way of defence, set-off or counter-claim in the

other action. In such case the party on whom the onus of proof lies is given the conduct of the proceedings, by being directed to proceed with his action: *Thomson* v. *S. E. Ry. Co.*, 9 Q. B. D. 320; see also *The Never Despair*, 9 P. D. 34; *Girvin* v. *Burke*, 13 P. R. 216. Rule 320.

An action for breach of an agreement and fraud, and a cross action for specific performance, were ordered to be consolidated in the latter action: *Holmes* v. *Hervey*, 25 W. R. 80.

Where the plaintiff brought an action for an account, and the defendant brought another action for a balance due on cross accounts, the latter action was stayed on the defendant's application: *Bethell* v. *United Stock Ex.*, W. N. 1866, 10.

Separate Actions between Different Parties.—In *Smith* v. *Whichcord*, 24 W. R. 900; separate actions between different parties relating to the same subject were consolidated; but in *Ryon* v. *Comeron*, 16 P. R. 235, and *Kauls* v. *Moose Mountain*, 26 O. L. R. 332, an application to consolidate was refused. Separate actions between different parties.

Though consolidation is refused, a trial of the actions at the same time may sometimes be had, where that course will be convenient, and a saving of expense: *Ryon* v. *Comeron*, *supra*.

Conduct of Consolidated Actions. — Where two actions commenced on the same day were consolidated, and a difference of opinion arose between the plaintiffs as to the conduct of the action, the plaintiffs who took the first steps towards severance were made defendants, and the conduct of the cause was given to the other plaintiffs, though their claim was the smaller in amount: *Holden* v. *Silkstone & Dodsworth Coal & Iron Co.*, 30 W. R. 98. Conduct of consolidated action.

There is no fixed rule that the action last begun is to be stayed: *Thomson* v. *S. E. Ry. Co.*, 30 W. R. 537; 46 L. T. 513; *Miller* v. *Confederation Life, etc.*, 11 P. R. 241; Seton, 706.

The plaintiff in the first action will not be given the conduct if his action is defective: *Re McRoe*, 25 Ch. D. 16.

In determining who is to have the conduct of a consolidation of two cross actions, the main *indicia* to be regarded are, which action was first begun, upon whom does the chief burden of proof lie, and which action is the more comprehensive in its scope: *Girvin* v. *Burke*, 13 P. R. 216.

As to the conduct of several administration actions after their consolidation: see notes to *Rule* 610.

In Master's Office.—The Master in Ordinary has no jurisdiction to consolidate actions in which judgments are entered, and under which separate references are pending in his office: *Boswell* v. *Grant*, 11 P. R. 376. Consolidation in M. O.

Practice.—The application is to be made usually in Chambers: see *Smith* v. *Whichcord*, 24 W. R. 900; Chitty's Arch., 13th ed., 1087; but occasion for consolidation may arise in Court, *e.g.*, on motion for an injunction. Practice.

The Master in Chambers, or other officer having like jurisdiction, may dispose of such applications: see *Rules* 207 (4), 206, 209.

Rule 321.

An application to consolidate several actions for libel, against different newspapers, was granted before the delivery of defences: *Stone* v. *Press Assoc.*, 1897, 2 Q. B. 159; 77 L. T. 41; but *semble*, it should not be made until statements of claim are delivered: see *Crossley* v. *Ferguson*, and other cases, *supra*, p. 783.

Venue in consolidated action.

Place of Trial.—Where cross-actions with different places of trial named are consolidated, the place of trial will be ordered as the balance of convenience requires: *Gonce* v. *Leitch*, 11 P. R. 255.

(iv) *Discontinuance.*

Discontinuance.

321.—(1) The plaintiff may, at any time before receipt of the statement of defence of any defendant, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application) by notice in writing, filed and served, wholly discontinue his action against such defendant or withdraw any part thereof; and the defendant shall be entitled to the costs of the action, if wholly discontinued against him, or if not wholly discontinued to the costs occasioned by the part withdrawn.

(2) A plaintiff may discontinue as to one or more of several defendants.

(3) Such costs may be taxed upon production of the notice served, and if not paid within four days from taxation the defendant may issue execution therefor.

(4) Such discontinuance or withdrawal shall not be a defence to any subsequent action.

(5) Except as provided by the preceding subsection a plaintiff shall not discontinue without leave of the Court, which may be granted upon such terms as to costs and as to any other action against all or any of the defendants, and otherwise as may be proper. C.R. 430.

See Eng. (1883), Rs. 290 and 292.

For form of judgment: see H. & L. Forms, No. 860.

Scope of present Rule.

Scope of Present Rule.—The present *Rule* besides allowing the plaintiff, as formerly, to discontinue the whole action, authorizes the withdrawal of a part of his cause of complaint, or a discontinuance of the action against one or more of several defendants; formerly, at Law, the discontinuance could only be of the whole action: *Benton* v. *Polkinghorne*, 16 M. & W. 8. In Equity a partial discontinuance could be effected by amendment.

The power to withdraw part is, however, only where the part is severable from the rest of the claim: *Bank of London* v. *Guarantee Co.*, 12 P. R. 499.

Rule 321.

It was formerly held that a plaintiff could not serve notice of discontinuance against one of several defendants; and that his proper course was to obtain an order for leave to discontinue against such defendant: *Fox* v. *Hamilton Prov. & L. Soc.*, 9 C. L. T. 197. The last sentence of clause (1) of *Rule* 321, makes a change in this respect.

Notice when, and to whom to be given.

Where a co-defendant, as against whom interlocutory judgment had been signed, is sued jointly for a libel, he is entitled to notice of the motion, and an order obtained without notice to him is irregular: *Jennings* v. *Cripps*, Divl. Court (14 Nov., 1903).

The plaintiff cannot serve notice under this *Rule* on an infant until a guardian is appointed, and so escape the costs of the action: *Ruth* v. *Taylor*, 79 L. T. Jour. 211.

One of several plaintiffs.

One of several plaintiffs has no absolute right to withdraw from an action and to have his name struck out as a plaintiff: *Re Matthews, Oates* v. *Mooney*, 1905, 2 Ch. 460. In case of difference between co-plaintiffs, an order may be made striking out a non-concurring plaintiff, and making him a defendant, but only on the terms of giving security for defendants' costs: *Ib.*

On a motion to set aside a discontinuance as irregular, leave was granted to discontinue on proper terms on a cross-motion of the plaintiff: *Spiller* v. *Coghlan*, 20 L. R. Ir. 32.

An action ought to be disposed of against all the parties to it, therefore, the defendant has become an unnecessary party owing circumstances arising subsequent to the issue of the writ, the ac ... should be dismissed, or discontinued, as against him: *McLaughlin* v. *Stewart*, 1 O. L. R. 295.

Class action.

After judgment for the benefit of the plaintiff and other members of a class for which he sues, an action cannot ordinarily be dismissed even by consent of parties: see *Arnbery* v. *Thornton*, 6 P. R. 190; but even in such an action the plaintiff remains *dominus litis* after judgment, and where there are no other unsatisfied members of the class, he may, on his own claim being satisfied, consent to an order staying all further proceedings: *Re Alpha Co., Ward* v. *Alpha Co.*, 1903, 1 Ch. 203; 87 L. T. 646.

By analogy the *Rule* has been held applicable to a third party notice: *Bucknoll* v. *Mitchell*, 13 O. W. R. 44.

Stage of proceedings.

At any Time, etc.—The *Rule* permits a discontinuance before appearance: *Moore* v. *S. Counties, etc., Bank*, W. N. 1889, 150; *The Salybia*, 1910, P. 25; 101 L. T. 959; but see in the case of an infant, *Ruth* v. *Taylor*, *supra*. It does not permit the plaintiff to discontinue his action after it has been entered for trial: *Matthews* v. *Antrobus*, 49 L. J. Chy. 80; and he has no right to demand to be non-suited at the trial. If he wishes to discontinue his action, at that stage, leave must be obtained under clause (4), or *Rule* 251; see *Fox* v. *The Star*, 1898, 1 Q. B. 636; 78 L. T. 311; 1900, A. C. 19; 81 L. T. 562.

The words "before taking any other proceeding in the action" mean "before taking any proceeding with an intention of continuing the action," and do not include a step such as taking money out of Court, or bringing in money in satisfaction of a counter-claim: *Spincer* v. *Watts*, 23 Q. B. D. 350; and see *Musman* v. *Boref*, 40 W. R. 352; 66 L. T. 171.

Rule 821.

The discontinuance is only of right, either before defence put in, or, if defence is put in, before taking any step, other than an interlocutory application. Proceedings for discovery after defence was held to be a step, though the proceedings were not effectively prosecuted: see *Christie* v. *Woodhouse*, 4 O. W. N. 93.

When confession of defence proper.

If the statement of defence sets up matters arising after the issue of the writ, the truth of which the plaintiff cannot deny, and which afford a good answer in law, the plaintiff's proper course will be, not to discontinue, but to enter a confession of the defence under *Rule* 164.

Form of notice.

Form.—For form of discontinuance: see Form No. 30; H. & L. Forms, No. 562.

Under the English Rule (which does not contain the words as to the notice being filed and served), it was held that a written notice by the plaintiff's solicitor as follows: "We are instructed to proceed no further in the action," was sufficient notice: *The Pommerania*, 4 P. D. 195; but a letter saying "We shall discontinue this action, and take out of Court the amount paid in, and tax our costs. We will send formal notice to-morrow," is not a notice of discontinuance within the Eng. R. and *a fortiori* not within this *Rule*: *Moon* v. *Dickinson*, 38 W. R. 278; 63 L. T. 371; see also *Brooking* v. *Maudslay* 55 L. T. 343.

It is not necessary for the plaintiff to ascertain the amount of defendant's costs and pay them in order to make the notice of discontinuance effectual: *Barry* v. *Hartley*, 15 P. R. 376.

Effect of discontinuance.

Effect of Discontinuance.—The *Rule* is express (clause 4), that by a discontinuance there is no *res judicata;* see also *The Kronprinz*, 12 App. Cas. 256 (Where the same action was revived); *United Telephone Co.* v. *Tasker*, 59 L. T. 852.

A discontinuance filed by a plaintiff has been held not to have the effect of discontinuing a counter-claim set up in the action: *McGowan* v. *Middleton*, 11 Q. B. D. 464 (overruling *Vavasseur* v. *Krupp*, 15 Ch. D. 474); but a counter-claim which the defendant could only assert by virtue of the plaintiff's submitting to the jurisdiction and suing the defendant, will be put an end to by the plaintiff's discontinuance: *Dominion Burglary Guarantee Co.* v. *Wood*, 3 O. L. R. 365; and a discontinuance in a vendor's action for specific performance puts an end to defendant's right, if any, to move for judgment for specific performance on admissions: *Lye* v. *McConnell*, 5 O. W. R. 326; and after the action has been discontinued a counter-claim cannot be filed: *The Salybia*, 1910, P. 25; 101 L. T. 959.

An appeal by the plaintiff will be thereby discontinued: *Conybeare* v. *Lewis*, 13 Ch. D. 469. Where, however, a plaintiff, who had given an undertaking as to damages, discontinued his action, it was held that the Court would nevertheless direct a reference as to damages: *Newcomen* v. *Coulson*, 7 Ch. D. 764.

The discontinuance of the action is no bar to a motion by a plaintiff, whose name has been used without authority, to have his name struck out of the proceedings; and to compel the solicitor acting without authority to pay the costs: *Gold Reefs of W. Australia* v. *Dawson*, 1897, 1 Ch. 115.

Costs.

Costs.—The defendant has an absolute right to all costs of the action, and they are not in the discretion of the Judge under the Jud.

Act, s. 74; *see The St. Olaf*, 2 P. D. 113; *The J. H. Henkes*, 12 P. D. 106. The costs will includs costs made costs in the cause on an application on which the plaintiff succeeded; *The St. Olaf*, *supra*. Rule 321.

The defendant is entitled to costs though the plaintiff discontinues before appearance: *Moore* v. *S. Counties, etc., Bank*, W. N. 1889, 156.

Costs of work in preparing, briefing, or otherwise relating to affidavits, etc., properly and not prematurely done, down to the time of discontinuance, are taxable: *Harrison* v. *Leutner*, 15 Ch. D. 559.

It was formerly held that as this *Rule* only applies to an "action" it could not be made use of in an interpleader issue: *Hogaboom* v. *Gillies*, 15 P. R. 402. See now Jud. Act, s. 2 (*a*); and *Bucknall* v. *Mitchell*, *supra*, p. 787.

A reasonable time will be given to defendant within which to apply for an appointment to tax his costs, before an appointment will be granted to the plaintiff to tax interlocutory costs to which he may be entitled: *Barry* v. *Hartley*, 15 P. R. 876.

Where a plaintiff gives notice of discontinuance, and the defendant's costs are taxed, judgment must be signed therefor, in case of non-payment, before execution to enforce payment can be issued: see clause (2). The English practice is different: see *Bolton* v. *Bolton*, 3 Ch. D. 276.

An order of a Master which stayed an action on payment of costs, was varied by substituting the word "discontinued" for "stayed," to prevent the possibility of the action being again proceeded with: *Anon*, W. N. 1876, 40; 2 Charl. Ch. Ca. 38.

Where, on a motion under the Eng. Rule corresponding to former C. R. 503, the defendant was ordered to pay money into Court as to part of the claim, and was given leave to defend as to the remainder, and the plaintiff afterwards discontinued, the costs were held to be not governed by this *Rule*, but were in the discretion of the Court under Jud. Act, s. 74, and plaintiff was given costs up to the time of payment into Court: *Suckling* v. *Gabb*, 36 W. R. 175.

The rule whereby the plaintiff in a creditor's administration action is precluded from discontinuing his action after judgment does not apply to a debenture holder's action, the reason being that in a creditor's action the Court, by directing in the judgment that the estate shall be applied in due course of administration, takes upon itself the duty of administering the assets, whereas no such direction is contained in the usual judgment in a debenture holder's action: *Re Alpha Co.*, 1903, 1 Ch. 203; and see *Re Ritz & New Hamburg*, 4 O. L. R. 639, *supra*, p. 440.

Discontinuance by Leave.—In a test action, the plaintiff asked for a postponement of the trial, or that an order for discontinuance might be made; the Court held it could not regard the rights of the plaintiffs in the other actions, but must act as if the plaintiff had not appeared at the trial, and dismissed the action: *Robinson* v. *Chadwick*, 7 Ch. D. 878. Discontinuance by leave.

Where a case had been referred to arbitration, and the arbitrator found in favour of defendant as to all but a small part, leave to discontinue was refused: *Stahlschmidt* v. *Walford*, 4 Q. B. D. 217; see also *Matthews* v. *Antrobus*, 40 L. J. Chy. 80.

Leave to discontinue is only granted on payment of the costs: *The J. H. Henkes*, 12 P. D. 106. Costs on discontinuance.

Rules 322, 323.

On a motion for leave to discontinue, tha Court haa no jurisdiction to give the plaintiff any costs where the defence, if undisputed, or if it were eatahliahed, would diaantitle tha plaintiff to maintain the action: *Lambton* v. *Porkinson*, 35 W. R. 545; aee also *Dicks* v. *Yates*, 18 Ch. D. 76.

Tha Court may impoae terma that no other action shnll be brought for tha same causa, as a condition of granting leave to discontinue: *Schlund* v. *Foster*, 44 C. L. J. 116.

Where this is done, the order will in effect constitute a bar to any further claim in respect to the matter in question by the plaintiff in any collatoral proceedings: see *Re Woodhouse*, 5 O. W. N. 148.

It has been held that, on the application of a plaintiff admitting the defence a Judge, under this *Rule*, haa jurisdiction to order a atay of all proceedinga, and to dispose of tha costs: *Musmon* v. *Boret*, 66 L. T. 171; 40 W. R. 352; *Armstrong* v. *Armstrong*, 9 O. L. R. 14.

Whare the action ia against two defendanta jointly, each defendant ia entitled to notice of a motion to diacontinua against either of them even though interlocutory judgment may have heen signed against one of them: *Jennings* v. *Cripps* (Divisional Court, 14 Nov., 1904).

Withdrawal of defence.

322. A defendant may withdraw his defence or any part thereof, by written notiee filed and served. C.R. 431.

See Eng. (1883) R. 290.

One of the defendants, in an action for the recovery of land, was nllowed to withdraw hia defence after the action had been in the paper for trial, hut had heen postponed till another action relating to tha same property should be ready for trial, upon tha terms of giving to the plaintiffs all the relief to which they could be entitled at the trial, and paying the coata occaaioned by the defence, and the coata of a summons for leave to withdraw: *Reol & Personal Advance Co.* v. *McCorthy*, 14 Ch. D. 188. The costa only which were occasioned exclusively by the defence were allowed: *Ib.*

A defence put in fraudulently, and without authority, was allowed to be withdrnwn: *Willioms* v. *Preston*, 20 Ch. D. 672.

As to withdrawal of defence of infanta, see *Fitzwoter* v. *Waterhouse*, 52 L. J. Chy. 83; *Gardner* v. *Topling*, 33 W. R. 473.

(v) *Dismissal of Actions for want of Prosecution.*

On failure to deliver statement of claim.

323. If the plaintiff, being bound to deliver a statement of elaim, does not deliver the same within the time allowed for that purpose, at the expiration of such time the action may be dismissed for want of prosecution. C.R. 432.

See the Eng. (1883), R. 294.

Dismissal for want of prosecution.

Rule 110 regulatea the time within which the plaintiff is bound to delivar his statement of claim, viz., one month after appearance, or, where there is more than one defendant, within a month from the last appearance, or from the time the last appearance should have been entered.

"Tha expiration of such time": sea *Armstrong* v. *Toronto, etc., Ry.*, 15 P. R. 449, in note to *Rules* 110 and 176. **Rule 323.**

Tha application to dismiss for want of prosecution is made in Chambers. Tha application may be supported by an affidavit that a statement of claim has not been delivered, and a certificate of the officer, in whose office the action is, of tha state of the cause. **Dismissal for want of prosecution.**

Whera tha plaintiff made default in delivering his claim, and had become bankrupt, it was held that notice of motion to dismiss under this *Rule* must be served upon the trustee in bankruptcy: *Wright* v. *Swindon Ry. Co.*, 4 Ch. D. 164.

And whera a plaintiff, suing on behalf of himself and all other creditors of the defendant, makes an assignment for tha benefit of creditors wharehy his interest in the subject matter of the action vests in the assignee, tha defendant may move to dismiss for want of prosecution in default of the assignee obtaining an order under *Rule* 301 to continue the proceedings: *Wolff* v. *Von Boolen*, 94 L. T. 502.

In *Higginbottom* v. *Aynsley*, 3 Ch. D. 288, on a motion to dismiss under this *Rule*, Hall V.C., gave a week's time to take further proceedings, observing that each case must depend upon its own merits. The plaintiff was ordered to pay tha costs of the motion. Probably tha plaintiff will in general ha given a short further time upon payment of costs.

Some only of tha defendants cannot have tha action dismissed, if, for sufficient reasons, proceedings against other defendants hava haen delayed, and the applicant ought probably to apply to tha plaintiff's solicitor for information as to the state of the cause against the other defendants: *Foley* v. *Lee*, 12 P. R. 371: sea *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

A defendant can only have the action dismissed as against himself: *Word* v. *Word*, 11 Beav. 159.

It has been said that if a plaintiff desires to avoid the cost of the hearing of the motion he should tander to tha defendant tha costs of the notice, and giva the usual undertaking to go on: *Evelyn* v. *Evelyn*, 13 Ch. D. 138; *Freason* v. *Loe*, 26 W. R. 138; hut this is not the practice in Ontario, even whera the motion to dismiss is merely for a default under this *Rule*: see note to Rule 325 (1). Tha filing of a statement of claim is no answer to a motion to dismiss: *Napanee Tamworth, etc., Ry. Co.* v. *McDonell*, 10 P. R. 525, if the time for filing it had expired when the notice of motion was given: see *Rule* 110. **Undertaking to proceed.**

Where, before statement of claim, an action was stayed until the plaintiff should give security for costs, and the time for delivery of a statement of claim expired without security having been given, it was held that tha stay did not prevent the action from being dismissed under this *Rule*: *La Gronge* v. *McAndrew*, 4 Q. B. D. 210. **Default in giving security for costs.**

A plaintiff was allowed to file a statement of claim after nine years' delay, it being shewn that tha delay was owing to the defendant being financially worthless: *Finkle* v. *Lutz*, 14 P. R. 446. **Further time allowed.**

Where the plaintiff set up a compromise, as a ground for not proceeding, and tha defendant disputed it, the question of settlement was ordered to he tried: *Rees* v. *Corruthers*, 17 P. R. 51.

Rule 323.

Where, after the time for delivering a statement of claim had elapsed, an order had been made dismissing an action unless a statement of claim should be delivered within a week, and this was not done, it was held that the action was at an end, the order having neither been complied with, nor appealed against, and an order could not afterwards be made extending the time for delivering the statement: *Whistler* v. *Hancock*, 3 Q. B. D. 83; see also *King* v. *Davenport*, 4 Q. B. D. 402; and *Hollender* v. *Foulkes*, 16 P. R. 225. But if an order to dismiss is made, further time may be given for appealing against that order: *Burke* v. *Rooney*, 4 C. P. D. 226; *Carter* v. *Stubbs*, 6 Q. B. D. 116; or if the time has not expired, so that the action is not gone, there is jurisdiction to vary or rescind the order for dismissal on proper grounds: *Welply* v. *Buhl*, 3 Q. B. D. 80, 253; *Carter* v. *Stubbs*, *supra*. In *Newcombe* v. *McLuhan*, 11 P. R. 461, the above cases were considered, and it was held that after the action stood dismissed for failure to file a statement of claim by the time named, and judgment was signed dismissing the action, an order could be made under *Rule* 176 to vacate the judgment, and further extend the time for delivering the statement of claim. See also notes to *Rule* 176, and *Bank of Minnesota* v. *Page*, 14 Ont. App. 347.

Final order of dismissal.

Where an order is made dismissing an action unless a statement of claim be delivered within a time named, it has been the practice in Ontario to obtain a further order *ex parte* dismissing the action, showing that the previous order has not been complied with: see *Burns* v. *Chisholm*, 2 Chy. Ch. 88; but doubt has been cast upon the propriety, or at any rate the necessity, of that course: *Hollender* v. *Foulkes*, 16 P. R. 225.

It would seem that an order dismissing an action does not take effect until it is drawn up and served; and that the action under the English practice is not dead until that is done: *Metcalf* v. *British Tea Association*, 46 L. T. 31; but see *Script Phonography* v. *Gregg*, 59 L. J. Ch. 406.

As to the effect of a peremptory order requiring plaintiff to proceed within a named time, see *Holdcraft* v. *Lorandes*, 27 Sol. Jour. 296; *Falck* v. *Axthelm*, 24 Q. B. D. 174; *Cox* v. *Holmon*, 25 L. J. N. C. 115.

Where an order was made dismissing an action in the event of the plaintiff not complying with an undertaking, it was held that on default the order was absolute, and no further order was necessary: *Crown Corundum Co.* v. *Logan*, 3 O. L. R. 434 (but the Divisional Court, though affirming the order, declined to deal with that point): *Ib.*, and it would probably in such a case be safe to obtain a final order.

The plaintiff sued the indorser of a bill of exchange. The debt was afterwards paid by the acceptor, and the indorser applied to dismiss the action for want of prosecution. Lindley, J., said, "I shall certainly not let the action go on simply to determine who is to pay the coats. All further proceedings in the action to be stayed, the defendant to pay the costs of the writ": *Anon.*, W. N. 1876, 37; see also *Elliott* v. *Gardner*, 8 P. R. 409; *Wallace* v. *Ford*, 1 Chy. Ch. 282.

Though no motion to dismiss is made, the plaintiff cannot after the time limited by *Rule* 110 has expired regularly proceed without leave: see note to *Rule* 110; but the former practice requir-

ing a Term's notice to be given, where a year has elapsed without a proceeding having been taken, is not continued under *The Judicature Act*: *Beaver* v. *Boardman*, 9 P. R. 239. For a similar restriction upon moving for judgment: see *Rule* 357. Rules 324, 325.

In England a formal judgment for defendant's costs is signed upon the order for dismissal: Chitty Forms, 189; but in this Province the costs may be recovered under the Judge's order: see *Rule* 3 (*g*).

An action may also be dismissed for not duly proceeding to trial: see *Rule* 325 (1).

Effect of Dismissal.—The dismissal of an action for want of prosecution is not necessarily a bar to a subsequent action in respect of the same matter: *Re Orrell Colliery & Firebrick Co.*, 12 Ch. D. 681; *Fyrne* v. *Frere*, 2 Moll. 180; *Roberts* v. *Lucas*, 11 P. R. 3; though made on consent, unless the order is made upon a compromise of the cause of action: *Magnus* v. *National Bank of Scotland*, 36 W. R. 603; 58 L. T. 617; but the plaintiff is liable to be called on for security for costs in the second action, if the costs of the first are not paid: see *Rule* 373. Effect of dismissal for want of prosecution.

The Court may examine the pleadings, and evidence and proceedings at the trial of a former action, and the reports of the reasons given for the judgment, to ascertain what was decided. The dismissal of an action, on the ground that it was prematurely brought, is no bar to another action when time has removed the objection: *Barber* v. *McCuaig* (2), 81 Ont. 598.

Notwithstanding an action is dismissed the Court has still jurisdiction to determine to whom money paid into Court pending the proceedings, should be paid out: *Wright* v. *Mitchell*, 18 Ves. 292; *Wynne* v. *Jackson*, 2 Russ. 351; *Brown* v. *Feeney*, 1906, 1 K. B. 563; 94 L. T. 460.

See *Sutton* v. *Huggins*, W. N. 1875, 235.

324. In actions to be tried without a jury at Toronto, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 250, the action may be dismissed for want of prosecution. C.R. 434. Non-jury cases, York.

See notes to *Rule* 325 (1).

Default must be made both in setting down, and proceeding to trial under *Rule* 25' before a motion to dismiss can be made: *Toronto Type Foundry Co.* v. *Tuckett*, 17 P. R. 538.

325.—(1) In all other actions if the pleadings are closed six weeks before the commencement of any sittings for which the plaintiff might give notice of trial, and he does not give notice of trial therefor and enter the action for trial, the action may be dismissed for want of prosecution. C. R. 433. On failure to give notice of trial.

(2) Where there are separate sittings for the trial of actions with and without a jury the plaintiff shall not be

Rule 325.

considered in default for failure to enter a non-jury action at the jury sittings. *New.*

See Eng. (1883) R. 38.

Rule 324 deals with Toronto actions, this *Rule* applies to all other actions.

The six weeks is not a time limited for "doing any act" within *Rule* 176. It, therefore, cannot be abridged under that *Rule*, and the lapse of this period is an absolute condition precedent to the right of the defendant to give notice of motion to dismiss for want of prosecution: see *Saunders* v. *Pawley*, 14 Q. B. D. 234; unless the plaintiff, on asking an indulgence, has been put on terms.

A defendant need not wait until the time for the plaintiff to give notice of trial has expired under this *Rule*, but may, if he chooses, himself give notice of trial after the close of the pleadings: *Rule* 246, and may in that way have the action tried on the merits, instead of moving to dismiss it for want of prosecution.

There is a continuing duty on the plaintiff's part to give notice of trial until the case is tried; hence, although he has given a notice, but the trial, for some reason, is postponed, the defendant may move to dismiss under this *Rule* if the plaintiff makes default in giving notice of trial for any subsequent sittings for trial: *Chapman* v. *Smith*, 32 C. P. 555; *Hibernian Bank* v. *Hughes*, 10 L. R. Ir. 15.

Remanet.

Where a case is made a *remanet*, a further notice of trial must be given under *Rule* 252, except in non-jury actions to be tried in Toronto. A case was held to be a *remanet* where, by verbal order at the trial, it was "postponed till the Autumn Assizes"; *Donovan* v. *Boulibee*, 10 P. R. 52.

Where new trial ordered.

Where a new trial has been ordered, and the plaintiff does not give notice of trial pursuant to this *Rule*, a motion in Chambers to dismiss for want of prosecution is the course for defendant to pursue; or he may himself give notice of trial: *Diamond Harrow Co.* v. *Stone*, 7 O. W. R. 685; the Court which ordered the new trial has no jurisdiction in the matter: *Roberts* v. *French*, 14 R. 210; 72 L. T. 147; 43 W. R. 258.

For what sittings notice to be given.

Where a case is to be tried without a jury, and two Spring or Autumn Sittings are appointed at the place of trial, one for jury, and the other for non-jury cases, the plaintiff may give notice of trial for either Sittings, but is not in default under this *Rule* by reason of his not giving notice of trial for the earlier Sittings, if it is not the non-jury Sittings: *Leyburn* v. *Knoke*; *Leyburn* v. *Herbert*, 17 P. R. 410.

Pleadings not closed.

Where one of several defendants in an action has delivered his defence, and the time for the plaintiff to deliver his reply to such defence has expired, but the plaintiff has, without the knowledge of that defendant, agreed in writing with the other defendants to extend the time for delivering their defences, that defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being "closed"; and it was said that a defendant's proper course is to write to the plaintiff's solicitor, and inquire how the action stands as regards the other defendants: *Ambroise* v. *Evelyn*, 11 Ch. D. 759.

Terms imposed.

On a motion to dismiss, or that the plaintiff give security for costs, an order was made for the plaintiff to give security for costs, and

staying proceedings in the meantime: *Wilmott* v. *Freehold, etc.*, 29 Sol. Jour. 385; 33 W. R. 554; 52 L. T. 743; and see *Rule* 374. Rule 326.

Where an action was ordered to be dismissed unless notice of trial was given by a specified time, and by mistake of the solicitor's clerk notice was not given, a Judge refused to extend the time, and the Divisional Court refused to interfere: *Gilder* v. *Morrison*, 30 W. R. 915.

An order that the action be dismissed unless notice of trial be given, and action entered for trial within a certain time, was made in *Sievier* v. *Spearman*, 74 L. T. 132.

In cases where equitable relief is granted upon a condition which the plaintiff fails to comply with, the action may be dismissed, even after judgment: *Hayes* v. *Elmsley*, 30 C. L. J. 574.

On motion to dismiss, some excuse must be given for the default, the sufficiency of which will depend upon the circumstances of each case. Chy. Gen. Order 276 was held to be applicable to such motions: *Bucke* v. *Murray*, 9 P. R. 495; and though that Order is not expressly continued in the *Rules* the practice originated under it and acted upon under the original *Rules* will probably be held to apply. That Gen. Order was as follows: Motions to dismiss.

"276. Where a defendant is entitled to give notice to dismiss, it is not to be sufficient answer to the motion for the plaintiff, after being served with the notice, to take out and serve an order for amending the bill or to file a replication, or undertake to speed the cause: but it shall be necessary for the plaintiff to shew that he has prosecuted the suit with diligence, or that under all the circumstances the bill should not be dismissed." Chy. Order 276.

Though an undertaking to speed the cause is therefore not a sufficient answer to a motion to dismiss for want of prosecution (though it is otherwise in England: *Evelyn* v. *Evelyn*, 13 Ch. D. 138; *Freason* v. *Loe*, 26 W. R. 138), it is still discretionary with the Judge to say whether, under all the circumstances, the action should be dismissed: *Bucke* v. *Murray*, *supra*. See also *Nopanee, Tomworth, etc., Ry.* v. *McDonnell*, 10 P. R. 525; *Carter* v. *Barker*, 11 P. R. 1. Undertaking to speed not an answer to motion.

The former decisions under the Chancery practice will therefore probably serve as authorities as to what is a sufficient excuse: see cases in Robinson & Joseph's Digest, pp. 2922, *et seq.*; *Finnegan* v. *Keenan*, 7 P. R. 385; and as to what amounts to waiver of objection to the delay: *Cotton* v. *Rodgers*, 7 P. R. 423; see also *Miles* v. *Roe*, 20 C. L. J. 113; 10 P. R. 218.

Where the action was brought on a ground for which no action lay, the plaintiff being in default under this *Rule*, indulgence was refused, and the action dismissed: *Clarke* v. *Creighton*, 13 P R. 113.

326.—(1) When an action has been discontinued or dismissed for want of prosecution a defendant who has counter-claimed may, if he so elects, proceed with the trial of his counter-claim, and if he elects to proceed he shall give notice of his election within 10 days after the discontinuance or dismissal of the action, and the counter-claim shall then be liable to dismissal for want of prosecution for failure to proceed to trial. Counter-claim may be proceeded with after discontinuance, or dismissal of action.

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(2) In default of such election the counter-claim shall on the discontinuance or dismissal of the action be regarded as dismissed without costs. *New.*

This *Rule* only applies to a counter-claim filed before an action has been dismissed, or discontinued; in that case, notwithstanding the dismissal or discontinuance, the counter-claim may be prosecuted: it does not enable a defendant to file a counter-claim after an action has been dismissed, or discontinued: see *The Solybio*, 1910, P. 25; 101 L. T. 959.

(vi) *Examination for Discovery.*

Discovery.

An action for discovery may still be brought, where necessary, but it can rarely now be necessary. As an aid to an action in Ontario, it will seldom be necessary, as discovery may under the *Rules* be obtained in such action; an action for discovery in aid of proceedings in a foreign Court will not lie: *Dreyfus* v. *Peruvian Guano Co.*, 41 Ch. D. 151.

The following are instances of actions for discovery: *Ainsworth* v. *Starkie*, W. N. 1876, 8; *Reiner* v. *Salisbury*, 2 Ch. D. 378; *Orr* v. *Diaper*, 4 Ch. D. 92.

In an action by the Attorney-General at the suit of a relator, the Crown, represented by the Attorney-General, has the same right of discovery as a subject has in an ordinary action: *Atty.-Gen.* v. *Newcastle*, 1897, 2 Q. B. 384; but the Crown is not bound to give discovery: *Ib.* See note to *Rules* 5 (2), and 744.

In general, discovery is obtained by interlocutory proceedings, as ancillary to the main object of an action, but an action for discovery may, in a proper case, still be brought: *Orr* v. *Diaper*, 4 Ch. D. 92; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644. For the grounds of objection to such an action: see Maddock's Chy. Pr., 3rd ed., 268.

Discovery General Rules.

The methods prescribed by the *Rules* for obtaining discovery are: Firstly, by examination of the adverse party, and, in the case of a corporation, of their officers or servants: *Rules* 327-337; Secondly, by the production under oath for inspection of the documents in the possession of the adverse party: *Rules* 348-353; Thirdly, in actions to recover damages for personal injury, by an examination by a duly qualified medical practitioner of the injured person: Jud. Act, s. 70; and Fourthly, by the inspection by the party and his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute: *Rules* 266, 370.

The Judicature Act has made no alteration in the right of the parties to discovery by examination: see *Atty.-Gen.* v. *Gaskill*, 20 Ch. D. 519; also *Hunnings* v. *Williamson*, 10 Q. B. D. 459; see also *Jones* v. *Jones*, 22 Q. B. D. 425; *Martin* v. *Treacher*, 16 Q. B. D. 507; *Malcolm* v. *Race*, 16 P. R. 330; *Whiteley* v. *Borley*, 56 L. J. Q. B. 312; *Derbyshire* v. *Mayor of Derby*, 1896, 2 Q. B. 53, 297; 74 L. T. 747; 77 L. T. 107; *Johnston* v. *London and Paris Exchange*, 6 O. L. R. 49.

Where no right to discovery.

Therefore there is no right to examine a defendant for discovery in an action touching an alleged champertous agreement: *Welbourne* v. *Can. Pac. Ry. Co.*, 16 P. R. 343; nor in an action for criminal conversation with the plaintiff's wife: *Mulholland* v. *Miscner*, 17 P. R. 132; *Taylor* v. *Neil*, *Ib.* 134; *Fleury* v. *Campbell*, 18 P. R. 110; (though an examination was allowed on a claim for damages for alienation of the affections and loss of the society of the wife in *Taylor* v. *Neil*, *supra*);

but see *Leitis* v. *Lambert*, 24 Ont. App. p. 664, and *Fleury* v. *Campbell*, *supra*; nor in an action against a tenant for double rent, or double value, under *The Landlord and Tenant Act* (R. S. O. c. 155), ss. 57, 58: *Hobbs* v. *Hudson*, 25 Q. B. D. 232; 62 L. T. 764; 63 L. T. 215; nor in an action based on a forfeiture, or an alleged forfeiture: *Mexborough* v. *Whitwood, etc.*, 1897, 2 Q. B. 111; 76 L. T. 765. overruling *Seaward* v. *Dennington*, 44 W. R. 696; nor in an action under the Imp. Trada Mark Act, 1883 (46 & 47 Vict. c. 57), s. 58, which imposes the forfeiture of a sum not exceeding £50, to the ragistered proprietors for each offence, to be recovered as a simpla contract debt: *Saunders* v. *Wiel*, 1892, 2 Q. B. 18, 321; or generally in an action for penalties: *Hunnings* v. *Williamson*, ana other cases *supra*; *Rose* v. *Croden*, 3 O. L. R. 383; nor in an action for extra tolls under *Tha Timber Slide Companies Act* (R. S. O. c. 181), s. 34, which is an action for penalties: *Pickerel, etc., Co.* v. *Moore*, 17 P. R. 287; sea also *Pickerel R. Imp. Co.* v. *C. Beck, &c., Co.*, 5 O. W. R. 183; hut in an action to recover a penalty for violation of *The Alien Labour Act* (R. S. C. c. 97), *The Canada Evidence Act* (R. S. C. c. 145), s. 2, was haid (Rose, J., dissenting), to authorize examination for discovery: *Reg.* v. *Fox*, 18 P. R. 343. Neither can discovery ha had in an action to recover damages, on the ground that tha defendant had bean guilty of maintenance: *Hopkins* v. *Smith*, 1 O. L. R. 659. Sea also *Johnston* v. *London & Paris Exchange* in note to *Rule* 349. Rule 327.

But an action for the amount payahle under *The Copyright Act*, 1842, for each representation of a copyright musical puhlication wae held not to he an action for penalties (such amounts being fixed hy way of compensation to the plaintiff), and therefore discovery was allowed: *Adams* v. *Bailey*, 18 Q. B. D. 625. Discovery may also ha had in an action for an injunction, though the defendant may incur a liability for a penalty, in the event of disobedience of the injunction: *The Derbyshire County Council* v. *Derby*, 1897, A. C. 550; 74 L. T. 747; 77 L. T. 107.

Under *The Evidence Act* (R. S. O. c. 76), s. 7. no person is excused from answering queations which may tend to criminate him, or which may tand to establish his liability to a civil proceeding at tha instanca of the Crown, or of any person, and tha effect of this proviaion is to take away the priviiege which formerly existed on that ground: *Chambers* v. *Jaffray*, 12 O. L. R. 377.

Examination for discovery.

327.—(1) A party to an action whether plaintiff or defendant, may, without order, be orally examined before tho trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness except as hereinafter provided.

Where discovery from a corporation is sought.

(2) In the case of a Corporation any officer or servant of such Corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the Corporation, and may be compelled to attend and testify in the

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same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

(3) After the examination of an officer or servant of a Corporation a party shall not be at liberty to examine any other officer or servant without an order. C.R. 439 and 1250.

Since *Rule* 327 (2), a past officer (formerly examinable), cannot be examined: *Cantin* v. *The News*, 8 O. L. R. 531, and besides an "officer" (alone, formerly examinable), a "servant" may now be examined: see formerly *Morrison* v. *Grand Trunk Ry. Co.*, 5 O. L. R. 38.

Scope of Rule.—The right to examine under this *Rule* does not extend to actions in which there is no right to discovery: see note preceding *Rule* 327.

An action for recovery of land is not one of the exceptions. The defendant in such an action is liable to be examined by the plaintiff for discovery: *Lyell* v. *Kennedy*, 8 App. Cas. 217; 48 L. T. 585; reversing S. C., 20 Ch. D. 484; 46 L. T. 752; and see under the dissimilar Eng. Rule, *Phillips* v. *Phillips*, 40 L. T. 821; and the fact that a defendant pleads that he is a "purchaser for value without notice" affords no ground for resisting discovery: *Ind* v. *Emmerson*, 56 L. T. 778; although this was formerly a good plea to a bill for discovery. An examination for discovery may be had in an action for breach of promise of marriage: *McLaughlin* v. *Carroll*, 4 C. L. T. 498; and see *The Evidence Act* (R. S. O. c. 76), s. 11; and in an interpleader issue: *Canada Perm. B. S.* v. *Forest*, 6 P. R. 254; and see *White* v. *Watts*, 31 L. J. C. P. 381.

"Action or Issue."—A petition authorized under the *Rules* would appear to be an "action": see Jud. Act, s. 2, and *Re Credit Co.*, 11 Ch. D. 256; *Re Haddan's Patent*, 51 L. T. 190; also interpleader proceedings.

"Before the Trial."—These words do not prevent the examination of a party after a trial which proves abortive, by reason of disagreement of the jury, and before a second trial, if the party has not already been examined. Such a trial is not a trial within the meaning of this *Rule*: *Clarke* v. *Rutherford*, 1 O. L. R. 275.

Who may be examined.

Parties Adverse in Interest.—Under the Eng. (1883) R. 343, providing for the examination of the "opposite party or parties," it has been held that a party added by the defendant in a counterclaim, is not an opposite party as regards the plaintiff: *Molloy* v. *Kilby*, 15 Ch. D. 162; but see *Bradley* v. *Clark*, 9 P. R. 410; 19 C. L. J. 193. But a third party, who has been notified by the defendant under *Rule* 165, and has appeared and obtained leave to defend, is entitled to examine the plaintiff in the same manner as an original defendant: *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194; *Eden* v. *Weardale Iron Co.*, 34 Ch. D. 223; and the plaintiff is entitled to examine him: *Bradley* v. *Clark*, 9 P. R. 410; 19 C. L. J. 193.

An official liquidator, as an officer of the Court, cannot be called upon to make discovery, unless he is representatively in the position

of an adverse litigant to the party requiring discovery: *Henderson* v. Rule 327.
Blain, 14 P. R. 308; *Re Borned's Banking Co.*, L. R. 2 Chy. 350; *Re Contract Corporation*, L. R. 7 Chy. 207; *Re Mutual Soc.*, 22 Ch. D. 714; *Re Alexandra Palace Co.*, 16 Ch. D. 58.

A defendant who has not appeared, and to whom e statemsnt of claim has not been delivered, is examinable by the plaintiff: *Bulst* v. *Currie*, 33 C. L. J. 622; 17 C. L. T. 335; but he was formerly not entitled to examine the plaintiff: see *Askley* v. *Brenton*, 13 P. R. 98; but owing to the variation in the present *Rule* 336 it is possible that case is no longer law.

If the issues between co-defendants are material to the case of the plaintiff, or to the character of the relief he seeks, he may examin a defendant upon them, though there is no issue between the defendant and himself: *Alexander* v. *Diamond*, 9 P. R. 274. A defendant whose interest is identical with that of the plaintiff is a party adverse in point of interest to his co-defendant, and may be examined by such co-defendent; (*sed vide, contra, Birchal* v. *Birch*, 1913, 2 Ch. 375); and, where the plaintiff's solicitor is present at such examination, the depositions may be read against the plaintiff: *Moore* v. *Boyd*, 8 P. R. 413. A disclaiming defendant charged with complicity in a fraud was held to be properly questioned as to the fraud: *McFarland* v. *McFarland*, 9 P. R. 73.

A necessary party to an action may be examined for discovery, though no relief is asked against him: *Spokes* v. *The Grosvenor & W. E. R. T. Hotel*, 1897, 2 Q. B. 124; 76 L. T. 679.

The plaintiffs on the record must be taken to be the parties conducting the litigation, and therefore a member of a plaintiff firm is examinable by a defendent, though he was admittedly not in favour of the action: *Howes Gibson Co.* v. *Howes*, 2 O. W. N. 1345, 1391.

Infants.—As a general rule an infant suing by next friend may Infants.
in the absence of special incapacity, be examined for discovery before trial in the same way as an adult: *Arnold* v. *Ployter*, 14 P. R. 399; distinguishing *Moyor* v. *Collins*, 24 Q. B. D. 361; approved in *Flett* v. *Coulter*, 4 O. L. R. 714; see also *Curtis* v. *Mundy*, 1892, 2 Q. B. 178.

An order for the examination of an infant for discovery should not give the examiner discretion to determine the capacity of the infant. The proper mode of raising the question as to the infant's capacity is by motion to set aside the appointment, or if there is not time for that, then upon a motion to commit for non-attendance, so that the question may be considered by the Court itself: *Flett* v. *Coulter*, 4 O. L. R. 714.

The next friend of a party is not "a party," and formerly could not Next friend.
be examined for discovery: *Vono* v. *Canadian Cotton Mills*, 13 O. L. R. 421; and see note to *Rule* 348, p. 827; but now he is liable to be examined for discovery: see *Rule* 332.

Officers, etc., of Corporations.—Under the present Ont. *Rule* 327 one present officer, or servent, of a company party may be examined without special order. If on his examination it turns out that he does not possess the necessary information, leave to examine others may be applied for; and it is altogether within the discretion of the Court whether another officer, or servent, should be examined: see clause (2); *Dawson* v. *London St. Ry.*, 18 P. R. 223.

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it is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself by obtaining knowledge of all relevant facts: *Clorkson* v. *Bank of Hamilton*, 9 O. L. R. 317.

Where the plaintiff sued "T. Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies, and one of the companies appeared and defended in its own name, "sued as the Tanners' Association," it was held that the agent of the syndicate could not be examined as an officer of the Association, because it was not a corporation, nor of the company defending, because he was not its officer: *Ahrens* v. *Tanners' Association*, 6 O. L. R. 63.

An auditor may, or may not, be an officer of a company. *Prima facie* he is not: *Re Western Cos., etc., Co.*, 45 W. R. 418.

An attorney appointed by a foreign corporation to represent it in Ontario in compliance with *The Extra Provincial Corporations Act* (R. S. O. c. 179), s. 10 (1), is liable to examination under this *Rule* as an officer of the corporation: *McNeil* v. *Lewis*, 16 O. L. R. 652.

The head of a municipal council is the only member of the council liable to examination for discovery under this *Rule*: *Davies* v. *Sovereign Bank*, 12 O. L. R. 557.

An officer of a Board of Commissioners appointed under a by-law of a municipality to manage Electric Light Works, was held to be examinable as a servant of the municipality: *Young* v. *Gravenhurst*, 2 O. W. N. 118.

The Medical Health Officer of a municipality has been held not to be an officer examinable: *Coleman* v. *Toronto*, 15 P. R. 27, 125; *Forsyth* v. *Cassiff*, 29 Ont. 478 (except when the corporation is being sued in respect of anything done by such officer: *Coleman* v. *Toronto*, *supra*; *Odell* v. *Ottawa*, 12 P. R. 446); nor surveyors usually employed by a municipality, but not formally appointed officers thereof: *Meek* v. *Yarmouth*, 9 C. L. T. 373.

In the case of a society which consisted of a head office, called the "Head Camp," and a number of local branches, called "subordinate camps," the clerk of a subordinate camp was held to be an officer of the society and examinable: *Readhead* v. *Woodmen of the World*, 9 O. L. R. 321.

Under the former practice an order was made to examine an architect of defendants, in an action for price of work and materials in erecting a building, where defendants themselves could give no information: *Smith* v. *Clarke*, 12 P. R. 217; and a local agent of an insurance company who procured the application for the insurance in question in the action: *Hartsell* v. *Canada Mutual Aid Co.*, 12 P. R. 401; *Goring* v. *London Mutual Fire Ins. Co.*, 10 P. R. 642.

An officer of a company called as a witness at the first trial of an action may, pending a second trial, be examined under this *Rule*: see *Leitch* v. *Grand Trunk Ry. Co.*, 12 P. R. 671.

An objection that the person sought to be examined is not an officer, should be taken at the outset when it is sought to examine him, and cannot be taken on taxation only: *Township of Logan* v. *Kirk*, 14 P. R. 130.

Where a corporation tenders one of its officers who is a solicitor, to make discovery on its behalf, the privilege of a solicitor cannot be claimed, *secus*, where the opposite party selects such person for examination: *Swansea* v. *Quirk*, 5 C. P. D. 106; *Solford* v. *Lever*, 24 Q. B. D. 695. Rule 337.

As to the time for making the examination: see *Rule* 336.

An order for the examination of an officer residing in a foreign country of a foreign corporation which had attorned to the jurisdiction, was refused: *Perrins* v. *Algoma, etc.*, 8 O. L. R. 634. Officer of a foreign corporation.

An application, pending an examination of an officer of a defendant corporation, to examine another servant of the defendant corporation was refused: *Hees* v. *Ontario Wind Engine Co.*, 44 C. L. J. 744.

And where, in an accident case, the plaintiff examined the conductor of the car on which the accident took place, it was held that the plaintiff was not entitled to examine another servant of the defendant company who had seen the accident: *Lange* v. *Toronto & York Radial Ry.*, 5 O. W. N. 64.

How Attendance Procured.—See *Rules* 337, 345-347.

Ordinarily an appointment is obtained from the Examiner: *Rule* 337, and a copy served on the solicitor of the party required to be examined seven days before the day fixed for the examination, the ordinary witness fees being also left with him at the same time. Attendance for examination, how obtained.

In the case of a party no subpœna is necessary. Where the person to be examined is not a party to the action, then the appointment together with a subpœna: *Rule* 345 (2), must be personally served, and the ordinary witness fees tendered to the person to be examined. In this case the appointment must also be served on the solicitor of the opposite party forty-eight hours before the time fixed for the examination: *McMurray* v. *Grand Trunk Ry.*, 3 Chy. Ch. 130; *Vardon* v. *Vardon*, 7 P. R. 436. A subpœna dated prior to the time when the party issuing it was entitled to examine the person served therewith, is irregular: *McMurray* v. *Grand Trunk Ry.*, *supra*. The solicitor of the opposite party should always be served with a copy of the examiner's appointment: *Fowler* v. *Boulton*, 12 Gr. 437.

The solicitor of the party to be examined is entitled to forty-eight hours, notice of the examination: *Rule* 346, but the party himself, where he has a solicitor, is only entitled to reasonable notice according to circumstances: *Wilson* v. *Cowan*, 19 C. L. J. 140; 3 C. L. T. 216; *Bolkow* v. *Foster*, 7 P. R. 388; see *Re N. Wheal Exmouth Mining Co.*, 31 Beav. 628; and *Lynskey* v. *Can. Pacific Ry. Co.*, 4 C. L. T. 93; but where a party who has no solicitor is required to attend, he should have forty-eight hours' notice: *Watson* v. *Ham*, 1 Chy. Ch. 293.

Semble, where a party to an action is required to be examined, two courses are open, he may be served with the appointment, and paid his witness fees, by delivering the same to his solicitor; if this method is adopted the service must be effected seven days before the day fixed for the examination. The other course is to serve the party personally with the appointment (which must also be served on his solicitor), and pay him his witness fees, in which case it is sufficient if the service on the solicitor is effected forty-eight hours, and on the client a reasonable time, before the time fixed for the examination.

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Where the party to be examined is a resident out of the jurisdiction: see *infra*, and *Rule* 328.

Where a party is subpœnaed, with others, for examination at the same hour, he is bound to wait until he can be examined, and, if he depart before examination, he may be ordered to attend again at his own expense: *Campbell* v. *Scott*, 5 O. L. R. 233. Where a party attends voluntarily for examination and submits to be sworn, he cannot refuse to answer proper questions because he has not been subpœnaed: *Cooke* v. *Wilson*, 3 O. L. R. 299.

Service on the solicitor of a corporation is not sufficient service on the officer sought to be examined; and an order will not be made for substitutional service upon an officer of a litigant corporation, of the subpœna and appointment: *Mills* v. *Mercer Co.*, 15 P. R. 276.

Abandonment of order.

A party taking out an order to examine and failing to appear on an appointment thereunder, loses the benefit of the order, and must obtain a new one: *Ferguson* v. *Elliott*, 7 P. R. 7. When an examination is adjourned *sine die*, re-service of an appointment and payment of conduct money is necessary in order to compel attendance: *Whitehead* v. *Harte* (Mr. Dalton, 22nd June, 1882), Globe.

Adjournment of examination.

So, where an examination is adjourned for further production of documents disclosed on the examination, the party to be examined is entitled to further witness fees for attendance on a subsequent day: *Chamberlain* v. *Thwaite*, 11 C. L. T. 53; and he is compellable to re-attend upon being paid his proper fees, although he has signed the depositions, and does not consent to the adjournment: *Re Metropolitan Brush Co.*, 51 L. T. 816; 54 L. J. Chy. 253.

Parties out of Ontario.

Party Out of Ontario.—Where a party to be examined is resident out of Ontario, even though temporarily within Ontario, he can only be examined pursuant to a special order made under *Rule* 328: *Connolly* v. *Dowd*, 18 P. R. 38; *Cox* v. *Prior*, 18 P. R. 492; he cannot be compelled to attend by being served under *Rules* 327, and 337, or 345, without such an order: *Ib.* The former cases of *Bolkow* v. *Foster*, 7 P. R. 388; *Smith* v. *Greey*, 11 P. R. 345; *Comstock* v. *Harris*, 12 P. R. 17; *Parker* v. *Meriden*, 7 C. L. T. 112; are now inapplicable owing to changes in the *Rules*.

Where a party resided in Quebec, a subpœna requiring his attendance for examination in Ontario might formerly be ordered to issue under Con. Stat. Can., c. 79, s. 4; *Moffatt* v. *Prentice*, 6 P. R. 33; *Bank of British North America* v. *Eddy*, 19 C. L. J. 192; and see *Morell* v. *Morrison*, 6 P. R. 210; but such an order was not granted *ex parte*: *Moffatt* v. *Prentice*, *supra*; and see *Dewalt* v. *Hughitt*, 7 P. R. 323. In *Lefurgey* v. *Great West Land Co.*, 11 O. L. R. 617, it was held that a subpœna cannot be granted to compel a party resident in Quebec to attend for examination for discovery; but the cases above mentioned were not referred to. Where considered necessary, an order for a subpœna may probably still be made, or contained in an order made under *Rule* 328, or a commission may be directed: see *Stratford* v. *Great Western Ry. Co.*, 6 P. R. 91.

Ordinarily, it is probable that it will be sufficient if the order directs attendance, upon service of a copy of the order and of the appointment of the Examiner upon the solicitor of the party: see *Rule* 328.

The party may doubtless, as formerly, when a subpœna was granted, he compelled to attend at such place as in the opinion of the Court is most convenient, and not necessarily the nearest to his place of abode: *Smith* v. *Babcock*, 9 P. R. 97; *Bank of B. N. A.* v. *Eddy*, 9 P. R. 396; but a defendant resident in Quebec cannot be ordered to attend in Ontario: *Lefurgey* v. *Great West Land Co.*, 11 O. L. R. 617. Rule 327

A Special Examiner must, by the order, be appointed to take the examination, or a commission may be issued: *Banque Franco-Egyptienne* v. *Lutscher*, W. N. 1879, 183; 41 L. T. 468; 28 W. R. 133; see also *Nadin* v. *Bassett*, 25 Ch. D. 21; but there is no authority to proceed without an order, and by subpœna only: see *Bank of B. N. A.* v. *Eddy*, 9 P. R. p. 399; *Connolly* v. *Dowd*, 18 P. R. 38.

Where such an order has been made, attendance will be compelled in such manner as may be directed by the order. If a commission is issued, attendance may be compelled as in the case of a commission for examination of a witness.

See also *Rule* 328, and notes.

Vacation.—Examinations for discovery cannot be held in the Long Vacation without leave: *Rule* 178. Examination in vacation.

Where a motion for an injunction is pending in vacation the Master in Chambers has no jurisdiction to authorize an examination of witnesses in support of the motion to be taken in vacation, the motion and all pertaining to it being within the jurisdiction of the Court: *Saskatchewan L. & H. Co.* v. *Leadley* (before Meredith, C.J.C.P., 11th September, 1903); but *semble*, the Master in Chambers, and other officers having like jurisdiction, would have jurisdiction to order an examination for discovery in vacation.

Place of Examination.—The Examination must usually be had before a Local Registrar, Local Master, or Deputy Clerk of the Crown, or Special Examiner, in the county where the party to be examined resides: *Rule* 345; but for special reasons, to be shewn on an application in Chambers, he may be ordered to attend elsewhere: *Rule* 347; *Gallagher* v. *Gairdner*, 2 Chy. Ch. 480; *McDermid* v. *McDermid*, *Ib.*, 371; *Compbell* v. *Tucker*, 7 P. R. 135; *Kahn* v. *Redford*, 3 Chy. Ch. 55; and note as to this case Cooper's Digest, 1873, p. 111. Place of examination.

Where a plaintiff is resident out of Ontario he may be ordered to attend at some place within the jurisdiction to be examined for discovery: *Lick* v. *Rivers*, 1 O. L. R. 57; but it is otherwise in case of a defendant: *Lefurgey* v. *Great West Land Co.*, 11 O. L. R. 617.

The Examination.—The Examiner's office is not a public Court, and he has a discretion which may be reviewed by the Court, as to the admission or exclusion of persons who desire to be present at an examination: *Re Western of Canada O. L. & W. Co.*, 6 Ch. D. 109; *Merchants Bank* v. *Ketchum*, 16 P. R. 366; *Wright* v. *Wilkin*, 6 W. R. 643; see also *Re Cambrian Co.*, 51 L. J. Chy. 221; *Re Grey's Brewery Co.*, 25 Ch. D. 400; *Pratt* v. *Pipe*, 3 O. W. N. 214. The Examiner in his discretion may exclude the clerk of the counsel conducting the examination, if his presence is objected to, and even the examinant's own solicitor if his presence interferes, in the Examiner's opinion, with the due taking of the examination: *Hand* v. *U. C. Furniture Co.*, 12 P. R. 292. Examiner's office not a public Court.

Rule 327. A defendant, who had allowed judgment to go by dsfault, was held entitled to be represented by counsel on the exnmination of his bookkseper nt the instance of a co-defendant under *Rule* 275; *Dominion Bank* v. *Bell*, 13 P. R. 471.

Exclusion of parties. Where several parties attend for examination, the Examiner may exclude those in the same interest, while the others are under examination: *Culverwell* v. *Birney*, 10 P. R. 575; *Stevewright* v. *Stevewright*, 8 P. R. 81; *Sodlier* v. *Smith*, 14 C. L. J. 30; but one of them should be permitted to remain for the purpose of instructing counsel, subject to his being first examined: *Stevewright* v. *Stevewright*, 8 P. R. 81; and the Examiner has a discretion as to the order of their examination, where several are in attendance for examination: *Stuart* v. *Bolkis*, 32 W. R. 676; 53 L. J. Chy. 791.

A refusal to comply with the Examiner's ruling is a contempt of Court: *Sadlier* v. *Smith*, 14 C. L. J. 30.

Producing of documents on examination. The party examined may be required to produce books and papers: *Rules* 341, 342, but books in constant use need not be produced until it is decided that they are necessary, when the Examiner may adjourn the examination until they are produced: *Comstock* v. *Horris*, 12 P. R. 17.

Ordinarily, any question as to whether documents are subject to production on the examination should be raised before the Examiner: *Alexander* v. *Irondale*, 18 P. R. 20; but in a proper case, such as a subpœna for the production of an enormous number of papers, amounting to an abuse of the process of the Court, a motion may be made to set aside the subpœna: *Steele* v. *Savory*, W. N. 1891, 195; 35 Sol. Jour. 92; 8 T. L. R. 94.

As to the scope of the examination: see notes to *Rule* 343.

Disclosure on examination. The issuing of a *subpœna duces tecum* as a substitute for an order for production is not to be encouraged: *per* Boyd, C., *Lovery* v. *Wolfe*, 10 P. R. 488; 20 C. L. J. 410.

If documents are produced, the examining party is entitled to have them marked as exhibits: *Hands* v. *U. C. Furniture Co.*, 12 P. R. 292.

If the examination is unnecessary, or vexatious, or of unnecessary length, the party taking it may have to pay, or at all events be disallowed, the costs of it: *Dobson* v. *Dobson*, 7 P. R. 256; *Evans* v. *Jaffroy*, 3 O. L. R. 327; and see *Rule* 654.

An examination for discovery in support of a defence which is bad in law will not be allowed: *Rogers* v. *Lambert*, 24 Q. B. D. 573; 62 L. T. 694.

Fees. Where the examination is taken before a Local Registrar, or other officer paid by salary, the fees are payable in stamps: *Denmark* v. *McConoghy*, 8 P. R. 136; Jud. Act, s. 78; but officers not paid by salary are entitled to fees in money for their own use, for such examinations: *Rule* 773.

Disclosure on Examination.—Privilege, etc.—As to what must be disclosed, privilege, etc.: see notes to *Rule* 343.

On Reference to an Official Referee.—As to Discovery on proceedings before a Referee: see *Rules* 400, 411.

Examination for Discovery at other Times than that Mentioned in Rule.—The examination under this *Rule* may be had as of course within the time prescribed, but it is possible that there is inherent jurisdiction to order, where justice so requires, an examination of a party for discovery at an earlier period, or after an examination under this *Rule* has taken place: see *Waynes Merthyr Co.* v. *Radford*, 1896, 1 Ch. 29; 73 L. T. 624, and *Thomson* v. *Gye*, 13 P. R. 273. There does not now, however, seem to be any express *Rule* on the subject. It was held under the former practice that a second examination of the same party should not be allowed except under the most special circumstances: *Thorburn* v. *Brown*, 8 P. R. 114; see also *Campbell* v. *Scott*, 14 P. R. 203; and upon a special motion made on notice: *Laird* v. *Stonley*, 6 P. R. 322. But assuming that there is authority to make an order for examination for discovery at an earlier period than that mentioned in this *Rule*, it ought not to be made except under special circumstances: *Thomson* v. *Gye*, 13 P. R. 273, and such an order, if obtained *ex parte*, would be irregular: *Hooey* v. *Gilbert*, 12 P. R. 114. Rule 328.

Where the pleadings have been amended raising matters not before suggested, after examination for discovery, an order may, in a proper case, be made for further examinations limited to the matter raised by the amendment: *Standard Trading Co.* v. *Seybold*, 7 O. L. R. 39.

328. Where a party to be examined is out of Ontario the Court may order the examination to be taken at such place and in such manner as may seem just and convenient, and service of the order and of all papers necessary to obtain the examination may be made on the solicitor of the party, and any conduct money may be paid to him unless the order makes other provisions therefor. C.R. 477. *Amended.* Examination for discovery of parties residing out of Ontario.

See notes to *Rule* 327.

This *Rule* is in terms restricted to the examination of the parties. It does not extend to the examination of officers of corporations: *Perrins* v. *Algoma Tube Works* (*Limited*), 8 O. L. R. 634; but it applies to the case of a party temporarily absent: *Maclean* v. *James Bay Ry. Co.*, 5 O. W. R. 440, 495; and an order may be made for the examination of such a party at the place abroad where he may happen to be: *Ib.*, 495.

Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained under this *Rule*, and not by appointment under *Rule* 337: *Cox* v. *Prior*, 18 P. R. 492. An order may, where convenient, be made for the examination in Ontario where the party happens to be, and such an order was made where the defendant resided in British Columbia and was temporarily in Ontario attending the House of Commons, of which he was a member: *Ib.*; and see *Lefurgey* v. *Great West Land Co.*, 11 O. L. R. 617; the fact that a party who resides out of Ontario has business interests in Ontario, and has permanent lodgings in Ontario while there, does not necessarily constitute him a resident of Ontario: *Denneen* v. *Walberg*, 3 O. W. N. 1511. Though a defendant resident out of the jurisdiction cannot be compelled to attend for examination for discovery within the jurisdiction, it is otherwise in the case of a plaintiff: *Lick* v. *Rivers*, 1 O. L. R. 57.

Rules 329, 330.

The Court, or Judge, may take judicial notice of the geographical situation of places where examinations can be held with reference to the residence of the party to be examined, in order to fix a place which may be just and convenient: *Lick* v. *Rivers*, 1 O. L. R. 57. A local Judge of the county where the solicitors for both parties reside, has jurisdiction to make an order under this *Rule*: *Ib.*

As to parties resident in Quebec: see note to *Rule* 327, *supra*, p. 802.

The principle on which an examination of a party can be read against him is that it is an admission under oath, but that principle does not apply to the officer of a corporation.

Examination of officer of corporation out of Ontario.

329. The Court may order the examination for discovery at such place and in such manner as may be deemed just and convenient of an officer residing out of Ontario of any Corporation party to an action, and service of the order and of all papers necessary to obtain such examination may be made upon the solicitor for such party, and conduct money may be paid to him, and if the officer fails to attend and submit to such examination pursuant to such order the Corporation shall be liable if a plaintiff to have its action dismissed, and if a defendant to have its defence struck out and to be placed in the same position as if it had not defended. Such examination shall not be used in evidence at the trial. C.R. 1321.

Depositions, how may be evidence.

330. Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence. C.R. 461.

See Eng. (1883) R. 366.

In the Court of Chancery of this Province, and in the Common Law Courts of both England and Ontario, a party could use no part of the examination of his opponent without using the whole. The consequence was that one of the great uses of an examination of a party (viz., the saving of expense by proving, by admission, the facts not really in dispute, was prevented), as such admissions in the examination often stood side by side with other statements which the examining party could not safely make part of his case.

The *Rule* only authorizes the examination for discovery to be used as evidence where it is that of "the opposite party." It does not authorize the use of the examination of any other person who is not a party, as evidence at the trial: *e.g.*, and the evidence of an assignor of a

chose in action taken under *Rule* 335 will not be usable against the assignee, nor will the examination "of a person for whose benefit" an action is brought or defended, taken under *Rule* 334, be usable against the actual parties to the action. In such cases the examination is confined to the purposes of discovery simply, and if the evidence is required at the trial, the person must be called and examined in the same way as any other witness. Rule 331.

See *Lyell* v. *Kennedy*, 50 L. T. at p. 734, in which under the corresponding English Rule it was said that when an admission is read, everything ought to be read which is fairly connected with that admission.

Where the plaintiff, without objection, put in the defendant's depositions and referred to certain parts, and the Judge in charging the jury referred to other parts, it was held that he could properly do so, as the whole depositions had been put in evidence: *Dougall* v. *Stapleton*, 12 Ont. 206.

Where the examination of a witness has been taken by a stenographer it is admissible in evidence, even though incomplete, and though, in consequence of the death of the witness, he could not be cross-examined: *Rondoll* v. *Atkinson*, 30 Ont. 242, 620; *semble*, the same rule would apply to an examination for discovery.

Where, after examination for discovery, the examinant dies, it has been held that his representatives continuing the action, or against whom it is continued, cannot use the deceased's examination as evidence, because the deceased if he had lived could not have used it in his own behalf: *Johnson* v. *Birkett*, 21 O. L. R. 319; *Atkinson* v. *Cosserley*, 22 O. L. R. 527; but an examination *de bene esse* of the deceased stands on a different footing and is admissible: see *Erdmon* v. *Wolkerton*, 20 Ont. App. 444; 23 S. C. R. 352.

The examination of an officer of a company cannot be used as evidence against the company: see *Rule* 329. Nor can the examination of a defendant be read against a co-defendant, unless the defendants stand in such a relation that they are bound by each other's admissions. But *semble*, the examination of one plaintiff can be read against his co-plaintiffs, if any.

331. Any person who refuses or neglects to attend at the time and place appointed for his examination, or refusing to be sworn or to answer any proper question put to him, shall be deemed guilty of a contempt of Court and proceedings may be forthwith had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed, and if a defendant, to have his defence, if any, struck out. C.R. 454. Penalty on witness refusing to attend or answer, etc.

This *Rule* is confined to three classes of cases (1) refusal, or neglect, to attend for examination, (2) refusal to be sworn, (3) refusal to answer lawful questions; and it renders a wilfully disobedient defendant liable to have his defence struck out: *Haigh* v. *Haigh*, 31 Ch. D. 478; and a disobedient plaintiff to have his action dismissed: *Republic of Liberia* v. *Imperial Bank*, L. R. 9 Chy. 569; S. C., as *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; *Dunn* v. *McLeon*, 6 P. R. 156; *Dauvillier* v. *Myers*, W. N. 1883, 58.

Rule 331.

By *Rule* 353 a party failing to comply with a notice or order for production, or inspection of documents, is liable to similar penalties.

Where there are joint plaintiffs the action cannot be dismissed for the default of one, in such a case the defendant must proceed against the defaulting plaintiff by motion for attachment: *Ferris* v. *McMurrich*, 2 O. W. N. 770.

The party or person must have been regularly subpœnaed: *McMurray* v. *Grand Trunk Ry. Co.*, 3 Chy. Ch. 130, and paid his witness fees: *Bolkow* v. *Foster*, 7 P. R. 388, or no order can be made against him: *McLean* v. *Bruce*, 12 P. R. 602.

A party subpœnaed for examination and paid his conduct money, having been examined while others were being examined, is bound to wait for examination, and is not justified in leaving without communicating with the examiner: *Campbell* v. *Scott*, 5 O. L. R. 233.

A motion to strike out the defence, or to dismiss the action, is not the proper course, where default has been made by an officer of a company or corporation in attending for examination or in answering questions. The remedy is to commit the officer: *Badgerow* v. *Grand Trunk Ry. Co.*, 13 P. R. 182; *Central Press Association* v. *American Press Association*, 13 P. R. 353; *McWilliams* v. *Dickson*, 10 O. L. R. 639.

Where an examination has been adjourned *sine die*, unless a new day has been agreed on by the solicitors in writing, there must be a new appointment served before the party under examination can be put in default: *McIntosh* v. *Robertson*, 2 O. W. N. 869.

Committal for contempt.

Motion to commit for Contempt.—It has been held that proceedings to attach must be taken before the Court, and not before a Judge in Chambers: *Merchants Bank* v. *Pierson*, 8 P. R. 123; but this decision does not seem in practice to have been adhered to in cases under this *Rule*. (In other cases of contempt: see *Southwick* v. *Hare*, 15 P. R. 331.) The motion is made to a Judge in Chambers in a case of non-compliance with a *præcipe* order, or an order in Chambers; and an application to the Court is necessary in case of breach of an order of the Court: see *Klein* v. *Union Ins. Co.*, 3 C. L. T. 601, and note to *Rule* 207.

The Master in Chambers cannot entertain applications to commit for non-production: *Rule* 208 (1); *Keefe* v. *Ward*, 9 P. R. 220; 18 C. L. J. 166; 2 C. L. T. 260; neither can a Local Judge, or a Local Master: *Rule* 209; but *semble*, a Local Judge may do so when acting under *Rule* 210.

Proof of due service of the appointment, and payment of conduct money is necessary in all cases of motion to commit, under this *Rule*, and, in the case of a person not a party, proof is also necessary of service of a subpœna: see *Rule* 345 (2); *In re Harvey*, 1907, P. 239.

It is not necessary to serve, with a notice of motion to commit, copies of the affidavit upon which it is based: *Hannum* v. *McRae*, 18 P. R. 185.

The defaulting party is entitled to notice of motion to strike out the defence, or to dismiss the action, which may be served on his solicitor. Where the motion is to commit the defaulting person or party, personal service of the notice of motion is requisite, as a general rule: *Rule* 546; *Mann* v. *Perry*, 44 L. T. 248; 50 L. J. Chy. 251; *Weir* v. *Matheson*, 1 Chy. Ch. 244; *Nelson* v. *Worssam*, W. N. 1890, 216; *Mander* v.

Falcke, 1891, 3 Ch. 488; 64 L. T. 791; except where every reasonable effort to effect personal service has failed, in which case an order for substituted service may be made: *Ib.*, and S. C., 65 L. T. 464; and in the case of default in production pursuant to a notice, or order to produce, and in certain other cases: see *Rule* 353. Two days' notice would seem to be sufficient in all cases: *Rule* 215. Rule 331.

Where an order was made for examination in Ontario of a defendant who resided out of Ontario, but was temporarily in Ontario attending the House of Commons, of which he was a member, it was held that the order could not be enforced by attachment against the defendant while the House was in session, but it might be enforced under *Rule* 331 by striking out his defence: *Cox* v. *Prior*, 18 P. R. 492.

In *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271, the Court refused to set aside an order for attachment founded on a notice of motion which had not been personally served, holding that the irregularity may be condoned if the Court sees fit; but in *Taylor* v. *Roe*, 3 R. 259; 68 L. T. 213, Kekewich, J., held that an irregularity will not be condoned on motions affecting the liberty of the subject, where the opposite party appears and takes the objection.

A person committed for default in attending to be examined is not entitled to a *habeas corpus*: *Re Anderson* v. *Vanstone*, 16 P. R. 243.

See further as to motions to attach, notes to *Rules* 545, 546.

As to motions to commit for unsatisfactory answers, see *Smith* v. *Greey*, 4 C. L. T. 589.

An objection to answer incriminating questions should be taken by the witness, but the privilege may be claimed on a motion to commit, though not claimed before the Examiner: *Hall* v. *Gowenlock*, 12 P. R. 604. The penal provisions of R. S. O. (1897), c. 334, ss. 2, 6, do not afford any ground for refusing to answer questions put regarding a fraudulent transaction: *Dunsford* v. *Carlisle*, 10 P. R. 449; and see *The Evidence Act* (R. S. O. c. 76), s. 7; and *The Canada Evidence Act* (R. S. C. c. 145), s. 5.

Dismissal of Action or Striking out of Defence.—In general another opportunity to obey will be given on terms, but where the action is unmeritorious the plaintiff may be refused this indulgence and the action may be dismissed: *Denham* v. *Gooch*, 13 P. R. 344. Dismissal of action, or striking out defence.

Where the plaintiffs were husband and wife, and the wife complied with an order for production, but the husband absconded without complying, Hall, V.C., refused to dismiss the action: *Hartley* v. *Owen*, W. N. 1876, 193; 34 L. T. 752.

For other cases in which the power has been exercised: see *Eyre* v. *Hughes*, 25 W. R. 528; and *Rep. of Liberia* v. *Roye*, 1 App. Cas. 139. In the last case it was held that where any step ought to be taken in a cause which, in the judgment of the Court, was necessary to facilitate the decision of the cause, and default had been made, the former Court of Chancery had power, if the party in default was the plaintiff, to dismiss the bill: see also *Fraser* v. *Burrows*, 2 O. B. D. 624.

Compliance was held excused by illness: *Lord Cardwell* v. *Tomlinson*, 33 W. R. 814; 52 L. T. 746.

Other Remedies.—On a motion to commit for non-production of books, etc., pursuant to a subpœna *duces tecum* on an examination for Other remedies for default.

Rule 332.

discovery, it was held that the proper course was to get the examiner to direct what should be produced, and to adjourn the examination for procuring the documents: *Lavery* v. *Wolfe*, 10 P. R. 488; *Comstock* v. *Harris*, 12 P. R. 17.

Where the defendant did not appear, nor deliver any statement of defence, after being served with a statement of claim, and a summons for him to attend to be examined touching the matters in question (delivering up to plaintiff of books and documents in his possession) was likewise disregarded, it was held, that, notwithstanding that he was a party to the action, he must be considered as being summoned as a witness, and must be dealt with accordingly, and that his disobedience was not disobedience of an order of Court. An order was therefore made under Eng. Rule of 1883, No. 495 (not adopted in Ontario), for his attendance for examination at his own expense, for disobedience of which an attachment might issue: *Powell* v. *Nevitt*, 55 L. T. 728.

The question whether or not the person or party alleged to be in default is really so, may be tested by moving to compel him to attend again at his own expense, and submit to examination, or in default that the action be dismissed, or defence struck out. Where such an order has been obtained and disobeyed, the motion to dismiss, or strike out defence, may perhaps be made *ex parte*: *Dunn* v. *McLean*, 6 P. R. 156; but see *Hollender* v. *Ffoulkes*, 16 P. R. 225; *Rule* 213.

Upon failure of a plaintiff to attend for examination, the action must be stayed for a definite time, to enable him to attend, but not indefinitely: *Comstock* v. *Harris*, 12 P. R. 17.

A party who has been ordered to attend for further examination after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order: *McGregor* v. *McDonald*, 11 P. R. 518.

Restoring action dismissed for non-production.

Restoring Action, etc.—Where an action has been dismissed it will not be restored, unless, perhaps, where the claim would otherwise be barred by the dismissal, *e.g.*, by the Statute of Limitations: *Dunn* v. *McLean*, 6 P. R. 156; and see *Hodgson* v. *Paxton*, 2 Chy. Ch. 398; *Bank of Montreal* v. *Wilson*, 2 Chy. Ch. 117; *Davy* v. *Davy*, 2 Chy. Ch. 26; nor where the defence has been struck out, and judgment signed, will the judgment be set aside: *Haigh* v. *Haigh*, 31 Ch. D. 478.

Miscellaneous.—It is not imperative on the Court to act under this *Rule*: *Kennedy* v. *Lyell*, W. N. 1882, 137. It was said in one case that the *Rule* is a penal one, and only to be acted on in the last resort: Lush, J., in *Twycross* v. *Grant*, W. N. 1875, 201, 229; 1 Charl. Ch. Ca. 115; see *Fisher* v. *Hughes*, 25 W. R. 528; *Pike* v. *Keene*, 24 W. R. 322; 35 L. T. 341.

Next friend or guardian of infant may be examined.

332. When an infant is a party the opposite party may examine the next friend or guardian of the infant or at his option the infant, if he is competent to give evidence. *New.*

See Eng. Rule, Ord. 31, R. 29.

The *Rule* is a reversal of *Vano* v. *Can. Cotton Mills*, 13 O. L. R. 421.

Having regerd to the collocation of *Rulcs*, 327-337, the examination referred to in this *Rule* appeara to be one for discovery, end the *Rule* gives a defendant, where ths plaintiff is an infant suing by his next friend, the option of either examining the infant, or his next friend, or guardian, for discovery, but not both, and if he elect to examine one, he cannot thereafter examine the other. The guardian rsferred to is probably the guerdian, if any, of the person or eetate, not a guardian *ad litem*. Rule 333.

With regard to a plaintiff suing en infant, the *Rule* appeara to authorize an examination of either the infant, or his guardian, hut not both.

Under the Ontario practice the Official Guardian is ordinerily the guardian *ad litem* of all infant defendants, whether the "guardian" referred to in thie *Rule* ia the guardian *ad litem* of an infant, or the guardian of the person or estate of the infant, remains to be determined. It seeme unlikely that the Official Guerdien waa intended to be subjected to such exnminations, at the same time the guardian of the pereon or estate of an infant may not be in any way before the Court, or connected with the litigation. It may be here remarked that the Eng. Rule above referred to is confined to the guerdian *ad litem*.

This *Rule* doee not extend to the next friend of a lunatic, or person of unsound mind. The English Rule permits the next friend of a lunatic to be examined for discovery: *Pospati* v. *Paspati*, 110 L. T. 751.

The infant will be only examinable if he he competent to give evidence; that is, understands the neture of an oath.

While the examination of a party for discovery may ordinarily be read against him as evidence at the triel on the ground that it constitutes an admiseion; yet it seems evident thet the examination of the next friend, or guardian of an infant, could not be read against the infant, hecauee he would not be hound by their admiesione. Possibly the infant might read such examination against the opposite party, as being the evidence of a witness called and examined hy him, especially in the event of the next friend, or guardian, dying before the trial. Wherever it is eonght to examine a next friend, or a gnardian, under this *Rule*, service of a subpœna is necessary: *Rule* 345 (2).

As to the liability of a next friend of an infant to make an affidevit of documents: see notes to *Rulc* 348.

333. Any person examined for discovery may be further examined on his own beh if, or on behalf of the Corporation whose officer or servant he is, in relation to any matter respecting which he has been so examined, and such explanatory examinations shall be proceeded with immediately after the examination in chief. C.R. 449 and 450. Parties and others may be examined on their own behalf.

The explanatory examination may be proceeded with, notwithstanding that the counsel for the opposite party has withdrawn: *Connolly* v. *Murrell*, 14 P. R. 187.

Rule 334.

Party benefited.

334. A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery. C.R. 440. *Amended.*

There appears to be no similar English Rule.

A person to be examined, etc., must be directly interested: *Menzies v. Toronto & Ottowa, etc.*, Globe, 1st October, 1881. An order was made for the examination of the plaintiff's wife, where it appeared, on affidavit, that the plaintiff was agent for his wife as to part of the subject matter of the suit: *Bowmon v. Sutherlond*, Globe, 10th September, 1881.

Examination, when ordered.

In *Johnson v. McIntosh*, 3 C. L. T. 313, J. L. was trustee for the E. estate for twenty years, when the plaintiff was appointed in his place. The action involved the consideration of matters during the trusteeship of J. L., and as to which the plaintiff was ignorant, and the E. estate was indebted to J. L., so that if the plaintiffs succeeded J. L. would be benefited. An order was made under this *Rule* for examination of J. L. *Semble*, an order is not necessary unless the person to be examined refuses to submit to examination.

In an action by creditors of a firm to establish the liability of defendant as a partner, the assignee of the firm for the benefit of creditors, though having no direct beneficial interest in the result, was regarded as a *quasi* plaintiff, and the defendant was held entitled to production from him, and to examine him for the purposes of discovery: *Frothingham v. Isbister*, 14 P. R. 112.

See also note to *Rule* 166, *supra*, p. 622.

An order under this *Rule* for the examination of the plaintiff's daughter, in an action of seduction, was refused, but under special circumstances was granted under the former C. R. 485 (now *Rule* 271); *Turner v. Kyle*, 18 C. L. J. 402; 2 C. L. T. 598; see also *Hollister v. Annable*, 14 P. R. 11; *Baxter v. Campbell*, 9 C. L. T. 5; but see now as to the scope of that *Rule*, notes to *Rule* 271.

Where, in an action for infringement of a patent, the defendant set up that he had acquired the right to use the invention from C. & Co., but it did not appear that C. & Co. had done anything in reference to the action before, or after, it was brought, it was held that C. & Co. were not persons for whose benefit the action was defended: *Moffott v. Leonord*, 8 O. L. R. 519.

The examination of a debtor, who had effected insurance and assigned the policy for the benefit of his creditors, was ordered, in an action by one creditor and the trustee for the benefit of other creditors: *Macdonald v. Norwich Union; Clarkson v. F. Ins. Assn.*, 10 P. R. 462; so also of a debtor, in an action against his assignee for the benefit of creditors, to establish the right of the plaintiff to rank upon the insolvent estate: *Garland v. Clarkson*, 9 O. L. R. 281.

See *Minkler v. McMillan*, 10 P. R. 506, where proof of the interest of the party sought to be examined was unsatisfactory, but the order was made, with the qualification that it was only to be used for the purpose of discovery.

In *Lamb v. Dodds* (Mr. Dalton, 8th May, 1883), the action was to establish an alleged will, suspected by the defendant to have been a forgery of the plaintiff's husband, who was not a party; the plaintiff having been examined had no knowledge of it, but the circumstances

under which it had come into her hands were suspicious, and an order was made, under this *Rule*, on defendant's application, for examination of the plaintiff's husband for discovery, as a person for whose benefit the action was brought. Rules 335, 336.

335. Where an action is brought by an assignee the assignor may without order be examined for discovery. C.R. 441. Assignor of chose in action, examinable for discovery.

An officer of a corporation, the assignors of a chose in action, cannot under this *Rule*, or otherwise, be examined for discovery: *Bank of Toronto* v. *Quebec F. Ins. Co.*, 18 P. R. 41.

Where an examination is sought under this *Rule* the assignor, if not already a party to the action, must be subpœnaed: see *Rule* 345 (2). If a party to the action, service on his solicitor as provided by *Rule* 337, would seem sufficient; in both cases ordinary witness fees must be paid.

336. Examination for discovery may take place at any time after the statement of defence of the party examining or to be examined has been delivered or after the pleadings have been noted as closed, and the examination of a party to an issue may take place at any time after the issue has been filed. C.R. 442. *Amended.* Time when examination may be held.

This *Rule* seems to vary in an important particular from C. R. 442, in that it seems to authorize a defendant who has delivered no defence to examine the plaintiff for discovery after the pleadings have been noted closed. Formerly he could not do so: see *Ashley* v. *Brenton*, *infra*.

A party may be examined as a witness in support of a motion although the time for examining him under this *Rule* may not have arrived: *McClennaghon* v. *Buchanon*, 7 Gr. 92. Party may be examined as a witness.

Under this *Rule* it will be noticed that the right of the plaintiff to examine only arises *after* the statement of defence, or after the pleadings are noted closed: see *Davis* v. *Wickson*, 9 P. R. 219. He is not obliged to wait until all of several defendants have filed their statements of defence; but may examine each defendant as soon as he has delivered his defence or the pleadings have been noted closed as to him. Time for examination by plaintiff.

But where a plaintiff is ordered to give particulars of his statement of claim, he has, by special order, been allowed to have discovery, by examination of the defendant, and production of documents, before delivering such particulars, where the Court thought it just: *Waynes Merthyr Co.* v. *Radford*, 1896, 1 Ch. 29; 73 L. T. 624; but not as to matters which ought to be within the plaintiff's own knowledge: *Zierenberg* v. *Labouchere*, 1893, 2 Q. B. 183; 69 L. T. 172. Particulars.

A plaintiff may examine a defendant who has made default in delivering a defence: see *Bacon* v. *Campbell*, 6 P. R. 275; and *Dominion Bank* v. *Bell*, 13 P. R. 471; or has not appeared: *Bulst* v. *Currie*, 33 C. L. J. 622; 17 C. L. T. 335; and see *Spokes* v. *The Grosvenor & W. E. R. T. Hotel Co.*, 1897, 2 Q. B. 124; 76 L. T. 679.

The right of a defendant to examine the plaintiff under this *Rule* arises after he has filed his statement of defence, or the pleadings have Time for examination by defendant.

Rules 337-338.

been noted closed: *Ashley* v. *Brenton*, 13 P. R. 98, therefore, would appear to be obsolete.

Co-defendants need not be notified of examination of plaintiff.

A defendant is entitled to examine the plaintiff as soon as his own statement of defence is filed; he is not obliged to wait until those of his co-defendants, if any, are filed: *Fowler* v. *Boulton*, 12 Gr. 437. He need not notify his co-defendants of the examination: *Ib.*

The examination may be had, though the case has been entered for trial: *Clarke* v. *Hawke*, 1 Chy. Ch. 346.

Service on solicitor for client.

337.—(1) A party within Ontario shall attend for examination for discovery before the proper officer in the County in which he resides upon service of an appointment upon his solicitor seven days before the day appointed for the examination, and conduct money shall be paid or tendered to the solicitor.

(2) The solicitor shall forthwith communicate the appointment to the party required to attend, and shall not apply the money to any debt due to the solicitor or any other person, or pay the same otherwise than to such party for his conduct money, and the same shall not be liable to be attached.

(3) The attendance of a party may also be required under Rules 345 to 347.

This *Rule* appears to be based on C. R. 447.

The word "party" means "party to an action." Where persons who are not parties, such as the next friend of an infant, or an officer of a corporation, are to be examined, a subpœna and personal service is necessary: see *Rule* 345 (2).

Where documents are required to be produced, notice to produce them, or a subpœna *duces tecum* should be also served: see *Rule* 341.

(vii) *General Rules as to Examinations.*

RR. 339-347. apply to examination of witnesses.

338. Rules 339 to 347 shall apply to the examination of a witness upon a motion or under an order and to cross-examination upon affidavits and to all examinations for discovery. C.R. 492. *Amended.*

The effect of this *Rule* is to assimilate the practice relating to examinations of witnesses on interlocutory applications, with that relating to the examination of parties for discovery.

Mode of conducting examination.

339. Any person examined shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be as at a trial. C.R. 451.

Rules 340, 341.

Examination may be taken in shorthand.

340.—(1) The examination (unless otherwise ordered or agreed) shall, if the examiner is a shorthand writer or a shorthand writer is available, be taken in shorthand by the examiner or by a shorthand writer approved and duly sworn by him and shall be taken down by question and answer; and it shall not be necessary for the depositions to be read over to, or signed by, the person examined.

Certified copy to have effect of original depositions.

(2) A copy of the depositions so taken, certified by the person taking the same as correct, and if such person be not the examiner, also signed by the examiner, shall be received in evidence saving all just exceptions. C.R. 457 and 458.

Depositions to be returned to Court.

(3) The depositions taken by the examiner shall, upon payment of his fees, be returned to and filed in the office in which the proceedings are carried on. C.R. 459.

Where an error has been made by the shorthand-writer in transcribing his notes, the Court may allow the transcript to be taken off the files for correction: see *The Knutsford*, 1891, 1 P. 219; 64 L. T. 352.

"Saving all just exceptions."—This *Rule* does not make the depositions of a party, or of an officer of a corporation, admissible in evidence, otherwise than as provided in *Rule* 330.

Production of papers.

341. The person to be examined or any party to the action shall, if so required by the subpœna or notice, produce on the examination all books, papers and documents relating to the matters in issue which he could be required to produce at a trial. C.R. 448. *Amended.*

The proper mode of compelling production on an examination for discovery, where the witness neglects, or refuses, to produce, is for the Examiner to direct what documents are to be produced, and to adjourn the examination. Process by subpœna *duces tecum* to get production of particular documents is not to be encouraged by treating non-production thereunder, for discovery, as contempt: *Lavery* v. *Wolfe*, 10 P. R. 488; but see *Alexander* v. *Irondale, etc.*, 18 P. R. 20. See note to *Rule* 342.

See *Russell* v. *Macdonald*, 12 P. R. 458.

Semble, the notice referred to in this *Rule*, is a notice to produce documents served with the appointment on the solicitor of the party to be examined, as provided in *Rule* 337; a subpœna *duces tecum* is required to be served on persons not parties: see *Rule* 345 (2). But where a witness is examined in support of a motion, it was held that he could not be compelled to produce documents to add to what he had to say, or to enable him to become possessed of facts not within his knowledge: *Re Baynes Carriage Co.*, 27 O. L. R. 244.

Rules 342, 343.

This *Rule* provides for production of documents by the party under examination. It does not cover the case of production of documents in the possession of an opposite party required for the purpose of examining a witness respecting them. Where documents of that kind are produced under *Rule* 348, they may be transmitted to the Examiner for the purposes of an examination as provided by *Rule* 396 (2); or, in case of need, a special order for production of documents at the examination may be obtained under *Rule* 349.

A party admitting the possession of documents may be ordered to produce them.

342. Any person who admits, upon his examination, that he has in his custody or power any such document may be directed to produce the same for the inspection of the party examining by the examiner, and for that purpose a reasonable time is to be allowed. C.R. 452.

Where Master may order production.

The power of the Master, or Special Examiner, to order production of documents under *Rule* 342, is not, as formerly, confined to cases where *parties to the action* admit the possession of such documents. Where the admission is made by an officer of a corporation, if the corporation is a party, the Master, and Examiner, has now power to make the order, and an application in Chambers is not necessary: see *Rule* 349. In the case of an officer of a corporation which is a party to the action, it would seem that an order for production of documents can only be made of such as he admits are in his custody or power, and not of any which are in the custody or power of some other officer. Production may be obtained upon service of notice, as provided by *Rule* 348. The provisions of *Rule* 342 are intended to meet the case of any one examinable under *Rules* 327, 332, 335, or as a witness upon any interlocutory motion, who on his examination admits that he has material documents which he has not produced; the examination may be adjourned for the purpose of enabling the examinant to comply with the Master's, or Examiner's, order for production: *Comstock* v. *Harris*, 12 P. R. 17. The Examiner's direction is subject to appeal: see *Rule* 344.

A person examined under *Rule* 271 may also be ordered by the Examiner to produce documents by virtue of this *Rule*: *Orpen* v. *Kerr*, 11 P. R. 128.

The question as to the liability of any person being examined to produce any documents referred to in a subpœna *duces tecum* should ordinarily, be raised before the Examiner, and not by motion to set aside the subpœna: *Alexander* v. *Irondale, etc., Ry.*, 18 P. R. 20; or by motion to commit for contempt in disobeying the subpœna: see note to *Rule* 341; *Steele* v. *Savory*, W. N. 1891, 195, is only to be followed in exceptional cases: *Alexander* v. *Irondale, supra.*

Objection to questions.

343. If any person under examination objects to any question put to him, the question and the objection shall be noted, and the validity of such objection shall be decided by the examiner, whose decision shall also be noted. C.R. 455. *Amended.*

See Eng. (1883) R. 496.

Disclosure on Examination for Discovery.—A party has the right to examine for discovery, not only for the purpose of obtaining information from the opposite party as to material facts which are not within his own knowledge, and is within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence of the facts admitted: *Att'y-Gen.* v. *Gaskill* 20 Ch. D. 519; *Hellier* v. *Ellis*, W. N. 1884, 9; see *Colter* v. *McPherson*, 12 P. R. 630; *Humphries* v. *Taylor Drug Co.*, 39 Ch. D. 693; *Macdonald* v. *Sheppard Pub. Co.*, 19 P. R. 282. Rule 343. Scope of examination for discovery.

The examination must not extend to matters wholly irrelevant to the pleadings: *Bentley* v. *Murphy*, 2 O. L. R. 685; *Cole* v. *Canadian Pacific Ry.*, 19 P. R. 104; and it will be, as far as possible, confined to matters relevant to what is raised by the pleadings: *Atty.-Gen.* v. *N. Metropolitan Tramways*, 1892, 3 Ch. 70; 67 L. T. 283; *Dickson* v. *Covert*, 2 Chy. Ch. 242; *Nicholl* v. *Elliott*, 3 Gr. 536; *Proctor* v. *Grant*, 9 Gr. 31; though a fair amount of latitude must be allowed: *Mack* v. *Dobie*, 14 P. R. 465, and matters germane to what is strictly raised by the pleadings may be inquired into, in view of the right to amend; information for which purpose is one of the objects of examination for discovery: see *McGillivray* v. *McConkey*, 6 P. R. 56. Relevancy to the mere allegations in the pleadings may not be sufficient to justify a particular line of discovery, if parts of the pleadings are not relevant to the action: *Bentley* v. *Murphy*, 2 O. L. R. 665. Questions with a view to discovering the names of the parties witnesses are not admissible: *Knapp* v. *Harvey*, 1911, 2 K. B. 275.

Discovery is relevant or material, not only if it is directed to the facts directly in issue, but also if it is directed to the damages: *Blumenstiel* v. *Edwards*, 5 O. W. R. 341.

Examination for discovery in support of a defence which was had in law, was not allowed: *Rogers* v. *Lambert*, 24 Q. B. D. 573; 62 L. T. 694.

It is improper to examine generally as upon a cross-examination of a witness: see *Kennedy* v. *Dodson*, 1895, 1 Ch. 334; *sed vide Rule* 339.

The plaintiff is entitled to discovery of what will help him to prove any issue to be determined at the trial; but where discovery is sought in aid of something which is not part of what the plaintiff must prove at the trial, but is merely consequential to it, the right is not absolute, but discretional, until the plaintiff has established his fundamental right at the trial: see *per* Street J., in *Graham q. t.* v. *Temperance, &c.*, 16 P. R. at p. 539; but where the plaintiff sued on an agreement, which defendant denied, but also set up that, if established, it had been performed, the defendant was required to answer questions directed to the alleged breach of the agreement, without the agreement itself having been first established: *Sheppard* v. *Harkins*, 8 O. L. R. 632.

Questions which only go to impeach the credit of the party examined are not admissible: *Mock* v. *Dobie*, 14 P. R. 465.

Where a party's right to an account depends on his establishing a fiduciary relationship which is denied, the opposite party may refuse to make discovery of matters of account until the question of relationship has been judicially determined: *Bedell* v. *Ryckman*, 5 O. L. R.

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670; and a defendant may refuse to answer questions as to facts, which would become material only in the event of the plaintiff establishing his right to recover damages: *Evans* v. *Jaffray*, 3 O. L. R. 327.

A defendant pleading privilege was allowed to be examined as to his reasons for believing in the truth, and as to the means taken by him to ascertain the truth, of the alleged slander in respect of which the action was brought: *Elliott* v. *Garrett*, 1902, 1 K. B. 170; 86 L. T. 441; and from whom he obtained information: *Edmondson* v. *Birch*, 1905, 2 K. B. at pp. 525-6, per Romer, L.J.; but see *Caryll* v. *Daily Mail*, 90 L. T. 307; *Adams* v. *Fisher*, 110 L. T. 537.

A plaintiff was held entitled to examine a married woman as to the estate possessed by her at the time of the contract, that being, as the law then stood, a matter which the plaintiff must prove: *Kennedy* v. *Bowes*, 11 C. L. T. 281; *Smith* v. *Berg*, 36 L. T. 471; and see *Bursill* v. *Tanner*, 16 Q. B. D. 1.

An executor pleading *plene administravit* was held bound to disclose particulars of the real and personal estate: *St. George* v. *St. George*, 19 L. R. Ir. 225.

A party examined is bound to inform himself as far as possible as to the matters in question so far as the means within his own possession, or that of his servants or agents, can assist him, in order to give the discovery which the opposite party is entitled to: see *Vanhorn* v. *Verral*, 3 O. W. N. 439.

Disclosure by Officers of a Corporation.—The person examined, whether a party, or an officer of a company, is bound to seek the necessary information which is in his own possession, or in possession of the servants or agents of the company, in order to give the discovery to which the party examining is entitled: *Harris* v. *Toronto Electric Light Co.*, 18 P. R. 285; *Clarkson* v. *Bank of Hamilton*, 9 O. L. R. 317; *Horton* v. *McLean*, 2 O. W. N. 1493; but it would seem that an officer is not bound to answer as to his own knowledge, not acquired in the course of his employment by the company, or to make inquiries of the other officers or agents as to their knowledge not acquired in the same way, but acquired accidentally, or in some other capacity than as such officers or agents: *Welsbach Incandescent, etc.*, v. *New Sunlight Incandescent, etc.*, 1900, 2 Ch. 1; 83 L. T. 58; see also *Sydney Cheese & Butter Factory Association* v. *Brower*, 19 P. R. 152, where a special agreement was set up by the defendant binding him not to divulge the matters, disclosure of which was sought.

Action to recover land.

Matters as to which Discovery may be had.—There is no distinction, as regards the right to discovery, between actions for recovery of land, and other actions; and a plaintiff is therefore entitled to discovery as to all matters relevant to his own, and not exclusively to the defendant's case: *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Daniel* v. *Ford*, W. N. 1883, 27, 52. This is not a new right, however; the right to discovery is unaffected by *The Judicature Act*: *Ib.*, and *Hunnings* v. *Williamson*, 10 Q. B. D. 459, 462.

Defamation.

In an action for libel of the plaintiffs in the way of their trade, where no special damage is alleged, but only general diminution of profits, discovery as to the amount of diminution, and how it was made out, was held to be relevant: *Blackford* v. *Green*, 14 P. R. 424.

In an action against a newspaper for libel, a defendant cannot be required to disclose the source of his information: *Pornell* v. *Walter*, 24 Q. B. D. 441; 62 L. T. 75; *Blanc* v. *Burrows*, 12 T. L. R. 521; *Plymouth Mutual C. & I. Society* v. *Traders Publishing Association*, 1906, 1 K. B. 403; 94 L. T. 258; and see *Ridgeway* v. *Smith*, 6 T. L. R. 275; *Hope* v *Brosh*, 1897, 2 Q. B. 188; but see *Edmonson* v. *Birch*, 1905, 2 K. B. 523-6, where it was said that such information may have to be disclosed, but not where the Court thinks it is asked for an ulterior purpose, such as to bring an action against the person who gave the information, and not *bonâ fide* for the purposes of the pending action; nor can a well established newspaper, sued for libel, be required to disclose the number of its circulation: *Whittaker* v. *Scorboro' Post*, 1896, 2 Q. B. 148; 74 L. T. 753, overruling *Parnell* v. *Walter*, *supra*, on that point. Questions as to the inquiries made as to the truth of the matters complained of before publishing them are proper: *White* v. *Credit Reform, &c.*, 1905, 1 K. B. 653; 92 L. T. 817; but not the names of persons to whom the publication had been shewn: *Ib.*; but an inquiry as to the names of persons to whom an alleged defamatory circular, the subject of the action, had been sent, was allowed: *Massey-Harris* v. *De Laval Separator Co.*, 11 O. L. R. 227, 591; and also as to the person who had given the information on which the circular was based: *Ib.*; *Chambers* v. *Joffroy*, 12 O. L. R. 377; but an inquiry as to the name of the informant from whom the defendants received the information on which they acted in sending the alleged libel, and in respect of which the defendants pleaded privilege, was disallowed: *Edmonson* v. *Birch*, 1905, 2 K. B. 523; 93 L. T. 462. And where defendant pleaded fair comment an interrogatory to the plaintiff "Do you intend to set up, that defendant in publishing the words complained of was actuated by express malice towards the plaintiffs —if yea, give generally the facts and circumstances on which the plaintiffs rely as showing actual malice," was disallowed: *Lever* v. *Associated Newspapers, Ltd.*, 1907, 2 K. B. 626; 97 L. T. 530. But whether an inquiry as to the name of the informant in libel actions against newspapers should be allowed is a matter of judicial discretion; such an inquiry for the purpose of enabling the plaintiff to sue the informant, is obviously illegitimate; and as a matter of public policy it may not be in the public interest that a newspaper sued for libel should be compelled to disclose its informant: see *Adams* v. *Fisher*, 110 L. T. 537. Rule 343.

Questions as to defendant's meaning of the alleged defamatory words were held inadmissible: *Heaton* v. *Goldney*, 1910, 1 K. B. 574; 102 L. T. 451; *Morley* v. *Patrick*, 21 O. L. R. 240.

Where a defendant pleads qualified privilege, though he does not plead justification, he is not precluded from examining the plaintiff for discovery as to matters affecting the question of the defendant's honest belief, as tending to shew absence of malice, even though the answers may tend to prove the truth of the libel: *McKergow* v. *Comstock*, 11 O. L. R. 637; nor, in an action of slander, from examining the plaintiff as to the truth of matters of fact on which the alleged defamatory remarks were based: *Walker* v. *Hodgson*, 1909, 1 K. B. 239; 99 L. T. 902.

In an action for slander the defendant may be asked whether he spoke the words complained of, "or words to that effect," and in whose presence he spoke them: *Dalgliesh* v. *Lowther*, 1899, 2 Q. B. 590; 81 L. T. 161; and what information he had, and what inquiries

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he made, as to the truth of the words: *Saunderson* v. *Von Radeck*, 11[illegible] L. T. Jour. 33; but questions as to whether, within three years, the defendant had uttered the alleged slander, and to what persons, were held to be oppressive, and were disallowed: *Barham* v. *Huntingfield* (1913), 2 K. B. 193; 108 L. T. 703.

In an action to recover a loan, questions with a view to shewing that the defendant carried on the business of a money lender within *The Money Lenders Act*, 1900, were allowed: *Nash* v. *Layton*, 1911, 2 Ch. 71; 104 L. T. 834.

Malicious prosecution.

In an action for malicious prosecution, questions as to what information the defendant had before instituting the prosecution, and what steps he took to ascertain the truth thereof, and as to the facts on which the defendant relied as constituting reasonable and probable cause, were disallowed: *Maas* v. *Gas Light & C. Co.*, 1911, 2 K. B. 543; 104 L. T. 767.

Patent cases.

In an action for infringement of a patent, the plaintiff was held to be bound to answer questions as to matters which tended to show that the patent was not a good one, having become forfeited: *Parramore* v. *Boston Manufacturing Co.*, 4 O. L. R. 627.

The general law applicable to discovery governs in patent cases. The defendant must disclose the particular lines of attack on the plaintiff's patent which are contemplated, but need not so individualize persons alleged to be prior users, as to enable the plaintiff to know the defendant's witnesses: *Smith* v. *Green* 10 P. R. 482.

As to the extent to which plaintiff may examine defendant for discovery in an action for infringement of a patent, where the defendant claims to use a secret process: see *Ashworth* v. *Roberts*, 45 Ch. D. 623; *Osram Lamp Works* v. *Gabriel Lamp Co.*, 1914, 1 Ch. 699; 111 L. T. 99.

In an action for infringement of patent where defendants were ordered to account for profits, it was held that, upon the reference, they must disclose the names and addresses of their customers: *Saccharin Corporation* v. *Chemicals and Drugs Co.*, 1900, 2 Ch. 556.

Seduction.

In an action for seduction, where defendant admitted the seduction, questions as to promise of marriage were disallowed; *Leroux* v. *Schnupp*, 15 O. L. R. 91.

Disclosure of evidence and names of witnesses.

A party, on examination for discovery, need not disclose the names of his witnesses: see *McColla* v. *Jones*, 4 T. L. R. 12; *Marriott* v. *Chamberlain*, 17 Q. B. D. 154; 54 L. T. 714; *Vunhorn* v. *Verral*, 3 O. W. N. 337; and see *Caswell* v. *Toronto Ry.*, 24 O. L. R. 339, 353; nor the evidence he intends to give: *Coyle* v. *Coyle*, 19 P. R. 97; though he cannot object to disclose a material fact only for the reason that names of witnesses will thereby, necessarily, be disclosed: *Ib.*; *Johns* v. *James*, 13 Ch. D. 370; *Humphries* v. *The Taylor Drug, etc., Co.*, 39 Ch. D. 693; *Birch* v. *Mather*, 22 Ch. D. 629; *Hall* v. *Liardet*, W. N. 1883, 175; *Marshall* v. *Metropolitan*, 7 T. L. R. 49; *Williamson* v. *Merrill*, 4 O. W. R. 528; and see 5 O. W. R. 64; *Sangster* v. *Aikenhead*, 5 O. W. R. 438, 495; or their reputation injured: *Macdonald* v. *Sheppard Pub. Co.*, 19 P. R. 282.

Answers tending to disclose party's evidence.

As to objections to answer questions tending to disclose evidence, see *Eade* v. *Jacobs*, 3 Ex. D. 335; *Atty.-Gen.* v. *Gaskill*, 20 Ch. D. 539, *Benbow* v. *Low*, 16 Ch. D. 93; Bray on Discovery, 445; *Coyle* v. *Coyle*, 19 P. R. 97; *Hooton* v. *Dalby*, 1907, 2 K. B. 78; 96 L. T. 537 (action of seduction); *Knapp* v. *Harvey*, 1911, 2 K. B. 725; 105 L. T. 473; (action for personal injury).

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Whers a solicitor's ohjection to questions is overruled hy ths Examiner, hs cannot put an end to ths examination hy withdrawing, and the examination if proceeded with will hs regular, and will not be struck out, though taken after he has withdrawn: *Connolly* v. *Murrell*, 14 P. R. 187, 270.

Privilege generally.

Privilege on Examination.—Ths gsneral rules as to privilege in evidencs apply in examinations for discovery, and in ths production and inspection of documents: ses notes to *Rule* 343.

Ths plaintiff is entitled to examine in ordsr to ascertain what title the defendant is setting up against him. This does not coms within ths ground of privilege: *Coyley* v. *Sandycroft*, 33 W. R. 577.

A hushand of wife may under *The Evidence Act* (R. S. O. c. 76), s. 9, refuse to disclose communications rnade hy ons to the other of them during marriage: *Connolly* v. *Murrell*, 14 P. R. 187, 270; hut each must disclose communications made hy a third person to either of them: *Williamson* v. *Merrill*, 5 O. W. R. 64.

As to ohjections to answers as tending to criminate, see *infro*.

As to ohjections on the ground of disclosing the names of witnesses, see *supra*, p. 820.

Whers interrogatories, under the English practice, were administered to the guardian *od litem* of a lunatic defendant, it was held that hs need not answer them, as he was not a party, and not called upon to make admissions against defendant's interest: *Ingrom* v. *Little*, W. N. 1883, 124; hut see *Rule* 332.

Where knowledge, which might have heen ohtained hy inquiry, is contained in reports which are privileged, the information so ohtained is privileged: *London, Tilbury & Southend Ry. Co.* v. *Kirk*, 51 L. T. 599.

As to the circumstances under which police officers can he compelled to disclose the source of information under which they have done an act for which the action is hrought: see *Humphrey* v. *Archibald*, 21 Ont. 553; 20 Ont. App. 267.

Answers tending to criminate.

Criminating Questions.—Formerly a person under examination for discovery might object to answer questions tending to criminate such person, or ths hushand or wife, of such person: *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; *Aloboster* v. *Horness*, 70 L. T. 375; *Mitchell* v. *Little*, 10 P. R. 265; *Jones* v. *Gollon*, 9 P. R. 296. The ohjection must have been made on oath: *Webb* v. *East*, 5 Ex. D. 23; *Power* v. *Ellis*, 6 S. C. R. 2; *Redfern* v. *Redfern*, 39 W. R. 212; *D'Ivry* v. *World*, 17 P. R. 387; and if not claimed bef·e the Examiner the privilege, it seems, might still have heen claimed on a motion to commit: *Hall* v. *Gowanlock*, 12 P. R. 204. It was sufficient if the person swore that the answer to the question 'might' tend to criminate him: *Lamb* v. *Munster*, 10 Q. B. D. 110. That another person might he exposed to an action, was, and is no ground for refusing to answer: *Tetley* v. *Easton*, 25 L. J. C. P. 293; hut an officer of a corporation might claim ths privilege on the ground that ths corporation might be exposed to a criminal prosecution: *D'Ivry* v. *World*, 17 P. R. 387.

See the notes to *Rule* 348, *infro*, p. 833.

The protection was against answering not only a question that had a direct tendency to criminate the person or corporation, hut also one

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that formed a step towards doing so; the person, however, or in the case of a corporation, an officer, must have pledged his oath to his belief that such would, or might, be the effect of the answer; and to entitle him to the privilege of silence, the Court must have seen from the circumstancee of the cnse, and the naturo of the evidence which the witness was called to give, that his belief was likely to he well founded: *D'Ivry* v. *World*, 17 P. R. 387.

Where, in an action on promissory notes, defendants pleaded that plaintiff and others hnd conspired to harass defendants, and lessen trade competition, contrary to 52 V. c. 41 (D.), s. 1 (c), aad had procured holders of notes to transfer them to the plaintiff, who was suing ss trustee, plaintiff was held not entitled to refuse to answer as to the names of his *cestuis que trustent*, on the ground that the answer would tend to criminate him: *Mills* v. *Mercer Co.*, 15 P. R. 276.

But now under *The Evidence Act* (R. S. O. c. 76), s. 7, a witness is not excnsed from answering any question on the ground that his answer may tend to criminate him; and see *The Canada Evidence Act* (R. S. C. c. 145), s. 5; *Reg.* v. *Fox*, 18 P. R. 343; *Chambers* v. *Jaffray*, 12 O. L. R. 377; hut whether these Acts cover the case of an officer of a corporation whose evidence might tend to criminate the corporation, is doubtful.

As to actions for hreach of promise of marriage, and proceedings in consequence of adultery: eee *The Evidence Act*, c. 76, s. 8, aad notes preceding *Rule* 327, *supra*, p. 797.

It was at first thought that answers given under such circumstances are not, under *The Canada Evidence Act* (R. S. C. c. 145), admissihie against the person examined, in any criminal proceedings, except a prosecution for perjury in giving such evidence, and the old rule exonerating a party from giving such evidence was therefore thought to be in effect ahrogated: see *Weiser* v. *Heintzman*, 15 P. R. 258; hut on appeal (S. C., 15 P. R. 407), it was held that the Dominion Act had not altered the practice in civil proceedings; hut see *Reg.* v. *Fox*, 18 P. R. 346.

In an action to recover damages for maintenance (which is an indictable offence), as no discovery could he had which would not involve the defendsnt in matters leading up to the offence, no examination for discovery can take place at all: *Hopkins* v. *Smith*, 1 O. L. R. 659; *sed quære*, how far, if at all, this is now law.

Examiner's order subject to review without appeal.

344. Any direction or ruling of the examiner shall be subject to review upon any motion with respect to such examination without an appeal. C.R. 453. *Amended.*

There is no *Rule* specially regulating appeals from Special Examiners, but an appeal might be had under *Rule* 505. This *Rule*, however, enables the Court to review any order or ruling of an Examiner, without an appeal. This may be done when the depositions are read before the Court, when any evidence which he has improperly received may be rejected.

Subpœna and appointment.

345.—(1) Any party who is liable to be examined may be required to attend before the proper officer in the County in which he resides, for examination, upon being

served with an appointment and upon payment of the proper fees. Rule 345.

2. Any person not a party, liable to be examined, shall also be served with a subpœna. C.R. 443. *Amended.*

"In which he resides": see *Maclean* v. *James Bay Ry. Co.*, 5 O. W. R. 440.

For special reasons, the examination may be specially ordered to be taken before some other person, and elsewhere than provided by this *Rule*: *Rule* 347; *Gallagher* v. *Gairdner*, 2 Chy. Ch. 480; *McDermid* v. *McDermid*, *Ib.*, 372; *Campbell* v. *Tucker*, 7 P. R. 135; *Kahn* v. *Redford*, 3 Chy. Ch. 55; Coop. Dig., 1873, p. 111; and see *Standard Trading Co.* v. *Scybold*, 7 O. L. R. 39.

The fact that a witness could only speak Welsh, was held not to be a reason for having the examination before some person other than the Court Examiner, as he can have an interpreter: *Marquess of Bute* v. *James*, 33 Ch. D. 157.

This *Rule* draws a distinction between persons who are parties, and persons who are not; parties are only required to be served with the appointment; persons not parties must be served not only with the appointment, but also with a subpœna. In both cases proper witness fees must be paid: see *infra*.

A party may be either personally served with an appointment under this *Rule*, in which case he would only be entitled to reasonable notice as in the case of a witness, unless he is suing or defending in person; as to which: see *infra*, or he may be served, by service under *Rule* 337, on his solicitor, in which case seven days' notice must be given.

Attendance and submitting to be sworn precludes objection that no subpœna had been served: *Cooke* v. *Wilson*, 3 O. L. R. 299.

An order for substitutional service of the appointment and subpœna for the examination of a person not a party to the action will not be made: *Mills* v. *The Mercer Co.*, 15 P. R. 276.

Subject to what is said below as to suitors suing, or defending, in person, a party, or person, who is personally served, is entitled to be served a reasonable time, but not necessarily 48 hours, before the time appointed: *Re North Wheal, etc., Co.*, 31 Beav. 628; 8 Jur. N. S. 1168; *Bolkow* v. *Foster*, 7 P. R. 388; *Wilson* v. *Cowan*, 19 C. L. T. 140; 3 C. L. T. 216; *Lynskey* v. *Can. Pac. Ry. Co.*, 4 C. L. T. 93.

The solicitor of the party to be examined is entitled to 48 hours' notice: *Rule* 346; and where a suitor has no solicitor, he is also entitled to 48 hours' notice: *Watson* v. *Ham*, 1 Chy. Ch. 293.

Where a motion is made to compel attendance of a person who has not attended, or has attended and refused to be sworn, it must be proved that he was duly served with a copy of the appointment, and (if not a party) also with a subpœna, and was paid proper fees: *McLean* v. *Bruce*, 12 P. R. 602. *Semble*, that the Examiner's certificate on these points would not be sufficient: *Ib.*

Default of Witness.—The evidence of default should show that the witness had been duly subpœnaed, where subpœna is necessary; a statement in the certificate of the examiner, that evidence of the service had been produced, is insufficient: *Waddle* v. *McGinty*, 2 Chy. Ch. 442; and see *Sutherland* v. *Rogers*, *Ib.*, 191; and *Barber* v. *Adams*, *infra*, p. 824. Default of witness, how punished.

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The subpœna (when necessary) must be served personally, otherwise an attachment for non-attendance cannot be obtained: *Barber* v. *Adams*, 16 P. R. 156.

Where the subpœna is issued from an office other than that in which the proceedings are being carried on, the person served, having been paid conduct money, should attend and there raise any objections he may have to the regularity of the subpœna: *Evel* v. *Bank of Hamilton*, 3 O. W. N. 336.

A witness failing to attend is liable to be committed for default. A witness who attends, but refuses to answer proper questions, may, on motion, be ordered to attend again and submit to answer the questions at his own expense, or in default be committed: see *Hannum* v. *McRae*, *per* Moss, J.A., 18 P. R. at p. 200.

It was held in *Woods* v. *Fader*, 10 O. L. R. 643, that in order to found proceedings for contempt it must be shown that the original subpœna was shown to the witness at the time of service: *sed quære*, if that is so any longer: see *Rule* 203.

A witness, whether a party, or a stranger to the cause, who is required to attend for examination, is entitled to be paid ordinary witness fees, and may refuse to attend, or, if attending, may refuse to be sworn, until paid: *Rule* 345 (1); *Brocas* v. *Lloyd*, 23 Beav. 129; *Wiltshire* v. *Morsholl*, W. N. 1866, 80; *Davey* v. *Durrant*, 24 Beav. 493; and see *Robins* v. *Carson*, 2 Chy. Ch. 343; *Bolkow* v. *Foster*, 7 P. R. 388; *Smith* v. *Greey*, 11 P. R. 345.

Where the defendant's solicitor was served under *Rule* 337, but defendant himself was not, but the appointment was twice duly enlarged, and defendant was served for the enlarged date, and his solicitor notified of the enlargement, the defendant not attending, was held to be in default: *Reid* v. *Wolters*, 19 P. R. 310.

A motion to commit a witness for refusing to answer questions is a civil process, and not a criminal proceeding. The privilege of Parliament may therefore be claimed by the witness: *Re Armstrong*, 1892, 1 Q. B. 327.

A motion to commit must be made before a Judge: *Keefe* v. *Ward*, 18 C. L. J. 166; 2 C. L. T. 260; and see *Rule* 208 (1).

A witness attending for examination, is not bound to wait more than half an hour, unless notified that his examination is to be proceeded with: *Perks* v. *Stottart*, 1 N. R. 563; but see *Campbell* v. *Scott*, supra, p. 808.

See *Clark* v. *Campbell*, in note to *Rule* 228.

Examination of party out of jurisdiction.

Party or Witness out of Ontario.—Where the witness, or party required to be examined in support of a motion is out of the jurisdiction, an order for a commission may be obtained as soon as the notice of motion is served: *Forrell* v. *Cruickshank*, 1 Chy. Ch. 12; or if a resident in Quebec a subpœna may be ordered to issue under C. S. C. c. 79, s. 4 (see R. S. O. p. 986); *Moffatt* v. *Prentice*, 6 P. R. 33; *McKerchie* v. *Montgomery*, 1 Chy. Ch. 225; *sed vide, contra*, *Lefurgy* v. *Great West Land Co.*, 11 O. L. R. 617.

Where a party resident out of Ontario comes temporarily within Ontario, his attendance for examination for discovery can only be obtained by order under *Rule* 328: *Cox* v. *Prior*, 18 P. R. 492.

A party resident in Quebec cannot be required to attend for examination in Ontario: *Lefurgey* v. *G. W. Land Co.*, *supra*. Rules 346-348.

346. The party examining shall serve a copy of the appointment for such examination upon the solicitor of the opposite party at least forty-eight hours before the examination. C.R. 446. Service of appointment on solicitor.

Sundays and other holidays are excluded in the computation of the 48 hours: see *Rules* 172 and 173 (2), and *Lovelace* v. *Harrington*, 10 P. R. 157. Service on Saturday at 9.30 a.m. for Tuesday at 2 p.m. is insufficient: *Senn* v. *Hewett*, 8 P. R. 70. Where the person to be examined is not a party, he must be personally served; the Court will not, in such a case, authorize substitutional service: *Mills* v. *The Mercer Co.*, 15 P. R. 276.

Where a suitor is suing, or defending, in person, he is held entitled to at least forty-eight hours' notice under this *Rule*: see *Watson* v. *Ham*, 1 Chy. Ch. 293.

347. An order may be made for the examination of any person liable to be examined as aforesaid before any other person or in any other county. C.R. 444. Order to examine.

Rule 345 (1) prescribes that a party liable to be examined is to be examined in the county where he resides. This *Rule* enables a special order to be made for examination in any other county. The *Rule* relates not only to parties, but also to persons, not parties, liable to be examined as witnesses: see *Hull* v. *Allen*, 2 O. W. N. 260.

See notes to *Rules* 327, 336, 345.

An order for the examination of an officer residing in a foreign country of a foreign corporation which had attorned to the jurisdiction was refused, in *Perrins* v. *Algoma*, 8 O. L. R. 634.

(viii) *Production of Documents.*

348. Each party, after the defence is delivered, or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and produce and deposit the same with the proper officer for the usual purposes. A copy of such affidavit shall be served forthwith after filing. C.R. 464. Notice for production of documents.

See Eng. (1883) R. 354.

This *Rule* makes a material change in C. R. 464, on which it is professed to be based. It substitutes a notice for a præcipe order. It limits the right to production on notice: (1) To cases where a defence, or an issue is filed. Formerly a plaintiff had a right to an order for production of documents, though no defence was filed, as soon as the time for delivering a defence had expired. Under this *Rule* that right

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does not exist: and *semble*, a special application for production will be necessary if required wherever no defence is filed. The issue referred to in the *Rule* is, probably, one specially ordered to be tried, *e.g.*, an interpleader issue, and not the ordinary joinder of issue in an action.

The notice for production can only be properly served under this *Rule*, where the party serving it is entitled to discovery. If the action is of such a nature as disentitles the plaintiff to such relief, the notice would be irregular, and would be set aside: *Johnston* v. *London & Paris Exchange*, 6 O. L. R. 49 (an action to recover penalties).

On a special application, production may be obtained under *Rule* 349 from "any party" and at any stage: see notes to that *Rule*.

In a petition of right, the Crown is entitled to discovery of documents from the suppliant: *Tomline* v. *The Queen*, 4 Ex. D. 252; and in an action by the Crown, the Crown has the same right of discovery against the defendant as one subject has against another: *Atty.-Gen.* v. *Newcastle*, 1897, 2 Q. B. 384; 77 L. T. 203. The defendant has not the same right against the Crown, though as a rule the Crown gives full discovery, unless the public interest requires that this should not be done: *Ib.*

This *Rule* does not enable a notice to be given to a next friend or guardian of either an infant, or a lunatic, nor to any person on whose behalf the action is brought, although the latter and also the next friend, or guardian, of an infant are liable to be examined for discovery: see *Rules* 322, 334.

Time for production.

Time for Production.—The *Rule* means that as each defendant puts in his defence, that defendant becomes liable to give, and is entitled to obtain, production.

Place.

Place.—Where production is required upon an issue, the officer with whom the issue is filed is the officer in whose office the documents should be produced: see *Rule* 125. In all other cases, the place for production will be the office where the proceedings were commenced: see *Rule* 762.

From whom production may be compelled.

Party Entitled to Production.—This *Rule* entitles any party to production from the adverse party: and *Rule* 327 enables a party to examine for discovery "any party adverse in interest," and it is probable that production may be obtained under this *Rule* from any party who might so be examined: see notes to *Rule* 327, *supra*: and *Hamilton* v. *Nott*, L. R. 16 Eq. 112; *Kennedy* v. *Wakefield*, 39 L. J. Chy. 827; 22 L. T. 645; 18 W. R. 884; and *Brigham* v. *Bronson*, 3 C. L. T. 311. (where a defendant obtained production from a co-defendant adverse in interest); but where there is no question at issue between co-defendants, they are not entitled to discovery from each other: *Birchal* v. *Birch*, 1913, 2 Ch. 375; 109 L. T. 275.

Under C. R. 466, persons for whose benefit an action was prosecuted or defended were *quasi* parties for the purpose of the production of documents, but that Rule has not been continued.

A defendant, who is a necessary party to the action, is liable to make discovery to the plaintiff, though no relief is asked against him: *Spokes* v. *The Grosvenor & W. E. Ry. T. Hotel Co.*, 1897, 2 Q. B. 124; 76 L. T. 679.

Under an order obtained by one defendant, other defendants cannot compel production: *Seymour* v. *Longworth*, 3 Chy. Ch. 112. Rule 348.

Where a defendant has not filed a defence he is not entitled to give notice under this *Rule*, neither can a plaintiff give such a defendant notice.

Third Party.—As to compelling production by, and against, a third party: see *Rule* 169 and notes.

Affidavit.—Under an order for production by the plaintiff, the plaintiff on the record is the person to make the affidavit, and an affidavit from some beneficial plaintiff is not a compliance with the order: *Wilson* v. *Ruffolovich*, 7 Q. B. D. 553. By whom affidavit to be made.

Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend, or by some one acquainted with the facts: *Troviss* v. *Bell*, 8 P. R. 550; and in the case of an infant, see *Arnold* v. *Ployter*, 14 P. R. 399; *Flett* v. *Coulter*, 4 O. L. R. 714. In England, *Higginson* v. *Holl*, 10 Ch. D. 235; to the same effect, was disapproved of in *Dyke* v. *Stephens*, 30 Ch. D. 189; see also *Mayor* v. *Collins*, 24 Q. B. D. 361; *Pink* v. *Shorwood*, 1913, 2 Ch. 286; 108 L. T. 1017. A motion by the defendant was granted, that the next friend of an infant plaintiff might be ordered to make an affidavit in reference to documents in his possession in *Crowe* v. *Bank of Ireland*, 5 Ir. R. Eq. 578; but see *Ingram* v. *Little*, 11 Q. B. D. 251; *Re Corsellis*, *Lowton* v. *Elwes*, 48 L. T. 425; W. N. 1883, 60; 52 L. J. Chy. 399; *Dyke* v. *Stephens*, 30 Ch. D. 189; *Redfern* v. *Redfern*, 1891, P. 139; and *Curtis* v. *Mundy*, 1892, 2 Q. B. 178; *Scott* v. *Consolidated Bank*, W. N. 1893, 57; 94 L. T. Jour. 508; decided under the English Rule of 1875, O. 31, r. 12 (1883. R. 354), not adopted here, but which provides that any 'party' may apply to a Judge for an order directing any other 'party' to the action to make discovery on oath of the documents which are or have been in his possession, etc., relating to any matter in question in the action. Infant and lunatic plaintiffs.

Where it is sought to remove a next friend of an infant, he cannot be compelled to give discovery under this *Rule* for that purpose: *Re Corsellis*, *Lowton* v. *Elwes*, 31 W. R. 414. (For the conclusion of that matter see 50 L. T. 703).

In an action by a husband and wife, the wife suing in respect of her separate property, they must make affidavits as to what documents they, and each of them, have, an affidavit as to what they have jointly not being sufficient: *Fendall* v. *O'Connell*, 29 Ch. D. 899. Husband and wife.

In other cases, where a plaintiff cannot make an affidavit, some proper person must do so for the plaintiff, and proceedings will be stayed meanwhile: *Republic of Liberia* v. *Roye*, 1 App. Cas. 139; see *Prioleau of U. S. America*, L. R. 2 Eq. 659; *U. S. America* v. *Wagner*, L. R. 2 Chy. 582; *Princes of Wales* v. *Earl of Liverpool*, 1 Sw. 114; see also notes to *Rule* 349. But it has been held that proceedings could not be stayed by a defendant, in an action on a marine policy, until the plaintiff had obtained an affidavit of documents from his assignor, who was not a party to the suit, nor under the plaintiff's control, within the jurisdiction: *Fraser* v. *Burrows*, 2 Q. B. D. 624; but see *Willis* v. *Baddeley*, 1892, 2 Q. B. 324; 67 L. T. 60, 206. Foreign Governments as suitors.

C. R. 468 provided: "Where the party required to produce documents is a corporation the affidavit shall be made by one of its officers, and may be according to Form No. 20." Affidavit on production by a corporation.

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That Rule has not been continued, but the practice has probably not been changed: see Form No. 21, and *Rule* 772 (2). This is in conformity with what was the practice in Chancery: see Dan. Prac., 5th ed., p. 1677, and cases there cited.

Where a bill was filed by a Republican government, the defendant, having put in a sufficient answer, was held entitled to the usual affidavit of documents, to be made by one or more of the Ministers, or officers, of the government: *Republic of Liberia* v. *Imperial Bank*, L. R. 16 Eq. 179.

It was held unreasonable to require a defendant company to answer interrogatories through a former director who was interested in the plaintiff company, the Court intimating at the same time, that such person might be made a defendant, and discovery thus obtained: *Manchester Val de Travers Paving Co.* v. *Slagg*, W. N. 1882, 127.

Person benefitted formerly a quasi party for certain purposes.

By C. R. 466 it was also provided: "A person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of production of documents."

That Rule has not been continued; whether such a person can now be required to make affidavit merely by notice seems doubtful. Such a person is liable to examination for discovery: see *Rule* 334, and notes: *Garland* v. *Clarkson*, 9 O. L. R. 281, and *Bradley* v. *Clarke*, in note to *Rule* 166, *supra*, p. 622.

The Court may stay proceedings in an action brought for the benefit of a person, not a party, until discovery of documents shall have been made by such person: *Willis* v. *Baddeley*, 1892, 2 Q. B. 324; 67 L. T. 60, 206.

By *Rule* 335 where an action is brought by an assignee of a chose in action, the assignor is examinable for discovery, but there is no *Rule* requiring the assignor to make an affidavit of documents.

Official liquidators.

As to production of documents by an official liquidator: see *Re Mutual Society*, 22 Ch. D. 714.

Affidavit where no documents produced.

An affidavit must be made, though the party has no documents to produce. It should not be made before the notice to produce is served: see *Kennedy* v. *Royal Ins. Co.*, 3 Chy. Ch. 489; *Dobson* v. *Dobson*, 7 P. R. 258; and it should not in such case refer to schedules containing no documents: see *Rogers* v. *Crookshank*, 4 C. L. J. 45.

"**Possession or Power.**"—The party's solicitor, who has in his books and papers entries relating to the party's affairs, cannot be compelled to produce them, nor can the party be required to get and produce copies: *O'Shea* v. *Wood*, 1891, P. 237 (reversed, on another point, in appeal, *Ib.*, 286).

Documents admitted by a defendant, sued as administratrix, to be in her hands individually, but not in her representative capacity, were ordered to be produced: *Fox* v. *Sleeman*, 17 P. R. 492.

"Usual purposes."

"**The Usual Purposes**" mentioned in this *Rule* include the inspection, and taking of copies by the opposite party; but where documents were mentioned as being in the hands of a third person, who refused to give them up until paid certain charges, it was held that the opposite party must content himself with inspecting them, and taking

copies, unless he would agree to indemnify his opponent against the costs of obtaining the documents: *Hogaboom* v. *Cox*, 15 P. R. 23. Rule 348.

Documents produced should ordinarily be deposited in the office in which the proceedings are being taken, (and the former order (Form 96) directed them to be deposited with the affidavit on production), and that practice must, doubtless, still be followed, but not in the case of books in daily use: *Macdonnell* v. *McKay*, 2 Chy. Ch. 141; though inspection of these must be allowed at reasonable times: *Hamelyn* v. *Whyte*, 6 P. R. 143. In practice it is not the custom to deposit the documents, unless specially required by the opposite party; and upon an undertaking being given to allow inspection, when required, of books in constant use, the deposit of them may be dispensed with: *Re Ross*, 5 Ont. App. 82. Where necessary, any convenient place for inspection may be named by special order: see *Hamelyn* v. *Whyte*, *supra*; *Gabbett* v. *Cavendish*, 3 Sw. 267 (n), (a case of books in daily use): *Prestney* v. *Colchester*, 24 Ch. D. 376; (old records and books): *Wagner* v. *Mason*, 6 P. R. 188, (documents in which other persons were interested). Deposit of documents.

Probably, notices to produce under this *Rule*, as under Chy. O. 134, are for the purposes of a trial only, and can not be used for the purposes of a reference, but the Master to whom the reference is directed may be applied to for a direction for production: *Hilderbroom* v. *McDonald*, 8 P. R. 389; *Rule* 411. See also *Shelly* v. *Hussey*, 8 P. R. 250. Production before Referees, or Masters.

See further as to production before Masters, and Referees, notes to *Rules* 399 and 411; and *Cochrane* v. *Morrison*, 10 P. R. 606.

In an action on a marine policy, an order that the plaintiffs and all other persons interested produce the ship's papers in accordance with the practice in that behalf before *The Judicature Act*, was held not superseded by it, and therefore proper: *China Trans-Pacific S. S. Co.* v. *Commercial Union*, 8 Q. B. D. 142.

As to restoring to parties documents left for inspection in the office of a Master: see *Darling* v. *Darling*, 10 P. R. 1.

Postponement of Discovery Pending Decision on Point of Law.—Under *Rule* 122, the Court may order any point of law which is raised to be argued, and may postpone inspection of documents until such point has been determined: *DeCorteret* v. *Lond Security Co.*, 42 W. R. 104; 70 L. T. 323; 7 R. 16; *Engeland* v. *Mitchell*, 13 O. L. R. 184; and may make the like order where some issue of fact ought to be first determined: *Rule* 352. Postponing production.

Discovery and Production of Documents Generally.—Courts of Equity have always compelled the production of documents. The Common Law Courts did so to a very limited extent, but the practice was extended by statute: R. S. O. 1877, c. 50, ss. 169, 170; 41 Vict. c. 8, s. 3. And now under The Judicature Act, the right is regulated by the rules previously existing in the Court of Chancery: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, 658; and the Common Law rules are entirely at an end: Cotton, L.J., in *Eade* v. *Jacobs*, 3 Ex. D. 337, explained in *Bidder* v. *Bridges*, 29 Ch. D. 29, in which it was decided that the defendant has no larger right to discovery than the plaintiff. Production is a matter of right (subject to any right of privilege or protection), and is not a matter in the discretion of the Court: *Bustros* v. *White*, 1 Q. B. D. 423; *Atherley* v. *Harvey*, 36 L. T. What must be produced.

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551; except where sought under *Rule* 349, when the Court would appear to have a discretion as to the documents to be produced.

A plea of purchase for value without notice was formerly available as a bar in Chancery, in a suit for discovery in aid of proceedings at law, but was not available against either discovery, or relief, in cases in which the Court of Chancery had concurrent jurisdiction. Section 16 (*c*) of the Act, therefore, does not protect defendants who set up such a defence from giving discovery, as the Supreme Court does not now exercise the mere auxiliary jurisdiction of the former Court of Chancery, but has complete jurisdiction over the whole action: *Emmerson* v. *Ind*, 12 App. Cas. 300; 56 L. T. 778.

All material documents unless some ground of privilege made out.

Every material document (see *Bewicke* v. *Graham*, 7 Q. B. D. at p. 411), must be produced, unless it is shown to be privileged; though where the materiality depends upon the determination of a question in dispute, and the discovery sought is calculated to cause considerable trouble, or to prove oppressive and vexatious to the party from whom it is sought, the Court may act upon *Rule* 352, and postpone the discovery until the question has been determined: *Wood* v. *Anglo-Italian Bank*, 34 L. T. 255; *Evans* v. *Jaffray*, 3 O. L. R. 327. See also notes to *Rule* 352.

It is the duty of a party, who, after filing an affidavit, discovers a document of which his opponent has a right to have production, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by a supplementary affidavit (the proper course), or at least by notice: *Mitchell* v. *Dorley Moin Colliery Co.*, 1 Cab. & Ell. 215.

Where the documents produced indicate that there are other documents in the possession of the party making the affidavit, which are not produced, such other documents unless shown to be privileged will be ordered to be produced: *Kent Coal Co.* v. *Duguid*, 1910, 1 K. B. 904; 102 L. T. 225; 103 L. T. 89; *Ormerod* v. *St. George's Iron Works*, 95 L. T. 695. A document delivered under seal to a banker (*e.g.*, in a sealed packet), is not exempt from production by the banker as a witness: *Rex* v. *Daye*, 1908, 2 K. B. 333; 99 L. T. 165, and *semble*, the owner, if liable to produce it, could not, by sealing it up, prevent its inspection.

Everything which will throw light upon the case: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Boyd* v. *Marchment*, 13 O. L. R. 468; or which *may* help the case; *Dinn* v. *Brandon*, 79 L. T. Jour. 196; *Cameron* v. *Comeron*, 10 P. R. 522; *Compagnie Financière, etc.*, v. *Peruvian Guano Co.*, 11 Q. B. D. at p. 63, is *primâ facie* subject to production, and inspection.

Letters written, though not mailed, must be produced; the mere fact that they were not forwarded is no ground of exemption: *Cameron* v. *Comeron*, 10 P. R. 522.

Photographs are "documents": *Fox* v. *Sleeman*, 17 P. R. 492.

Discovery of documents clearly immaterial to the question at the trial will not be compelled before trial: see note, p. 836.

Materiality.

As a rule only those documents material to the issue to be tried can be required to be produced; documents which may be material on a reference, if the relief claimed is granted, are not "material" before trial: see *Dickerson* v. *Rodcliffe*, 17 P. R. 586; and notes *infra*, p. 837.

The Court, however, does not in general distinguish nicely between the materiality of the discovery to the matter to be tried at the hearing, and by way of consequential relief; still if the discovery is such as might be used to the prejudice of the party, irrespective of the suit, the Court will look narrowly to the question, whether there is reasonable prospect of its being of material service at the hearing: *Carver* v. *Pinto Leite*, L. R. 7 Chy. 90; *Heugh* v. *Garrett*, 44 L. J. Chy. 305; 32 L. T. 45; *Republic of Costa Rica* v. *Erlanger*, L. R. 19 Eq. 33; *Graham, q. t.* v. *Temperance & G. L. A. Co.*, 16 P. R. 536; and where the plaintiff's right to judgment was conceded, discovery was ordered before decree as to matters which would be referred to a Master: *McDonald* v. *McArthur*, 7 C. L. T. 28, following *Elmer* v. *Creasy*, L. R. 9 Chy. 69. Rule 348.

Where, in an action for libel, defendant has pleaded justification, and has pleaded or delivered particulars in support of the plea, the issues to be tried are limited to the particulars, and discovery is also limited to those matters: *Yorkshire Provident, etc.*, v. *Gilbert & Rivington*, 1895, 2 Q. B. 148; *Arnold* v. *Bottomley*, 1908, 2 K. B. 151; 98 L. T. 777. Where publication is admitted, and an apology and payment into Court pleaded, production of the original MS. of the libellous contribution was not ordered: *Hope* v. *Brash*, 1897, 2 Q. B. 188; see also *Parnell* v. *Walter*, 24 Q. B. D. 441; *Blanc* v. *Burrows*, 12 T. L. R. 521, where in an action against a newspaper for libel, the editor was responsible for the publication, it was held not relevant to inquire from whom he got his information, or the means taken to test its truth: see also note to *Rule* 343, *supra*, p. 821.

Where a question, in an action on an insurance policy, was whether the plaintiff's answer to the question, whether he had been subject to asthma, was material under 55 Vict. c. 39, s. 33 (2), (see now R. S. O. c. 183, s. 156 (5)), which provided that no untrue statement should vitiate the contract unless material, it was held that the materiality was a question for the jury, and defendants were ordered to produce all other applications, and medical examinations, in which the answer as to asthma had been in the affirmative, with a view to the plaintiff's showing that in such cases the company had treated the answer as immaterial: *Ferguson* v. *Provident Institution*, 15 P. R. 366.

A defendant is entitled to inspect documents evidencing the contract sued on, though he does not admit their genuineness: *Benjamin* v. *Saulez*, 6 Ir. R. C. L. 16; and documents bearing upon the amount of damage, though there is no question of liability to be tried, but assessment of damages only: *Pape* v. *Lister*, L. R. 6 Q. B. 242.

After judgment for the plaintiff in an action for the infringement of a patent, he is entitled to inspection of defendant's books, and to an account, although an appeal may be pending from the judgment: *Sarby* v. *Easterbrook*, L. R. 7 Ex. 207. Inspection.

Discovery of the documents must be given, though the party may not be bound to produce them for inspection: *Rumbold* v. *Forteath*, 3 K. & J. 44; *Lazarus* v. *Mozley*, 5 Jur. N. S. 1119; *Manby* v. *Bewicke*, 8 D. M. & G. 476; *Kain* v. *Farrer*, W. N. 1877, 266; *New British Investment Co.* v. *Peed*, 3 C. P. D. 196; and see *Owen* v. *Wynn*, 9 Ch. D. 29; *Re Pickering*, 25 Ch. D. 247.

The party making an affidavit on production must, if necessary, seek the necessary information from his present or former agents: *Earl of Glengall* v. *Frazer*, 2 Hare, 99; *McIntosh* v. *G. W. Railway*, 4 DeG. & S. 544; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. Information to be sought by party producing.

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644; see *Rasbothom* v. *Shropshire, etc.*, 24 Ch. D. 110; *Southwork* v. *Quick*, 2 Q. B. D. 321; *Bolcklow* v. *Fisher*, 10 Q. B. D. 161; see also *Horris* v. *Toronto Electric Light Co.*, 18 P. R. 285; *Foakes* v. *Webb*, 28 Ch. D. 287. In an action on a policy of marine insurance, the defendants obtained an order that the action should be stayed until the plaintiffs satisfied the Court that they had done all in their power to obtain production of the ship's papers: *West of England Bank* v. *Canton Co.*, 2 Ex. D. 472; but where the person in whose control the documents were, was not within the jurisdiction, and it was difficult, if not impossible, to obtain the discovery, the Court refused to stay proceedings: *Froser* v. *Burrows*, 2 Q. B. D. 624; and where executors were sued for trust funds alleged to have been received by their testator, it was held that they were not bound to make inquiry of the testator's bankers, to enable them to say whether or not the fund had been paid to the bankers at a period 20 years prior to the testator's death, and that inquiry into transactions of so remote a date was no part of their duty: *Alliott* v. *Smith*, 1805, 2 Ch. 111.

Difficulty in obtaining production.

Mere difficulty, or inconvenience, in giving discovery, is no reason for not giving it. Thus a railway company were required to give discovery of the contents of books in the possession of themselves or their agents extending over a series of years, to show the receipt of goods specifically delivered to them for carriage: *Holl* v. *L. & N. W. Ry. Co.*, 35 L. T. 848. See also *Mertens* v. *Hoigh*, 11 W. R. 792.

Documents not in party's possession.

If documents not in the possession of a party are required to be produced, or information respecting them given, the party is entitled to be indemnified against the cost of obtaining the documents, or the information: *Homelyn* v. *Whyte*, 6 P. R. 143; *Bethell* v. *Casson*, 12 W. R. 200; *Hogoboom* v. *Cox*, 15 P. R. 23.

Secondary evidence.

Though documents are privileged from production, the opposite party may nevertheless give secondary evidence of them: *Calcraft* v. *Guest*, 1898, 1 Q. B. 759; 78 L. T. 283.

Copies.

A party who has a right to have documents produced for his inspection has also a right to take copies of them: *Pratt* v. *Pratt*, 30 W. R. 837; 51 L. J. Chy. 838; 47 L. T. 249; W. N. 1882, 117; and such copies may, under proper safeguards, be allowed to be taken by photography: *Lewis* v. *Londesborough*, 1893, 2 Q. B. 191.

As to obtaining copies: see *Rules* 193, 194.

Privileged documents.

Privilege and Protection from Production.—The general rules as to privilege in evidence, are applicable in regard to protection from discovery: *Wadeer* v. *East Indian Co.*, 2 Jur. N. S. 407; *Clegg* v. *Edmonson*, 22 Beav. 125. See *Greenough* v. *Gaskell*, 1 M. & K. 100.

The following are some of the principal classes of cases in which documents need not be produced:—

On ground of public policy.

1. State Documents and the Like, the Production of which is not in the Public Interest, and is against Public Policy.—*Kain* v. *Farrer*, W. N. 1877, 266; 37 L. T. 469; *H. M. S. Bellerophon*, 31 L. T. 756; 23 W. R. 248; 44 L. J. Adm. 5; *Hennessey* v. *Wright*, 21 Q. B. D. 509; *Wright* v. *Mills*, 62 L. T. 558; *Ford* v. *Blest*, 6 T. L. R. 295. But it must be stated in the affidavit how these are privileged: *Kain* v. *Farrer*, *supra*; and in such case it is for the head of the department, having the custody of such documents, not for the Judge, to determine whether the production will be injurious to the public service: *Bradley* v. *McIntosh*, 5 Ont. 227; *Hennessey* v. *Wright*, 21 Q. B. D. 509; *Hughes* v.

Vargas, 9 R. 661; 9 T. L. R. 551; see *Re Joseph Horgreaves*, 1900, 1 Ch. 347. Rule 348.

As to privilege by reason of a disclosure being injurious to the administration of justice: see *Humphrey* v. *Archibald*, 21 Ont. 553; 20 Ont. App. 267.

2. Documents, the Production of which would Tend to Involve the Party in a Criminal Charge, or to Subject Him to a Penalty.—*Webb* v. *East*, 5 Ex. D. 23; *Fisher* v. *Owen*, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, 3 Q. B. D. 654; *Hill* v. *Compbell*, L. R. 10 C. P. 222; *Boyle* v. *Wiseman*, 10 Ex. 647; see *Waters* v. *Earl of Shaftsbury*, 14 W. R. 259; *Pickerel, etc., Co.* v. *Moore*, 17 P. R. 287; or forfeiture: *Marborough* v. *Whitwood*, 1897, 2 Q. B. 111; *Atty.-Gen.* v. *Toronto Junction Recreation Club*, 7 O. L. R. 248; but the objection must be made upon oath: *Webb* v. *East*, *supra*, *Bromley* v. *Graham*, 11 P. R. 451; *Power* v. *Ellis*, 6 S. C. R. 1; and must be made in an affidavit pursuant to a notice under *Rule* 348, or an order for production; such an objection taken on a motion is no ground for refusing an order: *Spokes* v. *Grosvenor, etc., Hotel Co.*, 1897, 2 Q. B. D. 124; 76 L. T. 677; *National Association of Operative Plasterers* v. *Smithies*, 1906, A. C. 434; 95 L. T. 71. The penalty and forfeiture clauses of the 13 Eliz. c. 5, and 27 Eliz. c. 4 (see R. S. O. (1897), c. 334, ss. 2, 6), cannot be used to prevent production by parties to deeds which are impeached under those statutes: *Bunn* v. *Bunn*, 4 DeG. J. & S. 316; *Mortin* v. *Treacher*, 16 Q. B. D. 513; but see *Society of Apothecaries* v. *Nottingham*, W. N. 1875, 259. Involving party in criminal charge.

An action for pound breach, claiming treble damages, is a penal action, and the plaintiff is not entitled to an affidavit of documents: *Jones* v. *Jones*, 22 Q. B. D. 425; *Hobbs* v. *Hudson*, 25 Q. B. D. 232; but where the action is for a sum imposed by statute by way of compensation, the plaintiff is entitled to an affidavit: *Adams* v. *Batley*, 18 Q. B. D. 625; and see *Saunders* v. *Wiel*, 1892, 2 Q. B. 321.

The mere fact that a party disobeying the order of the Court granting the plaintiff the relief claimed would be liable to a penalty, is no ground for refusing discovery: *Derbyshire* v. *Derby*, 1896, 2 Q. B. 297; 1897, A. C. 550; 74 L. T. 747; 77 L. T. 107.

See also note to *Rule* 343, p. 821.

Generally, when fraud is charged, no privilege can be claimed for documents relating to the alleged fraud: *Ferner* v. *Williams*, 11 Jur. N. S. 902; *Philips* v. *Holmer*, 25 W. R. 578; *Chorlton* v. *Coombes*, 4 Giff. 372; *Mornington* v. *Mornington*, 2 J. & H. 697; *Williams* v. *Quebrada Ry.*, 1895, 2 Ch. 751; 73 L. T. 397; *Smith* v. *Hunt*, 1 O. L. R. 334; but see *Griffin* v. *Fawkes*, 17 P. R. 540; *Bullivant* v. *A.-G. Victoria*, 1901, A. C. 196.

A witness can no longer be excused from answering questions on the ground that they may criminate, or tend to criminate himself: see note preceding *Rule* 327, p. 797, *supra*; but it has not been determined whether the Acts there referred to render a witness or party liable to produce documents which may incriminate, or tend to incriminate him, or a corporation whose servant he is.

3. Documents Relating Exclusively to the Party's Own Title, or Case, or to the Evidence by which it is to be Established.—*Owen* v. *Wynn*, 9 Ch. D. 29; *Dow* v. *Eley*, 2 H. & M. 725; *Ingilby* v.

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Shafto, 33 Beav. 31; *Commissioner of Sewers* v. *Glasse*, L. R. 15 Eq. 302; *Stovel* v. *Coles*, 4 Chy. Ch. 9; *Green* v. *Amey*, 2 Chy. Ch. 138. In such case his opponent is not entitled to see his deeds, etc., in order to "pick holes" in them: *Owen* v. *Wynn*, 9 Ch. D. 29; but it must appear that they do not relate also to the title of the opposite party: *Clegg* v. *Edmonson*, 22 Beav. 125; *Lind* v. *Isle of Wight Ferry Company*, 8 W. R. 540; *Bishop of Winchester* v. *Bowker*, 29 Beav. 479; *Felkin* v. *Lord Herbert*, 9 W. R. 756; *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 88; *Jenkyn* v. *Bushby*, 14 W. R. 531; *Southwark & Vauxhall Water Company* v. *Quick*, 3 Q. B. D. 315, and it must appear on oath positively, and not on information and belief only, that the documents are exclusively matter of evidence in support of, and not impeaching, the party's own case, and do not support that of the opposite party: *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 1 O. L. R. 577.

Where a defendant claimed title to the property in question through the plaintiff it was held that the deeds under which he claimed were not privileged from production as relating exclusively to his own title: *Attorney-General* v. *Storey*, 107 L. T. 430.

The denial of the making of, or an allegation that, a document relating exclusively to the opposite party's own case, is forged, gives no right to call for its production: *Griffin* v. *Fawkes*, 17 P. R. 540.

Letters between co-defendants were held not capable of being put in evidence, and therefore, as not supporting the defendant's case, are not privileged: *Hey* v. *De la Hey*, W. N. 1886, 101.

Interrogatories seeking discovery in support of a substantive case set up by the defendant were required to be answered by the plaintiff: *Bidder* v. *Bridges*, 29 Ch. D. 29; but a party is not entitled to discovery of the manner in which, and the evidence by which, his opponent intends to establish exclusively his case: *Ib.*

Production cannot be refused merely on the ground that if the plaintiff's claim is unfounded, he has no interest in the documents: *Gresley* v. *Mousley*, 2 K. & J. 288.

Production was ordered when, from the circumstances of the case as stated, the Court thought that the cases of the plaintiff and defendant were so interwoven that nothing could relate to the one without relating to the other: *Hamilton* v. *Street*, 1 Gr. 327.

For what was held a sufficient description of the documents, and entitling them to protection on this ground: see *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Roberts* v. *Oppenheim*, 26 Ch. D. 724; *Budden* v. *Wilkinson*, 1893, 5 Q. B. 432; *Milbank* v. *Milbank*, 1900, 1 Ch. 376; 82 L. T. 63; *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 1 O. L. R. 577.

It was held by the Court of Appeal in *Budden* v. *Wilkinson*, 1893, 2 Q. B. 432, that this rule is not confined to documents relating to the title to land, overruling *Maclean* v. *Jones*, 65 L. T. 553; and see *Frankenstein* v. *Gavins H. C. C. Co.*, 1897, 2 Q. B. 62; 76 L. T. 747.

In *Budden* v. *Wilkinson*, *supra*, it was also held that the omission of a statement that the documents did not contain anything impeaching the case or title of the plaintiff was immaterial.

The following statements have been held to sufficiently disclose some ground of privilege: "The said documents relate solely to the case of the defendants, and not to the case of the plaintiff, nor do they tend to support it, and they do not to the best of our knowledge,

information and belief, contain anything impeaching the case of the said defendants, wherefore, we object to produce the same and say they are privileged from production": *Bewicke* v. *Graham*, 7 Q. B. D. 400; see a discussion of that case, 16 L. J. 263; see also *Roberts* v. *Oppenheim*, 26 Ch. D. 724; and *Bulman* v. *Dixon*, 49 L. T. 736. Rule 348.

4. (Properly speaking only a branch of the third head.) **A Party's Muniments of Title, which he Swears Relate Solely to his Own Case and do not Contain Anything (in the case of a Plaintiff) Impeaching his Case, or (in the Case of Either a Plaintiff or Defendant), Supporting, or Material to, the Case of the Opposite Party:**—*Atty.-Gen.* v. *Newcastle upon Tyne*, 1899, 2 Q. B. 478; *Minet* v. *Morgan*, L. R. 8 Chy. 361; *Morris* v. *Edwards*, 23 Q. B. D. 287; 16 App. Cas. 309; *Horton* v. *Bott*, 26 L. J. Ex. 267; *New British Invest. Co.* v. *Peed*, 3 C. P. D. 196; *Frankenstein* v. *Gavin's H. C. C. Co.*, 1897, 2 Q. B. 62; *Griffin* v. *Fawkes*, 17 P. R. 540; but not documents which tend to support the title of the opposite party: *Lyell* v. *Kennedy*, 8 App. Cas. 217, 223, 224; *Attorney-General* v. *Storey*, *supra*, p. 834; see *Smoll* v. *Eccles*, 3 P. R. 189; *Egremont Burial Board* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; *Webster* v. *Whewall*, 15 Ch. D. 120. It was held in the last case, that it was sufficient to swear to the best of the deponent's knowledge, information and belief. The contrary has been held in *Manby* v. *Bewicke*, 8 D. M. & G. 476. Muniments of party's title.

It is insufficient to swear generally that the documents are privileged. The affidavit must state the facts upon which the objection is grounded: *Gardner* v. *Irvin*, 4 Ex. D. 49; see also *Webb* v. *East*, 5 Ex. D. 23; *Clergue* v. *McKay*, 3 O. L. R. 478.

An affidavit to protect maps is more readily accepted than in the case of deeds: *March* v. *Bailey*, 78 L. T. Jour. 263; see also article on production of documents of title in 78 L. T. Jour. 278.

In an action for the recovery of land, and delivery of deeds relating thereto, in the defendant's possession, the defence of purchaser for valuable consideration without notice does not enable the defendant to resist discovery of such deeds and documents: *Emmerson* v. *Ind.*, 55 L. T. 422; 34 W. R. 778, but only if he sets that defence up simply (in which case the discovery would not be material to the issue to be tried), not if he also disputes, or does not admit, the plaintiff's title: *Ib.*; 33 Ch. D. 323; 12 App. Cas. 300.

The defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals, the defendants alleging that, if it did not, they would submit to a decree at once. It was held that the land having been conveyed to the plaintiffs in fee simple, they were *primâ facie* entitled to the land down to the centre of the earth, and, unless the defendants could show that the plaintiffs were not so entitled, the latter could not be compelled to produce their title deeds: *Egremont Burial Co.* v. *Egremont Iron Ore Co.*, 14 Ch. D. 158; see *Webster* v. *Whewall*, 15 Ch. D. 120.

The following is a form of statement of objection on this ground, in the affidavit on production: Form.

"I object to produce the documents set forth in the second part of the first schedule, on the ground that they are the muniments of my

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title to the , and do not to the best of my knowledge, information and belief, contain anything [*In the case of a plaintiff*, tending to impeach my case or] material to the case of the and tending to support it."

In the case of the defendant it is not necessary that the affidavit should state that the document does not contain anything tending to impeach his own case: *Attorney-General* v. *Newcastle on Tyne*, 1899, 2 Q. B. 478; *Johnson* v. *Whitaker*, 90 L. T. 535.

Title deeds of defendant in possession.

5. (Also properly speaking a branch of the third class above mentioned.) **Title Deeds of Land of Which a Party Defendant is in Possession, in an Action to Recover Possession of the Land by an Adverse Title:**—*Phillips* v. *Phillips*, 4 Q. B. D. 127; 27 W. R. 939; but the defendant must make an affidavit disclosing what they are: *Rumbold* v. *Forteath* (No. 1), 3 K. & J. 44; *New British Co.* v. *Peed*, 3 C. P. D. 196; *Wrentmore* v. *Hagley*, 46 L. T. 741; see *Owen* v. *Wynn*, 9 Ch. D. 29; *Lyell* v. *Kennedy*, 8 App. Cas. 217; *Daniel* v. *Ford*, W. N. 1883, 52. This rule depends on the circumstance that where claims to the same land in fee simple are made by two different persons, they must be based on inconsistent titles; it cannot therefore be applied to a case where the titles of the plaintiff and defendant are not absolutely adverse, but may to some extent be proved by the same evidence: *Ponsonby* v. *Hartley*, W. N. 1883, 13; 74 L. T. Jour. 208; affirmed on appeal though on a different ground, W. N. 1883, 44. In that case the right to possession was not disputed, but the right to minerals was claimed, and the plaintiff relied on a reservation of them, and the plaintiff was allowed to inspect the title deeds, to see if they supported his case.

Form of stating objection.

The following is a form of statement of objection on this ground.—

"I object to produce the documents, etc., on the ground that they relate to the evidence of my right to the possession of the subject matter of this action to which the plaintiff (or defendant) claims an independent title."

Mortgagees' deeds.

6. Mortgage Deeds are privileged until the mortgagee is paid what is due: *Chichester* v. *Donegall*, L. R. 5 Chy. 497; *Patch* v. *Ward*, L. R. 1 Eq. 426; *Jones* v. *Jones*, Kay, App. vi.; *Bridgewater* v. *DeWinton*, 12 W. R. 40; *Haward* v. *Robinson*, 4 Drew, at p. 526; *Weeks* v. *Stourton*, 13 W. R. 489; *Freeman* v. *Butler*, 33 Beav. 289; *Smith* v. *Barnes*, L. R. 1 Eq. 65; *Anon.*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23; Fisher on Mortgages, 4th ed., 302; unless the right to redeem is denied: *Patch* v. *Ward*, and *Jones* v. *Jones*, *supra*; *Bell* v. *Chamberlen*, 3 Chy. Ch. 429; and where the proceedings are being taken by the mortgagee upon the mortgage deed, inspection of it may be ordered, as of any other document sued on: *Emmens* v. *Middlemiss*, 8 P. R. 320.

Irrelevant to the question at the trial.

7. Documents Having no Bearing on the Question to be Tried:—These need not be produced before trial: *Merchants Bank* v. *Tisdale*, 6 P. R. 51; *Bryce* v. *McIntyre*, 7 P. R. 134; *Parker* v. *Wells*, 18 Ch. D. 477; *Parnell* v. *Walter*, 24 Q. B. D. 441; 62 L. T. 75; 38 W. R. 270; *Whittaker* v. *Scarborough Past*, 1896, 2 Q. B. 148; 74 L. T. 753; *Evans* v. *Jaffray*, 3 O. L. R. 327; such as papers relating to details of a trust account, until the right to account has been established: *Fennessey* v. *Clark*, 37 Ch. D. 184; *McGregor* v. *McDonald*, 11 P. R. 386; *Hurst* v. *Barber*, 12 P. R. 467; *Bedell* v. *Ryckman*, 5 O. L. R. 670; or of a partnership account, until a partnership, if disputed, is established: *Engeland*

v. *Mitchell*, 13 O. L. R. 184; but see *Sydney Cheese &c., Assen.* v. *Brower*, 19 P. R. 162; or relating to sales in an action for infringement of trade-mark, until the right to damages is established: *Waters* v. *Earl of Shaftesbury*, 1 W. R. 259; and see *Graham* v. *Temperance & G. L. I. Co.*, 16 P. R. 536; *Rule* 352. The Court does not distinguish too nicely, however, between documents relating to the question at the hearing and consequential relief (see note p. 831 *supra*), especially in cases where further inquiries consequent on the establishment of the plaintiff's right may not be directed at the trial, but judgment at the trial may be given as to the matters depending upon the right: *Re Morgan, Owen* v. *Morgan*, 39 Ch. D. 316; *Sheppard Publishing Co.* v. *Harkins*, 8 O. L. R. 632. Rule 348.

The rule is thus expressed in *Graham* v. *Temperance, etc.*, 16 P. R. 536, *per* Street, J., "Wherever discovery is sought in aid of an issue which must be determined at the hearing, the plaintiff is entitled to it, to help him prove the issue; but where it is sought in aid of something which does not form part of what he must prove at the hearing, but is merely consequential to it, the right is not absolute, but discretional, until the plaintiff has established his fundamental right at the hearing." See also *Sheppard Publishing Co.* v. *Harkins*, *supra*.

The plaintiff sued the defendant, who had acted as his stock-broker, for an account, and damages, making general allegations of fraud, and then interrogated with a view to establish the fraud. The defendant refused to answer on the ground that the plaintiff was not entitled to the information till after decree. It was held that the plaintiff was entitled to the discovery to establish his alleged charges of fraud at the trial: *Leitch* v. *Abbott*, 31 Ch. D. 374.

A party's case for the purposes of discovery consists of everything which it is reasonable to suppose will directly, or indirectly, enable him either to advance his own case, or damage, or repel, his adversary's: *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.*, 11 Q. B. D. 65; *English* v. *Tottie*, 1 Q. B. D. 141; *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Western of Can. Oil Co.* v. *Walker*, 6 P. R. 191; *Lawlor* v. *Murchison*, 3 Gr. 553; *Ferguson* v. *Provincial Provident Institution*, 15 P. R. 366; and the test of materiality is to assume the party's pleading to be true: *Gresley* v. *Mousley*, 2 K. & J. 288; *Whyte* v. *Ahrens*, 32 W. R. 311, affirmed in appeal; 26 Ch. D. 717; where it was held that the party was entitled to discovery before giving particulars of fraud under Eng. 1883, R. 202 (see also *Leitch* v. *Abbott*, 31 Ch. D. 374; *Miller* v. *Harper*, 38 Ch. D. 110; *Harbord* v. *Monk*, 6 Ch. D. 616); but a document relating exclusively to the case of the party making discovery is not material: see Wigram on Discovery, 15, 261; Bray on Discovery, 484; *Minet* v. *Morgan*, L. R. 8 Chy. 361; *Atty.-Gen.* v. *Emerson*, 10 Q. B. D. 191; 62 L. J. Q. B. 67, and *per* Brett, L.J., 74; Pelle on Discovery, 42.

Irrelevant documents, if disclosed, need not be produced for inspection: *Wilson* v. *Thornbury*, L. R. 12 Eq. 617; *Central News (Limited)* v. *Eastern Tel. Co.*, 28 Sol. Jour., 390; 33 L. J. Q. B. 236. Irrelevancy.

Where there was a *bona fide* contest as to the right to sell a certain drug alleged to be the subject of a patent of the plaintiff's, it was held that the defendants should not, before trial of the question of right, be compelled to afford discovery of the details and particulars of their buying and selling, so as to disclose their own and their customers' private business transactions: *Dickerson* v. *Radcliffe*, 17 P. R. 586; and see *Engeland* v. *Mitchell*, 13 O. L. R. 184.

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Libel.

In an action for libel, where a defendant has delivered particulars of a defence of justification, he is not entitled to discovery of documents relating to matters not covered by such particulars: *The Yorkshire P. L. Ass. Co.* v. *Gilbert & Rivington*, 1895, 2 Q. B. 148; 72 L. T. 445; *Arnold* v. *Bottomley*, 1908, 2 K. B. 151; 98 L. T. 777.

In an action against a newspaper for libel, the plaintiff is not entitled to the production of the original M.S. containing the alleged libel: *Hope* v. *Brash*, 1897, 2 Ch. 188; 76 L. T. 823; nor to discovery of the name of the writer, nor of the price paid for the MS., nor of the means taken by defendant to test its truth: *Parnell* v. *Wolter*, 24 Q. B. D. 441; nor (where there is no question as to the defendant's solvency) to discovery of the circulation of the newspaper containing the libel: *Whittaker* v. *Scarborough Post*, 1896, 2 Q. B. 148; 74 L. T. 753. See also notes p. 819 and 831.

Trade secrets.

In *Star Kidney Pad Co.* v. *Greenwood*, 3 Ont. 280, an action on a promissory note given for kidney pads, one defence was that the pads were useless, and possessed no healing properties. Discovery of the recipe or ingredients was refused, the plaintiff resisting the discovery, on the grounds that no representation was made as to the ingredients, which constituted a trade secret, and the disclosure of the same would damage the plaintiff's business. See also *Badische Anilin, etc.* v. *Levinstein*, 24 Ch. D. 156; *Howe* v. *McKernon*, 30 Beav. 574; *Ashworth* v. *Roberts*, 45 Ch. D. 623; but it is in the discretion of the Court to order inspection of documents which might disclose a trade secret: *Mistovski* v. *Mandleburg*, 6 T. L. R. 207.

Books of account.

Where books of accounts are produced which contain entries not relating to the matters in question in the action, the party producing them is entitled to seal, or cover up, during inspection by the opposite party, all parts not affecting, or relating to, the matters in question, but an affidavit should be made showing that the parts sealed, or covered up, do not in any way relate to, or affect, the matters in question: see *Graham* v. *Sutton*, 1897, 1 Ch. 761; 76 L. T. 369; and *Sydney Cheese, etc., Assn.* v. *Brawer*, 19 P. R. 152.

Where a defendant in an action for infringement of a patent is required to produce his books for the purpose of a reference as to profits made by him, he cannot refuse to disclose the names of his customers to whom he has sold goods infringing the plaintiff's patent: *Socchorin Corp.* v. *Chemical & Drugs Co.*, 1900, 2 Ch. 556; 83 L. T. 206.

Documents held in a different character.

8. Documents held by a Party in a Different Character from that in which he is Sued:—*Pindar* v. *Smith*, 6 Madd. 38; *Wogner* v. *Mason*, 6. P. R. 187.

Where a defendant claimed that he held documents only as solicitor for a co-defendant also a party, but who had not been called on to produce, nor notified of the application, it was held that he should not have been ordered to produce these documents without the co-defendant being called on to show cause: *McGregor* v. *McDonald*, 11 P. R. 386.

Documents in which a third person is interested.

9. Documents in which a Third Person, not a Party to the Action, is Interested—are not for that reason alone protected from production: *Kettlewell* v. *Barstaw*, L. R. 7 Chy. 680; *Hutchinson* v. *Glover*, 1 Q. B. D. 138; but when such documents are in the joint legal (not necessarily corporal: see *Reid* v. *Langlois*, 1 Mac. & G. 627; and *B. A. Ins. Co.* v. *Wilkinson*, 6 P. R. 268), possession of the third person,

and the party from whom production is sought, the latter cannot be required to produce them; see cases *supra*, *Murray* v. *Watter*, Cr. & Ph. 114; *Kearsley* v. *Philipps*, 10 Q. B. D. 36, 465 (where all the cases are reviewed), unless there is no interest which can be affected by their production other than the interest of the parties to the action: *London & Yorkshire Bank* v. *Cooper*, 15 Q. B. D. 7 and 473. Production will not be required from a party having the sole legal possession, if a third person who is not a party and who has the beneficial interest objects, unless the suit is of such a nature that the Court can say that the party having the legal custody sufficiently represents in the suit the other person interested: *Fraser* v. *Home Ins. Co.*, 6 P. R. 45; but where production will not be ordered, the party must give all the information in his power respecting the documents in his affidavit, and also on any examination: *Fraser* v. *Home Ins. Co.*, *supra*; *Nichols* v. *Elliott*, 3 Gr. 545; *Clinch* v. *Financial Corporation*, L. R. 2 Eq. 271; *Vyse* v. *Foster*, L. R. 13 Eq. 602; *Hadley* v. *McDougal*, L. R. 7 Chy. 312; *Evans* v. *Jaffray*, 3 O. L. R. 327. But, although documents in which a third person is interested are not producible, the party excusing production on that ground may nevertheless be required to disclose the contents of such documents: *Rattenberry* v. *Monro*, 103 L. T. 560; and see *per* Jessel, M.R., *Swanston* v. *Lishman*, 45 L. T. 360, at p. 361. Rule 348.

Possession by a party's agent, is of course the possession of the party: *Murray* v. *Watter*, Cr. & Ph. 114.

A defendant sued as administratrix was held bound to produce material documents admitted to be in her possession, but which she claimed to be entitled to individually, and not in her representative capacity: *Fox* v. *Steeman*, 17 P. R. 492; but a personal representative cannot be compelled to produce documents containing entries relating to the affairs of the deceased, when such documents are the private property of the solicitor who acted for the deceased in his lifetime: *O'Shea* v. *Wood*, 1891, P. 286; 65 L. T. 30.

As to documents in the joint custody of husband and wife: see *Fendall* v. *O'Connell*, 29 Ch. D. 899.

A solicitor cannot set up a lien acquired in the cause against the right of other parties to production; and the fact that a lien which may be set up exists, is not a sufficient reason for not ordering production, as the party may be able to free the documents from the lien: *Vale* v. *Oppert*, L. R. 10 Chy. 340; *Rodick* v. *Gandell*, 12 Beav. 325; 1 De G. M. & G. 763; *Lewis* v. *Powell*, 1897, 1 Ch. 678; 76 L. T. 282; *Pratt* v. *Pratt*, W. N. 1882, 117; but see *Bainbridge* v. *Blair*, 1 Jur. 256. Documents subject to a lien.

A lien of a solicitor on papers does not confer any greater right to refuse production of the documents subject thereto than his client would have; where therefore the client would have to produce the documents, an order may be made requiring the solicitor to produce them subject to his lien, in an action to which the client is a party, if production is necessary in order to do justice to parties other than the client: *Re Hawkes*, 1898, 2 Ch. 1; 46 W. R. 445.

The Court refused to compel defendants to produce documents which were in their possession solely as directors of a company to which the documents belonged: *Williams* v. *Ingram*, 16 T. L. R. 451. Papers belonging to third parties.

Production was not ordered in an action of trespass against a defendant, who was committee of a lunatic, of documents relating to

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the lunatic's estate, the documents not being in the custody of the party, but in the custody of the Court having jurisdiction in lunacy: *Vivian* v. *Little*, 11 Q. B. D. 370.

Form.

The following is a form of statement of objection in the affidavit on this ground:

"I object to produce the documents, etc., . . . on the ground of their being in my possession or power jointly with A. B. [*stating the noture of the joint possession*]."

For a description held not sufficient to protect on the ground of joint interest, see *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.

Communications between solicitor and client.

10. Documents which are Privileged, as being Communications Passing between the Party and his Confidential Professional Adviser, or Agents:—

Of this kind are all communications between a party and his solicitor or other legal adviser, whether made *ante* or *post litem motam*, it is enough if they are communications of a confidential character: *Smith* v. *Daniell*, L. R. 18 Eq. 649; *Original Hartlepool Collieries Co.* v. *Moon*, 30 L. T. 585; (not an open communication: *Foakes* v. *Webb*, 28 Ch. D. 287; *Rawstone* v. *Preston*, 30 Ch. D. 116); made by, or to, the legal adviser in a professional character: *Minet* v. *Morgan*, L. R. 8 Chy. 367; *Corporation of Hastings* v. *Ivoil. Ib.*, 1017; *Macfarlane* v. *Rolt*, L. R. 14 Eq. 580; *Homelyn* v. *Whyte*, 6 P. R. 143; *Hoffman* v. *Crerar*, 17 P. R. 404; *Mostyn* v. *West Mostyn*, 34 L. T. 531; *Wilson* v. *Northampton*, L. R. 14 Eq. 477; *Eadie* v. *Addison*, 47 L. T. 543; *Mayor, etc., of Bristol* v. *Cox*, 26 Ch. D. 678; *Proctor* v. *Smiles*, 55 L. J. Q. B. 527; *Lowden* v. *Blakey*, 23 Q. B. D. 332; *Bullivant* v. *A.-G. Victoria*, 1901, A. C. 196; see *Lyell* v. *Kennedy*, 9 App. Cas. 81; including communications with a former solicitor: *Thomas* v. *Sec. of State for India*, 18 W. R. 312; *Marriott* v. *Anchor, etc.*, 3 Giff. 304; *Wilson* v. *Brunskill*, 2 Chy. Ch. 147; and the predecessors in title of the party: *Minet* v. *Morgan*, and *Mostyn* v. *W. Mostyn*, *supra*.

The privilege may be claimed in respect to communications to a solicitor, who besides being the solicitor of a corporation, is also an officer of the corporation, and examinable as such: *Salford* v. *Lever*, 24 Q. B. D. 595.

It was held insufficient to state that the documents were privileged, as communications between deponent and her solicitor. It is necessary to state that they are professional communications of a confidential character: *O'Shea* v. *Wood*, 1891, P. 237, 286; *Clergue* v. *McKay*, 3 O. L. R. 478; *Ainsworth* v. *Wilding*, 1900, 2 Ch. 315.

Communications by a clerk of the defendant company to the company, containing references to advice given by the company's solicitor, whom the clerk had consulted, are privileged, being held to be the same as if written by the solicitors: *Boughton* v. *Citizens Insurance Co.*, 11 P. R. 110.

Where a document is privileged, the production of it as an exhibit to a witness in another action is not a waiver of the privilege for all purposes, even as to a person entitled to inspection of the deposition in which it was referred to: *Goldstone* v. *Williams*, 1899, 1 Ch. 47; 79 L. T. 373.

The privilege is not lost by the death of the client: *Bullivant* v. *Attorney-General of Victoria*, 1901, A. C. 196.

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Extent of this ground of privilege.

The privilege extends to a person who, unknown to the client, had ceased to practise as a solicitor when the communications were made: *Calley* v. *Richards*, 19 Beav. 401; see also L. R. 18 Eq. 654; and to communications with reference to actual or impending litigation coming from any third person employed by the solicitor, or at his instance, such as his town agent: *Cott* v. *Tourle*, 23 L. T. 485; 19 W. R. 56, or clerk, accountant, or other skilled person: see *Lawrence* v. *Campbell*, 4 Dr. 485; *Steel* v. *Stewart*, 1 Ph. 471; *Churton* v. *Frewen*, 2 Dr. & S. 390; *Hooper* v. *Gumm*, 10 W. R. 644; *Birmingham & M. Motor Co.* v. *London & N. W. Ry.*, 1913, 3 K. B. 850; or in any other way procured by the solicitor, or by the client or his agent, at the instance of the solicitor: *Bustros* v. *Whyte*, 1 Q. B. D. 423; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; *Taylor* v. *Batten*, 4 Q. B. D. 85; and to documents prepared with a *bonâ fide* intention of being laid before a solicitor in a contemplated action: *Southwark* v. *Quick*, 3 Q. B. D. 315; *Thompson* v. *Maryland Casualty Co.*, 11 O. L. R. 44; *Imrie* v. *Wilson*, 3 O. W. N. 929; *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; (see that case explained and upheld in *Colcraft* v. *Guest*, 1898, 1 Q. B. 759); *Kennedy* v. *Lyell*, 23 Ch. D. 387; *S. C.*, 9 App. Cas. 81; *Macdonnld* v. *Norwich Union, etc.*, 10 P. R. 501; *Lowden* v. *Blakey*, 23 Q. B. D. 332; even though they answer the purpose of giving information to other people as well: *Hunter* v. *Grand Trunk Ry. Co.*, 16 P. R. 385; but see *Jones* v. *Great Central Ry.*, *infra*, p. 842; letters from a third person in answer to inquiries by a party's solicitor with a view to anticipated litigation: *McCorquodale* v. *Bell*, 1 C. P. D. 471; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; or in answer to similar inquiries of the party himself at the suggestion of his solicitor: *Donohue* v. *Johnston*, 14 P. R. 476; or in reasonable contemplation of litigation: *Collins* v. *London General Omnibus Co.*, 5 R. 355; 68 L. T. 831; anonymous letters to solicitors about the case: *Young* v. *Holloway*, 12 P. D. 167; documents material to the party's case procured by his solicitors of their own motion for the purposes of the action: *The Palermo*, 9 P. D. 6; *Guelph C. Co.* v. *Whitehead*, 9 P. R. 509, and indicating also names of witnesses: *Elmsley* v. *Miller*, 10 O. L. R. 343; documents relating only to the conduct of the suit: *Ingilby* v. *Shafto*, 33 Beav. 31; *Gandee* v. *Stonsfield*, 4 DeG. & J. 1; *Turner* v. *Burkenshaw*, 11 W. R. 851; papers relating to a former action, and privileged therein: *Bullock* v. *Corry*, 3 Q. B. D. 356; *Bacon* v. *Bacon*, W. N. 1876, 96; *Nordon* v. *Defries*, 8 Q. B. D. 508; *Branford* v. *Branford*, 4 P. D. 72; *Pearce* v. *Foster*, 15 Q. B. D. 114; *Canadian Pacific Ry.* v. *Conmee*, 11 P. R. 197; *Colcraft* v. *Guest*, 1898, 1 Q. B. 759; 78 L. T. 283; but not otherwise: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Re Worswick*, 38 Ch. D. 370; a doctor's report of an examination at the instance of a party's solicitor: *Friend* v. *London, Chatham and Dover Ry. Co.*, 2 Ex. D. 437; and reports of surveyors as to the condition of a cargo, made solely for the case of one of the parties, or for the opinion of his legal adviser: *The Theodore Korner*, 3 P. D. 162, see *Cossy* v. *London, Brighton, etc., Ry. Co.*, L. R. 5 C. P. 146; and a report of an accident made in similar circumstances: *Collins* v. *London General Omnibus Co.*, 68 L. T. 831; 5 R. 355; *Hunter* v. *Grand Trunk Ry. Co.*, 16 P. R. 385; see also *Shapter* v. *Grand Trunk Ry.*, 3 O. W. N. 1334.

But where a member of a trade union was entitled to the legal assistance of the solicitor of the union, on satisfying the union that he had a good ground of complaint, it was held, in an action by him against his employer for wrongful dismissal, that letters by him to the

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union for the purpose of obtaining the solicitor's assistance were not privileged: *Jones* v. *Great Central Ry.*, 1910, A. C. 4; 100 L. T. 710.

But such a report cannot be privileged, merely by being made on a printed heading stating it is made for the information of the party's solicitor, and his advice thereon; the affidavit on production must distinctly show that the report was provided solely for the purpose of being used by the party's solicitor in any litigation which might arise in respect of the subject matter of the report: see *Swaisland* v. *Grand Trunk Ry.*, 3 O. W. N. 960.

All statements made at joint consultations between parties and their respective solicitors or counsel, even though made by one party to the solicitor or counsel of the other are privileged; so also is a statement made by one party to the solicitor of the other at an interview between them alone, held at the request of the other party *Rochefoucauld* v. *Boustead*, W. N. 1896, 74; 74 L. T. 783; 65 L. J. Ch. 794.

In a probate action an order for production of documents, the private property of plaintiff's solicitor, containing entries by the solicitor as to the deceased's affairs, was refused: *O'Shea* v. *Wood*, 1891, P. 237, 286; and where a plaintiff propounded a will which was contested on the ground of the alleged insanity of the testatrix, briefs of counsel in the possession of the plaintiff, who had acted as solicitor for the testatrix in the action to which they related were held to be privileged: *Curtis* v. *Beaney*, 1911, P. 181; 105 L. T. 303.

Documents publici juris.

Although copies of documents, which are *publici juris*, are themselves, unprivileged, a collection of entries in public records, and registers, and of photographs of tombstones, and houses, will be protected from production, when it has been made or directed by the solicitors of a party for his defence, and is the result of the professional knowledge, skill and research of those solicitors: *Lyell* v. *Kennedy*, 27 Ch. D. 1; 53 L. J. Chy. 937.

Transcript of shorthand notes.

Transcript of shorthand notes of proceedings in open Court are not privileged: *Re Worswick, Robson* v. *Worswick*, 38 Ch. D. 370; *Learoyd* v. *Halifax Banking Co.*, 1893, 1 Ch. 696; 68 L. T. 158; and see *North Australia Co.* v. *Goldsborough*, 1893, 2 Ch. 381; *Goldstone* v. *Williams, Deacon & Co.*, 1899, 1 Ch. 47; 79 L. T. 383; *Lambert* v. *Home*, 1914, 3 K. B. 86.

The giving of an extract, or copy, of an opinion of counsel procured by the solicitor for his client, on the subject matter of a suit, to the solicitor on the other side, does not prevent the opinion from being privileged: *Carey* v. *Cuthbert*, 6 L. R. Ir. Eq. 599; but as to making use of the copy so given: see *Calcraft* v. *Guest*, 1898, 1 Q. B. 759.

Communications not in professional character.

Protection cannot be claimed on this ground for communications made to a solicitor, but not in his character of solicitor: *Greenough* v. *Gaskill*, 1 M. & K. 98; *Rudd* v. *Frank*, 9 C. L. T. 387; *Thomas* v. *Rawlings*, 27 Beav. 140; as where he was not simply advising as solicitor, but negotiating on his own account in the transaction impeached in the action: *Pawson* v. *Merchants Bank*, 11 P. R. 21; and see *Bullivant* v. *Attorney-General*, 1901, A. C. 196; or was plaintiff's patent or other agent, as well as his solicitor; and the communication was in the former capacity: *Moseley* v. *Victoria Rubber Co.*, 55 L. T. 482; *Clergue* v. *McKay*, 1901, 3 O. L. R. 63; nor for letters to a party's

solicitor, not induced by inquiries: *McCorquodale* v. *Bell*, *supra*, p. 841 (*sed vide Young* v. *Holloway*, 12 P. D. 167, *supra*, p. 84); nor for documents not obtained by direction of the party's solicitor, but by way of precaution and by possibility to be laid before him for the purpose of defence to an action, if any should be brought: *Cook* v. *N. Metropolitan Tramway Co.*, 6 T. L. R. 22; and see *Rawstone* v. *Preston*, 30 Ch. D. 116; *Thompson* v. *Maryland Casualty Co.*, *supra*, p. 841; nor for statements made voluntarily, or at the party's request for his own information, by his unprofessional agents: *Bustros* v. *White*; *Anderson* v. *Bank of British Columbia*, *supra*, p. 841; though made in confidence, and so marked: *Hopkinson* v. *Lord Burghley*, L. R. 2 Chy. 477; see *Wimon* v. *Bradstreet*, 2 Chy. Ch. 77; nor where fraud is charged: see *infra*. Rule 348.

Where documents are produced in such cases, an undertaking may be required from the opposite party not to use the documents for any collateral purpose: *Hopkinson* v. *Lord Burghley*, *supra*; *Richardson* v. *Hastings*, 7 Beav. 354.

Notes on a bill of costs of proceedings in Chambers recorded by the solicitor are not privileged: *Ainsworth* v. *Wilding*, 1900, 2 Ch. 315, following *Greenough* v. *Gaskell*, 1 M. & K. at pp. 102-104; and *Re Worswick*, *Robson* v. *Worswick*, 38 Ch. D. at p. 373.

Protection also cannot be claimed for information derived from collateral sources, and not directly from the client: *Marsh* v. *Keith*, 1 Dr. & Sm. 342; *Ford* v. *Tennant*, 32 Beav. 162; *Desborough* v. *Rawlins*, 3 M. & Cr. 515; *Re Land Credit Society*, 15 W. R. 703; nor for mere collateral facts, such as the client's residence, unless communicated confidentially; *e.g.*, as his client's hiding place: see *Heath* v. *Crealock*, L. R. 15 Eq. 257; *Re Arnott*, *Ex parte*, *Chief Official Receiver*, 37 W. R. 223; 60 L. T. 109; or address: see *Bursill* v. *Tanner*, 55 L. J. Q. B. 53; (see also the distinction between confidential communications, and those of facts patent to the senses: *Kennedy* v. *Lyell*, 48 L. T. 455; 23 Ch. D. 387); nor for documents passing between the party's solicitor and third persons to enable the solicitor to advise his client, unless they were for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing, or contemplated, between the parties to the action: *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; (see that case explained and upheld in *Calcraft* v. *Guest*, 1898, 1 Q. B. 759); *Pavitt* v. *Metropolitan Tramways Co.*, W. N. 1883, 100; *Original Hartlepool Collieries Co.* v. *Moon*, 30 L. T. 193, 585; *Betts* v. *Grand Trunk Ry.*, 12 P. R. 86, 634; *Conmee* v. *Can. Pac. Ry. Co.*, 9 C. L. T. 36; *Learoyd* v. *Halifax Banking Co.*, 1893, 1 Ch. 686; *North Australia, etc., Co.* v. *Goldsborough*, 1893, 2 Ch. 381; (see *Westinghouse* v. *Midland, etc.*, 48 L. T. 98, 462, as to what constitutes *lis mota*); nor for professional opinions given partly for the benefit of the party requiring production: *Reynolds* v. *Godlee*, 4 K. & J. 88; *Talbot* v. *Marshfield*, 13 W. R. 885; *Wynne* v. *Humberston*, 27 Beav. 421; nor in respect of communications passing between a solicitor and his client, who was the predecessor in title of the plaintiff and defendant, in respect to property in dispute: *Platt* v. *Buck*, 4 O. L. R. 421. Of collateral information. Between solicitor and a third person.

Professional communications are excepted from protection in partnership actions, and actions between beneficiaries and trustees, where such communications had been obtained for the sake of, and paid for out of, the partnership, or trust estate: *Gaurond* v. *Edison Gower Bell Tel. Co.*, 59 L. T. 813; 57 L. J. Chy. 498.

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No privilege can be claimed by a trustee as against his *cestui que trust*, for letters passing between the trustee and the solicitor, relating to the trust before action brought: *Re Mason, Mason* v. *Cattley*, 22 Ch. D. 609; *Talbot* v. *Marshfield, supra*, p. 843; *Re Postlewaite, Postlewaite* v. *Rickman*, 85 Ch. D. 722.

Fraud.

Where fraud is charged, communications between solicitor and client as to the subject-matter of an alleged fraud are not privileged in an action: *Williams* v. *Quebrada Ry. Co.*, 1895, 2 Ch. 751; 73 L. T. 397; *Smith* v. *Hunt*, 1 O. L. R. 334; *Mornington* v. *Mornington*, 2 J. & H. 697; *Charlton* v. *Coombes*, 4 Giff. 372, 382; *Reynell* v. *Sprye*, 10 Beav. 51; 11 Beav. 618; see also as to the effect of a charge of fraud: *Re Postlewaite, P.* v. *Rickman, supra*; *Reg.* v. *Cox*, 14 Q. B. D. 153; *Reg.* v. *Bullivant*, 1900, 2 Q. B. 163; 82 L. T. 493, subsequently reversed in the House of Lords, because in that case no fraud was charged; see 1901, A. C. 196.

Secondary evidence of privileged document.

The privilege where it exists only prevents the production of the document, or the disclosure by the solicitor of its contents; secondary evidence of its contents may be given: *Calcraft* v. *Guest*, 1898, 1 Q. B. 759.

Where a solicitor or his clerk has improperly produced in legal proceedings documents which were privileged, as being communications from his client, the latter may apply to the Court to restrain by injunction the use of such documents, or copies thereof: *Ashburton* v. *Pape*, 1913, 2 Ch. 469; 109 L. T. 381.

Form of claim of privilege.

Form of Claim of Privileged Communications.—It is not enough to state that the documents are privileged, as being communications between the deponent and his solicitor. It is necessary to state that they are professional communications of a confidential character: *O'Shea* v. *Wood*, 1891, P. 286; *Clergue* v. *McKay*, 3 O. L. R. 478; and, in the case of a correspondence, in respect of which privilege is claimed, it must be so stated in the affidavit on production, without any ambiguity, in order that there may be no doubt as to its being privileged. That letters were "in reference to the matters which are now in question in this action," was held to be too indefinite a description: *Clergue* v. *McKay*, 3 O. L. R. 478.

The following are forms of statement of objections to produce communications between solicitor and client, on the ground of privilege:

"I object to produce the documents set forth in the second part of the said first schedule, on the ground that they are communications passing between me (*or* A. B., acting on my behalf), and my solicitor, with reference to matters which are now in question in this cause: and that the same are confidential communications between solicitor and client."

Or, "are communications written at the instance, and for the use of my solicitor for the purpose of the proceedings in this action, and of giving advice to me with reference to the same."

Or, "are communications between A. B. and myself, for the purpose of being laid before my solicitor for obtaining his advice, and with a view to this litigation."

Or, "are communications written, and sent by A. B. for the confidential and private information of my solicitor, with a view to the institution of legal proceedings against ."

"I object to produce the documents set forth in the second part of the first schedule, on the ground that being communications between solicitor and client they are privileged": *Hamelyn* v. *White*, 6 P. R. 143, followed, though with doubt, in *Hoffman* v. *Crerar*, 17 P. R. 404; see also *Macfarlane* v. *Holt*, L. R. 14 Eq. 580. Rule 348.

11. Communications with an Unprofessional Agent in anticipation of litigation, and with a view to the prosecution of, or defence to, a claim to the matter in dispute, were held to be privileged in *Ross* v. *Gibbs*, L. R. 8 Eq. 522; *Conmee* v. *Can. Pac. Ry. Co.*, 11 P. R. 297; the later cases, however, seem to show that such communications are not privileged, even where made during, and for the express purpose of, litigation: see *Bustros* v. *White*, 1 Q. B. D. 423; *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644, 658; *Slade* v. *Tucker*, 14 Ch. D. 824; *Martin* v. *Butchard*, 36 L. T. 732; see also *Reid* v. *Langlois*, 1 Mac. & G. 638; *Hamilton* v. *Nott*, L. R. 16 Eq. 112; see, however, *Thompson* v. *Maryland Casualty Co.*, 11 O. L. R. 44. Communication with unprofessional agent.

See also *Armstrong* v. *Toronto Street Railway Co.*, 15 P. R. 208, where in an action for damages for personal injuries received in a tramway accident, a report made to defendants by the conductor of the car was held not privileged as a whole, while the portion of the report containing the names of eye-witnesses was held to be protected.

Further Examples of Non-privileged Communications. — The following are further instances of communications not privileged:— Copies of letters between defendants and third persons procured for the purpose of defence by the solicitors of the defendants from such third persons, the defendants not having kept copies of the correspondence: *Chadwick* v. *Bowman*, 16 Q. B. D. 561. Instances of communications not privileged

A transcript of shorthand notes of evidence in an action instituted by a party, with a view to ulterior proceedings not then contemplated, and for the purpose of submitting the same to counsel in such ulterior proceedings if taken: *Rowstone* v. *Preston*, 30 Ch. D. 116; *Cook* v. *N. Metropolitan Tramway Co.*, 6 T. L. R. 22.

Opinions of engineers as to the validity of a patent, obtained with a view to being forearmed, in case litigation should arise: *Toronto Gravel Road Co.* v. *Taylor*, 6 P. R. 227; reports made to an insurance company by their medical officer, and by friends of the assured, to whom the company was referred, as to his health and habits: *Mahony* v. *National Widow's Life Ass. Fund*, L. R. 6 C. P. 252; reports of persons employed to survey a tug, for the purposes of an action for damages for improperly constructing the tug: *Martin* v. *Butchard*, 36 L. T. 732; correspondence between a vendor and a vendee relative to the subject matter of the action by a subvendee, but which could not be said to be confidential communications with a view to litigation: *English* v. *Tottie*, 1 Q. B. D. 141; letters from a defendant's unprofessional agent to defendant, relative to the subject matter of an action, not sent in order to be laid before the defendant's solicitor: *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 644; an agreement of compromise between the defendant and a third person relative to the subject matter of an action: *Hutchinson* v. *Glover*, 1 Q. B. D. 138; *Richards* v. *Morgan*, 4 B. & S. 641; papers obtained from experts, by arbitrators for their own guidance: *Ponsford* v. *Swaine*, 1 J. & H. 433; statements made to a reporter in the employment of the proprietor of a newspaper: *Davis* v. *Shepstone*, 55 L. T. 1. Opinions of Engineers, etc.

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Bankers' books.

Banker's books are not privileged from production, whether the bank be a party, or whether by a subpœna *duces tecum* production is sought from the bank as a witness: *Hannum* v. *McKae*, 18 P. R. 185. Customers' accounts are not privileged at Common Law, nor under our Banking Acts: *Ib.*

Correspondence after suit.

Correspondence between co-defendants after suit, is not as a general rule privileged: *Hamilton* v. *Nott*, L. R. 16 Eq. 112; see also *Sankey* v. *Alexander*, 8 L. R. Ir. 241; *Hey* v. *De la Hey*, W. N. 1886, 101.

Where a diary, that would not have been protected from production, has been lost, extracts made from it since the commencement, and for the purposes, of the litigation, are not protected: *Land Corporation of Canada* v. *Puleston*, W. N. 1884, 1; see *The Palermo*, 9 P. D. 6.

Form of affidavit claiming protection from production.

Form of Affidavit.—The Forms Nos. 20 and 21; H. & L. Forms, Nos. 504, 505, should be followed. "The statutory form is the right form, and is intended to be the common form. The affidavit of documents is intended now to be exhaustive, and the form given in the Act is so": *per* Lindley, J., W. N. 1876, 39.

Where an action is brought in the name of a firm, all the members of the firm ought to make affidavit on production, and if any one of them refuse, he may be proceeded against for contempt by his co-partners, because his default may entitle the defendant to a dismissal of the action: *Seal* v. *Kingston*, 1908, 2 K. B. 579; 99 L. T. 504.

For form of affidavit where two plaintiffs have different interests, see *Fendall* v. *O'Connell*, 52 L. T. 553.

The affidavit must give such description of the documents which the party objects to produce as will sufficiently identify them: *Taylor* v. *Batten*, 4 Q. B. D. 85; *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Taylor* v. *Oliver*, 45 L. J. Chy. 774; *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678. A list may be given setting them out in the same way as the documents which the party does not object to produce: see *Hamelyn* v. *Whyte*, 6 P. R. 143; *Hoffman* v. *Crerar*, 17 P. R. 404; *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.

It is obvious that a minute specification of the documents in the affidavit might often defeat the claim of privilege.

Examples of statements of objection to produce on ground of privilege.

The following descriptions have therefore been held sufficient: "A correspondence between the plaintiff and his predecessors in title on the one hand, and their respective solicitors from time to time on the other": *Minet* v. *Morgan*, L. R. 8 Chy. 361. "Certain documents, letters, and correspondence, which have passed between my legal advisers and myself, and certain instructions to, and opinions of counsel, which are numbered 50-76 inclusive and are tied up in a bundle marked with the letter A and initialed by me": *Taylor* v. *Batten*, *supra*; *Morris* v. *Edwards*, 15 App. Cas. 309; *Budden* v. *Wilkinson*, 1893, 2 Q. B. 432; 69 L. T. 427. "Bundles of letters" is not a sufficient description of correspondence: *Hamilton* v. *Nott*, L. R. 16 Eq. 112; but letters may be so described with sufficient description to identify them: *Walker* v. *Poole*, 51 L. J. Chy. 840. Too prolix and voluminous an affidavit may be ordered to be taken off the files: *Ib.*, W. N. 1882, 136; or the party filing it may be ordered to pay the costs of it: *Hill* v. *Hart-Davis*, 26 Ch. D. 470.

It is not sufficient to mention bundles containing a large number of documents, among which the deponent thinks one or two may be

material; an affidavit so framed may be ordered to be taken off the files: *Bolton* v. *Natal Land & Col. Co.*, 83 L. T. Jour. 203; W. N. 1887, 143. Rule 348.

Reference generally to letters, etc., as filed in Court on certain specified applications, was held sufficient, without scheduling the particulars: *Lyon* v. *McKay*, 10 P. R. 557.

The affidavit must also (see par. 3) assign a reason for objecting to produce the documents, and verify the facts upon which the claim to protection is based: *Bromley* v. *Graham*, 11 P. R. 451; *Gardner* v. *Irwin*, 4 Ex. D. 49; *Webb* v. *East*, 5 Ex. D. 108; *Roberts* v. *Oppenheim*, 26 Ch. D. 724. It has been held sufficient to swear to the best of the defendant's knowledge and belief: *Minet* v. *Morgan*, *supra*, p. 846, but see *Manby* v. *Bewicke*, 8 DeG. M. & G. 476. It is insufficient to swear generally that the documents are privileged: *Gardner* v. *Irwin*, 4 Ex. D. 49.

Where an affidavit of documents had been filed, setting out the number and the dates, but not the parties, to title deeds, it was held that as the deeds were privileged, the Court would not order the names of the parties to the deeds to be set out: *Taylor* v. *Oliver*, 45 L. J. Chy. 774; 34 L. T. 902.

Where one document only was mentioned as "a certain document," and possession of others was negatived, the statements (1) "I object to produce the said document; (2) the naming or production of the said document might tend to criminate me, or would tend to bring a criminal prosecution against me for a crime of which I am in fact innocent, but for which I might be criminally prosecuted," were held to be sufficient to "specify" the document within *Rule* 348, and to state a claim of privilege, though no information was given as to the date, nature, or contents, of the document: *Vansickle* v. *Axon*, 17 P. R. 535.

Portions of books produced, containing entries not relevant to the matters in question, may be allowed to be sealed up: *Re Pickering*, 25 Ch. D. 247; *Heugh* v. *Garrett*, W. N. 1874, 229; 1875, 26; *Jones* v. *Andrews*, 57 L. T. 843; 58 L. T. 601; or where books are in use the portions not relevant need not be actually sealed up, but may be temporarily covered up during inspection, and, where required, any necessary affidavit may be ordered to be made so as to protect the opposite party by oath against the possibility of a relevant portion being covered up: *Graham* v. *Sutton*, 1897, 1 Ch. 761; 76 L. T. 369.

As to the conclusiveness of the affidavit: see *infra*, p. 848.

Motion for better Affidavit.—Where a claim to protection from production is not sufficiently made out by the affidavit on production, or where, by admissions of the party who made the affidavit, it is made out that other documents than those produced are in the possession or power of the party, the course is to require a further and better affidavit to be made: *British Assoc. of Glass Bottle Mfrs.* v. *Nettlefold*, 1912, 1 K. B. 369; 1912, A. C. 709; 106 L. T. 5; 107 L. T. 529. If on the motion it appears that the claim to protection is not authorized, or sufficiently made out, or that there are such other documents, an order will be made directing the filing of a better affidavit making the further production which may be proper. Where one member of a partnership suing in the firm name refuses to make an affidavit of documents: see *Seal* v. *Kingston*, *supra*, p. 846. Further and better affidavit.

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It is irregular to go into the merits of the action on a motion for a better affidavit: *Morris* v. *Edwards*, 23 Q. B. D. 287; *Hoffman* v *Crerar*, 17 P. R. 404.

A second application for a better affidavit on production is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any material which did not exist at the time of the first motion: *Boughton* v. *Citizens Insurance Co.*, 11 P. R. 110.

Where the affidavit is made by an officer of a corporation, the examination for discovery of another officer of the corporation cannot be used to contradict the affidavit: *Swaisland* v. *Grand Trunk Ry.*, 3 O. W. N. 960.

Affidavit in proper form conclusive.

Affidavit on Production, when Conclusive.—Where the documents are properly identified and described, and the ground of protection sufficiently stated, if it is a valid ground, the affidavit is *primâ facie* conclusive as to the relevancy of documents, and privilege claimed: *Bewicke* v. *Graham*, 7 Q. B. D. 400; *Welsh Steam, etc., Co.* v. *Gaskell*, 36 L. T. 352; *Bulman* v. *Young*, 31 W. R. 766; 49 L. T. 736; and it cannot be contradicted by counter affidavits: *Jones* v. *Monte Video Gas Co.*, 5 Q. B. D. 556; *Lyon* v. *McKoy*, 10 P. R. 557; see also *Holl* v. *Trumon Honbury Co.*, 29 Ch. D. 307; *Nicholl* v. *Wheeler*, 17 Q B. D. 101; *McGregor* v. *McDonald*, 12 P. R. 81; *Morris* v. *Edwards*, 23 Q. B. D. 287; 15 App. Cas. 309; *Hoffman* v. *Crerar*, 17 P. R. 404; but the Master or Judge may see from the nature of the case, that the party has misconceived the effect of the documents, and may therefore disregard, or refuse to act upon his affidavit: *Attorney-General* v. *Emerson*, 10 Q. B. D. 19; *Ponsonby* v. *Hartley*, W. N. 1883, 13, 44; *Lyell* v. *Kennedy*, 31 W. R. 618; *Fraser* v. *Home Ins. Co.*, 6 P. R. 45; *Re Pickering*, 25 Ch. D. 247; *Moxley* v. *Canada Atlantic Ry. Co.*, 11 P. R. 39; *Frankenstein* v. *Govins, H. C. C. Co.*, 1897, 2 Q. B. 62 (but see *Leslie* v. *Cave*, 35 W. R. 515; 56 L. T. 332, where it was held that one document being shown not to be privileged as claimed, by relating only to the party's own case, another document is not on that ground to be ordered to be inspected); or if from the affid. it itself: *Jones* v. *Monte Video Gas Co.*, *supra*; *Wagstaffe* v. *Anderson*, 39 L. T. 332; (where the words "never have had" were omitted), or from the documents referred to, or an admission in the pleading of the party: *Hastings* v. *Ivoll*, L. R. 8 Chy. 1017; *Imp. Lond Co. of Marseilles* v. *Masterman*, 22 W. R. 66; 29 L. T. 559; *Jones* v. *Monte Video Gos Co.*, *supra*: *Smedley* v. *British America Ass. Co.*, 18 P. R. 92; or other documents affording reasonable suspicion that the affidavit is not sufficient: see *Lyell* v. *Kennedy*, 27 Ch. D. 1 (such as evidence given at a former trial of the case: *Moxley* v. *Canada Atlantic Ry. Co.*, 11 P. R. 39), or to his examination in the cause: see *Dobson* v. *Dobson*, 7 P. R. 256; or the admission of his solicitor: *Campbell* v. *McArthur*, 7 P. R. 46; or of any officer of a company: *Powson* v. *Merchants Bank*, 11 P. R. 18. (*sed vide Swaisland* v. *Grand Trunk Ry.*, *supra*), the Master, or the Judge, is of the opinion that the affidavit is insufficient a further affidavit may be ordered. See also *Ross* v. *Dublin United Tramways Co.*, 8 L. R. Ir. 213; *Compagnie Financiere* v. *Peruvian Guano Co.*, 11 Q. B. D. 55; *Central News (Limited)* v. *Eastern Telegraph Co.*, 28 Sol. Jour. 390; *Robinson* v. *Budgett*, W. N. 1884, 94; 28 Sol. Jour. 411; *Parnell* v. *Wood*, 1892, P. 137; but when the affidavit is positive that all the relevant documents have been set out in the

schednle to the affidavit, a further affidnvit will not be ordered: *Hull v. Brener*, 17 C. L. T. (Occ. N.) 132; and see *Swaisland* v. *Grand Trunk Ry.*, *supra*, p. 848. Rule 348.

Cross-Examination on Affidavit.—In England cross-examination upon the affidavit wna not allowed in Chancery, nor is it under the Jud. Act: see *Manby* v. *Mewicke*, 8 DeG. M. & G. 470; *Hall* v. *Truman H. & Co.*, 29 Ch. D. 307, 313; *Nicholl* v. *Wheeler*, 17 Q. B. D. 101; it was allowed under the Chnncery practice in Ontario: see *Dobson* v. *Dobson*, 7 P. R. 256; hut in *Frith* v. *Ryan*, 10 P. R. 235, it wns held that the Chy. practice was not continued under the Jud. Act; C. R. 512 was therefore passed in 1888 to continue the Chancery practice, but it waa rescinded in September, 1894, hy C. R. 1337 to prevent a double examination of n party, one upon the affidavit, and another for discovery. The prohibition is in effect continued in *Rule* 227, which limits the right to cross-examine on affidavits, to those "to he used on any motion, or at a trial, or on a reference." It would, however, seem that now, upon the usual examination for discovery, examination may take place in respect to the documents produced, as well aa in regard to nny other relevant matters: see *Dryden* v. *Smith*, 17 P. R. at pp. 504, 505; *McMahon* v. *Railway Passengers Assce. Co.*, 26 O. L. R. 430; *Lavery* v. *Wolfe*, 10 P. R. 488; *Dobson* v. *Dobson*, *supra;* and admissions so ohtained impeaching the correctness of the affidavit may, it would seem, he used as the foundation of a motion for a better affidavit; and see *Smedley* v. *British Am. Assur. Co.*, 18 P. R. 92. It is not permissihle, however, to the opposite party to ohtain a cross-examination of the deponent, hy the indirect means of examining him as a witness nnder *Rule* 228, for the purpose of using hia evidence upon a motion for a better affidnvit on production: *Dryden* v. *Smith*, 17 P. R. 500; nor, on an examination for discovery, to cross-examine on the affidnvit on production of documents: *Standard* v. *Seybold*, Divl. Ct., 6 Oct., 1902; and see 39 C. L. J. 772; nnd see *Swaisland* v. *Grand Trunk Ry.*, *supra*, p. 848. Cross-examination.

Inspection by a Judge of Documents claimed to be Privileged.—It seems, in England, to have been a not uncommon practice, on applications respecting discovery, to show the documents upon which a question of privilege arises to the Judge; and where hy consent, the documents are so shown to the Judge, and his decision thereupon taken, no appeal lies from his order: *Bustros* v. *White*, 1 Q. B. D. 427; see also *Macdonald* v. *Norwich Union F. Ins. Co.*, 10 P. R. 505; hut whether this course is right was doubted: see *Re Holloway*, 12 P. D. 167, 169; it is now, however, authorized by an express English Rule, O. 31, r. 19*a* (2). Under the Ontario practice this course would not seem to be authorized. Inspection.

Injunction to Restrain use of Privileged Documents.—Where the opposite party has by any improper means obtnined possession of privileged documents, his use of the same, or of copies thereof, may be restrsined by injunction: *Ashburton* v. *Pape*, 1913, 2 Ch. 469; 109 L. T. 381. Restraining use of privileged documents.

Inspection by the Party.—As soon as documents are produced, the opposite party, at whose instance the production is ordered, is entitled to inspect them: see *Rule* 348, and note, pp. 828-9; but where there is some preliminary question of law or fact to he determined, on special application, the right of inspection may he postponed until

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after the determination of such question: see *Rules* 122, 352, 472; *De Curteret* v. *Lond Security Co.*, 70 L. T. 323; 42 W. R. 104; 7 R. 16.

Costs.

Costs.—As to the costs of several successive affidavits on production by the same party: see *Baldwin* v. *Quinn*, 16 P. R. 248, where only the first affidavit, and the extra folios of subsequent affidavits, were allowed.

Production may be ordered at any time.

349. The Court may at any time order production and inspection of documents generally or of any particular document in the possession of any party. C.R. 463.

See Eng. (1883) R. 356. This *Rule* enables the Court or Judge to order production at any time: and this jurisdiction of the Court may be exercised by a Judge, or judicial officer, in Chambers: see *Rules* 207 (4), 208, 209. *Rule* 348 enables either party, after the defence is delivered, to give a notice for this purpose.

C. R. 463 expressly provided that the party might be required to produce "upon oath"; but this *Rule* is silent on that point.

The right to discovery of documents is not enlarged by *The Judicature Act*, and where a bill of discovery would not formerly lie, discovery of documents cannot now be had, *e.g.*, in an action to recover statutory penalties: see *Hunnings* v. *Williamson*, and other cases in the note preceding *Rule* 327.

Where, in any such case, a notice has been served under *Rule* 348, the defendant is not bound to file an affidavit, and claim privilege, but may have the notice set aside: see *Johnston* v. *London & Paris Exchange*, 6 O. L. R. 49.

The present *Rule* will only be applicable, where the ordinary procedure for obtaining production under *Rule* 348 will not meet the justice of the case.

Evidence will not be entered into on a motion under this *Rule*, but the Court will form its conclusions upon the pleadings, if any, or upon any proceedings already taken: *Downing* v. *Falmouth*, 37 Ch. D. 234.

As a general rule, production should not be ordered in favour of a party before he pleads, unless the Court or Judge is satisfied that discovery of documents is necessary to enable him to frame his pleading: *Arthur* v. *Runnians*, 18 P. R. 206.

Production of documents before defence.

Under the present *Rule* production by defendant was ordered, before defence, where the plaintiff had been awarded an injunction restraining the sale of chattels, and had been put on terms to go down to trial at such a time, that it was probable that the case would be tried, before production could be obtained in the ordinary way: *Coots* v. *Coots*, 3 C. L. T. 314. So production of a document was ordered to enable defendant to frame his defence: *Henderson* v. *Underwriting & Agency Association*, 1891, 1 Q. B. 557; so also before statement of claim, to enable it to be framed: *Maclean* v. *Barber, etc.*, 13 P. R. 500. So, under a similar Irish Rule, where discovery was required by defendants to ascertain what damages the plaintiff had sustained, with a view to payment of money into Court: *McGow* v. *McDiarmid*, 10 L. R. Ir. 376. See also *Jourdain* v. *Palmer*, L. R. 1 Ex. 102; *Re Sutcliffe*, 50 L. J. Chy. 574; 29 W. R. 732; 17 C. L. J. 367; *Whyte* v. *Ahrens*, 26 Ch. D. 717.

Documents taken out of the plaintiff's possession by the defendant, on leaving the plaintiff's employment, and to recover which the action was brought, were, on an interlocutory application, ordered to be delivered up to the plaintiff: *Whitwham* v. *Moss*, 73 L. T. 57. Rules 350, 351.

"**Documents.**"—Under this term "photographs" are included: *Fox* v. *Sleeman*, 17 P. R. 492. Photographs.

Copies.—The right of inspection includes the right to have or take copies: see *Pratt* v. *Pratt*, 30 W. R. 837; 47 L. T. 249; *Mutter* v. *Eastern*, 38 Ch. D. 92; and the Court has jurisdiction to order that the opposite party be at liberty to take copies by means of photographs of the documents, proper safeguards being adopted to secure the preservation of the originals from injury, or loss: *Lewis* v. *Londesborough*, 1893, 2 Q. B. 191; 69 L. T. 353. Copies.

The *Rule* only applies to production by parties to an action or proceeding, it does not apply to third persons, as to whom: see *Rules* 229, 350.

350. When a document is in possession of a person not a party to the action and the production of such document at a trial might be compelled, the Court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy which may be used for all purposes in lieu of the original. *New.* Documents in possession of persons not parties.

In order to get production before trial of a document in the possession of some third person, not a party to the action, two courses appear to be open, either an application may be made to examine the person having the document as a witness under *Rule* 229 and, if ordered, he might be served with a subpœna *duces tecum* under which he might be required to produce the document in his possession. Such an application under *Rule* 229 would probably be entertained on notice to the opposite party, but without notice to the witness; or, an application may be made under this *Rule* on notice to the opposite party, and also to the witness himself. If the application were granted the witness could probably be required to attend and produce under the order without service of a subpœna as required by *Rule* 345 (2); but he would have to be paid the usual witness fees.

351.—(1) A party shall be entitled to obtain the production, for inspection, of any document referred to in the pleadings or affidavits of the opposite party, by giving notice to his solicitor, and shall be entitled to take copies of such documents when so produced for inspection. Notice to produce documents referred to in pleadings or affidavit.

(2) The party to whom such notice is given, shall forthwith deliver to the party giving the same, a notice stating a time within two days from the delivery thereof. Notice to inspect.

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at which the document may be inspected at the office of his solicitor, and shall at the time named produce the document for inspection. C.R. 469 and 470.

See Eng. (1883) RR. 357, 358, 359.

C. R. 469 provided, that if documents were not produced as required, the party making default should not be at liberty to use the documents in evidence, unless he satisfied the Court that he had some sufficient cause for not producing them.

The present *Rules* render a party liable to have his action dismissed, or his defence struck out, in case he fails to comply with the notice: see *Rule* 353.

See notes to *Rule* 348.

Documents referred to in pleadings or affidavits.

In *Webster* v. *Whewall*, 15 Ch. D. 121, remarks were made by Denman, J., to the effect that "sufficient cause" for not complying with a notice by defendant under this *Rule* would be, that the defence had not yet been delivered. This dictum was not approved in *Quilter* v. *Heatly*, 23 Ch. D. 42, where it was held that a defendant was, *primâ facie*, entitled at once to inspect a document referred to in the pleadings, and the burden of showing cause is on the party from whom inspection is demanded; also that the *Rule* applies not only between the plaintiff and a defendant, but also between co-defendants. There Lindley, L.J., said: "There is a material distinction between ordinary discovery, and discovery of documents referred to in the pleadings or affidavits." And Jessel, M.R., said: "The defendant may say, 'Your case depends partly on a set of documents which you have set out incorrectly, I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence.' It is reason enough why the defendant should be allowed to see them that the plaintiff has made them part of his statement of claim"; and see *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 1 O. L. R. 577.

Where a document is referred to in an affidavit, of which a copy is served to be read in answer to a motion, the opposite party is entitled to call for the production of the document, even though the affidavit is not filed: *Re Fenner*, 1897, 1 Q. B. 667; 76 L. T. 376.

The documents need not be particularly identified, or referred to; but if more compendiously described by general words, they fall within this *Rule*, and inspection may be ordered: *Smith* v. *Harris*, 48 L. T. 869. A letter referred to in particulars of plaintiff's claim is a document within the *Rule*: *Cass* v. *Fitzgerold*, W. N. 1884, 18.

The reference in a pleading, etc., to a document in respect of which privilege might otherwise be claimed does not render it liable to inspection under this *Rule*, but if production is refused it cannot be used in evidence: *Roberts* v. *Oppenheim*, 26 Ch. D. 724; see also *Mayor of Bristol* v. *Cox*, 26 Ch. D. 678; *Leslie* v. *Cave*, 30 Sol. Jour. 76, and *Green* v. *Amey*, 2 Chy. Ch. 138.

Inspection of a foreign judgment was refused, in an action on a judgment brought under the old procedure: *Matthias* v. *Delcacho*, 1 Charl. Ca. (Court) 123. Inspection of a mortgage deed was refused to a defendant, who wished to find from it the amount, in order to

redeem, the plaintiff undertaking to give in a week a statement of principal, interest, and amount of costs, and of the particulars of all other subsequent incumbrances: *Anon.*, 2 Charl. Ch. Ca. 61; W. N. 1876, 23; but see *contra Emmens* v. *Middlemiss*, 8 P. R. 320. In *Lake* v. *Pooley*, W. N. 1876, 54, an action for breach of covenant in a lease, the defendant had made an assignment of one undivided moiety of leasehold property, consisting of land, brewery and fixtures; the plaintiff having applied for an order for inspection of documents, and the defendant having objected that the documents related solely to his own title, Archibald, J., made the order, because it was a case of an undivided moiety, the interest in which could only be realized by the *usufruct* of the whole property. Rule 351.

As to inspection of a company's books by a shareholder: see *Re Credit Co.*, 11 Ch. D. 256.

Form of Notice.—The form of notice need only be in language substantially according to Form 31; H. & L. Forms, No. 527: *Rule* 772, but the procedure must be according to *Rule* 351 in order to entitle to inspection of the documents; a notice to produce for inspection on the following morning, was held to be not authorized, and did not confer any right to inspect: *Re Credit Co.*, 11 Ch. D. 256. Form of notice.

Notice to Produce at the Trial.—The form of the usual notice to produce documents at the trial is No. 38; H. & L. Forms, No. 685. Notice to produce at trial.

As to the effect of not giving a proper notice to produce at the trial: see *Sugg* v. *Bray*, 51 L. T. 194; 54 L. J. Chy. 132; where parol evidence was not allowed to be given of a document in respect of which a proper notice to produce had not been given.

Copies.—In a proper case the Court may authorize a party to make photographs of the documents produced by the opposite party, due precautions being taken to provide for the safety of the documents: *Lewis* v. *Londesborough*, 1893, 2 Q. B. 191; 69 L. T. 353. Copies.

Exhibits.—Irrespective of any question as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect and take copies of the affidavit, has a similar right as to the exhibit: *Re Hinchcliffe*, 1895, 1 Ch. 117. Exhibits.

Privilege.—The same rules that govern the right to production of documents for discovery, are generally applicable where inspection is sought: see *Clegg* v. *Edmonson*, 22 Beav. 125, and notes to *Rule* 348; and so (except in the case of exhibits), there is no right to inspection of documents as to which there is no right to discovery: *Central News* v. *Eastern Tel. Co.*, 28 Sol. Jour. 390; see 53 L. J. Q. B. 236; but where a document is referred to in a party's pleading it is subject to production by him: *Quilter* v. *Heatley*, 23 Ch. D. 49, 50; *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 1 O. L. R. 577. Privilege from production.

This *Rule* only applies in the case of documents mentioned in pleadings, or affidavits, of the opposite party, other than affidavits on production.

The course to obtain inspection of documents produced under an affidavit on production will be found in the notes to *Rule* 348, p. 828 *et seq.*

Under C. R. 471, if the party served with the notice omitted to give notice of the time for inspection, or omitted or objected to give Order for inspection on default.

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inspection, the party desiring it might apply to a Judge of the High Court for an order for inspection, but this *Rule* has not been continued.

The present *Rules* provide for attachment, or for dismissal of the action, or striking out of the defence, as a penalty for noncompliance with the notice: see *Rule* 353.

Motion for inspection.

Motion for Inspection.—But assuming that a motion for inspection may still be made, *semble*, the Master in Chambers, Local Judge and Local Masters would have jurisdiction to entertain it: see *Rules* 207 (4), 208, 209. Where an application is made under C. R. 471, the Court might order inspection of the document indicated in the affidavit, notwithstanding that the other party might have made an affidavit on production omitting to disclose the document, and concluding with the usual general averment as to having no other documents: *Wiedemon* v. *Walpole*, 24 Q. B. D. 537; but see S. C., in appeal, *Ib.* 626.

Inspection might be ordered at any convenient place: see *Prestney* v. *Colchester*, 48 L. T. 353; W. N. 1883, 114, and note, *supra*, pp. 828-9.

In an action for breach of promise, judgment went by default, and the question of damages was referred to the Master. The plaintiff claimed a right to inspect and take copies of his letters to the defendant, as being material to the question of damages. It was held that the matter was one for the discretionary jurisdiction of the Court or a Judge, and inspection was refused on the ground that it would increase the costs. The Court of Appeal declined to review the decision: *Lodds* v. *Wolthew*, 32 W. R. 1000.

A party has the right to inspect documents the common property of both parties: *Brown* v. *Licll*, 16 Q. B. D. 229.

When inspection objected to.

352. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection. C.R. 472.

See Eng. (1883) R. 362.

Inspection of documents.

The right to the discovery or inspection of documents may depend, for example, on a disputed allegation of partnership: *Lyon* v. *Tweddell*, 13 Ch. D. 375; or on whether an alteration in a will, upon which the rights of the parties depend, was validly made: *Hurst* v. *Barber*, 12 P. R. 467; or on the validity of a patent: *Dickerson* v. *Radcliffe*, 17 P. R. 586; or whether the defendant was acting as a trustee: *Bedell* v. *Ryckman*, 5 O. L. R. 670; and, in such cases, the Court, or a Judge, may order that question to be determined first, reserving the question as to discovery on inspection.

Partners.

A plaintiff partner is entitled to inspect the partnership books by his agent, where there is no reasonable objection to the agent so

appointed, and the agent undertakes not to use any information so obtained except for the purpose of confidentially advising his principal: *Bevan* v. *Webb*, 1901, 2 Ch. 59. Rule 353.

In an action for an account of profits made by the defendants as the plaintiffs' agents, the defendants denying the agency, the Court declined, until after that question should be tried, to order production of the invoices of goods sold by third persons to the defendants, and re-sold by the defendants to the plaintiffs, the defendants having sworn that those invoices had nothing to do with the point at issue, and that the disclosure would be injurious to the defendants if the plaintiffs failed: *Verminck* v. *Edwards*, 29 W. R. 189. Principal and agent.

In *Re Leigh*, *Rowcliffe* v. *Leigh*, 6 Ch. D. 256, where an executrix disputed a horse dealer's account, and the dispute was whether or not certain horses were sold on commission, the Court refused to order the horse dealer to disclose the prices, as being immaterial until it had been decided that the horses were sold on commission. The question of liability must be one which is severable from the question of damages: see *Elkin* v. *Clarke*, 21 W. R. 447.

In a suit by an alleged next of kin to an intestate, against the solicitor to the Treasury, to whom administration had been granted, it was held that the defendant was not bound to make an affidavit of documents relating to the estate, until a *primâ facie* case had been made by the plaintiff that he was next of kin: *Lane* v. *Gray*, L. R. 16 Eq. 552. Next of kin

A person who had acted as the foreman of a manufacturer's business, filed a bill against the manufacturer, alleging that the plaintiff was to have a weekly salary, and one-sixth of the profits of the business, and praying an account, and payment of one-sixth of the profits of the business to him accordingly. The defendant by his answer admitted a right to a weekly salary, and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff, that the latter should take the statements of the defendant as to the profits to be true, and should not ask for an account or question the business transactions, or be entitled to examine or investigate the business books; it was held that he was not compellable to produce them before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree for an account: *Turney* v. *Boyley*, 4 DeG. J. & S. 332. Account.

See also *Parker* v. *Wells*, 18 Ch. D. 447; *Wood* v. *Italian Bank*, 34 L. T. 255; and other cases in notes to *Rule* 348, p. 837; also *Johns* v. *James*, 13 Ch. D. 370; *English* v. *Tottie*, 1 Q. B. D. 141; *De Carteret* v. *Land Security Co.*, 70 L. T. 323; 42 W. R. 104; 7 R. 16.

In England a Judge may inspect a document whose production is in dispute and determine from such inspection whether or not it shall be produced: Ord. 31, r. 19 *a*: *Birminghom & M. M. Omnibus Co.* v. *London & N. W. Ry.*, 109 L. T. 64; but there is no such provision in these *Rules*.

It was held under this *Rule*, that where a question on examination is substantially answered, a further answer ought not to be required when discovery would be oppressive: *McGregor* v. *McDonald*, 11 P. R. 386.

353. If a party fails to comply with any notice or order for production or inspection of documents, he shall be liable to attachment and shall also be liable, if a plain- Consequences of disobeying notice or order for discovery.

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tiff, to have his action dismissed, and if a defendant, to have his defence, if any, struck out. Service of the notice of motion upon the solicitor of the party is, unless the Court otherwise directs, sufficient. C.R. 473 and 474.

See Eng. (1883) R. 363.

See *Rule* 331 and notes.

This *Rule* applies in case of disobedience of a notice to produce given under *Rule* 348, but possibly not to a notice served under *Rule* 341: see *Merchants Bank* v. *Pierson*, 8 P. R. 123.

A notice for production, or inspection, need not be personally served in order to make a party disobeying it liable to attachment; it is sufficient to serve it on his solicitor: *Rule* 351, and C. R. 475, expressly provided that an order for production, or inspection, need not be personally served in order to found an application for an attachment, but that provision is not continued in these *Rules*, and it may be, that in the absence of such express provision, service of the order must be personal in order to found proceedings for an attachment.

Motion to commit; service of notice of motion.

Service of a notice of motion to commit is generally required to be personal: see notes to *Rule* 546 *infra*; *Monn* v. *Perry*, 50 L. J. Chy. 251; *Re Dance*, W. N. 1895, 127; and see Gilbert's Chy. Pr. 198-9, but this *Rule* makes an exception to the general rule, in the cases mentioned: *Re Harnden*, *Harnden* v. *Harnden*, 11 P. R. 35; 21 C. L. J. 238.

Two clear days' notice seems sufficient: *Rule* 215.

Motions to commit for breach of any order of course, or order made by a Judge in Chambers, or judicial officer, may be made in Chambers, but motions to commit for breach of any judgment or order made in Court should be made to a Judge in Court: see *Southwick* v. *Hare*, 15 P. R. 239, 331; *Roberts* v. *Donovan*, 21 Ont. 535; *Berry* v. *Donovan*, 21 Ont. App. 14; and notes to *Rule* 331.

A motion to commit, when made in Chambers, must be made before a Judge; the Master in Chambers, or Local Master, has no jurisdiction to entertain it: *Keefe* v. *Ward*, 18 C. L. J. 166; see *Rules* 208 (1), (4), 209; but a Local Judge would appear to have jurisdiction where *Rule* 210 applies. See also notes to *Rule* 331.

Default; how established.

On motions to commit for non-production in, or for not bringing accounts into, the Master's office, the Master is to determine whether the party has been sufficiently notified. The Master's certificate of default is the only evidence of default which is necessary, or can be used: *Paxton* v. *Dryden*, 6 P. R. 83; *Wilson* v. *Wilson*, 7 P. R. 57; but on motions to commit for non-production in the proper office under *Rule* 348, it is necessary to prove the due service of the notice, and also to produce the certificate of the proper officer that it has not been complied with: *Ib.*

It is not necessary to serve with the notice of motion copies of the affidavits intended to be used in support of it: *Honnum* v. *McRae*, 18 P. R. 185.

The certificate of default should bear the latest possible date: *Somerville* v. *Joyce*, 1 Chy. Ch. 202. Such a certificate may be read, though no notice of reading it be given: *Mallock* v. *Plunkett*, 1 Chy. Ch. 381. See notes to *Rule* 546.

Where the order has been complied with, after notice of motion served, the motion will be refused, but the applicant will be entitled to his costs: *Mallock* v. *Plunkett*, *supra*, p. 856; *Berrie* v. *Moore*, 1 Chy. Ch. 107. Rule 354.

And, even after committal for not bringing in accounts, the party is entitled to be discharged on production of the Master's certificate that the accounts have been brought in, and the sufficiency of the accounts will not be inquired into on the application for discharge, nor will the payment of costs be made a condition precedent of the discharge: *Clark* v. *Clark*, 3 Chy. Ch. 67. Where a party obstinately refuses obedience, or becomes unable to obey: see *Rule* 551. Discharge from custody; on subsequent obedience.

Where the party has complied with a notice, or order, but it is contended that his compliance is insufficient, the question of sufficiency must, in cases pending in the Master's office, be determined by the Master upon a warrant to bring in a better affidavit, or account, as the case may be: *Merkley* v. *Casselman*, 1 Chy. Ch. 292; but see *Wilson* v. *Wilson*, 7 P. R. 57. Sufficiency of compliance: how determined

But where there is an alleged insufficient compliance with a notice served under *Rule* 348, the question of sufficiency must be determined on motion in Chambers to compel the party to bring in a better affidavit, or, in default, that he be committed: *Ross* v. *Robertson*, 2 Chy. Ch. 66.

(ix) *Default of Pleading.*

354. A defendant who fails to deliver a statement of defence and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim. Effect of default in pleading.

This *Rule* is based on C. R. 586. It would not seem to apply to the case where a defendant has, with his appearance to a specially indorsed writ, filed the affidavit required by *Rule* 56, but delivers no other defence. Where the defendant files the affidavit, if the plaintiff does not within 5 days after appearance serve notice, the defendant may within ten days from his appearance deliver a statement of defence: *Rule* 112, but if he does not, the affidavit may be treated as the defence: see *Rule* 112 (3), and see *Voight* v. *Orth*, 5 O. L. R. 493, and the plaintiff should, in such a case, after the ten days have expired, note the pleadings closed, and proceed to trial in the ordinary way. Specially indorsed writs.

In other cases, where a judgment cannot be obtained as of course for default of defence: see *Rule* 355, the plaintiff must note the pleadings closed, and move in the Weekly Court, or at the trial where there are other defendants as to whom the action has to be tried: *Rule* 356 (2), for judgment on the statement of claim as against the defendant in default: *Rule* 222. Other cases.

This *Rule* in effect introduces the former Chancery practice, which entitled a plaintiff to have his bill of complaint heard *pro confesso* as against a defendant who put in no defence.

Notice of motion for judgment must be given to defendants who have appeared, even though they have delivered no defence. Two days' notice is sufficient: *Rule* 215; but it is not necessary to serve defendants who have not appeared: *Rule* 35. Notice of assessment of Notice of motion.

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damages must be given, even though a defendant has not appeared: *Rule* 247. In the case of a sole defendant, if judgment cannot be entered, as of course, or a motion made therefor in Chambers under *Rule* 466, a motion for judgment must be made to a Judge in the Weekly Court; the motion must be brought on within a year from the time when the right to move accrued, otherwise leave to move is necessary: see *Rule* 357; where there are other defendants who defend, the motion for judgment against a defendant who does not defend may be made at the trial of the action: *Rule* 356 (2), or upon motion for judgment against such other defendants. Where the relief sought against a defendant in default, is separable and distinct from that claimed against other defendants who defend, the motion for judgment against the party in default may properly be made without waiting until the action is ready for trial, or motion for judgment, as against the other defendants. But such a course would not be proper where the relief claimed against the party in default is bound up with that against the other parties who defend, as for example in an action to set aside an alleged fraudulent conveyance by a debtor, a motion for judgment against the debtor who made no defence would be premature, if made before the action was also ripe for hearing as against his grantee, otherwise two inconsistent judgments might be pronounced in the same action, one against the debtor declaring the conveyance impeached to be fraudulent, and another against his grantee in effect declaring it to be valid.

The difficulty in some cases about making a final order at a hearing of the action as against some defendants only, and in the absence of others, is referred to in *Cooke* v. *Gilbert*, 40 W. R. 682; W. N. 1892, 111; *MacMillan* v. *Australasian*, etc., 76 L. T. 182.

Notwithstanding pleadings noted closed, action may be dismissed.

As to noting pleadings closed for default of defence: see *Rule* 121. Notwithstanding that a defendant allows the pleadings to be noted as closed, the action may nevertheless be dismissed as to him, if on the trial of the action against a co-defendant the plaintiff fails to establish his case, whenever the cause of action against the two defendants is inseparable: see *McDermott* v. *McDermott*, 3 Chy. Ch. 38; and *Tucker* v. *Goyer*, before MacMahon, J., 29 April, 1898; *Challoner* v. *Lobo*, 1 O. L. R. 292.

Informal defence.

Where a defendant, with his appearance, filed a notice to the following effect: "The defendant admits only $103, but otherwise disputes the plaintiff's claim in this action," this was held to be in effect a defence, and a judgment signed for default of defence was held to be void: *Voight* v. *Orth*, 5 O. L. R. 443.

Defence mislaid by officer.

Where a defence has been filed, but mislaid by the officer, and not entered in his procedure book, a judgment signed for default of defence is irregular: see *Moore* v. *Simons*, 1 C. L. J. 183; *Bank of Montreal* v. *Harrison*, 4 P. R. 331; and where a defence is filed by defendant after the pleadings are noted as closed under *Rule* 121, though it is irregular, it is not a nullity, and the defendant should be notified of any motion for judgment: *Jackson* v. *Gardiner*, 19 P. R. 137. *Quære*, should not a motion be made to set it aside: see notes to *Rule* 112.

Plaintiff not wishing to proceed against a defendant.

Where, after a defendant has appeared, it becomes unnecessary to continue the action against him, the action should be either formally discontinued: see *Rule* 321; or the action should be formally dismissed against him, and it is irregular to proceed with the action without taking that course: see *McLaughlin* v. *Stewart*, 1 O. L. R. 295.

As to the right of a defendant in default, to notice of proceedings upon a reference to a Master, see *Rule* 403; or for the appointment of a receiver by way of equitable execution: *Tilling* v. *Blythe*, 1899, 1 Q. B. 557; 80 L. T. 44. Rule 355.

355. Where a plaintiff would be entitled to sign judgment for default of appearance to the writ he shall be entitled to sign a similar judgment, *mutatis mutandis*, for default of defence. *New.* Judgment in default of defence.

This *Rule* is based on C. R. 587, and see Eng. 1883, R. 295.

The cases in which a plaintiff is entitled to sign judgment for default of appearance as of course, are those enumerated in *Rules* 37 and 38, 39, 40, 41, 42, and 467. In cases of that nature where default is made in delivering a defence judgment may also be signed under this *Rule* as of course. Cases in which judgment may be signed on default of defence.

An affidavit of default should be filed, or the judgment will be irregular: *Hyslop* v. *Ostrom*, 14 O. L. R. 136.

See Eng. R. (1883) R. 295.

The present *Rule* varies from the Eng. *Rule* inasmuch as it applies to cases where the plaintiff is suing for other claims besides a debt or liquidated demand, the Eng. Rule being confined to cases where a debt, or liquidated demand, alone is the subject of the action.

Under this *Rule* the plaintiff may obtain a final judgment for default of defence for a liquidated demand, and may continue the action against the same defendant for any other claim, and against co-defendants, if any, who have defended. So that it will be possible for a plaintiff to recover several final judgments in the same action for different parts of the relief claimed.

Judgment can be properly signed under this *Rule* only in respect of claims which can be, and are, specially indorsed on the writ of summons: *Star Life* v. *Southgate*, 18 P. R. 151.

Where the plaintiff's claim is in the alternative against either one of two defendants, judgment cannot be signed against both, and the signing of judgment against one is an indication of election not to proceed against the other: *Morel* v. *Westmoreland*, 1904, A. C. 11, 14; *French* v. *Howie*, 1906, 2 K. B. 674; 95 L. T. 274. Alternative claims.

A defendant to whom a statement of claim is delivered must deliver his defence or counterclaim within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last: *Rule* 112.

As to the effect of delivering a defence after the time for doing so has elapsed: see notes to *Rule* 112.

In an action for replevin, where damages are claimed as well as recovery of the chattels, *Rule* 368 provides that "where the plaintiff is entitled to sign judgment by default, he may sign final judgment for five dollars and costs, but shall not be entitled to recover a larger sum, except upon an assessment before a Judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent." Judgment in replevin action.

Rule 355.

Judgment on replevin bond.

It is held in England that in an action on a replevin bond, if the plaintiff, instead of claiming damages, claims the amount for which the bond was given, and becomes entitled to judgment by default, his proper course is to enter final judgment, and not interlocutory judgment: *Dix* v. *Groom*, 5 Ex. D. 91, and see notes to Jud. Act, s. 125.

Defence struck out.

Where a defence has been struck out, *e.g.*, for disobedience to an order for discovery, judgment may be signed under this *Rule*: see *Fisher* v. *Hughes*, 25 W. R. 528.

An informal defence cannot be treated as a nullity: see *Voight* v. *Orth*, *supra*, p. 858; nor yet a defence delivered after the proper time: see notes to *Rule* 112.

Effect of enlarging claim in statement of claim.

Formerly if the defendant did not appear the plaintiff could not enlarge, in the statement of claim, his claim indorsed on the writ: *Law* v. *Philby*, 35 W. R. 450; 56 L. T. 522; *Gee* v. *Bell*, 35 Ch. D. 160; *Stone* v. *Smith*, 35 Ch. D. 188; but he may do so now under *Rule* 100: see that *Rule* and notes; but see *Snider* v. *Snider*, 5 O. W. N. 325, 328, 956; but where a material addition is thus made by the statement of claim, a non-appearing defendant must be served therewith.

Where the plaintiff claimed interest at seven per cent., showing no ground for more than six, it was held to be the duty of the officer signing judgment to allow only six per cent.: *Bank of Hamilton* v. *Harvey*, 11 P. R. 145.

Judgment in default of defence to counter-claim.

Counter-claim.—Although a counter-claim is regarded for some purposes as a separate action, yet in the event of a plaintiff's not putting in a defence to it, judgment cannot, even where the counter-claim is for a liquidated demand, be entered under this *Rule*, but the defendant will have to move for judgment: *Jones* v. *Macaulay*, 1891, 1 Q. B. 221; 64 L. T. 621; and see *Rules* 121, 356.

Several defendants.

Where Several Defendants. — In *Ribel* v. *Livingstone*, 4 C. L. T. 135, an action on a promissory note against K. & L., two joint makers, final judgment was signed against L., and costs of the action up to judgment taxed. The plaintiff afterwards at the trial recovered judgment against K., and in taxing costs against K. the Taxing Officer held that by taxing the general costs against L., the plaintiff had waived the right to recover these costs from K. To remedy this an order was made in Chambers *ex parte* setting aside the judgment as to costs against L., upon showing that he was worthless, and that no steps had been taken to enforce the judgment against him. But see *Muir* v. *Jenks*, and other cases in note to *Rule* 521.

In *Wilkinson* v. *Garrett*, 7 C. L. T. 22, judgment was obtained against defendants at different stages; against defendant R. by default of appearance, and afterwards against G. who had defended. The whole costs were ordered to be taxed against G., including the costs of judgment against R.; costs up to and including judgment against R. to be also taxed against him, and, if recovered from either, to be credited on the judgment against both.

Joint debtors.

Joint Debtors.—A judgment recovered under this *Rule* against one or more partners, or joint debtors, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants: *Ducber Watch Case Mfg. Co.* v. *Taggart*, 26 Ont. App. 295; 30 S. C. R. 373; and other cases, *supra*, pp. 380 and 501.

See also *Jenkins* v. *Davies*, 1 Ch. D. 696.

Joint Tortfeasors.—Where the action is against joint tortfeasors, the damages recoverable by the plaintiff are not severable, and there must be one verdict, or assessment, and judgment, against all: *Greenlands* v. *Wilmshurst*, 1913, 2 K. B. 507; 109 L. T. 487; but the costs are severable, and part may be awarded as against one defendant, and part against another; see *supra*, p. 252. Rule 356. Joint tortfeasors.

356.—(1) In any other case the plaintiff may after the pleadings have been noted as closed move for judgment upon the statement of claim. How judgment obtained.

(2) Where default is made by one defendant and the action proceeds to trial as against another defendant such motion may be made at the trial. *New.*

The first clause of this *Rule* is based on C. R. 609.

See Eng. (1883), R. 559.

Rules 37 *et seq.* provide for the plaintiff's signing final judgment on default of appearance, in the cases therein mentioned; and *Rule* 355, for the like judgment upon default of pleading without any motion in the like cases.

Rule 57-62 and 207 provide for obtaining judgment in Chambers on specially indorsed writs.

Rule 62 provides for the recovery of judgments on special motions, by leave, at any time after the writ has issued.

Rule 264 provides for judgment at trials.

Rules 466-467, provide for obtaining judgment on default of appearance or defence, or where the plaintiff's case is admitted, in cases of foreclosure, sale, or redemption.

Rule 529 provides for a like judgment where, under the Act or these *Rules*, or otherwise, it is provided that judgment may be entered or signed upon the filing of an affidavit, or production of a document.

Rules 600 *et seq.* provide for obtaining an adjudication in a summary way upon matters such as are enumerated in *Rule* 600.

Rules 608-610, 615, provide for obtaining judgments in Chambers for administration, or partition.

Motions for judgment may be necessary in other cases to obtain the proper relief in case of defendant's default in appearing, or pleading: see *Rule* 121; *e.g.*, where a claim is indorsed for specific performance or other equitable relief, in which case if defendant does not appear the plaintiff must deliver a statement of claim, and cannot sign any judgment, or move for judgment by reason of the default in appearance: *Stuart* v. *McVicar*, 18 P. R. 250; or where the Judge at the trial of the action has not ordered a judgment to be entered: see *Wellbanks* v. *Conger*, 12 P. R. 354; or different issues or questions have been determined in different ways, and at different times, where a motion for judgment on the result may thus become necessary: see *Rule* 358, see also *Rule* 63.

As to motions for judgment on default of defence to a counterclaim: see *Rule* 121.

Rule 356.

Before setting a case down on motion for judgment, the plaintiff must in general have delivered a statemsnt of claim: see *Minton* v. *Metcalf*, 46 L. J. Chy. 584; W. N. 1877, 142; *Hunter* v. *Wilcockson*, 9 P. R. 305, or the equivalent of a statement of claim: see *Rule* 111; and see notes to *Rule* 109, p. 506.

Two clear days' notice under *Rule* 215 is sufficient: *Martens* v *Birney*, 10 P. R. 368; see *Roupell* v. *Parsons*, W. N. 1876, 61.

Officers to see to regularity of proceedings.

By direction of the Judges, the officer with whom cases are set down is required to see that all preliminary proceedings are regular before setting a cause down. Solicitors will therefore require, in setting down cases for judgment on default of defence, (1) to file with the officer with whom the case is set down the writ of summons, affidavit of service of writ, and statemsnt of claim, affidavit of non-appearance, or no defence, and the order authorizing the service of the writ when that is necessary under *Rule* 25, and a certificate of the state of the cause, where the action is pending in an outer county.

It seems that in England, as a matter of form, further directions cannot he reserved; hut the same object is accomplished by declaring that the further consideration of the action is adjourned: *Bennett* v. *Moore*, 1 Ch. D. 692; *Gilbert* v. *Smith*, 2 Ch. D. 686; *Brassington* v. *Cussons*, 24 W. R. 881. This difficulty would seem not to exist in practice here.

Facts in statement of claim to be deemed to be admitted.

Under *Rule* 354 where there is no defence, the statements of fact in the statement of claim are deemed to be admitted. The motion for judgment under this *Rule* is ordinarily made in the Weekly Court, but if there are other defendants on the record, as to whom the action has to be tried, the motion msy be made at the trial, as provided hy clause 2.

On a motion for judgment under this *Rule*, though the facts alleged in ths statement of claim are to be taken ss true, it is nevertheless open to a defendant in default to contend that upon those facts the plaintiff is not in law entitled to the relief clsimed: see *Rule* 261; and see *Greig* v. *Green*, 6 Gr. 240; *Scane* v. *Hartrick*, 7 Gr. 161.

Proof by affidavit of the allegations contained in the statement of claim is, therefore, unnecessary as against a defendant who has put in no defence: see *Rule* 354; and see *Williams* v. *Brisco*, 29 W. R. 713; 17 C. L. J. 478; *Ripley* v. *Sawyer*, 31 Ch. D. 494; *Jones* v. *Harris*, 55 L. T. 884; *Willmott* v. *Young*, 44 L. T. 331; *Montagu* v. *The Land Corporation of England*, 56 L. T. 730; *De Jongh* v. *Newman*, 56 L. T. 180; *Webster* v. *Vincent*, 77 L. T. 167; *Bagley* v. *Searle*, 35 W. R. 404; 56 L. T. 306; and *Gray* v. *Roberts*, 32 Sol. Jour. 322. But under the corresponding Irish Rule, it has been held that where the plaintiff's title depends on documents, he must produce and prove them: *Crisford* v. *Dodd*, 15 L. R. Ir. 83; hut see *Smith* v. *Buchan*, and *Faithful* v. *Woodley*, *infra*, p. 863.

A defendsnt though in default of defence, if he has appeared, is entitled to notice of motion for judgment, whether it be made in the Weekly Court, or at the trial: see *Rules* 213, 215. If he has not appeared ths motion msy be mads without notice: *Rule* 35.

Variation of claim indorsed on writ by the statement of claim.

Where the plaintiff by his statement of claim has materially varied his claim as indorsed on the writ, the defendant must be personally, or substitutionally served with ths statement of claim: *Rule* 109 (2) even though he has not appeared; and as only the statement of

claim will be before the Court on a motion for judgment it is the duty of the plaintiff to inform the Court of such variation; it being a well understood rule that on all *ex parte* applications the utmost candour must be observed. Rule 356.

On a motion for judgment on default of defence, a plaintiff will be confined to the relief asked by his statement of claim; thus, where by his statement of claim the plaintiff asked for specific performance and ancillary relief, but not for any declaration of lien, upon motion for judgment on default of defence, it was held that the plaintiff could not have a declaration of lien: *Tocon* v. *National Standard Land Co.*, 56 L. T. 165; nor a rescission of the contract: *Stone* v. *Smith*, 35 Ch. D. 188; 56 L. J. Ch. 871. Plaintiff confined to relief asked by claim.

Where by the statement of claim, in an action for specific performance, the plaintiff craved leave to refer to the agreement, and the property did not appear, except by reference to the agreement, it was held that the allegations were insufficient, as nothing beyond the statement of claim could be looked at: *Smith* v. *Buchan*, 36 W. R. 631; 58 L. T. 710; *Faithfull* v. *Woodley*, 43 Ch. D. 287.

If a statement of claim against a married woman on a contract, made before 13th April, 1897, does not allege the possession of separate estate, no judgment can be given: *Tetley* v. *Griffith*, 36 W. R. 96; 57 L. T. 673. Claim insufficient to found relief.

Where plaintiff's claim was dismissed by interlocutory order, defendant was held to be entitled to proceed for judgment on his counter-claim: *Higgins* v. *Scott*, 21 Q. B. D. 10; *Roberts* v. *Booth*, 1893, 1 Ch. 52. Motion for judgment on counter-claim

Where a part of the plaintiff's claim is for a debt or liquidated demand, and the balance is an unliquidated demand, and a motion for judgment is made, under *Rule* 121, in default of defence, the Court may, in its discretion, refer the motion to one of its officers to take an account of the amount due, and is not obliged to give final judgment for the amount of the liquidated demand: *Charles* v. *Shepherd*, 1892, 2 Q. B. 622; or the Court may on proof of the claim by affidavit, give final judgment for the amount claimed, without a reference: *Roberts* v. *Booth*, *supra*. In Ontario, however, it is open to a plaintiff to sign judgment under *Rule* 355 in default of defence for that part of the claim which is a debt, or liquidated demand: see *Rule* 355. Judgment, where part of claim is liquidated and part is not.

Where a defence is struck out for non-compliance with *Rules* as to examination, or with an order to produce, under *Rules* 331, 353, the defendant is in default under this *Rule*: *Fisher* v. *Hughes*, 25 W. R. 528. Defence struck out.

As to judgment in an action on a bond which is subject to s. 125, *supra*; see notes to that section.

The *Rule* was applied in *Re Smith*, *Bridson* v. *Smith*, W. N. 1876, 103, where one defendant made default, and the others admitted the plaintiff's claim by their defence.

In *National Provincial Bank* v. *Evans*, 51 L. J. Chy. 97; 30 W. R. 177, the defaulting defendant was an infant, and the action was set down under Eng. R. 1875, O. 19, r. 17 (not adopted in Ontario), for trial as against him, and on motion for judgment against other defendants. The practice in Ontario is, without express provision, Infant defendant.

Rules 357, 358.

the same. See also *Re Fitzwater*, 52 L. J. Chy. 83; *Gardner* v. *Tapling*, 33 W. R. 473.

Where a defence is put in after the proper time, but before a motion under this *Rule* is made: see notes to *Rules* 110, 112 and 121.

Several defendants.

Under the English Rules a motion cannot be made against one of several defendants alone unless the cause of action be severable, and it would seem that this *Rule* must be understood to be subject to that limitation: see *Verney* v. *Thomas*, 36 W. R. 398; 58 L. T. 20; *MacMillan* v. *Australian Territories*, 76 L. T. 182, and note to *Rule* 354.

In a case where several persons joined as plaintiffs to restrain the infringement of rights of pasture to which they were severally entitled, the defendant counter-claimed against the plaintiffs, and seven third parties, to restrain the erection of fences on the land in question. Judgment by default of appearance against the seven third parties was refused before trial, because, assuming them to have been properly made parties, the cause of action against them was not severable from that against the plaintiffs: *Verney* v. *Thomas*, 36 W. R. 398; 58 L. T. 20.

Under the former Chancery Practice, where a bill was filed against a patentee, and his vendee, impeaching the patent, and the vendee allowed the bill to be taken *pro confesso*, the plaintiff failing to establish his case against the patentee who defended, the bill was dismissed as against both defendants, though without costs as to the vendee: *McDermott* v. *McDermott*, 3 Chy. Ch. 38; and see *Tucker* v. *Goyer*, referred to in note to *Rule* 354.

Costs.

Costs.—Upon the motion for judgment the costs are, under section 74, *supra*, in the discretion of the Court: *Young* v. *Thomas*, 1892, 2 Ch 134; 60 L. T. 575.

Leave required for motion after one year.

357. Except by leave an action shall not be set down on motion for judgment for default, after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do. C.R. 612.

See Eng. (1883) R. 567.

In case of issues between parties other than plaintiff and defendant.

358. Where issues arise otherwise than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the Court may, at the trial or on motion, give such judgment as upon the pleadings may seem just. C.R. 594.

See Eng. (1883) R. 307.

The Eng. Rule enables the plaintiff in a counter-claim to obtain judgment against any defendant thereto who makes default: *Street* v. *Crump*, 25 Ch. D. 68; see, in Ontario, *Rule* 121.

For form of judgment as to costs where an action comes on for trial against one defendant, and on motion for judgment against another defendant who has not appeared to the writ, or does not appear at the trial, and the plaintiff recovers judgment against both

with costs: see *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell*, 1908, 1 Ch. 127; 98 L. T. 830. Rule 359.

(x) *Replevin.*

359.—(1) An order of replevin may be obtained.

When motion for replevin order required.

1. On motion therefor on showing the facts of the wrongful taking or detention complained of, the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

When it may issue on præcipe.

2. Or on *præcipe* if the person claiming the property, his servant or agent, makes an affidavit stating,

Affidavit to obtain order on præcipe.

(*a*) That the person claiming the property is the owner or lawfully entitled to the possession thereof;

(*b*) The value thereof;

(*c*) That the property was wrongfully taken out of the possession of the claimant, or fraudulently got out of his possession, within two months next before making of the affidavit;

(*d*) That the deponent is advised and believes that the claimant is entitled to the order;

(*e*) And that there is good reason to apprehend that unless the order is issued without waiting for a motion, the delay would materially prejudice the just rights of the claimant in respect to the property.

Order may issue on præcipe if the property was distrained for rent, or damage feasant.

3. Or on *præcipe* (in case the property was distrained for rent or damage feasant), if the person claiming the property, his servant or agent, makes an affidavit stating,

(*a*) That the person claiming the property is the owner or is lawfully entitled to the possession thereof (describing the property);

(*b*) The value thereof;

(*c*) That the property was taken under colour of a distress for rent or damage feasant;

and in such case the order shall state that the defendant has taken and unjustly detains the property, under

Rule 360.

colour of a distress for rent or damage feasant (as the case may be). C.R. 1068.

The order is issued on *præcipe* (by the officer in whose office the action is commenced: see *Rule* 762), under clause (2) in cases where the goods have been taken out of the plaintiff's possession, or, under clause (3), where they have been distrained for rent, or damage feasant. A special application is necessary under clause (1) in all other cases.

The latter application is made on notice, unless the special circumstances, in the opinion of the Judge, justify the making of an *ex parte* order: *Rule* 360.

Motion for replevin order.

Whether the application may now be made in Chambers, as formerly, is not clear; unless it comes within *Rule* 207 (4) as being a matter relating to the conduct of an action or matter, then it would appear that the motion must be made in the Weekly Court.

The affidavit for a *præcipe* order is to be by the person claiming the property, his servant or agent. An affidavit not describing the deponent as servant or agent, but using the words "now acting for the said (plaintiff)" was held to be insufficient, but for the fact that it further showed facts from which the agency might be inferred *Arnold* v. *Hamilton*, 1 P. R. 263.

The affidavit on special application under clause (1) may be made by any one cognizant of the facts necessary to be sworn to.

In either case the affidavit must be sufficiently explicit to enable the Sheriff to identify the property: *Jones* v. *Cook*, 2 P. R. 396, *Hoorigan* v. *Driscoll*, 8 P. R. 184; and the description must be inserted in the order: see Form No. 85; H. & L. Forms, No. 1271.

An objection that there was in fact no taking or detention is not a ground for setting aside the order; that is one of the questions to be determined in the action: *Gilchrist* v. *Conger*, 11 U. C. Q. B. 197.

An order will not be granted to replevy a vessel seized for breach of the revenue laws: *Scott* v. *McRae*, 3 P. R. 16; neither should the order be issued on *præcipe* in such a case: *Ib.*

Before taking the property the Sheriff takes a bond from the plaintiff under *Rule* 362, unless otherwise provided by the order.

Where the order is issued on *præcipe* the Sheriff takes the property under it, but does not replevy it without further order directing him to do so, except where the property was distrained for rent, or damage feasant: *Rule* 365.

Discretionary power of the Court or Judge when an application for an order is made.

360. The motion shall be on notice to the defendant, unless the special circumstances of the case in the opinion of the Court justify the making of an *ex parte* order. The Court instead of granting or refusing the order may direct the Sheriff to take a bond in less or more than treble the value of the property, or may direct him, in addition to taking a bond pursuant to Rule 369, to take and detain the property until the further order of the

Court, instead of at once replevying the same to the plaintiff; or may order that the plaintiff instead of giving a bond be at liberty to pay into Court to the credit of the action, subject to further order, such sum as may be proper to stand as security to the defendant in the same manner and to the same extent as any bond which the plaintiff would otherwise be required to give to the Sheriff. C.R. 1069. Rules 361, 362.

See *Hessey* v. *Quinn*, 20 O. L. R. 442; 21 O. L. R. 519.

361. The defendant may apply to the Court to discharge, vary, or modify the order, or to stay proceedings thereunder, or for any other relief, with respect to the return, safety or sale of the property or any part thereof, or otherwise. C.R. 1070. Defendant may apply to discharge order.

An objection that there was in fact no taking, is not a ground for setting aside the order: *Gilchrist* v. *Conger*, *supra*, in note to *Rule* 359.

An objection that a writ of replevin was directed to a Sheriff who was sole liquidator of the plaintiff company, was over-ruled in *Alpha Oil Co.* v. *Donnelly*, 12 P. R. 515.

This *Rule* applies to applications to discharge the order of replevin on the merits, and not for mere irregularities: *Ib.* On an application to discharge the order, however, the question involved in the action and to be disposed of at the trial cannot be considered: *Ryan* v. *Fraser*, 2 O. W. N. 1386.

362.—(1) Before the Sheriff acts on the order he shall take a bond, Form 132, from the plaintiff with two sufficient sureties in such sum as may be prescribed by the order, or if no special provision has been made, then in treble the value of the property as stated in the order of replevin. Replevin bond to be taken by Sheriff.

(2) The plaintiff may instead of giving a bond pay into Court twice the value of the goods as stated in the order, and the Sheriff may act upon a certificate of the Accountant that the money has been paid. C.R. 1072.

For form of bond, see No. 132: H. & L. Forms, No. 1272.

The taking of a bond is imperative, and no act can be done under the order until the security is given: see *Lawless* v. *Radford*, 9 P. R. 33, where the seizure was set aside as irregular.

This *Rule* makes it clear, by the insertion of the words "from the plaintiff with two sufficient sureties," that the Sheriff is bound to use due care to obtain a bond sufficient, at the time of taking it, to answer the damages recoverable in the event of the plaintiff being unsuccessful: see *Norman* v. *Hope*, 13 Ont. 556; 14 Ont. 287. The Sheriff must exercise a reasonable discretion in inquiring into the Sureties required.

Rule 363.

sufficiency of the sureties; if he fails to do so he will be liable to the defendant in the replevin action, in case it results in his favour, for all damages, to the amount of the penalty, naturally flowing from the wrongful act, *e.g.* (where the replevin arises out of distress for rent), the rent in arrear, costs of distress, and of the replevin suit, and of any action against the principal and sureties on the bond: *Ib.*

As two sufficient sureties are required, it will not be sufficient if the plaintiff in replevin and one of the sureties are worth the amount of the penalty at the time the bond is taken: *Ib.*

Semble, that a subscribing witness, and an affidavit of its due execution, is necessary to the validity of the bond: see *Heley* v. *Cousins*, 34 U. C. Q. B. 63.

As to the terms, and extent of the security, to which defendant is entitled, in cases respecting goods not previously taken out of the plaintiff's possession: see *Rule* 363.

The defendant is entitled to see the bond in the hands of the Sheriff: *Logue* v. *Prescott*, 18 C. L. T. 186 (N.B.).

An action lies against the Sheriff for refusing to assign the bond: *Pacaud* v. *McEwan*, 31 U. C. Q. B. 328. Only nominal damages were recovered, where the plaintiff was found not entitled to recover the value of the goods, not being their owner: *Ib.*

An action on the bond will lie,—

Action on replevin bond.

(1) For not prosecuting the suit with effect, *i.e.*, not successfully: as to which see *Welsh* v. *O'Brien*, 28 U. C. Q. B. 406; *Mulvaney* v. *Hopkins*, 18 U. C. Q. B. 174; *Patterson* v. *Fuller*, 31 U. C. Q. B. 323; 32 U. C. Q. B. 240.

(2) For delay in prosecuting: see *Belcher* v. *Burn*, 24 U. C. Q. B. 124; *Churchill* v. *Denham*, 29 C. P. 474; but see *O'Donnell* v. *Duchesnault*, 14 Ont. 1.

(3) For not returning the goods: see *Patterson* v. *Fuller*, *supra*.

As to the damages recoverable: see *Norman* v. *Hope*, 13 Ont. 556; 14 Ont. 287. Formerly the excess of solicitor and client costs of defence, over and above taxed party and party costs, were not recoverable: *Williams* v. *Crow*, 10 Ont. App. 301; but see now *Rule* 363.

Damages for "illegal distress" and for "annoyance and injury to credit and reputation in trade" are recoverable in an action of replevin arising out of a wrongful distress for alleged arrears of rent: *Smith* v. *Enright*, 69 L. T. 724.

Indemnity of defendant in replevin proceedings.

363. When an order of replevin is issued for any property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might bring an action for conversion, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond shall be conditioned so as to require the plaintiff and the sureties to indemnify and save harmless the defendant from all loss

and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the defendant may incur, including reasonable costs not taxable between party and party. This provision shall not be required in cases of distress for rent or damage feasant. C.R. 1074. Rules 364, 365.

The statute (48 Vict. c. 13, s. 8), from which this *Rule* is taken was probably passed in consequence of the decision in *Williams* v. *Crow*, 10 Ont. App. 301, to the effect that a successful defendant in replevin could not recover as damages the extra costs he had been put to between solicitor and client.

Under this *Rule* these extra costs are now recoverable, except in cases where the goods replevied have been distrained for rent, or damage *feasant*.

This *Rule* gives no right of action independently of the bond, but merely adds another condition to the bond beyond that formerly required: *Harper* v. *Toronto Type Foundry*, 31 Ont. 422.

The sureties are not discharged by the trial being postponed on the application of the plaintiff without the defendant's consent or concurrence: *O'Donnell* v. *Duchenault*, 14 Ont. 1.

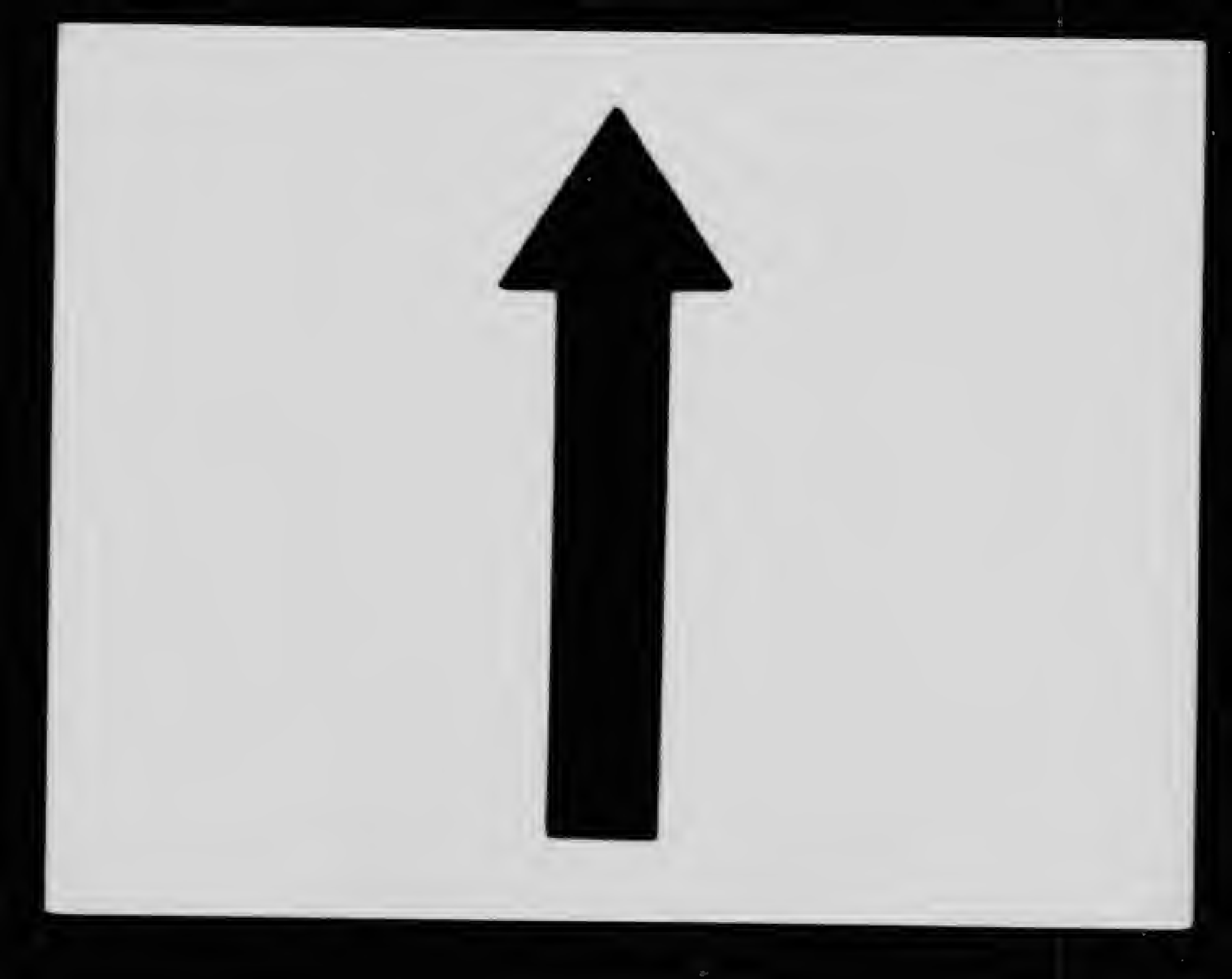
364. The Sheriff shall not serve a copy of the writ of summons or order until he has replevied the property, or some part thereof if he cannot replevy the whole. C.R. 1075. Sheriff not to serve writ of summons till he has replevied.

As to the mode of framing the statement of claim where part of the goods are eloigned: see *Thurston* v. *Breard*, 8 P. R. 10.

365. Where the order is issued on *præcipe* under Rule 359 (2) the Sheriff shall take and detain the property, and shall not replevy the same to the plaintiff without the order of the Court, but may, after seven days from the time of taking the same, re-deliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the Sheriff an order directing a different disposition of the property. C.R. 1076. What Sheriff shall do when the order issues on præcipe.

Before acting upon the order the Sheriff must take a bond from the plaintiff, as provided in *Rule* 362, unless otherwise provided by the order.

In replevying, power is given to the Sheriff by *The Replevin Act* (R. S. O. c. 69), s. 5, to search for the property in, and if necessary (but during the daylight only) to break open the door of the defendant's dwelling house, after a demand publicly made at the door for delivery of the property, and non-compliance for six hours.



Rules 366, 367.

By section 6 of the same Act, if the property is reasonably supposed to be in any enclosure, other than the dwelling house, the Sheriff may publicly demand it at the enclosure, and in case it is not forthwith delivered, he may, and if necessary must, at once break open the enclosure to make replevin.

By section 7 of the same Act, if the property is reasonably supposed to be concealed about the person, or the premises (other than the dwelling house or other enclosure) of the defendant, or any other person holding the same for him, the Sheriff may demand it from the defendant, or such other person, and upon refusal or neglect to deliver it, may, and if necessary must, search the person of the defendant, or such other person, or such premises.

When order to be returned with Schedule annexed.

366. The Sheriff shall return the order on or before the tenth day after the service thereof, and shall transmit annexed thereto,

What Schedule to contain.

(*a*) The names of the sureties in, and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto;

(*b*) The place of residence and addition of the sureties;

(*c*) The number, quantity and quality of the articles of property replevied; and in case he has replevied only a portion of the property and cannot replevy the residue by reason of the same having been eloigned out of his county, or not being in the possession of the defendant or of any other person for him, he shall state in his return the articles which he cannot replevy and the reason therefor. C.R. 1077.

If Sheriff returns that the property has been eloigned, order to issue.

367.—(1) Where the Sheriff makes such a return of the property distrained, taken or detained having been eloigned, the Court may make an order (Form 86) directing the Sheriff to take in *withernam* goods and chattels of the defendant.

Where Sheriff returns goods eloigned.

(2) Where a Sheriff makes return that the whole or any part of the property has been eloigned, or that for any reason the same cannot be replevied, the plaintiff may, if he so elect, serve the writ of summons, and in his statement of claim, claim either the return of the goods and damages for their detention, or damages for their conversion. C.R. 1078. *Amended.*

For Form of order: see No. 86; H. & L. Forms, No. 1273.

On the 5th Dec., 1859, the practice in England was that if the Sheriff returned an eloignment (*quod averia, etc., elongata sunt*) to *alias* and *pluries* writs of replevin, the writ of *capias in withernam* issued; but the plaintiff might take out and deliver to the Sheriff the writ of replevin, *alias*, and *pluries*, at the same time, so as to get a return from the Sheriff to the *pluries* at once: Gilbert on Replevin, 95. It would seem that under the present *Rules* no *alias* and *pluries* orders or writs are provided for, and the order *in withernam* may be issued upon the Sheriff's return, to the order of replevin, of an eloignment. Rules 368-370.

368. Where the plaintiff is entitled to sign judgment by default, he may sign final judgment for five dollars and costs, but shall not be entitled to recover a larger sum except upon an assessment or upon filing the consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent. C.R. 1079. Damages on judgment by default.

As to damages recoverable by a plaintiff in replevin at a trial, or on an assessment of damages: see *Grohom* v. *O'Colloghan*, 14 Ont. App. 477.

(xi) *Interim Preservation of Property, etc.*

369. Where there is a dispute arising upon a contract or any alleged contract affecting the title to any property the Court may make an order for the preservation or interim custody of such property, or may order that the amount in dispute be brought into Court or otherwise secured, or may order the sale of the property and the payment of the proceeds into Court. C.R. 1095. Order for interim preservation of property.

See Eng. (1883) R. 657.

This provision gives increased power to the Court for preserving the rights of the parties uninjured, during the pendency of litigation, and an interlocutory order made under this *Rule* may be enforced by attachment: *Hutchinson* v. *Hartmont*, W. N. 1877, 29.

In *Russell* v. *Davies*, W. N. 1883, 109; 19 C. L. J. 273, an action to recover arrears of an annuity, an order made for payment of the annuity till the trial, the plaintiff being in destitution, was reversed in appeal, as it appeared in the evidence that the defendant had a *primâ facie* case for insisting that the annuity had determined.

370.—(1) The Court may, upon the application of any party and upon such terms as may seem just, make any order for the detention or preservation of property, being the subject of the action, or for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute; and for all or any of the purposes aforesaid may authorize any person or persons to enter upon or into any land Order for detention and inspection of property.

Rule 370.

or building in the possession of a party and may authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence. (See also Rule 266.) C. R. 1096.

(2) The Court may also on notice to any person not a party to the action make an order authorizing entry upon or into any lands or building in the possession of such person for the purposes of such inspection.

See the Eng. (1883) R. 659.

Similar jurisdiction of Court of Chancery.

The Court of Chancery, under its similar jurisdiction, would not grant an inspection on the application of the plaintiff, unless satisfied that he had a case to be tried at the hearing; nor in any case unless the inspection asked for was necessary for the purpose of enabling the party applying for it to prove his case: *Piggott* v. *Anglo-American Telegraph Co.*, 19 L. T. 46; *Batley* v. *Kynock*, L. R. 19 Eq. 90.

C. R. 1098 provided that an application might be made at any time after the right appears, and although that Rule has not been continued, presumably the application may be so made under this *Rule*: see *Right of Way Mining Co.* v. *La Rose Mining Co.*, 14 O. L. R. 80, where an application for inspection of property was successfully made before the delivery of the statement of claim.

Inspection by the plaintiff and his solicitor and certain witnesses of a building, the construction of which was in question in the action, was ordered: *Keyes* v. *McKeon*, 23 O. L. R. 529.

Semble, a Judge cannot, validly, on an interlocutory motion, take a view of the subject matter in dispute, in lieu of the evidence of witnesses: *London General Omnibus Co.* v. *Lavell*, 1901, 1 Ch. 135; 83 L. T. 453; but see *Rule* 265.

Formerly, inspection could not be granted to one defendant of property belonging to another defendant, when there was no right in question between them in the action: *Shaw* v. *Smith*, 18 Q. B. D. 193; but under the *Rule* as now framed such an inspection might be ordered, if necessary for the proper determination of the question in dispute in the action.

The power to grant inspection under this *Rule* is limited by clause (1) to property in possession of a party to the action; where, to make the inspection effective, entry into any land or building is necessary, such entry must be limited to any land or building in the possession of a party to the action; and an order was refused where the person having possession was not before the Court: *Reid* v. *Powers*, 28 Sol. Jour. 653; *Garrard* v. *Edge*, 37 W. R. 501. Under clause (2), however, where the property in question is on the land or in possession of some third person not a party, on notice to such person inspection may be ordered.

In an action to restrain defendants (who were owners of a house fronting on the same street as the house owned by the plaintiff), from causing, or permitting, sewage to be discharged from their premises into a drain belonging to the plaintiff, and from permitting any connection to remain between their premises and the plaintiff's drain, an

order was made under this *Rule*, authorizing the plaintiff to enter on that part of the etreet the eoil of which belonged to ths defendants. for the purpose of experimenting, in order to discover whether the pipe which joined the plaintiff'e drain proceeded directiy from the defendant'e houee, and for thie purpose to dig up the street as far as might he necessary: *Lumb* v. *Beoumont*, 27 Ch. D. 356; but *semble*, such an order could not he made in respect of a pubic etreet or highway in Ontario without the consent of the municipaiity having jurisdiction over such street or highway. Rule 370.

Where the defendant in an action for obstruction of light and air, had not delivered his statement of defence, Arohibaid, J., refueed an order for inspection until he had diecloeed hie defence: W. N. 1876, 53.

In a nuisance action, an application to inepect the defendant's worke to ascertain how the nuieance was occasioned was refused, as proof of the nuisance could be obtained from external eourcee: *Borlow* v. *Bailey*, 18 W. R. 783; see aleo *Flower* v. *Lloyd*, W. N. 1876, 169, 230.

Upon a *primâ facie* case of mineral trespass, or encroachment by the defendant, or where the fact of trespass (which is denied) can only be aecertained by inspection, and no injury will result to the defendant therefrom, an interiocutory order will be made for the inspection of his mine; and the order will, when necessary, extend to the removal of the obetruction to the inspection: Seton, 5th ed., 503; see *Cooper* v. *Ince, Holl & Co.*, W. N. 1876, 24; *Right of Way Mining Co.* v. *La Rose Mining Co.*, 14 O. L. R. 80. Mineral trespass.

The Court has juriediction under this *Rule* to grant an interim injunction in a proper case, to reetrain a defendant from ceasing to pump water out of a mine which the defendant was in posesssion of. and had agreed to iease, in order to prevent ite destruction: *Strelley* v. *Pearson*, 15 Ch. D. 113. Injunction.

The rule in actione for the infringement of ietters patent is, where a plaintiff ie unable to obtain clear and satisfactory evidence of infringement, the Court, upon a fair *primâ facie* case being made ont, will order the defendant to permit an inspection to he made of his premises and machinery, by proper persons named on behaif of the plaintiff: Seton, 5th ed., 351. In an action to restrain infringement of a patent for grinding grain eo as to separate the germ from the flour. inspection of the plaintiff's procese, to see how it wae actually carried on under their patent, was granted. The plaintiffe did not claim any novelty in the machinery, their epecification was confined to a new process or product: *The Germ Milling Co.* v. *Robinson*, 53 L. T. 696; 34 W. R. 194; 55 L. J. Chy. 287 Infringement of letters patent.

Inspection of eamples was [illegible] in *Munn* v. *McConnell*, 7 C. L. T. 169.

In an action to recover jewellery, the defendant alleged that it belonged to a third party, and had been depoeited by him to eecure a debt due to the defendant. The Court ordered it to be given up to an officer of the Court: *Veloti & Co.* v. *Brahom & Co.*, 46 L. J. C. P. 415. Preservation of snbject of action.

The Court has full power to allow photographs to he taken hy a party to the action of documente in the poeeession of the other party: *Lewis* v. *Londesborough*, 1893, 2 Q. B. 191.

On the affidavit of plaintiff, stating that the property was rapidly being damaged, the Court of Appeal appointed him receiver and manoger, though no application for thie purpose had heen made, either to a Divisional Court or a Judge: *Hyde* v. *Warden*, 1 Ex. D. 309. Receiver to preserve property.

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As to authorizing the making of experiments: see *Badische Anilin, etc.*, v. *Levinstein*, 24 Ch. D. 156.

Delivery up of documents.

Instead of ordering documents to be brought into Court, the Court in a clear case, on an interlocutory motion, directed a defendant to deliver up documents of which he obtained possession while in the plaintiff's service, and which he had improperly carried away on leaving his employ: *Whitwham* v. *Moss*, 73 L. T. 57.

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An application under this *Rule* is generally made to the Court as on motions for injunctions: see *English* v. *Camberwell*, W. N. 1875, 256; but an order has been made in Chambers: see *Cooper* v. *Ince, Hall Co.*, W. N. 1876, 24; *Right of Way Mining Co.* v. *La Rose Mining Co.*, *supra*, p. 873. It should, in general, be upon notice: see the next *Rule*, and *Habershon* v. *Gill*, W. N. 1875, 231; but where circumstances rendered it proper, on an *ex parte* application, an order for the purpose of inspecting and taking samples was made: *Hennessey* v. *Rohmann*, 36 L. T. 51; W. N. 1877, 14; an order for detention and preservation of property: *Meluish* v. *Milton*, 24 W. R. 679; and an order for inspection of a mine, in an action for damages for withdrawing support to land: *Mitchell* v. *Darley Main Colliery Co.*, 31 W. R. 549.

A party is bound by an order for preservation of property as soon as he has notice of it: *Ex p. Langley*, 13 Ch. D. 110. See also p. 72, *supra*.

Chattel property in dispute may be ordered to be sent out of the jurisdiction, for the purpose of inspection by a witness out of the jurisdiction whose evidence is ordered to be taken abroad: *Chaplin* v. *Puttick*, 1898, 2 Q. B. 160; S. C., *sub nom. Chaplin* v. *Laing*, 78 L. T. 410.

Where the parties agree, without order, to an inspection, the costs thereof are taxable as part of the costs of the action: *Ashworth* v. *English Card Clothing Co.*, 1904, 1 Ch. 702.

Sale of perishable goods.

371. The Court may, at any time, order the sale in such manner and on such terms as may seem just, of any goods, wares, or merchandise which may be of a perishable nature or likely to be injured from keeping, or which for any other reason it may be desirable to have sold at once. C.R. 1097.

See Eng. (1883) R. 638.

Quære, whether an order can be made under this *Rule* only where the goods, etc., are the subject of the action: *Dongar* v. *Gospel Oak Iron Co.*, 6 T. L. R. 260, and see *Rule* 370.

An order may be made for the sale of a chattel which, for a "just and sufficient reason, it may be desirable to have sold at once." Thus, in *Bartholomew* v. *Freeman*, 3 C. P. D. 316, the Court ordered a horse to be sold, on the ground that it was consuming its value in food, and there was no reason why it should not be sold. In *Coddington* v. *Jacksonville P. & M. Ry. Co.*, 39 L. T. 12, an order was made for the sale of bonds as perishable property; and in *Evans* v. *Davies*, 1893, 2 Ch. 216; 68 L. T. 244, a like order was made in respect of shares in a limited company, as being goods within the meaning of this Rule. (See also note to *Rule* 222, *supra*, p. 683 *et seq.*); and see *Gee* v. *Betts*, 103 L. T. Jour. 267.

A foreign ship was ordered to be sold on the report of the Marshal that the sale was desirable: *The Hercules*, 11 P. D. 10. Rules 372, 373.

An order was refused to the plaintiff where there was no dispute in the action that the property in the goods was in the defendant, there being no urgent reason for a sale: *Dongar* v. *Gospel Oak Iron Co.*, *supra*.

In an action for an unpaid balance on the sale of a horse, and for breach of warranty of another horse received in part payment, plaintiff applied for leave to sell the horse so received in part payment; it was held by Quain, J., that no order was necessary, and that the *Rule* was not applicable: *Anon.*, 1 Chart. Ch. Ca. 127; 60 L. T. Jour. p. 84.

In an action of replevin an order was refused, where applied for by the plaintiff, for the sale of six valuable horses which had been delivered to him under an order of replevin in the action, it being held that he was free to sell them, at the risk, of course, of damages, if he failed in his action: *Innes* v. *Hutcheon*, 9 O. L. R. 392.

372. Where a plaintiff seeks to recover specific property other than land, and the defendant does not dispute the title of the plaintiff, but claims to retain the property by virtue of a lien or otherwise as security for money, the Court may order that the plaintiff pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as the Court may direct, and that upon such payment into Court being made, the property claimed be given up to him. C.R. 1099. Amount of lien claimed may be paid into Court and property delivered up.

See Eng. (1853) R. 664.

Under this *Rule* in order to entitle the plaintiff to an order that the specific property be given up to him, he must pay into Court the whole amount of the lien claimed by the defendant, notwithstanding that it exceeds the value of the specific property claimed: *Gebruder Naf* v. *Ploton*, 25 Q. B. D. 13; 63 L. T. 328. But this would not prevent the Court from dealing with a case where a fraudulent excessive claim is made for the purpose of defeating the *Rule*; S. C., *per* Lord Esher, M.R.

The *Rule* would appear to apply to both real and personal property in respect of which a lien is claimed.

(xii) *Security for Costs.*

373. Security for costs may be ordered, Security for costs, order for.

(*a*) Where the plaintiff resides out of Ontario;

(*b*) Where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario;

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(c) Where the plaintiff has brought another action or proceeding for the same cause which is pending in Ontario or in any other country;

(d) Where the plaintiff or any person through or under whom he claims, has had judgment or order passed against him, in another action or proceeding for the same cause in Ontario or in any other country, with costs, and such costs have not been paid;

(e) Where the plaintiff sues as an informer, or seeks to recover any penalty given to an informer or person who sues for the same under a statute or law by which a penalty is given to any person who sues for the same, either for his sole benefit, for the benefit of the Crown, or partly for his benefit and partly for the benefit of the Crown, and the defendant swears that in his belief the plaintiff or informer is not possessed of property sufficient to answer the costs of the action in case a judgment is rendered in favour of the defendant, and that he (the applicant) has a good defence to the action upon the merits, as he is advised and believes;

(f) Where the action is brought by a nominal plaintiff;

(g) Where upon the examination of the plaintiff it appears that there is good reason to believe that the action is frivolous and vexatious, and that the plaintiff is not possessed of sufficient property in Ontario to answer the costs of the action;

(h) Where an action is brought on behalf of a class and the plaintiff is not possessed of sufficient property to answer the costs of the action, and it appears that the plaintiff is put forward or instigated to sue by others;

(i) Where under the provisions of any statute the defendant is entitled to security for costs;

(*j*) Where either party to a garnishee, interpleader or other issue is an active claimant, and would if a plaintiff be liable to give security for costs. C.R. 1198. *Amended.* Rule 573.

The amendment to C. R. 1198 consists of the addition of the clauses (*e*), (*f*), (*g*), (*h*), (*i*) and (*j*). All the cases enumerated in those sections were cases in which the Court was previously accustomed to order security for costs to be given, and their addition to this *Rule* does not really make any change in the practice.

"**Plaintiff.**"—As to this word: see *Molsons Bank* v. *Sawyer*, and other cases, *infra*, p. 887.

Security for Costs, when Ordered.—This *Rule* does not limit the right to security for costs to the cases enumerated, but gives a specific right to security in those cases in addition to any others in which, according to law or the practice of the Court, a party has been heretofore entitled to claim security for costs.

In addition to the cases enumerated in this *Rule* security for costs may be required to be given: (1) By parties residing out of the jurisdiction coming into the Master's Office to prove claims as creditors or otherwise. (2) Generally, by persons out of the jurisdiction initiating any proceedings. (3) By a defendant out of the jurisdiction setting up a counter-claim unconnected with the plaintiff's claim.

The fact that the cause of action is a foreign judgment recovered by the plaintiff does not affect the right to security: *Crozat* v. *Brogden*, 1894, 2 Q. B. 30.

It will not be ordered in an alimony suit: *Bennett* v. *Bennett*, 7 P. R. 54, because in such actions the plaintiff is not ordered to pay costs although she fails.

In regard to the liability to give security for costs, an executor stands in no different position from a litigant suing in his own right: *Re Parker*, 16 P. R. 392; nor does a foreign receiver: *Canadian International Mercantile Agency* v. *International Mercantile Agency*, 4 O. W. R. 338.

Poverty of the plaintiff is no ground alone for asking security: *Ross* v. *Jacques*, 8 M. & W. 135; *Sweetman* v. *Morrison*, 10 P. R. 446; *Cowell* v. *Taylor*, 31 Ch. D. at p. 38; *Greener* v. *Kahn*, 1906, 2 K. B. 374; 95 L. T. 481; *Heckscher* v. *Crosley*, 1891, 1 Q. B. 224; (as to this case: see *Wightwick* v. *Pope*, 1902, 2 K. B. 99); *Lemesurier* v. *Ferguson*, 20 T. L. R. 32; *Cook* v. *Whellock*, 24 Q. B. D. 658; 38 W. R. 534; nor his insolvency where he is suing for his own benefit: *Rhodes* v. *Dawson*, 16 Q. B. D. 548; not even though the plaintiff be also a married woman: *McKay* v. *Boker*, 12 P. R. 341. But where a party is prosecuting an appeal from a judgment, poverty may be a sufficient ground for ordering security for costs of the appeal: see *Wightwick* v. *Pope*, *supra*; *Billington* v. *Billington*, 1907, 2 K. B. 106; 96 L. T. 665.

A defendant's right to security for costs may, however, be waived, by not applying at a proper stage of the cause: *Robertson* v. *McMaster*, 8 P. R. 14. The rule as to when it is too late to apply is not the same, however, as formerly: see *United Telephone Co.* v. *Bassano*, 31 Ch. D. 630; and see *Wightwick* v. *Pope*, *supra*.

Where a defendant admitted the cause of action sued upon, and set up a counter-claim founded upon a distinct transaction, he was held

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not entitled to security for costs from the plaintiff, a foreigner, residing without the jurisdiction: *Winterfield* v. *Bradnum*, 3 Q. B. D. 324.

The affidavit on which the application is based need not *disclose merits*, it is sufficient if the deponent swears that he has "a good defence upon the merits, as he is advised and believes": *Bowker* v. *Nat. Electric Co.*, C. P. Divisional Court, 1898.

When the defendant is a corporation aggregate, the required affidavit, to obtain security for costs under this *Rule*, may be made by one of its officers: see *Rule* 294.

Residence out of jurisdiction.

(a) Residence out of the Jurisdiction.—A defendant is *primâ facie*, but not necessarily, entitled to security where the plaintiff's residence is out of the jurisdiction. If it be made apparent from evidence which the Court can look at, such as defendant's admissions on examination, or other admission, though not in any technical form: *Anglo-American Cosings Co.* v. *Rowlin*, 10 P. R. 391, that there is no defence, security will not be ordered, or a *præcipe* order will be set aside: *Doer* v. *Rand*, 10 P. R. 165; *Thiboudeau* v. *Herbert*, 16 P. R. 420; *De St. Martin* v. *Davis*, W. N. 1884, 86; 28 Sol. Jour 392.

A plaintiff giving a fictitious address within the jurisdiction, when he is in fact a prisoner under criminal sentence in Ontario, will be ordered to give security for costs: *Fournier* v. *Hogarth*, 15 P. R. 72; although the fact that the plaintiff is in prison is not of itself a ground for ordering him to give security: see *Dupont* v. *Crook*, 80 L. T. Jour. 31.

A plaintiff wilfully giving a false or fictitious address within the jurisdiction, though really living without, will be ordered to give security: *Woldron* v. *McWalter*, 6 P. R. 145; *Sutherland* v. *McDonald*, 9 P. R. 178; *Redondo* v. *Choytor*, 4 Q. B. D. 458; *Monby* v. *Bewicke*, 8 De G. M. & G. 468, and see *Re Sturgis, etc.*, 34 W. R. 163; *Andrews* v. *Reed*, 3 T. L. R. 573; *Fraser* v. *Polmer*, 3 Y. & C. 280; and where this is done, the order will not be discharged merely because the plaintiff comes to reside within the jurisdiction: *Ib.*; but where a plaintiff has, by mistake, given an erroneous address within the jurisdiction, when he was in fact resident, temporarily out of the jurisdiction, on the mistake being established, he will not be ordered to give security, if he has in the meantime come to reside within the jurisdiction: *Anderson* v. *Quebec Fire Ins. Co.*, 15 P. R. 132. A sole plaintiff residing out of the jurisdiction, will *primâ facie* be obliged to give security: Dan. Pr., 5th ed., 28; *Republic of Costo Rica* v. *Erlanger*, 3 Ch. D. 62; also a sole plaintiff leaving the jurisdiction during the pendency of the action in order to avoid arrest for contempt of Court: *Codd* v. *Delap*, 15 P. R. 374; but not one of several plaintiffs, one of whom resides within the jurisdiction, where they sue in respect of a joint claim, even though a several claim be set up in the alternative: *D'Hormusgee* v. *Grey*, 10 Q. B. D. 13; *McConnell* v. *Wakeford*, 13 P. R. 455; *Smith* v. *Silverthorne*, 15 P. R. 197; but where the claims are several: see *Felgate* v. *Hegler*, *infra*, p. 879. But since *Rule* 66, *supra*, p. 415, all the plaintiffs may not be jointly liable for the whole costs; hence, the rule that security for costs should not be ordered where the objection taken to a plaintiff (*e.g.*, residence abroad, insolvency), is not applicable to other co-plaintiffs, does not now universally govern: *Irving* v. *Clark*, 12 P. R. 29, in which security was ordered for the costs of the defendants against one plaintiff, where the claims of the several plaintiffs were distinct.

Security for costs was refused in an alimony suit though the plaintiff was resident out of the jurisdiction: *Bennett* v. *Bennett*, 7 P. R. 54. Rule 373.

Security will not be required if the plaintiff is serving abroad in the army or navy: *Evelyn* v. *Chippendale*, 9 Sim. 497; *Evering* v. *Chiffenden*, 7 Dowl. 538; *Dickenson* v. *Duffill*, 1 Chy. Ch. 108; or if a British subject, and at the time resident within the jurisdiction, though his movements be uncertain: *Allen* v. *Globe*, Globe, 21 December, 1881; *Gardiner* v. *Harris*, 8 L. R. Ir. 352; but see *Horkley* v. *Toronto General Trusts Co.*, 33 C. L. J. 432.

In *Martin* v. *Russell*, 21 L. R. Ir. 196, security was ordered to be given by a sailor following his calling out of the jurisdiction, though his family resided within it; but where a plaintiff had his home in Ontario, but carried on business out of the jurisdiction, and only visited his home at intervals of a month for a few days at a time, he was held to reside in Ontario: *Moffitt* v. *Leonard*, 8 O. L. R. 383.

A motion for security was refused where the plaintiffs resident out of the jurisdiction, had recovered judgment, and the defendant was appealing, and alleged that, since recovery of the judgment, the plaintiffs had removed their assets out of the Province: *Exchange Bank* v. *Bornes*, 11 P. R. 11; *Smoll* v. *Henderson*, 18 P. R. 314.

An infant plaintiff resident out of the jurisdiction will not be ordered to give security for costs, nor will his guardian or next friend, if within the jurisdiction: *Moron* v. *Kellogg*, 10 C. L. T. 184; *Scott* v. *Niagara, etc.*, 15 P. R. 409, 455; *Roberts* v. *Coughlin*, 18 P. R. 94, but see *Stinson* v. *Martin*, 2 Chy. Ch. 88; but if the infant and his next friend be resident out of the jurisdiction, security for costs will be ordered unless a new next friend resident within the jurisdiction is appointed: *McBain* v. *Waterloo Manufacturing Co.*, 8 O. L. R. 820; and where the infant plaintiff is within the jurisdiction, and the next friend is resident out of the jurisdiction, and is also a plaintiff, the latter may be required to give security for costs, or in default his claim may be struck out: *Feigote* v. *Hegler*, 9 O. L. R. 315.

If the plaintiff's permanent residence is foreign, the defendant is entitled to security if the plaintiff is out of the jurisdiction at the time of the motion: *Robertson* v. *Cowan*, 10 P. R. 568.

If a plaintiff goes out of the jurisdiction permanently pending action, he may be required to give security for both past and future costs: *Mossey* v. *Allen*, 12 Ch. D. 807; *Hoteley* v. *Merchants' Despotch Transportation Co.*, 10 P. R. 253; *Codd* v. *Delap*, 15 P. R. 374; and see *Tanner* v. *Welland*, 19 P. R. 149.

A foreign corporation must be incorporated and have its head or controlling office within the jurisdiction, in order to be excused as a plaintiff from giving security for costs: *Ashland Co.* v. *Armstrong*, 11 O. L. R. 414.

Defendants were held not entitled to security from plaintiffs who sued as executors, and who, under a power of attorney from English executors, took out probate in Ontario of the will of a testator who resided and died in England: *Sykes* v. *Canadian Pacific Ry.*, 3 C. L. T. 505.

Semble, that an affidavit of information and belief as to residence abroad is not sufficient ground for an order for security for costs: *Hollingsworth* v. *Hollingsworth*, 10 P. R. 5, and see *Rule* 13.

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As to what constitutes "residence" abroad: see *Re Trench*, 25 Ch. D. 500; *Re Sturmer & Beaverton*, 2 O. W. N. 1116, 1227; *Re Fitzmartin & Newburg*, 2 O. W. R. 1114, 1177; *Langdon* v. *Molsons Bank*, 2 O. W. N. 1387.

And as to what constitutes residence within the jurisdiction by a foreign company: see *Parker* v. *Odette*, 16 P. R. 69; *Welsbach I. Light Co.* v. *St. Ledger*, *Ib.*, 382; *Pittsburgh C. S. Co.* v. *Morz*, 102 L. T. Jour. 532; W. N. 1897, 36; *Ashland Co.* v. *Armstrong*, 11 O. L. R. 414.

Where the action is in the nature of a cross action and the plaintiff is resident out of the jurisdiction it is a matter of judicial discretion as to whether or not he should be ordered to give security for costs: *New Fenix Co.* v. *The General Accident Co.*, 1911, 2 K. B. 619; 105 L. T. 469.

Where on an application by an administrator for administration under *Rule* 608, a defendant out of the jurisdiction appears, and an issue is ordered to be tried in which the defendant is made plaintiff, he will, in such circumstances, be excused from giving security for costs: *Forbes* v. *Forbes*, 23 O. L. R. 518.

(b) Temporary Residence within Jurisdiction. — Formerly, if the plaintiff was in fact within the jurisdiction, he could not be required to give security: see *Wilder* v. *Hopkins*, 4 P. R. 350; *Redondo* v. *Choytor*, 4 Q. B. D. 453; and other cases cited *supra*, p. 878; but now under the provisions of this *Rule* a temporary residence within the jurisdiction will not be sufficient to exonerate a party, ordinarily resident abroad, from giving security: *Nesbit* v. *Goina*, 3 O. L. R. 429; *Kavanough* v. *Cassidy*, 5 O. L. R. 614. It is no answer to an application for security for costs against a plaintiff ordinarily resident out of the jurisdiction, that he has no fixed place of residence anywhere: *Allcroft* v. *Morrison*, 19 P. R. 59; overruling *Denier* v. *Marks*, *Earle* v. *Marks*, 18 P. R. 465. It is probable that this branch of the *Rule* may be held to extend to other cases besides that of a plaintiff in an action, where residence abroad is the ground of ordering security to be given. An application to compel security to be given by a foreigner in prison within the jurisdiction was refused: *Dupont* v. *Crook*, 80 L. T. Jour. 31; but that was before the amendment of the *Rule* authorizing an application in case of temporary residence.

A plaintiff who comes into the jurisdiction after the issue of an order may be relieved from it, if he is actually, and intends to remain, a resident there: *Nesbit* v. *Goina*, 3 O. L. R. 429.

Another action pending.

(c) Pendency of Another Action.—To bring a case within clause (*c*) of this *Rule* it must be clearly shown that the causes of action are identically the same, and not merely growing out of the same transaction: *Dean* v. *Lamprey*, 2 Chy. Ch. 202. See also *Hill* v. *Paulet*, 66 L. T. 645; *Caswell* v. *Murray*, 18 C. L. J. 76; *Grand Junction Ry.* v. *Peterborough*, 10 P. R. 107; *Lucas* v. *Cruickshank*, 13 P. R. 31; *Cobbett* v. *Warner*, L. R. 2 Q. B. 108; *Weir* v. *Weir*, 2 O. W. N. 1187; and *Martin* v. *Beauchamp*, 25 Ch. D. 12; approved in *McCabe* v. *Bank of Ireland*, 14 App. Cas. 413.

In *Brunsden* v. *Humphrey*, 14 Q. B. D. 141, it was held, that where a judgment had been obtained, in an action to recover damages for injury to the plaintiff's cab in a collision caused by the defendant's servant, another action might be brought for damages for a personal

injury suffered in the same collision, as it was held to constitute a distinct cause of action. Rule 373.

See *Russell* v. *Waterford & Limerick Ry.*, 16 L. R. Ir. 314, for an instance of splitting a cause of action.

In *Serrao* v. *Noel*, 15 Q. B. D. 549, an action had been instituted in the Chancery Division for an injunction to restrain the defendants and a company from parting with shares, or registering the defendants as transferees, and for "further and other relief." That action was settled by a consent order for delivery up of shares to the plaintiff, and staying the action. Owing to delay in delivering the shares they were sold at a loss, and this action was brought for damages for the detention. It was held that it was the same cause of action as in the Chancery Division, and the plaintiff was estopped by the consent order from recovering damages, the action in the Chancery Division being for all relief necessary to do complete justice between the parties.

Where security is ordered the proceedings are of course stayed until the security is given: see *Campbell* v. *Elgie*, 16 P. R. 440: *Rule* 377, and the action may be dismissed if the security be not given within the time limited by the Court: see *Rule* 376. The word "proceeding" in this and the following clause of the *Rule* means a proceeding in Court. An appeal from an order dismissing a motion to set aside an award was held not to be a "proceeding for the same cause," as an action to recover moneys in respect of certain matters included in the submission, but not dealt with by the award: *Caughe* v. *Brower*, 17 P. R. 438.

(d) Non-payment of Costs in another Action for same Cause.— This *Rule* supersedes the former practice under which the second action might be stayed until the costs of the former action were paid: *Campbell* v. *Elgie*, 16 P. R. 440. Non-payment of costs.

As to the meaning of the word "proceeding": see *Caughell* v. *Brower*, *supra*.

Security for costs may be ordered to be given, even though the former action was not between precisely the same parties, where the plaintiff is suing substantially by virtue of the same alleged title as that set up in the former action: *May* v. *Werden*, 17 P. R. 530, where the second plaintiff knew the history of the prior litigation, and appeared to have been made plaintiff, in order to evade the practice which would require security to be given.

Where, however, the costs in the former action were not ordered to be paid by the plaintiff personally, but out of an estate, security was refused: *Curtis* v. *McNabb*, 7 P. R. 246; *Peters* v. *Tilly*, 11 P. R. 145.

The plaintiff cannot set up that the first action was brought without his authority, where, when it becomes known to him he could move to relieve himself on that ground from liability for the costs, but did not do so: *Lea* v. *Lang*, 17 P. R. 203; 18 P. R. 1, where the order for security was set aside on terms, the plaintiff having obtained an order setting aside the judgment obtained against him in the first action.

Under the former practice, where some of the causes of action in a second action were the same as in a former action, the plaintiff

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having discontinued as to those, the Court refused to stay the second action in respect of the new causes of action till costs of the former action were paid: *Bywater* v. *Dunne*, 10 L. R. Ir. 380.

Where an action by a married woman by her next friend was dismissed with costs, for want of prosecution, a second action on her behalf for the same object, but by a new next friend, was stayed till the costs of the first action were paid: *Re Payne*, *Randle* v. *Payne*, 23 Ch. D. 288; and in such a case the defendant would now be entitled to security for costs under this clause of the *Rule*.

Where an application for registration under the Land Titles Act was opposed, and the contestant was ordered to be made plaintiff in an issue to determine the question of his right, he, being resident out of the jurisdiction, was ordered to give security for costs, on it appearing that he had brought two previous actions in respect of the same matter which had been dismissed with costs which had not been paid, and on the evidence, as it appeared before the Master of Titles, his claim should be dismissed: *Boyle* v. *McCobe*, 24 O. L. R. 313.

(e) Actions to Recover Penalties.—This section is based on C. R. 1200.

Rule 1244, from which C. R. 1200 was taken, provided only for the giving security for the costs "to be incurred," under which wording it was held that security for costs already incurred could not be required: *Thompson* v. *Williamson*, 16 P. R. 368; *Budworth* v. *Bell*, 10 P. R. 544; but the *Rule* as revised here contains no such limitation, and the security to be given under this *Rule* should therefore be for all costs.

Nominal plaintiff.

(f) Nominal Plaintiff.—Security may be ordered if the plaintiff is insolvent, and the action is in reality for the benefit of some other person: *Mason* v. *Jeffrey*, 2 Chy. Ch. 15; *Little* v. *Wright*, 16 Gr. 576; *Pendry* v. *O'Neill*, 7 P. R. 52; *Boice* v. *O'Loane*, 7 P. R. 359; *Delaney* v. *MacLellan*, 13 P. R. 63; *Delap* v. *Charlebois*, 15 P. R. 45; *Major* v. *Mackenzie*, 17 P. R. 18 (explaining *Gordon* v. *Armstrong*, 16 P. R. 432); *May* v. *Werden*, 17 P. R. 530, affirmed by D. C., 33 C. L. J. 568; *Re Sturmer & Beaverton*, 24 O. L. R. 65; especially if such other person is out of the jurisdiction, though the plaintiff had a nominal interest: *Re Rainy Lake Lumber Co.*, 11 P. R. 314; see also *Swain* v. *Follows*, 18 Q. B. D. 585; and see *Port Rowan & L. S. Ry. Co.* v. *South Norfolk Ry. Co.*, 13 P. R. 327, where an application for security for costs was made, on the ground that the plaintiff company was alleged to have no corporate existence, and was alleged to be suing on behalf of a third person who was insolvent. So, where the plaintiff is only one of a large number interested, and the Court is satisfied that he has been put forward by the others to institute the action, and he is a man of no means: *Hathway* v. *Doig*, 9 P. R. 91; *Clark* v. *St. Catharines*, 10 P. R. 205; *Re Seventh E. C. Bdg. Soc.*, 51 L. T. 109; security may be ordered; and see clause (*h*), *infra*, p. 884.

Where an action was brought by a mortgagor in respect of the mortgaged estate, and the mortgage was so large as to leave no value in the equity of redemption, so that the action was really for the benefit of the mortgagee, the plaintiff was required to give security for costs as being in effect a nominal plaintiff: *Gordon* v. *Armstrong*, 16 P. R. 432; see *Major* v. *Mackenzie*, 17 P. R. 18.

To entitle a defendant to security on this ground, it is not sufficient to show that the plaintiff is a man of no means, and has no beneficial

interest; it must be shown that tha action is really that of some other person: *Major* v. *Mackenzie*, 17 P. R. 18; and security will not he ordered to be given where the plaintiff asserts a cause of action in which no one hut himself is interested: *Clarke* v. *Rama Timber Transport Co.*, 10 P. R. 384; nor where the plaintiff himself has an interest in the action which is brought partly for the benefit of another: *Wallbridge* v. *Trust & Loan Co.*, 13 P. R. 57; but the interest must be substantial, and not merely nominal: *Delaney* v. *MacLellan*, 13 P. R. 63. Rule 373.

Where an alleged nominal plaintiff is examined in support of a motion to compel him to give security for costs, he cannot be required to answer as to his financial ability, until a *prima facie* case has been made out that he is in fact a nominal plaintiff; such *prima facie* case may he made hy the affidavit of the defendant, that, in his belief, such is the fact: *Pritchard* v. *Pattison*, 19 P. R. 108, 277; very clear proof that the plaintiff has no substantial interest is necessary, or the order will not be made: *S. C.*, 1 O. L. R. 37; *Ricker* v. *Britton*, 3 O. W. N. 1512.

In a class action brought by four ratepayers against a municipal corporation and reeve for an account of moneys received by the reeve from the corporation, security was refused, although the plaintiffs were alleged to be financially incompetent to answer costs, the action being virtually the plaintiffs', and not that of third persons putting the plaintiffs forward to sue: *McAllister* v. *O'Meara*, 17 P. R. 176.

An assignee in insolvency, *bona fide* suing in the discharge of his duty, will not be ordered to give security, though without means and not beneficially interested: *Vars* v. *Gould*, 8 P. R. 31; *Greener* v. *Kahn*, 1906, 2 K. B. 374; 95 L. T. 481; nor will a receiver of an insolvent company continuing, hy order of the Court, an action brought hy the company: *Provincial Ins. Co.* v. *Gooderham*, 7 P. R. 283; nor an official liquidator: *Cowell* v. *Taylor*, 31 Ch. D. 34; nor an administrator bringing an action under *The Fatal Accidents Act* (R. S. O. c. 151): *Sharp* v. *Grand Trunk Ry.*, 1 O. L. R. 200; nor a trustee suing to enforce a covenant in a separation deed: *White* v. *Butt*, 1909. 1 K. B. 50; 99 L. T. 823; hut where a plaintiff has entered into an agreement to prosecute the action for the benefit of a trustee for his creditors, he is a nominal plaintiff, and as such liable to be ordered to give security for costs: *Lloyd* v. *Hathern S. B. Co.*, 85 L. T. 158; and, if resident out of the jurisdiction, a receiver of a company is liable to give security in the same way as any other person so resident: *Canadian International Mercantile Agency* v. *International Mercantile Agency*, 4 O. W. R. 338.

Where the plaintiff is a corporation, the fact that it is insolvent, and a receiver of its assets has been appointed, is no ground for ordering security: *Dartmouth Harbour Commission* v. *Mayor of Dartmouth*, 34 W. R. 774; 55 L. J. Q. B. 483; but see *Hawkins H. Co.* v. *Want*, 69 L. T. 297; 4 R. 577; 9 T. L. R. 481, 538.

Quære, whether the rule that security is not ordered against one only of several plaintiffs was ever applicable to the case of an insolvent plaintiff suing for the benefit of another: *Irving* v. *Clark*, 12 P. R. 29.

Where the plaintiff parts with his interest *pendente lite*, further proceedings may be stayed until security is given, or the action is revived in the name of the assignee: *Swan* v. *Adams*, 7 P. R. 147; see also *Secar* v. *Lawson*, 16 Ch. D. 121, and *Goatley* v. *Enmott*, 15 C. B. 291.

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(g) Frivolous Action.—This section of the *Rule* resolves in the affirmative the *quære* suggested in *Potter* v. *Cotton*, W. N. 1879, 204.

As to what is to be considered frivolous or vexatious actions: see note to Jud. Act, s. 16 (*f*), *supra*, p. 45. Such actions may also be stayed: see *Ib.*

(h) Insolvent Plaintiff Representing Class.—Although section (*h*) is an addition to C. R. 1198, yet the Court, by virtue of its inherent jurisdiction, made orders for security in the circumstances mentioned therein: see *Hathaway* v. *Doig*, and other cases noted, *ante*, p. 882.

(i) Statutory Right to Security.—Among the cases in which there is a statutory right to security are the following:

Libel.

Actions for Libel.—By *The Libel and Slander Act* (R. S. O. c. 71), s. 12, in actions for Libel contained in a newspaper (as defined by s. 2 of the Act), the defendant may, at any time after the filing of the statement of claim, apply for security for costs upon notice, and on an affidavit by the defendant, or his agent, showing the nature of the action and defence, and showing that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence on the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous. Where, however, the alleged libel involves a criminal charge, the defendant is not entitled to security for costs, unless he satisfies the Court or Judge that the action is trivial or frivolous, or that the article was published in good faith, and that there was reasonable ground to believe that the same was for the public benefit, and that the publication took place in mistake or misapprehension of the facts, and that there was an equally public retractation as mentioned in sec. 8 (2). As to form of affidavit of defendant: see *Robinson* v. *Mills*, *infra*, and as to sufficiency of plaintiff's affidavit in answer: see *McVeity* v. *Ottawa Free Press*, 2 O. W. N. 703.

But, on such an application, the Judge is not to try the merits, and contentious affidavits in answer will not be received: *Bartram* v. *London Free Press*, 18 P. R. 11; it is sufficient if the defendant makes out a *primâ facie* case for security: *Swain* v. *Mail Printing Co.*, 16 P. R. 132; *Lennox* v. *Star Co.*, 16 P. R. 488; and see *Southwick* v. *Hare*, 15 P. R. 222; *Bartram* v. *London Free Press*, 18 P. R. 11.

A "Sporting Editor," or one who has the editorial care of a certain department of a newspaper, if sued for libel for matter so published, is entitled to security for costs: *Robinson* v. *Mills*, 19 O. L. R. 162; *Neil* v. *Norman*, 21 C. L. T. Occ. N. 293, distinguished.

As to the case where a criminal charge is involved: see *Smyth* v. *Stephenson*, 17 P. R. 374; *Georgian Bay Co.* v. *The World*, 16 P. R. 320; *Macdonald* v. *World*, *Ib.*, 324.

A libel does not involve "a criminal charge," unless the offence imputed is one that could be made the subject of an indictment; *e.g.*, a charge that a joint stock company bribed aldermen is not a "criminal charge," because a company could not be indicted for an offence involving malice, or intent, on the part of the alleged offender: *Georgian Bay Co.* v. *The World*, *supra*; *Bennett* v. *Empire Print. Co.*, 16 P. R. 63; and see *D'Ivry* v. *The World*, 17 P. R. 387.

An accusation of "blackmailing" imputes an indictable offence: *Marks* v. *Samuel*, 1904, 2 K. B. 287; but see *Macdonald* v. *The Mail*, 2 O. L. R. 278. Rule 373.

Where it was shown that the plaintiff was not in fact the person referred to in the alleged libel, the action was regarded as frivolous: *Graeme* v. *Globe Printing Co.*, 14 P. R. 72; *sed vide Hulton* v. *Jones*, 1910, A. C. 20.

A printed paper issued daily by the conductors of a mercantile agency to persons who are subscribers to the agency, for the purpose of giving the information required by such subscribers, is a "newspaper" within R. S. O. c. 71, s. 12, *supra*: *Slattery* v. *Dun*, 18 P. R. 168; but the Statute only entitles newspaper publishers or proprietors to security for costs; a person sued for libel contained in an advertisement published in a newspaper, of which the defendant is neither the proprietor nor publisher, is not entitled to security: *Powell* v. *Ruskin*, 35 C. L. J. 241.

As to what is a good defence on the merits: see *Paladino* v. *Gustin*, 17 P. R. 553. It must be disclosed: see *Lancaster* v. *Ryckman*, 15 P. R. 199; *Georgian Bay Co.* v. *The World*, 16 P. R. 320. An order of a Judge granting, or refusing security under R. S. O. c. 71, is final; but not that of the Master in Chambers, or other judicial officer: see *Ib.*, and see *Bryant* v. *Reading*, 17 Q. B. D. 128; 54 L. T. 524; *Clench* v. *Dooley*, 56 L. T. 122; *Christie* v. *Conway*, 9 P. R. 529; but see *Reg. ex rel McGuire* v. *Birkett*, 21 Ont. 162.

Formerly where the alleged libel was against a candidate for a public office in Ontario, the defendant, not having published a retractation, was not entitled to security: *Conmee* v. *Weidman*, 16 P. R. 239; but under *The Libel & Slander Act* (R. S. O. c. 71), as it is now framed, that case would appear to be no longer an authority.

Actions of Slander for Imputing Unchastity.—By *The Libel and Slander Act* (R. S. O. c. 71), s. 19, in actions by women for slander imputing unchastity or adultery, the defendant may, at any time after the filing of the statement of claim, apply to the Court or a Judge, upon notice to the plaintiff, for security for costs, upon an affidavit of the defendant showing the nature of the action, and that the plaintiff is not possessed of property sufficient to answer the costs of the action if a verdict or judgment is given in favour of the defendant, and that the defendant has a good defence to the action on the merits, or that the grounds of the action are trivial or frivolous. Slander imputing unchastity.

On such an application the nature of the defence must be disclosed; it is not sufficient for the defendant simply to swear that he has a good defence on the merits: *Lancaster* v. *Ryckman*, 15 P. R. 199; and see *Paladino* v. *Gustin*, 17 P. R. 553; and the onus of showing that the plaintiff has not sufficient property is on the defendant: see *Feaster* v. *Cooney*, 15 P. R. 290; property to the value of $500, unincumbered, has been deemed sufficient: *Ib.*, and see *Bready* v. *Robertson*, 14 P. R. 7; *Belair* v. *Buchanan*, 17 P. R. 413, 476.

Actions against Justices, and other Public Officers.—By *The Public Authorities Protection Act* (R. S. O. c. 89), s. 16, in actions, or other legal proceedings, brought against a Police Magistrate, or other Justice of the Peace, or any other person, for any act done by him in pursuance, or execution, of any statute, or of any public duty, or authority, or in respect of any alleged neglect or default in the execution Public officers.

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of any such statute, duty or authority, the defendant may, at any time after the service of the writ, apply for security for costs on notice to the plaintiff, and on an affidavit by the defendant or his agent, showing the nature of the action, and of the defence, and showing, to the satisfaction of the Court or Judge, that the plaintiff is not possessed of property sufficient to answer the costs of the action, in case a verdict or judgment should be given in favour of the defendant, and that he has a good defence on the merits, or that the grounds of the action are trivial or frivolous.

A police officer laying an information for obscene language is entitled to security for costs in an action brought for maliciously laying such information: *Eaves* v. *Nesbitt*, 1 O. L. R. 244; so also a police officer sued for trespass in executing a warrant of arrest: *Lewis* v. *Dalby*, 3 O. L. R. 301. A sheriff acting in execution of a *fi. fa.* is not a public officer entitled to security for costs under the statute: *Creighton* v. *Sweetland*, 18 P. R. 180.

The provisions of the Act must be followed with some approach to strictness: *Robinson* v. *Morris*, 15 O. L. R. 649. The solicitor for the defendant is his "agent" within the meaning of s. 16, and may make the affidavit: *Ib.*, where the affidavit is based on belief the grounds thereof must be disclosed: *Rule* 293.

The defence on the merits must be disclosed: see *Lancaster* v. *Ryckman*, 15 P. R. 199, and *Paladino* v. *Gustin*, 17 P. R. 553. The merits of the action will not be tried on the application, but a *prima facie* defence must be established: see *Paladino* v. *Gustin*, *supra*. *Swain* v. *Mail Printing Co.*, 16 P. R. 132; *Lennox* v. *Star Co.*, 16 P. R. 488; *Southwick* v. *Hore*, 15 P. R. 222. Although the application may be made at any time after the service of the writ, yet it has been held that when a person holding a public office is made a defendant, on an application for security the pleadings must be looked at, and if, on them, the case cannot go to the jury against the defendant as a public officer, he is not entitled to security, and even though he shows on affidavit that his sole connection with the matter alleged against him was in his public capacity: *Parker* v. *Baker*, 17 P. R. 345.

(j) Garnishee, and Interpleader, Proceedings.—

Garnishing proceedings.

Garnishing Proceedings. — Security has also been ordered to be given by one of the parties to an issue arising out of garnishee proceedings, where he was resident out of the jurisdiction: *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121; *Edwards* v. *Edwards*, 12 P. R. 538; but a judgment creditor appealing from an order refusing him an attaching order was held not liable to give security for costs: *Palmer* v. *Lovett*, 14 P. R. 415.

Interpleader.

Interpleader Proceedings.—In an interpleader matter either party: *Knickerbocker* v. *Webster*, 17 P. R. 189; *Swain* v. *Stoddart*, 12 P. R. 490; *Wolker* v. *Niles*, 3 Chy. Ch. 108; *Deller* v. *Prickett*, 20 L. J. Q. B. 151; *Tomlinson* v. *Land & Finance Co.*, 14 Q. B. D. 539; *Lovell* v. *Wardroper*, 4 P. R. 265; *Farley* v. *Pedlar*, 1 O. L. R. 570, may be ordered to give security for costs, in the same circumstances as a plaintiff would be so ordered in an ordinary action. The substantial, and not the nominal, interest of the parties must be looked at, and, therefore, where one of the defendants in an interpleader issue was really interested in the result thereof as a plaintiff, he was held not entitled to call upon the plaintiff in the issue to give security for costs, upon

the ground that the latter was a foreigner residing abroad: *Belmonte* v. *Aynard*, 4 C. P. D. 352; and see *Knickerbocker* v. *Webster*, *supra*. If the party substantially moving the proceedings, whether plaintiff or defendant, is out of the jurisdiction, he should give security: *Re Ancient Order of Foresters & Castner*, 14 P. R. 47. Rule 373.

A Sheriff in interpleader proceedings is only entitled to security for costs under the same circumstances as would entitle an ordinary litigsnt thereto: *Sweetman* v. *Morrison*, 10 P. R. 446.

Other Interlocutory Proceedings.—In addition to the cases above enumerated, there are others in which security for costs may he ordered: e.*g.*—

Master's Office.—Parties residing out of the jurisdiction, coming into the Master's office to prove claims as creditors, or otherwise, may he required to give security for costs: *Re Rees. Urquhart* v. *Toronto General Trusts Co.*, 10 P. R. 425; hut this case was disapproved of hy the Divisional Court of the Q. B. D. in *Palmer* v. *Lovett*, 14 P. R. 415; hut see *Re Parker*, 16 P. R. 392; and *Con. International Mercantile Agency* v. *International Mer. Agency*, 4 O. W. R. 338. Security, when ordered in Master's office.

Summary Applications.—Security was ordered to he given for the costs of opposing a petition for the custody of an infant: *Re Pinkney*, 1 O. W. R. 694, 715; and for a petition for the payment of money out of Court, presented hy a petitioner resident out of the jurisdiction: *Re Porker*, 16 P. R. 392; *Can. International Mercantile, etc.* v. *International, etc.*, 4 O. W. R. 338; hut see *Palmer* v. *Lovett*, 14 P. R. 415; and where two persons, hoth out of the jurisdiction, were claiming the same fund, each was ordered to give security for costs to the other of them: *Sinclair* v. *Campbell*, 2 O. L. R. 1; and a person resident out of the jurisdiction making a claim to a fund in Court, under an inquiry as to who was entitled, was ordered to give security on the ground that he was in the position of a plaintiff in interpleader proceedings: *Re Milward & Co.*, 1900, 1 Ch. 405; 82 L. T. 339; and even though it seemed probable that in any event the costs would he ordered to be paid out of the fund: *Bruce* v. *A. O. U. W.*, 11 O. L. R. 633; so also for costs of opposing a motion for an injunction: *Whiteley Exerciser* v. *Gamage*, 79 L. T. 20; 1898, 2 Ch. 405. Summary applications.

A defendant residing out of the jurisdiction has a right to take any proceedings to defend himself: *Re Percy & Kelly Nickel, etc., Co.*, 2 Ch. D. 531; against the plaintiff, upon the pleadings and proofs hetwsen the plaintiff and defendant: *Walmsley* v. *Griffith*, 11 P. R. 139, ss mod ded hy *Molsons Bonk* v. *Sawyer*, 19 P. R. 316; or may move to set aside the service on him of a writ of summons: *Sporrow* v. *Rice*, 5 O. W. R. 625; 6 O. W. R. 61; or present a petition: *Cochrone* v. *Fearon*, 18 Jur. 568, without heing called on to give security for costs; and a plaintiff moving to set aside proceedings hrought in his name without his authority is in the position of a person brought into Court and defending himself: *Sample* v. *McLoughlin*, 17 P. R. 490; but where a defendant claims indemnity, or other relief, against a co-defendant, and his claim to such relief is altogether independent of any defence to the plaintiff's claim, he is in the position of a plaintiff, and msy hc ordered to give security for costs to the co-defendant as against whom he seeks relief, and *Walmsley* v. *Griffith*, *supra*, is to thst extent overrnled: *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

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In re Cornwall, 15 L. R. Ir. 144, security was ordered to be given by a client out of the jurisdiction, seeking to tax his solicitor's bill; but see *Re A. B.*, 6 P. R. 210.

On an appeal to a Divisional Court it was held that the Divisional Court had inherent jurisdiction to order security to be given for the costs of the appeal: *Billington* v. *Billington*, 1907, 2 K. B. 106; 96 L. T. 665; and see *Wightwick* v. *Pope*, *infra*.

Quieting Title proceedings.

Quieting Title Proceedings.—A Judge, or the Referee of Titles, may at any stage of the proceedings, order security for costs to be given by the applicant for a certificate, or by any person making an adverse claim: R. S. O. c. 123, ss. 19, 22. A petitioner resident out of the jurisdiction, or only temporarily resident within the jurisdiction, may be ordered to give security for the costs of a contestaot; but a contestant out of the jurisdiction will not ordinarily be ordered to give security to the petitioner, as he stands in the position of a defendant: see *Low* v. *Morrison*, 14 Gr. 192; but see *Boyle* v. *McCabe*, 24 O. L. R. 313; but a contestant, whose claim has been disallowed, may be required to give security as a condition of obtaining a re-investigation of the title in question: *Re Howland*, 4 Chy. Ch. 74. But in prosecuting a claim to land before the Referee of Titles, a contestant served with notice will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant: *Shepherd* v. *Hoyboll*, 13 Gr. 681; see also *Re Percy & Kelly Nickel, etc., Co.*, 2 Ch. D. 531.

Winding-up proceedings.

Winding-up Proceedings.—A Referee acting under the Winding-up Act (R. S. C. c. 144), and *The Companies Act* (R. S. O. c. 178), s. 187, *et seq.*, has power to order security for costs, and to stay proceedings until it is given: *Re Sarnia Oil Co.*, 14 P. R. 335.

A petitioner for winding up a company who had given an address at which he could not be found, and whose solicitor was unable to state his private address, was ordered to give security: *Re Sturgis Motor Power Syndicate (Ltd.)*, 53 L. T. 715; 34 W. R. 163.

Defendant, when ordered to give security for costs.

Defendant, when Ordered to give Security for Costs.—Security will be ordered to be given by a person out of the jurisdiction applying to be added as a party, and for leave to apply for substantial relief, as he must be considered as in the position of a plaintiff: *Apollinaris Co.* v. *Wilson*, 31 Ch. D. 632.

A defendant out of the jurisdiction moving for a new trial may be ordered to give security for costs: *Wightwick* v. *Pope*, 1902, 2 K. B. 99; 86 L. T. 750.

Where a claim and counter-claim arise out of different matters, so that the counter-claim is really in the nature of an independent or cross-action, the defendant, if residing out of the jurisdiction, may be required to give security, and should be so required, if the only dispute in the action is on his counter-claim: *Sykes* v. *Sacerdoti*, 15 Q. B. D. 423; *Lake* v. *Haseltine*, 55 L. J. Q. B. 205; see also *The Newbattle*, 54 L. J. (P. D. & Ad.) 16.

In an action for breach of contract against defendant, a foreigner residing abroad, where the defendant denied the breaches, and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim,

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it was held that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter-claim: *Mopleson* v. *Masini*, 5 Q. B. D. 144; and wherever a defendant's counter-claim arises out of the same transaction as the plaintiff's claim, the Court has discretion to refuse to order security for costs: *Neck* v. *Taylor*, 1893, 1 Q. B. 560; 68 L. T. 399; *Miller's Patent*, 70 L. T. 270.

A cross action brought by a foreigner, if it is, in effect, merely a defence, will be subject to a similar discretion; but if the cross action is in substance an independent action, the plaintiff therein may be ordered to give security for costs: *New Fenix Co.* v. *General Accident T. & L. Ass. Co.*, 1911, 2 K. B. 619; 105 L. T. 469.

In the Admiralty Division, in an action for collision, a defendant claiming damages by counter-claim was ordered to give security for the plaintiff's costs of the action: *The Julia Fisher*, 2 P. D. 115.

A defendant out of the jurisdiction claiming indemnity, or other relief, against a co-defendant, may be required to give that defendant security for costs: *Molsons Bank* v. *Sawyer*, 19 P. R. 316.

A defendant out of the jurisdiction disputing the right of a plaintiff to probate of a will is not liable to give security for costs: *Ward* v. *Benson*, 2 O. L. R. 366; even when he is made plaintiff in an issue: see *Forbes* v. *Forbes*, 23 O. L. R. 518; but see *Boyle* v. *McCabe*, 24 O. L. R. 313; *Re Riddell*, 3 O. W. N. 1232.

A foreign claimant putting in a claim under a general inquiry will not as a rule be ordered to give security: but see *Re Milward & Co.*, *supra*, p. 887, where security was ordered to be given by a foreign claimant, on an inquiry as to the persons entitled to a fund in Court, on the ground that the inquiry was equivalent to an interpleader issue, in which the foreign claimant was in the position of plaintiff.

Order for security for costs, form of.

374.—(1) The order shall require the plaintiff, within four weeks from service, to give security in $400 for the defendant's costs of the action, and shall direct that all further proceedings be stayed in the meantime, and that in default of such security being given the action shall, as against the defendant obtaining the order, be dismissed with costs.

(2) In actions in the County Court the amount of the security shall be $200. C.R. 1198 (2, 3). *New.*

The reference to C. R. 1198 is erroneous, it should be C. R. 1199 (2), (3).

The amount of security named in this *Rule* may, on special application, be increased or diminished: *Rule* 382.

Where, after judgment, the Master in Chambers makes an order for security for costs, his order should not direct proceedings to be stayed as that is effected by *Rule* 377, the Master under *Rule* 208 (16), having no power to stay proceedings after verdict or judgment: *Stow* v. *Currie*, 20 O. L. R. 353.

Order on præcipe.

375. Where it appears by the writ of summons, or by an indorsement thereon, that the plaintiff resides out of

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Ontario, the order may be obtained on *præcipe*. C.R. 1199.

Except in the case provided for in this *Rule*, *i.e.*, where it appears by the writ of summons, notice, or other proceeding, by which a cause or matter is commenced, or by an indorsement thereon, that the plaintiff resides out of the jurisdiction, all applications for security for costs must be made in Chambers, on notice to the plaintiff, or other party from whom security is claimed.

Where the order is properly issuable on *præcipe*, it is to be obtained at the office where the action or proceeding is commenced: *Rule* 762. For Forms, see No. 61; H. & L. Forms, No. 1678.

The word "plaintiff" in this *Rule* should probably be held to include any person initiating a proceeding other than an action, *e.g.*, a petitioner, or person giving an originating or other notice of motion, where such notice is the commencement of a proceeding, or application for relief by such person, and not merely incidental to opposing proceedings initiated by some other person: see *Re Parker*, 16 P. R. 392; but see *Poimer* v. *Lovett*, 14 P. R. 415.

Præcipe order, how obtained.

Præcipe Order.—The Ontario *Rules* do not expressly require as the English Rules do [see Eng. (1883) R. 19], that the address of the plaintiff suing by solicitor shall be indorsed upon the writ: see *Rule* 11. The form of writ, however (Form No. 1), contemplates such an indorsement, and this should therefore be followed. Where the plaintiff is without the jurisdiction and liable to give security, if the writ does not disclose the residence, a special application for security is proper: *Lowless* v. *Rodford*, 17 C. L. J. 388; 1 C. L. T. 661; and the costs of it will be to the defendant, as the plaintiff ought in such case to indorse his address on the writ, so as to enable defendant to obtain an order on *præcipe* under this *Rule*: *McCready* v. *Hennessy*, 9 P. R. 439. If there is any difficulty in ascertaining the plaintiff's place of abode: see *Rule* 13.

A *præcipe* order should only issue where it appears by the indorsement on the writ that the plaintiff resides, or all the plaintiffs reside, out of the jurisdiction: *McConnell* v. *Wakeford*, 13 P. R. 455. *Semble*, the order, where obtainable on *præcipe*, may issue at any time before judgment; it was issued after defence, and before issue joined, in *Smerling* v. *Kennedy*, 5 O. L. R. 430, and see *Small* v. *Henderson*, 18 P. R. 314.

Where the indorsement stated that the plaintiffs resided at the Township of Brant in the County of Bruce, and in Wisconsin, U.S.A., this was held to be a statement that they resided out of the jurisdiction: *McConnell* v. *Wakeford*, *supra*.

If it appears by the indorsement on the writ that one of several plaintiffs resides within Ontario, a *præcipe* order should not issue, and *semble*, if issued, it is void and a nullity: *McConnell* v. *Wakeford*, 13 P. R. 455. An order issued as to one plaintiff only is irregular: *Ib.*, but compliance with it will waive the irregularity: *Ib.*

A *præcipe* order has as much force, upon being served, to effect a stay of proceedings, as if made on application to a Judge: *Bank of Nova Scotia* v. *La Roche*, 9 P. R. 503; *Doer* v. *Rand*, 10 P. R. 165; except so far as is provided by *Rule* 383. An order under this *Rule* limits in the first instance the time for giving security.

Where an order has limited a time, and provided for dismissal in case of default, a subsequent *ex parte* motion showing default has been customary in Ontario to obtain the dismissal of the action: see *Barns* v. *Chisholm*, 2 Chy. Ch. 88; this practice was not approved of in *Hollender* v. *Floulkes*, 16 P. R. 225, but has now been established by *Rule* 376. Rule 375.

An order made on motion of one of several defendants may properly provide that the security to be given is to answer the costs of all of the defendants: *Delap* v. *Charlebois*, 15 P. R. 325. See also *Edmunds* v. *Mabee*, 11 C. L. T. 177, where two defendants having obtained separate orders on *præcipe*, an order was made on plaintiff's application that a bond filed in compliance with the first order should stand as security for both defendants, without prejudice to their rights to move to have the amount increased. Where, in pursuance of an order obtained by one of several defendants, the plaintiff pays money into Court as security for costs, on the other defendants, or any of them, obtaining similar orders, the money paid in may, on the plaintiff's application, be ordered to stand also as security for such other defendant's costs: *Syracuse Smelting Works* v. *Stevens*, 2 O. L. R. 141.

Special Application.—A special application is necessary whenever the order is not obtainable on *præcipe*. Where a special application is necessary it must be made on notice to the plaintiff. As to evidence required on such application, see notes to *Rule* 373. Unexplained delay in making the application may be a bar to its being entertained: *Bertuzato* v. *Fauquier*, 38 C. L. J. 79. After judgment, security for costs of a reference may, in a proper case, be ordered upon a special application: *Brown* v. *Hoig*, 1905, 2 Ch. 379; 93 L. T. 99. Special application.

As to what is a sufficiently positive statement that the plaintiff's residence is out of the jurisdiction, in an affidavit to obtain an order for security: see *Hollingsworth* v. *Hollingsworth*, 10 P. R. 58.

Time for Obtaining Order for Security for Costs on Præcipe.—A defendant is not entitled to an order for security for costs before he has entered an appearance: *Rule* 383 (1). Formerly, a defendant, by taking a step in the action after he became entitled to require security for costs to be given, was held to waive his right thereto, but now a defendant may obtain the order on special application at any time before issue joined: see *Caswell* v. *Murray*, 9 P. R. 102; *Small* v. *Henderson*, 18 P. R. 314; *Smerling* v. *Kennedy*, 5 O. L. R. 432; *Martano* v. *Monn*, 14 Ch. D. 419; 42 L. T. 893; *The Lydney & W. Iron Co.* v. *Bird*, 23 Ch. D. 358; 48 L. T. 853; *Re Smith*, 75 L. T. 46; W. N. 1896, 88. When the order is properly issuable on *præcipe*, it may be obtained at any time before issue joined: *Smerling* v. *Kennedy*, 5 O. L. R. 430, 432.

It was held to be too late for defendant to apply for security after judgment had gone against him, and he was appealing to the Court of Appeal: *Small* v. *Henderson*, 18 P. R. 314.

Amount of Security.—See *Rules* 374, 383. Security if applied for promptly, is generally for past, as well as future costs: *Brocklebank* v. *King's Lynn S. S. Co.*, 3 C. P. D. 365; *Massey* v. *Allen*, 12 Ch. D. 807; *Hateley* v. *Merchants Despatch*, 10 P. R. 253. See note to *Rule* 373 (*e*). Amount of security required.

Grounds for Refusing, or Rescinding, Order.—If the plaintiff has substantial property within the jurisdiction, of sufficient value, and Order, when refused or rescinded.

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available in execution, this may be shown in answer to a motion for security to displace the *prima facie* case made by proof of residence out of the jurisdiction: *Gault* v. *Spencer*, 2 Chy. Ch. 92, and see *Bready* v. *Robertson*, 14 P. R. 7; *Feaster* v. *Cooney*, 15 P. R. 290; *Belair* v. *Buchanan*, 17 P. R. 413, 476; *Re Armstrong*, 18 P. R. 55; *Mansell* v. *Robertson*, 2 O. W. N. 337; or it may be made the ground for a special motion to discharge any order which has been made on *præcipe* for security: *Ganson* v. *Finch*, 3 Chy. Ch. 296; *Belair* v. *Buchanan*, *supra*. The property must be immediately available in execution: *Welsbach Incandescent, etc., Co.* v. *St. Leger*, 16 P. R. 362; but it would not seem, according to the latest cases, to make any difference whether the property is real, or personal: *Homburger* v. *Poetting*, 30 W. R. 769; 47 L. T. 249; *Redondo* v. *Chaytor*, 4 Q. B. D. 453; *Republic of Costa Rica* v. *Erlanger*, 3 Ch. D. 62; but see *Kilkenny Ry. Co.* v. *Fielden*, L. R. 6 Ex. 81; *Re Carroll*, 2 Chy. Ch. 305; *Higgins* v. *Manning*, 6 P. R. 147; *McKenzie* v. *Sinton*, 6 P. R. 282; *Wilson* v. *Wilson*, 6 P. R. 152; *Swinbourne* v. *Carter*, 23 L. J. Q. B. 16; *Re Howe S. M. Co.*, 61 L. T. 170; *Re Apollinaris Co.*, 1891, 1 Ch. 1; *Duffy* v. *Donovan*, 14 P. R. 159; *Welsbach I. L. Co.* v. *St. Leger*, 16 P. R. 362; *Pittsburgh C. S. Co.* v. *Morr*, 102 L. T. Jour. 532. But the acquisition of property, subsequently to an order for security, is no reason for discharging it: *Reaume* v. *Leavitt*, 6 P. R. 70. A plaintiff cannot rely on the property which is the subject of litigation, where a *prima facie* good defence is shown: *Wolters* v. *Duggon*, 33 C. L. J. 362, but where the defendants are possessed of funds belonging to the plaintiff, the discretion of the Court may be exercised against hampering the plaintiff by ordering security: *Duffy* v. *Donovan*, 14 P. R. 159; *Stock* v. *Dresden Sugar Co.*, 2 O. W. R. 696; and see *Daniel* v. *Birkbeck Loan, etc.*, 5 O. W. R. 757; and where, in administration proceedings, the plaintiff resided out of the jurisdiction, but was entitled to an interest worth $273 in the estate, he was not ordered to give security for costs, upon his consenting that his whole interest in the estate should be subject to a first charge in respect of any costs he might be ordered to pay: *Re Armstrong*, 18 P. R. 55. The fact that the action is brought on a foreign judgment is no ground for refusing the order: *Crozat* v. *Brogden*, 1894, 2 Q. B. 30; 70 L. T. 522. If the possession of sufficient property at the time of applying for a *præcipe* order was known to the defendant's solicitor, this may be a reason for discharging the order with costs: *Ganson* v. *Finch*, *supra*.

As to what is sufficient in value: see *Bready* v. *Robertson*, 14 P. R. 7; *Feaster* v. *Cooney*, 15 P. R. 290; *Belair* v. *Buchanan*, 17 P. R. 413, 476. It should be sufficient to pay costs of both parties, and not merely the defendant's costs, otherwise the whole property may be paid over to the plaintiff's own solicitor, during the litigation, to meet his own costs. The onus of showing property of sufficient value is on the plaintiff on a motion by him to set aside an order for security: *Daniel* v. *Birkbeck Loan, etc.*, 5 O. W. R. 757.

Return of plaintiff to jurisdiction.

If a plaintiff returns to reside permanently within the jurisdiction an order for security may be discharged: *Nesbit* v. *Galna*, 3 O. L. R. 429; *Horvey* v. *Smith*, 1 Chy. Ch. 392; *sed quære*: see *Badnall* v. *Hayley*, 4 M. & W. 535; 7 Dowl. 19, referred to in *Hateley* v. *Merchants Despatch Co.*, 12 Ont. App. 643, 646, unless obtained because the plaintiff had wilfully misstated his residence: see *Waldron* v. *McWalter*, 6 P. R. 145. But if the Court thinks the return is merely to get rid of the order, and the plaintiff has *no* ties, business or

otherwise, to guarantee that he will remain within the jurisdiction, the order will not be rescinded: *Marsh* v. *Beard*, 1 Chy. Ch. 390, and see *Rule* 373 (b), and notes, *supra*, p. 880. Rule 373.

Where a plaintiff resident abroad was moving to set aside the proceedings, as brought without authority, an application to compel him to give security for costs was refused: *Semple* v. *McLoughlin*, 17 P. R. 490.

Where a plaintiff residing out of the jurisdiction obtained judgment by default of defence, but defendant obtained leave to defend on terms of giving security for costs, and the judgment and execution were allowed to stand as security for the plaintiff's claim, a *præcipe* order for security for costs subsequently obtained by the defendant was set aside: *Davis* v. *Teeger*, 18 C. L. T. 140; 34 C. L. J. 287.

Where an order for security for costs has been regularly issued and acted on, it will not be rescinded merely because the defendant subsequently pays money into Court in satisfaction of the plaintiff's claim: *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127.

Where an order for security for costs is properly granted, but is set aside on grounds subsequently arising, terms may be imposed, such as payment of the costs of the order, and of appeals therefrom: see *Lea* v. *Lang*, 18 P. R. 1.

Stay of Proceedings until Security Given.—Where an order for security for costs is obtained, the proceedings in the action are stayed from the time of the service of the order until the security is given, and if given by bond, until the bond is allowed: *Rules* 377-378; and after notice, under *Rule* 381 (2), of payment of money into Court as security, the stay continues for at least one day: see *The Northern Elevator Co.* v. *N. W. Transportation Co.*, in note to *Rule* 381, p. 897.

Pending such stay, the plaintiff, subject to the provisions of *Rule* 388, cannot move, or proceed with a pending motion, even for an interim injunction: *Weekes* v. *Underfeed Stoker Co.*, 19 P. R. 299; *Whitley Exerciser Co.* v. *Gamage*, 1898, 2 Ch. 405; 79 L. T. 20; but a plaintiff may move to set aside a *præcipe* order for security for costs, notwithstanding the stay of proceedings imposed by the order, and without giving security for the costs of the motion: *Walters* v. *Duggan*, 17 P. R. 859.

An order obtained by the defendant for security, with a stay of proceedings, does not prevent the defendant from moving to dismiss for want of prosecution: *London Road Car Co.* v. *Kelly*, 18 L. R. Ir. 43; but see *Duffus* v. *Scullin*, 20 L. R. Ir. 8.

In default of compliance with an order for security for costs, where no time has been limited for giving security, a motion may be made to limit the time, or in default to dismiss the action for want of prosecution: *La Grange* v. *McAndrews*, 4 Q. B. D. 210; *White* v. *Bromige*, W. N. 1878, 28. If the plaintiff then wishes to give security he must pay the defendant's costs of the application: *Ex parte Isaacs*, 10 Ch. D. 1.

It is now made clear by *Rules* 374, and 376, that the order for security may properly limit the time within which it is to be given, and in default dismiss the action. Under the former Rules it was also so decided in *Ashcroft* v. *Tyson*, 17 P. R. 42; distinguishing *Thompson* v. *Williamson*, 15 P. R. 368; see also *Lea* v. *Lang*, 18 P. R. 1.

Rules 376-378.

Where, pending the stay of proceedings, the defendant prepared affidavits for the purpose of opposing a motion for injunction, pending when the order for security for costs issued, the costs of such affidavits were allowed to the defendant on the subsequent dismissal of the action for failure to give security: *Whitley Exerciser* v. *Gamage*, 1898, 2 Ch. 405; 79 L. T. 20.

Dismissal of proceedings on default.

376. Upon default in giving security the action may upon an *ex parte* application be dismissed with costs. C.R. 1203.

On the application under this *Rule* proof of service of the order for security for costs must be given, and also that default has been made in giving the security.

Where an appeal has been lodged against the order for security, that is a sufficient ground for not dismissing the action until the appeal has been disposed of, and the motion may be adjourned to be heard with the appeal: *Bennett* v. *Empire Print. Co.*, 15 P. R. 430.

This *Rule* is an affirmance of *Burns* v. *Chisholm*, 2 Chy. Ch. 88, which had not been followed in *Hollender* v. *Fyoulkes*, 16 P. R. 225, 315, which latter case must now, it is presumed, be taken to be superseded by this *Rule*.

Stay of proceedings till security given.

377. Where security for costs is ordered, proceedings in the action shall be stayed, from the service of the order until the security is given, and, if given by bond, until the bond is allowed. C.R. 1204.

The stay of proceedings continues the whole of the day on which the security is actually given, if by payment into Court; or, if by bond, of the day on which the bond is allowed, and the time for taking the next proceeding does not begin to run until the following day: *Rule* 378; see formerly *Compou* v. *Rondall*, 17 P. R. 325. The stay of proceedings does not prevent a motion by the plaintiff to set aside an order for security for costs obtained on *præcipe*: *Walters* v. *Duggan*, 17 P. R. 359; but proceedings on a pending motion for an interim injunction are stayed: *Whitley Exerciser* v. *Gamage*, 1898, 2 Ch. 405; 79 L. T. 20; *Weeks* v. *Underfeed Stoker Co.*, 19 P. R. 299.

Where the right to security only arises in respect of a particular cause of action: *semble*, the action should only be stayed as to that particular cause of action, *e.g.*, where the action is for libel against a newspaper, or for slander of a woman, and other causes of action as to which no right to security for costs exists, are joined: see *Lancaster* v. *Ryckman*, 15 P. R. 199.

Though the order does not contain a stay of proceedings, yet proceedings are stayed by an order for security, under this *Rule*: see *Stow* v. *Currie*, 20 O. L. R. 353.

Computation of period of stay of proceedings.

378. The day on which an order that a party do give security for costs is served, and the time until and including the day on which the security is allowed, shall

nnt be reckoned in the computation of time allowed for taking any proceeding in the action. C.R. 346. Rules 379, 380.

See Eng. (1883) R. 966.

Where the plaintiff has paid money into Court as security for costs, and has given notice of payment in, the defendant is entitled to at least one day to ascertain if such payment in has really been made, and to file his defence, before the plaintiff can note the pleadings as closed, or take further proceedings: *The Northern Elevator Co.* v. *The North-West Transportation Co.*, 6 O. L. R. 23.

379. A bond given as security for costs shall be to the party requiring the security, and shall be by two sufficient sureties. C.R. 1205. Security for costs where given by bond.

For form of bond: see H. & L. Forms, Nn. 1685.

The bond need not be executed by the plaintiff who is liable without it, but must be executed by two sureties. Formerly one surety might be sufficient, and the plaintiff was ordinarily a party, but the execution of the bond by the plaintiff might be dispensed with: *Delap* v. *Charlebois*, 15 P. R. 325.

Where a surety company is approved by Order in Council, its bond may be given and accepted as sufficient security without any affidevit of justification, and *semble*, notwithstanding this *Rule*, without any other surety: see Jud. Act, s. 69, *supra*, p. 233; and *Aldrick* v. *British Griffin, &c., Co.*, 1904, 2 K. B. 850; 91 L. T. 229.

The plaintiff should not now be named as a party to the bond, unless she executes it: see *Grothe* v. *Pearce*, 15 P. R. 195.

The plaintiff's solicitor should not be a surety: *Beckitt* v. *Wragg*, 1 Chy. Ch. 5; *Grand Trunk Ry. Co.* v. *Ontario & Quebec Ry. Co.*, 3 C. L. T. 173.

The sureties must be solvent: *Cliffe* v. *Wilkinson*, 4 Sim. 122; and residents within the jurisdiction: *Hall* v. *Mackenzie*, 31 C. L. J. 700; and if the security becomes altered by the death, or insolvency, of a surety, fresh security may be required: *Lautour* v. *Holcombe*, 1 Ph. 362; *Veitch* v. *Irvine*, 11 Sim. 122; *Gogo* v. *Canada Publishing Co.*, 10 P. R. 169; Morgan & Wurtzburg, p. 22.

Where the order is made on the application of one of several defendants, it may provide that the security to be given shall answer the costs of all of the defendants: *Delap* v. *Charlebois*, 15 P. R. 325.

As to procuring the allowance of the bond: see *Rule* 380.

The plaintiff, instead of giving a bond, might formerly obtain an order *ex parte*, giving leave to pay $400 into Court: *Cliffe* v. *Wilkinson*, 4 Sim. 123; *Ganson* v. *Finch*, 3 Chy. Ch. 296; see also *Re Howland*, 4 Chy. Ch. 6; *Luther* v. *Word*, 2 Chy. Ch. 175; and may now under *Rule* 381 pay in not less than one-half of the penalty of the bond required without an order. The money should be paid into Court in the usual way: see *Rules* 727 *et seq.* Payment to a Local Registrar is not regular, or sufficient: *Leroux* v. *Lanthier*, 2 C. L. T. 48.

380. Upon the bond being filed, with affidavits of execution and justification, either party may apply to allow or disallow the same within seven days after notice Bond for security for costs, how allowed.

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of filing it is served, otherwise the bond shall stand allowed. C.R. 1206. *Amended.*

Where a bond filed as security for the costs of an appeal was disallowed because leave to appeal had not been obtained, and subsequently, upon leave being obtained, the same bond was refiled, it was held that it was properly disallowed a second time, because the sureties might object that it had been improperly used by the appellant, and the respondent was entitled to security free from any objections of that nature: *Jones* v. *Macdonald*, 14 P. R. 535.

The party opposing the allowance of the bond may read the sworn statements of a surety made in another action: *Ib.*

A surety may be cross-examined on his affidavit of justification; but a surety, justifying on his private property, cannot be compelled to answer questions as to the liabilities of a firm of which he happens to be a member: *Douglas* v. *Blackey*, 14 P. R. 504.

No affidavit of justification is necessary where a bond of a surety company approved by Order in Council is given: Jud. Act, s. 69, *supra*, p. 233.

A bond of a foreign guaranty company doing business in this Province, if otherwise unobjectionable, may be received as sufficient security; *Aldrick* v. *British Griffin Co.*, 1904, 2 K. B. 850, 91 L. T. 229; but the company would not, unless approved by the Lieutenant-Governor in Council as mentioned in Jud. Act, s. 69, *supra*, be sufficient as sole surety: see *Rule* 379; nor would it, in such a case, seem proper to dispense with an affidavit of justification as required by this *Rule*.

Money may be paid into Court.

381.—(1) Instead of giving a bond as security for costs, a party may, without special order, pay into Court, as such security, a sum of money not less than half the penalty of the bond required.

Notice to be served.

(2) The party paying in the money shall, when paying the same in, state the purpose for which it is paid in, and shall forthwith serve a notice upon the opposite party specifying the fact and purpose of such payment. C.R. 1207.

See note to *Rule* 379.

If the money paid in is not sufficient the opposite party may apply under *Rule* 382, to have "further" security given.

The money must be paid into Court to the credit of the cause, in the same way as other moneys are paid into Court: see *Rules* 727, *et seq.*, and notes, *infra*; and the *præcipe* for the direction to the bank, necessary under *Rule* 728, should contain a statement of the purpose for which the money is paid in. Deposit of the money with a Local Registrar is invalid: *Leroux* v. *Lanthier*, 2 C. L. T. 48. After payment of defendant's costs, any surplus of money paid into Court under this *Rule* may be made exigible by means of a stop order to satisfy any other claim which the defendant may have against the plaintiff: see *Evans* v. *Huntsville*, 7 O. L. R. 540.

Money paid in, in answer to any order obtained by one of several defendants, may be ordered to stand also as security for the costs of the other defendants: *Syracuse Smelting Works* v. *Stevens*, 2 O. L. R. 141. Rule 382.

A plaintiff is not entitled to get money out of Court, paid in by him under this *Rule*, merely because the defendant pays money into Court in satisfaction of the plaintiff's claim, except on the terms of first paying the defendant's costs: *American Aristotype Co.* v. *Eakins*, 7 O. L. R. 127.

After the receipt of the notice mentioned in sub-section 2 of this *Rule*, the defendant is entitled to at least one day to ascertain if the money has been paid in, before the plaintiff can take further proceedings: *The Northern Elevator Co.* v. *N. W. Transportation Co.*, 6 O. L. R. 23.

382. The amount of security, whether directed to be given by an order issued on *præcipe* or otherwise, may be increased or diminished from time to time. C.R. 1208. Amount may be varied.

This *Rule* is said to be merely declaratory of the inherent power of the Court: see *D'Ivry* v. *The World*, 33 C. L. J. 202.

Where the order for security is made upon motion, the Judge or officer making it may name such amount in which security is to be given, as the circumstances of the case warranta: *Delap* v. *Chorlebois*, 15 P. R. 45.

Security to the amount of £600 was ordered in *Dom. Brewery* v. *Lister*, 104 L. T. 127; and to the amount of $1,000 in *Delap* v. *Chorlebois*, *supra*.

The security given under a *præcipe* order under *Rule* 374, may be reduced, or increased, on reason being shown.

Security given under a *præcipe*, or special order, might, even before this *Rule*, have been, in a proper case, increased. This was refused where the usual amount, $400, was likely to be insufficient only by reason of an adjournment of the hearing, owing to the Judge having to close the Sittings to take another Circuit, and it was not shown that defendant might not at the outset have applied for a larger sum than $400: *Bell* v. *Landon*, 9 P. R. 100. Also where the trial was postponed on terms, and the giving of security was not imposed as one of the terms: *Simon* v. *Lo Banque Notionole*, 7 P. R. 422; and also where it was alleged to be necessary for the defendant to issue a foreign commission to take evidence, there having been delay in making the application, and the effect of granting it would have been to delay the trial: *Trevelyan* v. *Myers*, 15 C. L. T. 135; 31 C. L. J. 284; and see *D'Ivry* v. *The World*, 33 C. L. J. 202.

In a suit by a foreign government £120 security for costs had been given before the Judicature Act came into operation. A large amount of costs would be incurred before the suit was heard, and further security to the amount of £500 to cover future costs was ordered to be given: further security, it was said, could not be ordered to be given for *past* costs: *Republic of Costo Rico* v. *Erlanger*, 3 Ch. D. 62.

In a matter in the Surrogate Court security was directed to be given to the amount of $200. Subsequently the matter was removed

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to the High Court, nothing at the time being said as to further security. On motion, further security was ordered: *Johnston* v. *Wilson*, 4 C. L. T. 291.

Obtaining a præcipe order does not preclude a subsequent application by defendant for increased security, and no reservation of the right to make a further application is necessary in the *præcipe* order: *Standard Trading Co.* v. *Seybold*, 5 O. L. R. 8; but the application for further security must not be made an excuse for checking of proceedings at every step in the action: see *S. C.*, 6 O. L. R. 379.

Where it appeared by the admissions of defendant that there was over $5,000 due to the plaintiff, and the contest was as to the counterclaim of defendant, further security was refused: *Reynolds* v. *Walsh*, 6 O. W. N. 310.

Additional security for the costs of a motion by the plaintiff for a new trial was ordered: *Bensten* v. *Taylor*, 1893, 2 Q. B. 193; 69 L. T. 333.

The application for additional security should be made in Chambers: *Ib.*

Security on motion for judgment, under Rule

383.—(1) A defendant must appear before obtaining an order for security of costs. *New.*

(2) Where the writ of summons is specially indorsed the defendant shall also file the affidavits required by Rule 56, and if an order for security for costs is issued the plaintiff may pay into Court the sum of $50, as a partial compliance with such order, and thereupon he shall be at liberty to cross-examine and move for judgment; but the order for security shall, in all other respects, have its full operation and effect.

(3) Such payment into Court shall not prejudice any motion that may be made to set aside the order for security.

(4) In actions in the County Court the amount of the partial security shall be $25.

Judgment for part.

(5) Where upon motion under Rule 57 the plaintiff is awarded judgment for a portion only of his claim, he may issue the judgment and execution thereunder, but so long as the order for security stands he shall not take any other proceedings in respect to the residue of his claim, until it has been fully complied with. C.R. 1209.

This *Rule* is intended apparently to remove the obstacle which formerly existed in the way of the plaintiff's taking any proceedings until he had complied with an order for security for costs, or obtained its discharge: *Doer* v. *Rand*, 10 P. R. 165.

Where a plaintiff against whom an order for security for costs had been obtained, moved to set it aside, and also for judgment undsr former C. R. 603, without paying $50 into Court under this *Rule*, the motion was refused with costs, and *Doer* v. *Rond*, 10 P. R. 105, and *Anglo American Casings Co.* v. *Rowlin*, *Ib.*, 391, were held to be no longer in force: *Poyne* v. *Newberry*, 13 P. R. 354; but where there was an admission hy defendant of the debt sued for, sworn to and not contradicted, an order for security was set aside, notwithstanding that the plaintiff might, under this *Rule*, have paid $50 into Court and proceeded to move for judgment: *Thiboudeou* v. *Herbert*, 16 P. R. 420, following *Doer* v. *Rond*, 10 P. R. 105. Rules 384, 385.

This *Rule* does not extend the time for putting in security for costs, it only enahles a plaintiff to remove ths stay of proceedings for the sole purpose of moving for judgment under *Rule* 57. If he fails on that motion he must put in the security within the time limited, or, in dsfault, tho action will stand dismissed, unless the defendant himself treats the act . . as still alive: *Hollender* v. *Ffoulkes*, 16 P. R. 225; but the time for putting in security may be enlarged upon an application under *Rule* 176; *S. C.* 16 P. R. 315.

A plaintiff may move to set asids a *præcipe* order for security for costs, without first giving security under this *Rule: Walters* v. *Duggon*, 17 P. R. 359.

See *Rule* 375 and notes, *supro*, p. 879 *et seq.*

384. A bond given for security for costs may be delivered up for cancellation or suit upon consent of the solicitors in the cause without order. C.R. 1210. Delivery of bond out of Court.

The consent must be in writing, and should he filed with the officer having the custody of the bond.

Where security for costs of the action has been given, ths plaintiff on recovsry of judgment, and at the expiration of the time for appealing therefrom, and no appeal having been lodged, is entitled to move to have the bond delivered up; hut where an appeal to the Appellate Division has been, or is about to be, brought, such an appeal was expressly stated to he a step in the action: see C. R. 798 (and presumably still is, although that Rule has not been continued), and the order would not be granted until such appeal was disposed of.

Wbere security has been given for the costs of an appeal to tbe Appellate Division, if the party giving the security succeeds on the appeal, he is entitled to have the hond delivered up to be cancelled; or where money has heen paid into Court as security for such costs, he is entitled to have it paid out to him, notwithstanding that the opposite party is prosecuting an appeal to the Supreme Court of Canada, because the security is not given to answer the costs of such an appeal: *Marsh* v. *Webb*, 15 P. R. 64; *Homill* v. *Lilley*, 19 Q. B. D. 83; 56 L. T. 620; *Centaur Cycle Co.* v. *Hill*, 7 O. L. R. 411.

385. Where money has been paid into Court as security for costs or with a defence it may be paid out on the consent of the solicitors in the cause or matter, without order, and may be paid to the solicitors upon produc- Payment of money out of Court.

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tion of the consent of the client verified by affidavit. C.R. 1211. *Amended.*

Primâ facie the payment is to be made to the litigant entitled, and not to his solicitor. Where it is desired to obtain payment to the solicitor of the party, his written consent duly verified, as required by this *Rule*, is necessary.

(xiii) *Interim Alimony.*

Defendant may notify plaintiff that he submits to pay interim alimony claimed.

386.—(1) In an alimony action, the defendant may, at any time before the statement of defence is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the plaintiff in the indorsement on the writ; and in that case no motion for interim alimony shall be made until there has been a default in payment; and in case of default, affidavits being filed verifying the indorsement and notice and the default, an order for payment of the sum demanded shall be issued on *præcipe*.

Procedure where defendant submits to pay a less sum than plaintiff claims.

(2) The defendant may give notice in writing that he submits to pay such less sum as he may deem proper and may name in his notice.

(3) Where a notice has been so served and the plaintiff accepts the amount therein mentioned as sufficient, the defendant shall pay thereafter the sum so offered as interim alimony, and no order for interim alimony shall be made until there has been default in payment.

(4) Where a notice has been so served, the plaintiff's interim disbursements may be taxed without order.

(5) Where the plaintiff does not accept the amount offered and upon motion for interim alimony it is found that the sum so offered is reasonable, and the defendant pays to the plaintiff the sum so offered, no order for interim alimony shall be made until there has been default in payment. C.R. 370.

When the order is authorized to be issued or *præcipe*, the officer in whose office the action was commenced may issue it: *Rule* 762.

See notes to *Rule* 387.

Application for interim alimony and costs, when it may be made.

387. An application for interim alimony or for interim disbursements shall not be made until the time for delivering the defence has expired, and costs shall not be ordered to be paid *de die in diem* by the defendant, but

only the amount of the cash disbursements actually and properly made by the plaintiff's solicitor. C.R. 1144. Rule 387

This *Rule* is also based in part on C. R. 371.

Interim Alimony.—For form of indorsement, on the writ, of a claim for interim alimony: see Form 4; H. & L. Forms, No. 64. If the indorsement is omitted, an application for interim alimony may be made, but in such case it will only run from the date of the order; and no costs of the motion will be allowed: *Peterson* v. *Peterson*, 6 P. R. 150; and see *Parish* v. *Parish*, 4 O. W. N. 105.

For provisions for fixing the amount so as to avoid a motion: see *Rule* 386.

The application may be made at any time after the statement of defence has been filed: *Gorman* v. *Gorman*, before Proudfoot, V.C., 20th September, 1875; or after the time for delivering it has expired; *Peck* v. *Peck*, 9 P. R. 299; unless the defendant has given notice under *Rule* 386, and has not made default in payment of an amount accepted by the plaintiff as sufficient.

The allowance of alimony *pendente lite* depends on the marital relationship between the parties existing *de facto*, and the Court exercises a discretion in granting, or withholding, alimony *pendente lite*, which is regulated by the circumstances of each case: *Walker* v. *Walker*, 10 P. R. 633; *Atwood* v. *Atwood*, 15 P. R. 425; 16 P. R. 50; *Parish* v. *Parish*, *supra*.

It is allowed, when necessary, for the maintenance of the plaintiff: *Soules* v. *Soules*, 3 Gr. 113; *Thompson* v. *Thompson*, L. R. 1 P. & D. 553, but not as of course; the relative incomes of the husband and wife may be considered, and discretion exercised in the whole circumstances of the case, and it may be refused if the plaintiff is shown not to be in need of support: *Bradley* v. *Bradley*, 3 Chy. Ch. 329; *Smith* v. *Smith*, 6 P. R. 51; *Knapp* v. *Knapp*, 12 P. R. 105: *Falvey* v. *Falvey*, 2 O. W. R. 476, 832; and see *Allen* v. *Allen*, 1894, P. 134; and *Lovell* v. *Lovell*, 5 O. W. R. 401, 640; or if it is not shewn that the defendant has means to comply with an order if made: *Pherrill* v. *Pherrill*, 6 O. L. R. 642. Interim alimony, when allowed.

Alimony was refused where it was shewn that plaintiff and defendant had executed a separation deed containing an alimentary provision, and the wife had bound herself not to sue for alimony: *Atwood* v. *Atwood*, 15 P. R. 425; and in appeal, 16 P. R. 50, where the Divisional Court of the Ch. Div. was equally divided; but where a similar separation deed was disputed by the plaintiff, interim alimony was ordered, following *Henderson* v. *Henderson*, 19 Gr. 464; *Lafrance* v. *Lafrance*, 18 P. R. 62; and where the separation agreement contained no provision for the wife's maintenance, it was held to be no bar to her right to alimony: *Frémont* v. *Frémont*, 26 O. L. R. 6.

Where the wife is undergoing sentence for a crime, alimony will not be ordered, unless her sentence is about to expire: *Leslie* v. *Leslie*, 98 L. T. 62.

On an application for interim alimony, cross-examination of the plaintiff on her affidavit in support of the motion was allowed, but limited to the question as to her own means: *Cook* v. *Cook*, 28 C. L. J. 95; 12 C. L. T. 73.

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Interim alimony is payable from the date of the service of the writ, if there has been no delay in making the application: *Howe* v. *Howe*, 3 Chy. Ch. 494; *Thompson* v. *Thompson*, 9 P. R. 526; 19 C. L. J. 252; *Parish* v. *Parish*, *supra*, p. 901; and the claim for interim alimony is indorsed on the writ: *Peterson* v. *Peterson*, 6 P. R. 150; in other cases from the date of the order. Where the plaintiff was living in the defendant's house, and brought the action for alimony on the ground of alleged desertion, without alleging cruelty, and the husband by his defence and affidavit offered to resume co-habitation, interim alimony was refused: *Snider* v. *Snider*, 11 P. R. 140; but where it was proved that the plaintiff, though living in the defendant's homestead, was in need, it was allowed: *Lalonde* v. *Lalonde*, 11 P. R. 143.

Evidence required on motion for interim alimony.

On a motion for interim alimony, it is sufficient if a *de facto* marriage be proved: *Taylor* v. *Taylor*, 1 Chy. Ch. 234; *Foden* v. *Foden*, 1894, P. 307; 71 L. T. 279; its validity cannot be inquired into; *Bradley* v. *Bradley*, *supra*; *Nolan* v. *Nolan*, 1 Chy. Ch. 368; *Carr* v. *Carr*, 2 Chy. Ch. 71; *Walker* v. *Walker*, 10 P. R. 363; nor can any question affecting the merits of the action; thus, alleged adultery by plaintiff cannot be raised on such an application: *Campbell* v. *Campbell*, 6 P. R. 128; nor the question whether the plaintiff is justified in leaving the defendant: *Wilson* v. *Wilson*, *Ib.*, 129; *Keith* v. *Keith*, 7 P. R. 41; *Lovell* v. *Lovell*, 5 O. W. R. 401, 640; *Theakstone* v. *Theakstone*, 10 O. L. R. 386.

Plaintiff must undertake to proceed to trial at next sittings.

The plaintiff is usually required to undertake to proceed to a trial of the action at the next sittings; but where the defendant neglected to pay the alimony, and the plaintiff was left without means of taking the case to trial, the undertaking was extended: *Bowslaugh* v. *Bowslaugh*, 6 P. R. 200; and where the cause had been entered for trial, it was ordered to stand over, until a sum sufficient to pay plaintiff's witnesses was paid by defendant: *Haffey* v. *Haffey*, 7 P. R. 137.

It would seem that the plaintiff's solicitor has no lien for his costs on moneys paid to him for interim alimony: *Cross* v. *Cross*, 43 L. T. 533; and see *Re Robinson*, 77 L. T. Jour. 237; *Leete* v. *Leete*, 40 L. T. 788.

Where interim alimony not applied for, permanent alimony ordered only from date of service of writ.

Exception to rule.

Where interim alimony had not been applied for, the Court refused to order the permanent alimony to run from a date prior to the decree: *Soules* v. *Soules*, 3 Gr. 113. But where the husband had agreed to a separation, and to pay the plaintiff an allowance, the Court awarded permanent alimony at the rate agreed to be paid by defendant and directed payment from the date of the writ, though no application had been made for interim alimony: *Mallory* v. *Mallory*, before Boyd, C., at Cobourg, 2nd April, 1883; and permanent alimony has been granted from the service of the writ, where no application for interim alimony was made, and judgment was obtained on motion in default of defence (the notice of motion for judgment stating that it would be so asked): *Hagarty* v. *Hagarty*, before Boyd, C., 11th February, 1885.

An order cannot be made in Chambers, even on consent, for payment of permanent alimony, as that is equivalent to a judgment in the action: see *Craig* v. *Craig*, 1 Chy. Ch. 41; but judgment might be pronounced in Court in such a case under *Rule* 222.

Motion to set aside order.

Where, after an order for interim alimony, the wife returned to her husband's house, and resided there for some time, but was afterwards compelled to leave, by reason of cruelty, a motion to set aside the order for interim alimony, on the ground of condonation, was refused: *Maxwell* v. *Maxwell*, 1 Chy. Ch. 27.

The payment of interim alimony has been stayed until the plaintiff produced on oath, books and papers which she had taken from her husband, and which deprived him of the means of paying it: *Old* v. *Old*, 9 P. R. 552. Rule 387.

Amount to be Allowed.—There is no fixed rule as to the amount to be allowed for interim alimony. In England, the rule is usually to allow about one-fifth of the annual income of the husband, but it is in the discretion of the Court, and may vary according to the circumstances of the case. But in this Province a percentage on the income is not always the measure for the allowance, and the value of the defendant's labour may also be taken into account: *McCulloch* v. *McCulloch*, 10 Gr. 320. The allowance is usually less than would be allowed as permanent alimony, the wife being bound *pendente lite* to live in retirement and seclusion: Coote Eccl. Pr. 338; *Rees* v. *Rees*, 3 Phill. 389; *Hawkes* v. *Hawkes*, 1 Hagg. 526; *Otway* v. *Otway*, 2 Phill. 108. As to the effect of *The Married Women's Property Act*, on the right to alimony, see *Wilson* v. *Wilson*, 2 Hagg. 204; *Milne* v. *Milne*, L. R. 2 P. & M. 202; 23 L. T. 877; *Mogurn* v. *Mogurn*, 10 P. R. 570. Amount to be allowed for interim alimony.

Where the defendant had agreed to pay the plaintiff an allowance for her separate maintenance, and subsequently a suit was brought for alimony, and for specific performance of the agreement, and the plaintiff obtained an order for interim alimony, and subsequently a decree for specific performance, it was held that the plaintiff was bound to credit the sums received as interim alimony, on account of the sums payable under the agreement: *Maxwell* v. *Maxwell*, 7 P. R. 63.

Where an order for interim alimony was granted (the defendant not appearing on the motion), for the amount indorsed on the bill, and the defendant subsequently moved to reduce the amount as excessive, a reference was granted, on payment of full costs of the application: *Hooper* v. *Hooper*, 3 Chy. Ch. 114.

Where a plaintiff in an alimony suit improperly registered a *lis pendens* the certificate was vacated, and the costs of the motion were ordered to be deducted from the interim alimony: *Crondell* v. *Crandell*, 20 C. L. J. 329. See *White* v. *White*, 6 P. R. 208, and notes to Jud. Act. s. 36, *supra*, p. 200.

Costs.—Under this *Rule*, in addition to interim alimony, the plaintiff is also entitled to an order for payment of the cash disbursements, properly made by her solicitor. Costs de die in diem.

The cash disbursements do not include fees paid to agents for solicitors' services, nor to counsel, when the solicitor or his partner is the counsel: *Gallagher* v. *Gallagher*, 17 P. R. 575; *Lalonde* v. *Lalonde*, 11 P. R. 143; *Leslie* v. *Leslie*, 12 C. L. T. 326. The former decisions of *Magurn* v. *Magurn*, 10 P. R. 570; *Bradley* v. *Bradley*, 21 C. L. J. 141; 10 P. R. 571, to the contrary, would seem not now to be followed; and see *Ingram* v. *Ingram*, 10 P. R. 569; and *Bucke* v. *Bucke*, 21 Gr. 77.

Notwithstanding this *Rule*, prospective witness fees were ordered to be paid on the plaintiff's solicitor's undertaking to account for the money paid, and not so expended: *Stevenson* v. *Stevenson*, 19 P. R. 48.

Where a cause was entered for trial it was ordered to stand over, until the defendant had paid to the plaintiff a sum sufficient to pay plaintiff's witnesses: *Hoffey* v. *Haffey*, 7 P. R. 137.

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In *Otway* v. *Otway*, 59 L. T. 153; 13 P. D. 141, a doubt was expressed as to whether the rules respecting a wife's costs in litigation with her husband were affected by *The Married Women's Property Act*.

Where, before trial, an alimony suit is compromised by the parties, the plaintiff returning to co-habitation with the defendant, the solicitor of the plaintiff is not entitled to his costs from the defendant as between solicitor and client, but only to cash disbursements: *Ringrose* v. *Ringrose*, 10 P. R. 299, 596, overruling *Leonard* v. *Leonard*, 9 P. R. 450; *Moore* v. *Moore*, 10 P. R. 284; and see *Thompson* v. *Thompson*, 57 L. T. 374; but see *Ferris* v. *Ferris*, 7 Ont. 496; *Re Friedberg*, 10 P. D. 112.

Registration of order.

Registration of Order.—An order for payment of interim alimony and disbursements may be registered: see the Jud. Act, sec. 73, *supra*, p. 237; *Miller* v. *Miller*, 8 C. L. T. 120.

Plaintiff failing, defendant to pay disbursements only.

388. Where the plaintiff in an alimony action fails to obtain a judgment for alimony, no costs beyond the amount of the cash disbursements actually and properly made by the plaintiff's solicitor, shall be ordered to be paid by the defendant. C.R. 1145.

Where a plaintiff *pendente lite* returned to her husband, on the petition of her solicitor, the defendant was ordered to pay the plaintiff's costs as between solicitor and client: *Leonard* v. *Leonard*, 9 P. R. 450; *Moore* v. *Moore*, 10 P. R. 284; 20 C. L. J. 291; but in *Ringrose* v. *Ringrose*, 10 P. R. 299, 596, Proudfoot, J., refused to follow the cases and only gave disbursements, and his decision was subsequently affirmed by the Divisional Court; and see *Thompson* v. *Thompson*, 57 L. T. 374; but see *Ferris* v. *Ferris*, 7 Ont. 496; *The Friedberg*, 10 P. R. 112.

As to what come within the term "cash disbursements": see *Rule* 387, notes.

(xiv) *Change of Solicitor.*

Change of solicitor.

389. A party suing or defending by a solicitor may change his solicitor by filing and serving a notice to that effect. C.R. 335. *Amended.*

Where a solicitor on the record dies, a new solicitor appointed by the client should file and serve a notice of his appointment, and *semble*, he should also give therein an address for service: see *Rule* 11; where this is not done: see *Rule* 392 as to how service of papers is to be effected.

The *Rule* is probably intended to apply only to cases where, under the former practice, an order of course to change a solicitor could be obtained, or where the change could be made without order.

Where under the former practice a special application was necessary it is probably still so.

Order to change solicitor when necessary.

Notice of Change of Solicitor.—A notice of change of solicitor is necessary, not only where the client desires to discharge his solicitor in an action, but also where the solicitor discharges himself: see *Griffiths* v. *Griffiths*, 2 Hare, 587; 7 Jur. 573. Where the client appoints

a new solicitor in place of one deceased, notice of the appointment of the new solicitor should be filed and served under this *Rule*: see *Hunt* v. *Fineburg*, 22 Q. B. D. 259; Braith. Pr. 564, 565; *Bonk of Montreal* v. *Harrison*, 4 P. R. 331. And, in default, the opposite party may serve papers as provided by *Rule* 392. Rule 389.

Until an order to change the solicitor is obtained and served, or a notice of the appointment of a new solicitor is filed and served under this *Rule*, service on the solicitor on the record or his agent, is good, even though the former has ceased to act, and though a new one has been appointed: *Dovidson* v. *Leslie*, 9 Beav. 104; *Wright* v. *King*, *Ib.*, 161; *Brown* v. *Burgor*, 2 Chy. Ch. 446; *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. 357; but eee *Reg.* v. *JJ. of Oxfordshire*, in note to *Rule* 199.

Under the former practice at law, the attorney could not be changed by the client, unless his costs were first paid: *Witt* v. *Ames*, 11 W. R. 751; but in Chancery the rule was otherwise: *Meyers* v. *Robertson*, 1 Gr. 439. This is one of those matters in which the rules of Equity and the rules of the Common Law differed, and therefore under the Jud. Act, s. 22, the rule of Epuity is now to prevail, and notice of the change of solicitor may be given without payment of coste: eee *Grant* v. *Hollond*, 3 C. P. D. 180. Payment of costs not a condition precedent.

Where there ie a joint retainer, notice to change the solicitor by some or one of the clients only, would be irregular: see *Re Norwich and Norfolk Building Society*, 22 W. R. 856; *Wedderburn* v. *Wedderburn*, 17 Beav. 158.

Where there are special facts: *e.g.*, the existence of a special retainer for a term of years unexpired: *Richards* v. *Scorborough Market Co.*, 17 Beav. 83; or the fact of the solicitor being mortgagee of the client's share in the fund in question: *Jenkins* v. *Bryant*, 3 Drew. 70; there, a notice by the client changing his solicitor would be liable to be set aside on the application of the solicitor. Material facts must be disclosed.

After a notice of change of solicitor has been filed and served, if the latter objects to the change, he should apply to set aside the notice: see *Topping* v. *Scorson*, 2 H. & M. 205. Setting aside order.

Where an action is brought in the name of a nominal plaintiff, the beneficiary on whose behalf the action is brought is entitled to change the plaintiff's solicitor, and if the nominal plaintiff insists on carrying on the action in the name of the original solicitor, he may be restrained by injunction from so doing on the application of the beneficiary: *Loskey* v. *Runtz*, 124 L. T. Jour. 569.

Where a solicitor on the record dies, the client must file and serve a notice of the appointment of a new solicitor as provided by this *Rule*, otherwise the opposite party may serve all subsequent proceedings as provided in *Rule* 392.

The notice is only authorized in the cases specified in *Rules* 389, 390, 391 and 392. In cases not specified, *semble*, an order of course is still necessary, *e.g.*—

Where one of several plaintiffs desires to make an application in the action separately from his co-plaintiffs, he must obtain an order of course, giving him leave to appoint a solicitor for that express purpose: Danl. Pr., 5th ed., 1724. Application by one of several plaintiffs.

Proceedings taken by a new solicitor without an order, or notice, filed and served under this *Rule*, when one is necessary, or by a

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suitor in person when he has a solicitor on the record, are irregular and will be set aside: *Rathbun* v. *Hughes*, 3 Chy. Ch. 160; *Yeatman* v. *Snow*, 42 L. T. 502; Arch. Pr., 13th ed., p. 110; 12th ed., p. 94.

If a solicitor retained in an ordinary Common Law action refuses, pending the action, to continue to act without some reasonable cause, and upon reasonable notice, he has no right of action for his costs: *Underwood* v. *Lewis*, 1894, 2 Q. B. 306; but the rule appears to be otherwise in actions for equitable relief, in which the proceedings might be of a very long and complicated character, and be divided into several stages: *Ib.*, and *In re Hall*, 9 Ch. D. 538.

Where a defendant, in consideration of an indemnity against costs, has agreed that his defence shall be conducted by a co-defendant, to whose solicitor he gives a retainer, he will be restrained from afterwards withdrawing the retainer or interfering with the prosecution of an appeal: *Montfort* v. *Marsden*, 1895, 1 Ch. 11, and *semble*, in such a case a notice changing his solicitor, without the consent of such co-defendant, would be irregular, and would be set aside on the application of the latter.

Notice to change when a discharge of solicitor by client.

The filing and serving of a notice changing a solicitor is *prima facie* a discharge of the former solicitor by the client: *Webster* v. *Le Hunt*, 9 W. R. 804. But it is not a discharge of the solicitor by the client, where it is filed and served in consequence of the prior refusal of the solicitor to act; and a solicitor will be considered to have discharged himself, on the bankruptcy of himself, or the firm of which he is a partner: *Re Moss*, L. R. 2 Eq. 345; or by being arrested, or detained in custody: *Re Williams*, 3 D. F. & J. 104; 28 Beav. 465; *Scott* v. *Fleming*, 9 Jur. 1085; but not by being merely in embarrassed circumstances: *Re Smith*, 9 W. R. 396. So also a firm of solicitors will be deemed to have discharged the client, where the firm is dissolved; and no arrangement can be made by the solicitors for the transfer of the client's business to one of their number without his consent amounting to a new retainer: *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Griffiths* v. *Griffiths*, 2 Hare, 587; *Slater* v. *Stoddard*, 6 P. R. 299; *Alchin* v. *Buffalo & L. H. Ry. Co.*, 2 Chy. Ch. 45.

Where any new party is brought into an action by order to continue proceedings, by reason of the death of, or transfer of interest by, any of the parties, such new party is not obliged to employ the solicitor by whom the deceased person, or transferor, was represented, but he may employ a new solicitor, but notice of such new solicitor being so employed must be filed and served as required by this *Rule* in the proper office: see *Rule* 762: and see *Simmonds* v. *Great Eastern Ry. Co.*, L. R. 3 Chy. 797; but the assignee of the plaintiff in a creditor's suit could not appoint a new solicitor except on special application: *Topping* v. *Scorson*, 2 H. & M. 205.

Although a solicitor may, for sufficient cause, by notice to his client, terminate the connection between them, the Court will not make an order for that purpose on the *ex parte* application of the solicitor: *Bricker* v. *Ansell*, 1 Chy. Ch. 367.

Solicitor when restrained from acting for opposite party.

Solicitor Restrained from Acting for Opponent.—Where a solicitor is discharged by the dissolution of a firm of which he is a member, he is not at liberty to act for the opposite party: *Cholmondeley* v. *Clinton*, 19 Ves. 261; but when he is discharged by his client he cannot be restrained from acting for the opposite party, nor the latter

from employing him: *Little* v. *Kingswood & Parkfield Colliery Co.*, 20 Ch. D. 733; 47 L. T. 323; 52 L. J. Chy. 66; *Rakusen* v. *Ellis*, *infra*; but the solicitor may be restrained by injunction from divulging the secrets of his former client to the opposite party, either in the same transaction, or in any other flowing thereout, or connected therewith: *ib.*; and see *Davies* v. *Clough*, 8 Sim. 262, 267; *Grissell* v. *Pelo*, 9 Bing. 1; *Johnson* v. *Marriott*, 2 Cr. & M. 183; *Rakusen* v. *Ellis*, 1912, 1 Ch. 831; 106 L. T. 556. Rule 369.

An agreement between solicitors acting for different parties, to share profit costs, in consideration of being introduced into the litigation, was held to be misconduct: *Re Four Solicitors*, 1901, 1 K. B. 187.

How far the solicitor's retainer continues after judgment is recovered in the action in which he is retained to sue or defend, seems doubtful; see 79 L. T. Jour. 208; *Millar* v. *Kanody*, *supra*, p. 656, in note to *Rule* 202. Service of notice of appeal from the judgment made on the respondent's solicitor on the record, was held good: *De la Pole* v. *Dick*, 29 Ch. D. 351; 52 L. T. 457; but a retainer of a solicitor to collect a debt was held not to authorize him, after judgment recovered, to enter upon interpleader proceedings without further instructions: *James* v. *Ricknell*, 20 Q. B. D. 164; 58 L. T. 278. See also *Reg.* v. *JJ. of Oxfordshire*, 1893, 2 Q. B. 149.

Where an order has been made dismissing an action for failure to give security for costs, the retainer of the defendant's solicitor was held to continue, so as to enable the plaintiff to serve him as the solicitor on the record with proceedings by way of appeal from, or under *Rule* 217, to rescind, the order: *Muir* v. *Guinane*, 9 O. L. R. 324; 10 O. L. R. 367.

Lien of Solicitor on Books and Papers.—A solicitor has a lien on the books and papers of his client, which have come to him in the course of business in his professional capacity. This lien, however, is a mere right to retain the documents until his costs are paid, and cannot be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. In the absence of any agreement to the contrary, the lien is general, and attaches for all costs due from the client, and is not confined to the costs incurred in the particular business in which the documents came into the solicitor's hands: *Re Faithful*, L. R. 6 Eq. 325; *Bozon* v. *Bolland*, *supra*; *Richards* v. *Plalel*, Cr. & Ph. 82; *Worrall* v. *Johnson*, 2 Jac. & W. 214; *Ex parte Sterling*, 16 Ves. 257; *Friswell* v. *King*, 15 Sim. 191; *Colmer* v. *Ede*, 19 W. R. 313; *Re Messenger*, 3 Ch. D. 317; and see *Re Rapid Rood Tronsil Co.*, 1909, 1 Ch. 96; 99 L. T. 774. While it exists the client is not entitled to inspect or take copies of papers subject to the lien: *Re Biggs*, 102 L. T. Jour. 364. Lien on books and papers.

As to principles and extent of a solicitor's lien, generally, and the remedies against a solicitor to enforce production, or delivery, notwithstanding his lien: see *Re Hawkes*, 1898, 2 Ch. 1, 15; 78 L. T. 336.

The solicitor cannot acquire any greater right of detainer, than the client had himself, and the lien is therefore subject to the rights and equities of those claiming by title paramount to that of the client: *Francis* v. *Francis*, 5 D. M. & G. 108; *Sledmon* v. *Webb*, 4 My. & Cr. 346; *Clulton* v. *Pardon*, T. & R. 304; *Molesworth* v. *Robbins*, 2 J. & Lat. 358; *Pelly* v. *Wathen* 1 D. M. & G. 16; 7 Ha. 351; *Blunden* v. *Desart*, 2 Dr. & W. 405; *Bell* v. *Taylor*, 8 Sim. 216; *Baker* v. *Henderson*, 4 Sim. 27; *Worburton* v. *Edge*, 9 Sim. 508; *Re Mosely*,

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15 W. R. 975; *Young* v. *English*, 7 Beav. 10; *Stennett* v. *Aruyn*, 2 Chy. Ch. 218; *Re Union Cement and Brick Co., Ex parte Pulbrook*, L. R. 4 Chy. 627; and where the client would be bound to produce the documents in evidence on the demand of third parties, the solicitor cannot refuse to produce them on the ground of his lien: *Hope* v. *Liddell*, 7 D. M. & G. 331; 20 Beav. 438; *Fowler* v. *Fowler*, 44 L. T. 799; 50 L. J. Ch. 686; *Re Lawrence, Bowker* v. *Austin*, 1894, 1 Ch. 556; 70 L. T. 91; *Re Llewellin*, 1891, 3 Ch. 145; 65 L. T. 240; *Smith* v. *Pontypridd & R. V. T. Co.*, 96 L. T. Jour. 83; *Re Hawkes*, 1898, 2 Ch. 1; 78 L. T. 336.

A solicitor, employed by a person about to be appointed a trustee, is entitled to a lien on the trust deed for his costs incurred before its execution in investigating the title of the trust property, and preparing the deed, etc., both as against his client, the trustee, and also as against the *c. q. t.*: *In re Dee, Wright* v. *Dee*, 1911, 2 Ch. 85; 104 L. T. 903.

Third parties, whose rights are acquired under the client subsequent to the creation of the lien, have no greater rights than the client himself had at the time they acquired title: *Gill* v. *Gamble*, 13 Gr. 169; 2 Chy. Ch. 135. The solicitor, however, cannot claim a lien against such third parties, for costs incurred by him subsequently to their acquiring their rights: *Blunden* v. *Desart*, 2 Dr. & W. 405; *Re Rapid Road Transit Co.*, 1909, 1 Ch. 96; 99 L. T. 774.

A solicitor cannot acquire a lien on the documents of a joint stock company which by statute, or the articles of association, are required to be kept in the office of the company: *Re The Anglo-Maltese Co.*, 52 L. T. 841; but he may acquire a lien on the books and documents of a company which are not so required to be kept in the office of the company, *Ib.*, but not for business which was *ultra vires* of the company: *Re Howard & Dollman*, 1 H. & M. 433.

A solicitor of a company, of whose assets a receiver is appointed, is entitled to a lien on the moneys of the company in his hands for all costs incurred up to the appointment of the receiver: *Re British Tea Table Co.*, 101 L. T. 707.

A solicitor who is employed by a mortgagor and mortgagee to prepare a mortgage, after completion of the mortgage holds the title deeds for the mortgagee, and cannot as against him, claim any lien thereon for a debt due by the mortgagor: *Ex parte Quinn*, 49 L. T. 811.

A solicitor is not entitled to a lien on his client's papers, for the costs of proceedings instituted against the solicitor on behalf of the client: *Re Honbury*, 75 L. T. 449.

Semble, an agent of a solicitor is entitled to a lien on the documents which come to his hands in the course of his agency, for the costs of the proceedings in which the documents relate both as against his principal and the latter's client: see *Re Jones*, 1905, 2 Ch. 219.

Effect of taking security.

The lien is superseded by the solicitor's taking security for his costs inconsistent with the retention of his general lien: *Cowell* v. *Simpson*, 16 Ves. 275; *Re Taylor*, 1891, 1 Ch. 590; see *Brownlow* v. *Keatinge*, 2 Ir. Eq. 243; *Kennin* v. *Macdonald*, 22 Ont. 484; *Bissell* v. *Brodford & P. T. Co.*, 94 L. T. Jour. 285; *Re Douglas*, 1898, 1 Ch. 199; 77 L. T. 552; but only to the extent of the security: *Watson* v. *Lyon*, 7 D. M. & G. 288; *Re Morris*, 1908, 1 K. B. 473; 98 L. T. 500; and ceases altogether on payment, and the solicitor cannot then retain documents

on the ground that a third party claims an interest in them: *Re Emma Mine, Ex p. Turner*, 24 W. R. 54. The lien may also be lost by the solicitor's assigning his bill of costs to a third party: *Reeser* v. *Ellis*, 7 P. R. 371; and also by parting with possession of the documents; but where on the dissolution of a firm of solicitors, one of the partners took possession of documents on which the firm had a lien, without the permission or consent of his late partners, it was held that the lien of the firm was not thereby lost: *Re Carter, Carter* v. *Carter*, 53 L. T. 630. Rule 389.

Where a firm is changed by the introduction of a new partner, there is no lien on papers delivered to the new firm, for costs due the old firm: *Re Forshaw*, 16 Sim. 121.

Toronto agents, as against their principals, have a general lien for their agency bills on papers placed in their hands by their principals; and the lien is not lost even though the relationship of principal and agent is dissolved by the agent: *Re Attorney*, 7 P. R. 311; *Re A. B. & Co.*, 14 C. L. J. 142; *Re Cross*, 4 Chy. Ch. 11. Agent of solicitor.

A solicitor is entitled to a lien on a deceased client's books and papers for moneys due by the client's executor, or administrator, in his individual capacity: see *Re Foster*, 116 L. T. Jour. 388.

Lien on Fund.—A solicitor has not only a general lien on his client's papers for all costs due to him, but he has also a particular lien for the costs of proceedings to recover a fund, upon the fund recovered, or ordered to be paid: *Lann* v. *Church*, 4 Mad. 391; even against a liquidator of a client company: *Re Meter Cabs Ltd.*, 1911, 2 Ch. 557; 105 L. T. 572; or a receiver appointed at the instance of debenture holders of the company: *Re British Tea Table Co.*, 101 L. T. 707; and, if the fund actually reaches the solicitor's hand, he is only entitled to retain it until his costs of the action in which the fund is recovered are paid: he has not a general lien thereon for all costs: *Mackenzie* v. *MacIntosh*, 64 L. T. 318, 706; but he is entitled to a lien thereon for any costs he is put to in establishing his lien, in case his retainer is disputed: *Re Meter Cabs Ltd.*, *supra*; and his lien attaches upon the sum to which his client becomes entitled, in priority to the claims of other parties to whom his client is personally ordered to pay costs: *Wright* v. *Bell*, 24 S. C. R. 656; and the taxing officer, or Master, unless specially authorized so to do, has no power to set off costs payable to a party out of a fund in Court against costs payable by such party personally to other parties in the action, so as to deprive his solicitor of his lien on the fund: *Ib.*; *Davidson* v. *Douglas*, 15 Gr. 354; *Hall* v. *Laver*, 1 Hare, 571; but his lien only extends to what is due to him in his character of a solicitor: *Re Galland*, 31 Ch. D. 296; 53 L. T. 921. Lien on fund.

Where the compromise of an action is sanctioned by the Court on behalf of infant parties, and a fund is directed to be paid to them, without reserving the rights of their solicitor, the latter is not thereby deprived of his common law lien for costs on the fund so recovered, or preserved, through his instrumentality: *Re Wright's Trusts*, 1901 1 Ch. 317; 83 L. T. 515.

The solicitor's lien on the amount payable under a verdict is entitled to priority over the claim of a creditor of his client who has obtained an attaching order: *Berneski* v. *Tourongeau*, 18 P. R. 263.

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The solicitor may give notice to the opposite party not to pay the money until his costs are satisfied: *Cowell* v. *Simpson*, 16 Ves. 275; and see *Sympson* v. *Prothero*, 5 W. R. 814; notice to his solicitor is sufficient: *Sanvidge* v. *Ireland*, 14 P. R. 29. And this lien is not lost by the discharge of the solicitor by the client, or by the act of God, pending the suit; thus where the plaintiff assigned his interest in the suit, and the assignee named a new solicitor, the first solicitor was held entitled to a lien on the fund ultimately recovered and to payment of his costs thereout, next after those of the solicitor by whom the suit was concluded: *Clark* v. *Eccles*, 3 Chy. Ch. 324; and see *Kellett* v. *Kelly*, 5 Ir. Eq. R. 34; *Bozen* v. *Bolland*, 4 My. & Cr. 354; *Cormack* v. *Beisly*, 3 D. & J. 157; *Re Wadsworth, Rhodes* v. *Sugden*, 34 Ch. D. 155; 55 L. T. 596. But after the fund has been paid to the client, with the solicitor's acquiescence, or without notice by the payer of the solicitor's claim, his lien is gone, and he must look to his client alone for payment of his costs: see 86 L. T. Jour. 446.

If payment be made to the client, notwithstanding notice given by the solicitor not to pay till his costs are satisfied, the solicitor, to the extent of his lien, is entitled to recover the amount paid against the party paying: *Ross* v. *Buxton*, 42 Ch. D. 190.

Solicitor refusing to act.

Where the solicitor declines to act he has no lien upon a fund in Court: *Cresswell* v. *Byron*, 14 Ves. 271.

Compromise.

Where a compromise has been made, the plaintiff's solicitor may be entitled to a lien on money payable under it to his client as the fruits of litigation: see *Walker* v. *Gurney*, 18 P. R. 274, 471; *Re Wright's Trusts*, 1901, 1 Ch. 317.

Lien may be actively enforced.

The lien on a fund may be actively enforced: *Bozon* v. *Bolland*, 4 My. & Cr. 354. The solicitor may obtain a stop order: *Hobson* v. *Shearwood*, 8 Beav. 486; or an order for payment of his costs out of any money in Court payable to his client, or applicable to the payment of the costs: *Wardell* v. *Trenouth*, 8 P. R. 142; or a charge for his costs on a fund recovered or preserved through his instrumentality: see *Rule* 689. But a solicitor can have no higher claim against a fund, by virtue of his lien than that of his client: and if the client would not be entitled to payment of his costs out of the fund neither will his solicitor; although it may have been recovered by means of proceedings taken by him: *Francis* v. *Froncis*, 5 D. M. & G. 108; *Re Harrald, Wilde* v. *Walford*, 51 L. T. 441.

Where several solicitors in succession have acted, the general rule is that the solicitor who conducts the action to a successful termination is entitled to be paid first, and so, in inverse order, up to the solicitor first employed: *Ford* v. *Mason*, 15 P. R. 392; *Re Knight, Knight* v. *Gardiner*, 1892. 2 Ch. 368; 66 L. T. 646; see also *Clark* v. *Eccles*, 3 Chy. Ch. 324; but the first solicitor may be entitled to be paid first out of a fund created by his exertions, *e.g.*, by his having obtained an order for its payment into Court before his discharge: *Ford* v. *Mason*, *supra*.

Client cannot defeat lien.

The client cannot assign a fund in Court so as to defeat his solicitor's lien, even to a purchaser for value, without express notice: *Haymes* v. *Cooper*, 33 L. J. Chy. 488; *Yemen* v. *Johnston*, 11 P. R. 231. Neither can the client release the adverse party from the payment of costs ordered to be paid, so as to defeat his solicitor's lien: *Ex parte Bryant*, 1 Mad. 49. But the lien may be defeated by a *bond*

fide compromise by the parties to the action: *The Hope*, 8 P. D. 144; 49 L. T. 158; *Bellamy* v. *Connolly*, 15 P. R. 87; *Brunsdon* v. *Allard*, 1859. 2 El. & El. 19; *Walker* v. *Gurney*, *supra*, p. 910; but a collusive compromise will not have that effect: Beames Costs, 312, 313; *Langle* v. *Fetterly*, 5 U. C. Q. B. 628; *Griggs* v. *Meyers*, 6 U. C. Q. B. 532; *Connors* v. *Squires*, 2 P. R. 149; and see *Plant* v. *Stone*, 9 U. C. Q. B. 458; *Ex parte Morrison*, L. R. 4 Q. B. 153; *Ex parte Games*, 3 H. & C. 294; *Brown* v. *Conant*, 2 P. R. 208; *Smith* v. *Thompson*, 5 P. R. 110; *Morgan* v. *Holland*, 7 P. R. 74; *Barrett* v. *Barrett*, 42 Ch. D. 190; 18 C. L. J. 56; *Hall* v. *Griffith*, 5 Ont. 478; *Friedrich* v. *Friedrich*, 10 P. R. 308. 546; *Ross* v. *Buxton*, 60 L. T. 630; *Re Margetson & Jones*, 1897, 2 Ch. 314; 76 L. T. 805. Rule 389.

But collusion must be shewn, or the act complained of must have been done after notice from the solicitor complaining that his costs are unpaid, and that he looks to the proceeds of the action for payment: *Sandidge* v. *Ireland*, 14 P. R. 29; see *Re Elliott* v. *McCuaig*, 27 C. L. J. 26; *De Santis* v. *Can. Pac. Ry.*, 14 O. L. R. 108.

Where a compromise is effected for the purpose of depriving a plaintiff's solicitor of his costs, he may be authorized to carry on the action for the purpose of realizing them out of the defendant: *Dunthorne* v. *Bunbury*, 24 L. R. Ir. 6; but unless collusion to deprive the solicitor of his costs is clearly shewn, the defendant will not be ordered to pay the plaintiff's solicitor's costs: *Bellamy* v. *Connolly*, 15 P. R. 87. But where, in a suit for foreclosure, the plaintiff and defendant compromised the suit, the plaintiff paying the defendant $200 in consideration of his releasing his equity of redemption, the defendant's solicitor was held to have no lien on the $200; *Brownscomb* v. *Tully*, *Re Fairbairn*, 3 Chy. Ch. 71.

An agent of a solicitor has a lien on a fund recovered: *Re Ryan*, 11 P. R. 127, and payment by the client to the agent in order to obtain his papers, is a good payment as against the principal solicitor: Re *Cross*, 4 Chy. Ch. 41; but the lien of the agent is no greater than that the principal solicitor, and if the latter has no claim upon the fund as against his client, the agent may be compelled to pay it over upon a summary application on behalf of the client: *Re Edwards*, 45 L. T. 578. Where the fund was in Court an order was made for payment to the agent of the amount of his lien thereout: *Re Ryan*, 11 P. R. 127.

Where money is standing to the separate account of a party to a cause, he may apply for payment out by a new solicitor, without an order changing the solicitor: *Waddilove* v. *Taylor*, 17 L. J. Chy. 384. But where the new solicitor delivered the cheque to the client before the lien of the former solicitor was satisfied, he was ordered to pay him the amount of his lien: *McPhatter* v. *Blue*, 15 C. L. J. 162.

A plaintiff's solicitor has no lien for his costs on money paid by plaintiff into Court as security for costs, as against the execution creditor of the plaintiff who has obtained a stop order: *Gibson* v. *Le Temps*, 10 O. L. R. 434.

Effect of Lien on Right of Set-off between Parties.—Under *Rule* 606, *infra*, set-off of damages or costs between the parties is not to be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but costs of interlocutory proceedings in the same action may be set-off: see *Rule* Effect of lien on right of set-off.

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665 and notes. But that *Rule* is held to apply only to the set-off of damages and costs in separate actions: see notes to *Rule* 666; where that is sought, the set-off is not to be allowed to the prejudice of the solicitor's lien: *Webb* v. *McArthur*, 4 Chy. Ch. 63; *Edwards* v. *Hope*, 14 Q. B. D. 922; 53 L. T. 69; *Cuthcbert* v. *Commercial Travellers Assoc.*, 7 P. R. 255; and see *Ross* v. *McLay*, 7 P. R. 97; *Wardell* v. *Trenouth*, 8 P. R. 142; *Barker* v. *Hemming*, 5 Q. B. D. 509; *Re Harrald*, *Wilde* v. *Walford*, 48 L. T. 352; 51 L. T. 441; but see *Wilson* v. *Switzer*, 1 Chy. Ch. 75, 160. But a set-off of damages and costs payable in the same action, will ordinarily be allowed without regard to the solicitor's lien: *Pringle* v. *Gloag*, 10 Ch. D. 676; 40 L. T. 512; *Cameron* v. *Campbell*, 12 U. C. Q. B. 159; *Young* v. *Hobson*, 8 P. R. 253; *Brigham* v. *Smith*, 17 Gr. 512; and the set-off of a claim and counter-claim arising out of the same transactions cannot be defeated by the claim of a solicitor to a lien: *Brown* v. *Nelson*, 11 P. R. 121 (per Osler, J.A.); *Westacott* v. *Bevan*, 1891, 1 Q. B. 774; 65 L. T. 253; but see *Flett* v. *Way*, 14 P. R. 312 (where the plaintiff being awarded costs against one defendant, and being ordered to pay the costs of other defendants, all the defendants being represented by the same solicitor, a set-off to the prejudice of the lien of the plaintiff's solicitor, was refused), and *Canadian Pacific Ry.* v. *Grant*, 11 P. R. 208 (where the claim, and counter-claim, were regarded as separate actions).

Where a special lien was given by one of the parties to his solicitor, the right of set-off, to the extent of the special lien thus created, was held to be defeated: *Ross* v. *McLay*, 7 P. R. 97.

Lien on estate recovered.

Lien on Estate Recovered.—Until the passing of *Rule* 689, a solicitor in Ontario could not become entitled to any lien on an estate recovered through his instrumentality: *Shaw* v. *Neale*, 6 H. L. C. 581; *Tremeear* v. *Lawrence*, 20 Ont. 137; but see *Morgan* v. *Holland*, 7 P. R. 74. Since *Rule* 689, however, a charge may be declared and enforced: see notes to that *Rule*.

Discharge of solicitor by client.

Effect of Discharge of Solicitor on his Lien.—Where the solicitor is changed by the client, the original solicitor is still entitled to a lien on any fund afterwards recovered in the cause, and is entitled to be paid his costs, after the costs of the solicitor by whom the suit is concluded: see *Clark* v. *Eccles* and other cases, *supra*, p. 910.

There is an important difference in the right of lien, of a solicitor in an action who discharges himself, and one who is discharged by his client.

Discharge by client.

Where the solicitor is discharged by the client he cannot generally be ordered to deliver up the papers, until his lien has been satisfied: *Re Faithful*, L. R. 5 Eq. 325; *Griffiths* v. *Griffiths*, 2 Hare, 587; *Bozen* v. *Bolland*, 4 My. & Cr. 354, unless it appears that there is strong ground for believing that there is nothing due the solicitor: *Re Bevan & Whitting*, 33 Beav. 439. Nor is the solicitor, in such a case, bound even to produce the papers for the purpose of the cause, until his bill is paid: *Lord* v. *Wormleighton*, Jac. 580; *Redfearn* v. *Sowerby*, 1 Sw. 84; *Robins* v. *Goldingham*, L. R. 13 Eq. 440; but see *Simmonds* v. *Great Eastern Ry. Co.*, L. R. 3 Chy. 797; *Clifford* v. *Turrill*, 2 D. & S. 1; *Webster* v. *Le Hunt*, 9 W. R. 804; *Re Leah*, 6 Jur. N. S. 387; nor permit his client to inspect, or take copies of the documents: *Re Biggs*, 102 L. T. Jour. 364, but see *Lockett* v. *Carey*, 10 Jur. N. S. 144. But where the discharged solicitor neglects to deliver his bill of costs within

the proper time, he may be ordered to deliver up the papers subject to his lien thereon: *Cooper* v. *Hewson*, 2 Y. & C. C. C. 515; and, where the papers are urgently needed, he may be ordered to deliver them up, on the amount claimed for costs being paid into Court, together with a sum to meet the costs of taxation: *Re Galland*, 31 Ch. D. 296; 53 L. T. 921; *Re South Essex Investment Co.*, 46 L. T. 280. Rule 389.

Where the action is one for administration, in which the rights of third parties are concerned, the solicitor, though discharged by his client, may be compelled to deliver up the papers necessary for the prosecution of the action on the usual terms: *Re Boughton, Boughton* v. *Boughton*, 48 L. T. 413; *Belaney* v. *Ffrench*, L. R. 8 Chy. 918; 29 L. T. 706; and it is immaterial that the papers came to the hands of the solicitor before the action was commenced: *Re Hawkes*, 1898, 2 Ch. 1; 78 L. T. 336; and so also in a partition action: *Boden* v. *Hensby*, 1892, 1 Ch. 101; 65 L. T. 744 (see *Re Hawkes*, *supra*, at p. 11); *Pallister* v. *Medd*, 33 C. L. J. 465; and see *Re Capital Fire Insurance Assn.*, 24 Ch. D. 408; 49 L. T. 697; *Hutchinson* v. *Norwood*, 54 L. T. 842. But costs incurred by an administrator in administration proceedings are a charge upon the estate, and upon his death, the administrator de *bonis non* takes the estate subject to the charge, and cannot compel the delivery up of papers in the hands of the solicitor until his costs are paid: *Re Watson*, 50 L. T. 205. Administration action.

A lien on books and papers may continue in respect of a bill barred by the Statute of Limitations: see *Curwen* v. *Milburn*, 42 Ch. D. 424; 62 L. T. 278; *Re Carter, Carter* v. *Carter*, 53 L. T. 630; and under an order for taxation containing a submission on the part of the client to pay what is found due on taxation, payment of statute-barred costs will be enforced: *Re Margetts*, 1896, 2 Ch. 263; see also *Re Brockman*, 1909, 2 Ch. 170; 100 L. T. 821.

A solicitor is bound to deliver up documents on which he has a lien, on tender of the amount of his claim, though not in settlement: *Re Hanbury*, 75 L. T. 449.

When a solicitor is retained by the acting partner of a firm, as solicitor for the firm in an action, the retirement of a dormant partner from the firm, without notice to the solicitor, pending the action, will not relieve the retiring partner from liability to the solicitor for his costs subsequently incurred: *Court* v. *Berlin*, 1897, 2 Q. B. 396; 77 L. T. 293.

Effect on Lien, of Solicitor Discharging Himself.—Where the solicitor discharges himself, he is bound to deliver up the papers in the action to the new solicitor, upon the latter undertaking to hold them subject to his lien for what, if anything, shall be found due on taxation of his bill; and to proceed with the cause with due diligence, and to re-deliver the papers within ten days after he shall cease to have occasion for them, if the lien be not sooner satisfied: *Colgrave* v. *Manley*, T. & R. 400; *Heslop* v. *Metcalf*, 3 My. & Cr. 183; *Wilson* v. *Emmet*, 19 Beav. 233; *Cane* v. *Martin*, 2 Beav. 584; *Robins* v. *Goldingham*, L. R. 13 Eq. 440; *Ley* v. *Brown*, 1 Chy. Ch. 179; *Merrewether* v. *Mellish*, 13 Ves. 161; *Mayne* v. *Hawkey*, 3 Sw. 93; *Webster* v. *Le Hunt*, 9 W. R. 804; *Commerell* v. *Poynton*, 1 Sw. 1. The solicitor cannot, in such a case, require the client to undertake to proceed to a taxation of his bills: *Moir* v. *Mudie*, 1 S. & S. 282. And Solicitor discharging himself.

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If he refuses to deliver up the papers to the new solicitor, on his undertaking as above mentioned, he may be ordered to pay the costs of an application to compel him to do so: *Robins* v. *Goldingham*, *supra*. A solicitor who declines to proceed with an action until his costs are paid, in effect discharges himself: *Ib.*, and see *Re Lewis*, 72 L. T. Jour. 387; but see *Underwood* v. *Lewis*, and *In re Hall*, *supra*, p. 906. And so the dissolution of the firm of solicitors engaged by the client, or the arrest, or detention in custody, or bankruptcy, of the solicitor, works a discharge of the client by the solicitor: *vide supra*, p. 906. But where the client dies, or his interest is transferred by assignment or otherwise, and an order is made to continue the proceedings in the name of some new party who names a new solicitor, in such cases the solicitor is deemed to be discharged by the client: see *Re Moss*, L. R. 2 Eq. 345.

Party who has acted in person may appoint solicitor.

390. A party suing or defending in person and desiring to be represented by a solicitor may file and serve a notice to that effect. C.R. 336. *Amended.*

See note to *Rule* 389.

Notice of acting in person.

391. A party represented by a solicitor and desiring to sue or defend in person may file and serve a notice to that effect. *New.*

See note to *Rule* 389.

Death of solicitor.

392. When the solicitor on the record dies and no notice changing the solicitor has been filed and served, service may be effected by mailing the document to be served to the party at his address given in the writ or appearance (as the case may be) by registered letter, indorsed with a memorandum: "This document is served by mail as your solicitor is dead and no new solicitor has been appointed in his place." *New.*

See note to *Rule* 389.

The procedure authorized by this *Rule* must be strictly followed, or the mode of service thereby authorized may not be effective.—The document to be served is to be indorsed with the memorandum mentioned in the *Rule*, not the letter enclosing it.

(xv) *Compounding Penal Actions.*

Leave to compound penal actions.

393. Leave to compound a penal action may be given, but in cases where part of the penalty goes to the Crown notice shall first be given to the Attorney-General for Canada or the Attorney-General for Ontario as the case may be. C.R. 436. *Amended.*

By 18 Eliz., c. 5, s. 3 (now Jud. Act, sec. 145, *supra*), no penal action by a common informer can be compromised without the leave of the Court.

Where the Crown is concerned, the consent of the Attorney-General must be procured: *Howard* v. *Sowerby*, 1 Taunt. 103. If the Crown ae represented by the Dominion Government ie entitled, the Attorney-General of Canada must be notified, and if the Crown as represented by the Provincial Government is entitled, then the Provincial Attorney-General must be notified. Leave is not necessary in actions by the party aggrieved: *Kirkham* v. *Wheeley*, 1 Salk. 30. It is entirely in the discretion of the Court to grant it, or not: *Maughan* v. *Wolker*, 5 T. R. 98; *Sheldon* v. *Mumford*, 5 Taunt. 268. Where the sum offered is so small as to indicate collusion, leave will be refused: *Wood* v. *Cassin*, 2 W. Bl. 1157. Leave will not be granted until after the statement of defence: *Rex* v. *Collier*, 2 Dowl. 481; and see *Rex* v. *Crisp*, 1 B. & Al. 282. Rule 394. Leave, when granted.

Leave was given to compromise a penal action brought under 32 Hen. 8, c. 8, for buying pretended titles, on paying the Crown's share into Court: *May q. t.* v. *Dettrick*, 5 O. S 77.

A promise founded on the compromise of a penal action without the leave of the Court is void: *Hort* v. *Meyers*, 7 U. C. Q. B. 416; and see *Bell* v. *Riddell*, 10 Ont. App. 544.

An action for a penalty imposed by a statute cannot be brought by a common informer, unless the statute imposing the penalty so provides, either expressly, or by implication: *Bradlaugh* v. *Clarke*, 8 App. Cas. 637; 48 L. T. 681; 52 L. J. Q. B. 505. Where the penalty was claimed under the wrong statute, an amendment was refused: *Burnett* v. *Samuel*, 109 L. T. 630; 29 T. L. R. 583; *Forbes* v. *Samuel*, 1913, 3 K. B. 706; 109 L. T. 599. Where action by informer will lie.

Where the statute does not authorize an action by a common informer, the penalty can only be recovered in a proceeding at the suit of the Crown: *Bradlaugh* v. *Clarke*, *supra*; but see *Shrigley* v. *Taylor*, 4 Ont. 396.

An action to recover a penalty cannot be brought by an infant by his next friend; it must be brought by the informer in person, or by his solicitor: *Garrett* v. *Roberts*, 10 Ont. App. 650

The Court refused to set aside a judgment of *non pros.* regularly signed, in a penal action: *McClenigan* v. *McLeod*, 8 U. C. L. J. 233; 3 P. R. 13.

The pendency of a prior action for the same penalty is, if *bonâ fide*, a bar to a subsequent action: *Forbes* v. *Samuel*, *supra*.

The Court of a Judge, and the Lieutenant-Governor in Council, have now power to remit penalties imposed by any Act of the Province of Ontario, either wholly, or in part: see *The Fines and Forfeitures Act* (R. S. O. c. 99), ss. 6, 7. They have, however, no power to remit costs incurred up to the time of the remission: *Ib.*, s. 7. Remission of penalties.

And by *The Criminal Code* (R. S. C. c. 146), s. 1084. The Governor-General in Council may also remit, penalties, fines or forfeitures imposed by Dominion Statutes.

394. The order for compounding shall not be made unless the defendant undertakes to pay the sum for which the Court has given him leave to compound such action. C.R. 437. Order for compounding.

Rules 395, 396.

The payment of such sum might formarly be enforced by attachment: *Regina* v. *Clifton*, 5 T. R. 257; hut see now *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83) s. 13.

King's proportion of composition.

395. Where leave is given to compound the proportion of the Crown shall, unless otherwise ordcred, be paid into Court for the use of His Majesty. C.R. 438.

See *Brown* v. *Boiley*, 4 Burr. 1929. Presumahiy the money should he paid through the Accountant'a office in the same manner as other moneys are paid into Court: aee *Rulcs* 727, *et seq.* By the order authorizing the action to be compounded, or hy some subsequent order, proviaion should he made for payment out of the money to the Provincial Tressurer, or other puhiic officer entitled to receive the same

(xvi) *Transmission of Papers.*

Local officers to transmit papers to Toronto on præcipe.

396.—(1) Every local officer shall upon *præcipe* and payment of the necessary postage or express charges for transmission and return, transmit to the Central Office, Toronto, all papers and documents required for use in Toronto. C.R. 337.

Transmission of documents from one officer to another.

(2) Where documents filed with an officer of the Court, are required by or for use before any other officer, the officer with whom the documents are filed shall upon the production of a request signed by the officer requiring them, transmit them upon payment of the postage or express charges required for their transmission and return. C.R. 338.

The following are clauses of Regulations of the Judges, promulgated on 17th Dec., 1904:—

6. When the Judge at a trial reserves judgment in any case, elsewhere than at Toronto, the Clerk of the Court shall forthwith forward the Record and Exhibits to the Central Office.

7. All Local Officers of the Court when aending papers or Exhibits to the Central Office ahall indorse on the wrapper enclosing such papers or Exhihits, the short style of cause, the title of the Officer sending them, and the purpose for which they are sent.—*e.g.*, "*Jones* v. *Smith*. From Local Registrar at Brantford, for Appeal to Divisional Court," *or* "For Hon. Mr. Juatice —— "—*or as may be*.

Where the papers are transmitted for the purposes of an appeal to a Judge of the High Court Division it should be so stated.

Production of documents in other causes may be ordered.

This *Rule* is general in its terms, and appears to apply to all documents, whether filed with an officer in the action, in which their production is required, or in some other action. But there seems to be an obvioua objection to strangers to an action being permitted, on præcipe, to require the transmission of papers therein to another office. Serious inconvenience might he occasioned thereby.

Rules 397, 398.

Proof required that production of originals is necessary.

Formerly, where the documents in some other cause were required to be produced, an order was considered necessary. Where a party in his affidavit on production referred to documents produced by him, and in the custody of a Deputy Registrar in another suit, an order was made *ex parte* for their production: *Gainer* v. *Doyle*, 2 Chy. Ch. 279; but see *Hamelyn* v. *White*, 6 P. R. 143. On a motion to produce documents in another cause at the trial, it was necessary to show that the original documenta were required, and that the production of office copies would not be sufficient: *Chadwick* v. *Thompson*, 2 Chy. Ch. 389; *Jarvis* v. *White*, 8 Ves. 313; *Attorney-General* v. *Ray*, 6 Beav. 335; *Anon.*, 13 Beav. 420; and see *Gaynor* v. *Salt*, 24 U. C. Q. B. 180; and, ordinarily, an application for the order was required to be on notice: *Lamb* v. *Danby*, 9 W. R. 765. But under this *Rule* it is, perhaps, not necessary in any case to obtain any order.

Where documents filed in an office of the Supreme Court, or County Court, Registrar of Deeds, Surrogate Court, or Clerk of the Peace, are produced in evidence under a subpœna, the original documents are not to be left with the Court, but certified copies, if necessary, are to be put in: *The Evidence Act* (R. S. O. c. 76), s. 48; except where the genuineness of the document produced is in question: *Ib.*

By regulation of the Court dated 16th February, 1905, directions are given to the officers of the Court that, subject to this *Rule*, original documents on file, or of record, are not to be taken away from the Court by any officer under a subpœna unless authorized by a Judge's order: see note to *Rule* 274.

(xvii) *Confession of Action or Judgment.*

397. No *cognovit actionem* or warrant of attorney to confess judgment given after these Rules come into force shall be of any validity. The practice with respect to any warrant of attorney or *cognovit actionem* given before these Rules came into force shall be as laid down in Rules 597 to 602 of 1897. *New.*

The practice of taking *cognovits* which used to be common, prior to *The Assignments and Preferences Act*, has long since ceased, and has practically become obsolete. This *Rule* abolishes it altogether, except as to *cognovits* given before the 1st September, 1913. As to the former practice on this subject: see Holmested & Langton's Jud. Act & Rules (3rd ed.), notes to Rules 597-602.

(xviii) *Striking Out Jury Notices.*

Jury notice, when to be struck out.

398.—(1) When an application is made to a Judge in Chambers for an order striking out a jury notice, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury, and in case the action has been entered for trial shall direct the action to be transferred to the non-jury list.

Rule 398.

Judge at trial may strike out jury notice.

(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury. Nor shall an order made in Chambers striking out a jury notice interfere with the right of the judge presiding at the trial to direct a trial by jury.

(3) The Judge presiding at a jury sittings in Toronto may in his discretion strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge. C.R. 1322.

See Jud. Act, s. 56, and notes, *supra*, p. 215.

R. J. Jud.

CHAPTER XV.

REFERENCES.

Masters are officers of Supreme Court.

The Master in Ordinary, and Local Masters, are all officers of the Supreme Court: Jud. Act, s. 76, and, as such, actions may be referred to them.

The Judges of the County Courts, the Master in Ordinary, the Master in Chambers, the Clerk of the Crown and Pleas, the Registrars, and the Local Masters, are also *ex officio* Official Referees: Jud. Act, s. 86, *supra*, p. 274.

Place of reference.

Under the former practice in Chancery the plaintiff was *primâ facie* entitled to have a reference, when necessary, directed to the Master at the place where the bill was filed: *Macora* v. *Gwynne*, 3 Gr. 310; *Watson* v. *Henderson*, 2 Chy. Ch. 370; and the defendant might for good cause apply to change the reference: *McNob* v. *McInnis*, 4 Chy. Ch. 53; but now in administration actions, it has been held that the reference should be *primâ facie* to the Master in the county where the deceased resided: *Thompson* v. *Fairbairn*, 10 P. R. 523; and see *Armstrong* v. *Armstrong*, 18 P. R. 55.

Prima facie plaintiff entitled to have reference where writ issued.

Subject to this exception, the old rule, it is presumed, will still be followed, and a plaintiff will have the right *primâ facie* to have the reference, if any, directed to the Master in the county where the writ issued. Formerly when it was sought to change the reference on the score of expense, the difference of expense must have been considerable; and if on the ground of convenience, a clearly preponderating convenience in favour of the proposed change must have been established; and the fact that a defendant was a man in extensve business, or a trustee, was not a sufficient ground for changing the reference: *McNob* v. *McInnis*, *supra*; *Jackson* v. *Harriman*, 9 C. L. J. 29.

Reference may be changed; on what grounds.

Since *The Judicature Act* it has been held that the policy of that Act is to decentralize business, and to send local matters to the Local Masters, and the fact that a partnership business had been carried on in the county to which it was proposed to change the reference to take the partnership accounts, and that a delay of two months would be incurred by retaining the reference at the place directed by the judgment, was held sufficient ground to warrant the change: *Aitken* v. *Wilson*, 9 P. R. 75.

When Master has been professionally concerned.

Where the Master has been professionally concerned for any of the litigants, in reference to the same or any other matter, that is a sufficient ground for changing the reference: *Bigelow* v. *Bigelow*, 6 P. R. 124; *Boyd* v. *Simpson*, before Spragge, C., 19th June, 1878. (See Reg. Lib.)

But where the reference was directed to a Master, who had, prior to the appointment, been counsel for one of the litigants, neither party objecting, and the Master certifying that he acted in the reference at the pressing request of both parties, the Court held that the party against whom the Master reported could not raise that objection on appeal from the report, having taken the chance of the Master's finding in his favour: *Cotter* v. *Cotter*, 21 Gr. 159.

Rules 399, 400.

Where necessary to add Master as a party.

Where, in the course of a suit, it became necessary to add as a party the Master to whom the cause was referred, the reference was changed on an *ex parte* application by the plaintiff: *Weldon* v. *Templeton*, 1 Chy. Ch. 360. Usually, however, any application to change the reference should be on notice: *McConnell* v. *McConnell*, 3 Chy. Ch. 122.

Application to be made on notice.

The following *Rules*, 402-490, regulate the practice in the Master's offices, and apply to all actions which are referred to a Master, or to a Referee.

(i) *Referees.*

399. In the event of the Referee declining to act, or dying before he has made his report, a Judge may appoint a new Reference. C.R. 648. *Amended.*

This clause enables only a Judge of the High Court to appoint a new Referee. The Master in Chambers has therefore no jurisdiction in the matter: see *Rule* 208 (13).

Referees are either "Official Referees," or "Special Referees."

Official Referees are officers appointed by the Lieutenant-Governor in Council: Jud. Act, s. 76 (1), (o); and certain officers of the Court who under s. 86 (1) are declared to be Official Referees. Special Referees are referees appointed by the consent of the parties: see Jud. Act, s. 64 (1).

The *Rule* applies to both classes of Referees, but in the case of the death of a Special Referee, the new Referee to be appointed under this *Rule* would have to be an Official Referee, unless all parties agreed to the appointment of a Special Referee: see Jud. Act, s. 64 (1), p. 227 *supra*.

Procedure before Referee.

400. The practice and procedure on a reference to a Referee, shall be the same, as nearly as may be, as the practice and procedure in the Master's office. C.R. 650.

This *Rule*, in effect, confers on Referees, for the purposes of references before them, the like jurisdiction as that of the Masters of the Court; and their jurisdiction is similarly limited. They may take accounts, and inquire as to matters referred to them, and make a report thereon, but they have no power to order judgment to be entered: see Jud. Act, s. 67.

As to the matters which may be referred to Referees and the procedure thereon: see Jud. Act, ss. 64 and 65 and notes, *supra*, pp. 225-230.

In Englsnd it has been held that an Official Referee is not bound on a reference to him to take accounts, to pursue the strict method followed on a reference to a Chief Clerk, who occupied there a position similar to that of the Master in Ordinary, and Local Masters: *Re Taylor, Turpin* v. *Pain*, 44 Ch. D. 128. It would appear from this *Rule*, however, that a reference to an Official Referee is intended to be conducted in the same manner as references to Masters.

As to the procedure before Masters: see *Rules* 402-490 and notes, *infra*.

A reference to a Referee whether Official, or Special, is not, unless the parties expressly so agree, a reference to arbitration: *Munday* v. *Norton*, 1892, 1 Q. B. 403; a Referee's report is consequently not an award. *The Arbitration Act* does not apply thereto, except where the reference to the Referee is expressly made as an arbitrator. Rules 401, 402.

401. The Court may require explanations or reasons from a Master or Referee, and may remit the cause or matter, or any part thereof, for further consideration, to the same or any other Master or Referee. C.R. 652. *Amended.* Court may remit case

See Eng. (1883) R. 476.

Under this *Rule* the Court may require of the Referee explanations or reasons, or send the matter back for re-trial, or reconsideration, and to another Referee if it thinks fit; or upon an appeal from the report may itself decide the question on the same evidence, or with additional evidence.

This *Rule* does not apply to the case of an arbitration ordered by the Court upon consent, where the arbitrator is selected and agreed upon by the parties: *Kennedy* v. *Beal*, 29 Ont. 599.

(ii) *Proceedings on References.*

402. Every order of reference shall be brought into the Master's office within ten days after it is issued, by the party having the carriage of the same, and in default any other party having an interest in the reference may assume the carriage of the order. C.R. 657. Order to be carried into M.O. within 10 days.

Usually the original, or a copy, of the judgment or order of reference, is required to be left with the Master.

Under these *Rules*, no time appears to be prescribed within which an order, or judgment, directing a reference, is to be drawn up and entered.

According to the former practice, it would appear that the party having the conduct of an order, or a judgment, directing a reference, was entitled to at least 21 days from the time the order, or judgment, was pronounced, or finally disposed of, by the Court, within which to issue the order, or judgment, and carry it into the Master's office; but whether he is entitled to the same time, or any longer or shorter period, under the present practice is not clear, and the *Rules* seem to furnish no analogy.

The rule which regulates the question, as to who shall have the carriage of an order, or judgment, directing a reference to a Master, is a technical one, and in the majority of cases, the solicitors alone are interested. The solicitor of the party having the conduct of the judgment is entitled to prosecute all those proceedings which relate to the general inquiries, and the other parties only prosecute those which relate exclusively to themselves, or such as it would be inconsistent for the party having the carriage of the order or judgment to do. Thus, if the plaintiff has the conduct, his solicitor bespeaks and Conduct of reference, who entitled to.

Rule 403.

Duty of solicitor having conduct.

procures to be inserted all advertisements, whether for creditors, or for next of kin, or for the sale of property; he prepares the abstract and answers the requisitions; and if the purchaser requires a reference as to title, he attends upon it. He furnishes, where directed, for the purpose of answering the general inquiries, and taking the general account, copies, abstracts, or extracts of, or from accounts, deeds or other documents, and pedigrees, etc., relating to proceedings of a general character, and not belonging to particular parties to prosecute. Smith's Pr., 7th ed., 729. See also notes to *Rule* 86.

May be changed for delay

Where the party having the carriage of a judgment or order directing a reference, is guilty of delay in carrying it into the Master's office within the meaning of this *Rule*, any other party to the action, or any party having an interest in the reference, may assume the carriage of the judgment, or order, which, when necessary, would include the right to draw up the minutes, and procure them to be settled, and to have the order or judgment passed and entered. No order seems necessary to entitle him to do this; but see *Re Shaw*, 14 Gr. 524, where a special application was made for the conduct of the reference, after the order issued, in pursuance of leave reserved. Where the judgment, or order, has been drawn up and entered, but has not been carried into the Master's office within the prescribed time, an office-copy of the judgment, or order, may be obtained and carried into the Master's office by any other party interested. Persons who are not parties to the action, but who are interested in the reference, *e.g.*, creditors, next of kin, heirs, etc., are entitled under this *Rule* to assume the carriage of the order, or judgment, where the prescribed time has elapsed: see *Re Shaw*, 14 Gr. 524.

Or proceedings stayed.

When a plaintiff neglects for twenty years to prosecute a judgment directing a reference to take accounts in a redemption action, he may be deemed to have lost his right to prosecute the reference, and his proceedings may be stayed: see *Re Leslie*, 23 Ont. 143.

Party interested may assume carriage, when.

Where a judgment, or order, has been carried into the Master's office, in the event of delay arising on the part of the party having the carriage of it, the Master may transfer the conduct of the reference to any other person interested: see *Rule* 407.

Notice to parties in Master's office.

403. Unless otherwise directed by the Master, notice of the first proceeding before him shall be given to every party affected by or interested in the inquiry though any such party may not have appeared or pleaded in the action. C.R. 658.

This gives the force of a *Rule* to what had been previously the practice in the Master's office. The *Rule* constitutes an exception to *Rule* 35.

Under the present practice, provision is made for hearing the action *pro confesso* for default of appearance or defence: see *Rules* 35, 354; and judgment may be awarded against a defendant on default of appearance, or on default of defence, and the future proceedings may be carried on against him *ex parte*, "except where otherwise provided by these *Rules*, or where otherwise ordered by the Court or a Judge." One of the cases "otherwise provided" is specified in this *Rule*. A defendant, if interested in, or affected by the inquiry, is, therefore, under this *Rule*, entitled to notice of proceedings upon a reference, unless the Master sees fit to dispense with it.

service on a defendant who has not appeared may, unless the Court otherwise directs, be effected by posting up a copy of the document required to be served "in the office where the proceedings are being carried on": *Rule* 200; but that *Rule* has been held not to apply to proceedings after judgment: see notes to that *Rule*. Where a defendant who has not appeared, appears to have some substantial interest in the proceedings on the reference, the Master would probably direct personal service. Rule 404.

Where service is effected by posting a copy, it would seem that it should be posted in the office in which the proceedings are being carried on, i.e., the Master's office: see *Rule* 200, but see *Rule* 762.

Where a defendant who has made no defence, has no interest in, and is not affected by, the reference, service on him may properly be dispensed with.

404. Where in proceedings before the Master, it appears to him that a person not already a party ought to be made a party, and ought to be at liberty to attend the proceedings before him, he may direct an office copy of the order, indorsed with a notice (Form 41), to be served upon such person, who thereupon shall be treated and named as a party to the action and shall be bound as if he had been originally made a party. C.R. 659 and 660. Master may add parties in his office.

An office copy of a judgment or order is a copy certified by the officer in whose office it is entered. For the form of the indorsement to be made thereon: see No. 41; H. & L. Forms, No. 967.

The *Rule* speaks only of an office copy of the "order" but the Form 41 indicates that where the reference is under a judgment the office copy of the judgment is to be served.

It is most important that all proper parties should be added. Persons interested, who are not added, or served with the judgment under *Rule* 87, are not bound by the proceedings, and may intervene, and compel the refunding of moneys distributed in their absence to the prejudice of their rights: see *Uffner* v. *Lewis*, 27 A. R. 242; 3 O. L. R. 208; with interest: S. C. 5 O. L. R. 684.

The Master has power to dispense with the service of the judgment on parties required to be served therewith under *Rules* 79-87; but he would seem to have no power to dispense with service on parties who ought to be added as parties under the provisions of this *Rule*. Master may dispense with service of judgment.

As to substituted service of an office copy of the judgment, or order, and as to dispensing with service: see *Re Hynes*, *Hodgins* v. *Andrews*, 19 P. R. 217.

Persons served with a copy of a judgment under *Rules* 79-87, are not thereby made parties to the action: see notes to *Rule* 87, p. 465; but persons required to be served under this *Rule* are made parties to the action.

Where persons are required to be added as parties, the Master usually issues an order making them parties, and directing them to Adding parties.

Rule 404.

he served with the judgment, or order, of reference, indorsed as required by this *Rule*.

Persons acquiring interests pendente lite need not be added.

Persons who acquire equitable interests in the subject matter of litigation *pendente lite* need not be added as parties, but are nevertheless bound, and concluded, by the proceedings; thus, a person recovering a judgment, and execution, against a mortgagor: *Wallbridge* v. *Martin*, 2 Chy. Ch. 275; or obtaining a mortgage, or other incumbrance from him: *Robson* v. *Argue*, 25 Gr. 407; pending an action for foreclosure, or sale, by a prior mortgagee, need not be made a party. But where a person acquires the legal estate *pendente lite* it may sometimes be necessary to make him a party for the purpose of obtaining a conveyance. A person, who after the institution of a foreclosure action acquired an interest, was on his own application added as a party in *Gibson* v. *Nelson*, 2 O. L. R. 600; 35 S. C. R. 181; *Re Parbola, Blackburn* v. *Parbola, infra*. A purchaser *pendente lite* may be added as a defendant in the Master's office under this *Rule*: *Lindsay* v. *Bank of Montreal*, 13 Gr. 66; but see *Abell* v. *Parr*, 9 P. R. 564. But where, after registration of a certificate of *lis pendens*, a statement of claim was amended by claiming further and other relief than that originally sought, it was held that persons acquiring interests before such amendment, though after the registration of the *lis*, were not bound by notice of such further relief: *Price* v. *Price*, 35 Ch. D. 297; but see 7 C. L. T. 205, and Bennett on *Lis pendens*, c. 1. The doctrine of *lis pendens* does not affect third persons acquiring title *pendente lite* under tax sales: *Ib.*, c. 5, a. 80; nor *bonâ fide* assignees of negotiable paper: *Ib.*, ss. 86, 87; nor persons acquiring title under Acts authorizing expropriation: *Ib.*, s. 89; nor persons claiming under prior unregistered deeds: *Clergue* v. *McKay*, 6 O. L. R. 61; 8 O. L. R. 84; and it has no application to personal property other than chattel interests in land: *Wigrom* v. *Buckley*, 1894, 3 Ch. 483; 71 L. T. 287; nor does the doctrine affect persons acquiring interests from parties to the action, but without actual notice of the action, where no certificate of *lis pendens* has been registered: *Farah* v. *Glen Lake Mining Co.*, 17 O. L. R. 1; and see *Rule* 469 and notes.

Except assignee of legal estate.

Effect of lis pendens.

A person acquiring an interest in mortgaged property pending an action for foreclosure, may apply to be added as a defendant, but, if so added, he must take things as he finds them, and is not entitled to any extension of time for redemption, except on such grounds as the original defendant might be entitled to ask indulgence, and he must in any event pay the costs of the application to be added: *Re Parbola, Blackburn* v. *Parbola*, 1909, 2 Ch. 437; 101 L. T. 382.

A purchaser from the plaintiff in a foreclosure action, in anticipation of a final order being granted, acquires no greater rights than his vendor, and where the final order was erroneously granted the fact of the sale was held to furnish no obstacle to its being set aside on the application of the mortgagor: *Foresters* v. *Pegg*, 19 P. R. 54; and such a sale *pendente lite* was held not to be supportable at a sale under the power of sale in the mortgage: *Ib.*

Persons with paramount title not to be added in M. O.

Persons having a paramount title to the plaintiff, cannot be made parties in the Master's office, if they object: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69. Thus, in a suit by an execution creditor, to set aside a fraudulent conveyance of the equity of redemption by the execution debtor, an order adding a prior mortgagee for the purpose of redeeming him, was discharged. When that is required he should be made

an original party to the action: *Crowford* v. *Meldrum*, 19 Gr. 165. Rule 405.

But where a decree has been made to take partnership accounts, in the absence of one of the partners alleged to be insolvent, and out of the jurisdiction, it was held that he was properly made a party in the Master's office on his returning to the jurisdiction pending the reference: *Peterson* v. *Holland*, 7 Gr. 563; and as to adding parties interested in the equity of redemption: see *Rule* 490. Absentee when action commenced, may be added in M. O. on his return.

The action is only deemed to be commenced as against parties added in the Master's office from the date of the order adding them: *Juson* v. *Gardiner*, 11 Gr. 23; and see *Dumble* v. *Lorush*, 27 Gr. 187; *Sterling* v. *Campbell*, 1 Chy. Ch. 147. Where it is made to appear to the Master that all liability on the part of a party added, is barred by the Statute of Limitations, he may discharge the order adding him as a party: *Kline* v. *Kline*, 3 Chy. Ch. 161. Action, commencement of, as against parties added.

No direct relief can be had against parties added in the Master's office, and they cannot be required to account: *Hooper* v. *Horrison*, 28 Gr. 22; *Rolph* v. *Upper Canada Building Society*, 11 Gr. 275, 278; *Walker* v. *Seligmann*, L. R. 12 Eq. 152; *Re Parkes, Simpson* v. *Porkes*, 66 L. T. 151. And it would seem they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff: see *Whitney* v. *Smith*, L. R. 4 Chy. 513; they are simply bound by, and entitled to the benefit of, the proceedings.

A party filling two capacities, if made a party to a suit distinctly in one capacity only, may not be bound as to his rights in the other capacity: *e.g.*, a person added as a defendant in his character of a judgment creditor, was held not to be bound in his character of a mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340; but see *Beordsley* v. *Beordsley*, 1899, 1 Q. B. 746; 80 L. T. 51. Party filling two capacities, how far bound.

405. A person so served may apply to the Court at any time within ten days from the date of such service, to discharge, add to, vary, or set aside the order of reference or the order adding him as a party. C.R. 661. Parties added in M. O. may move against judgment.

The application is required to be brought on to be heard within the ten days; but the application may, in the discretion of the Court, be entertained after that time: see *Stewart* v. *Hunter*, 2 Chy. Ch. 265. Application, when to be heard.

Both vacations are excluded from the ten days: *Rule* 179 (*d*).

Where a party is added who claims by title paramount to the plaintiff, he should move to discharge the order: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69; *Crawford* v. *Meldrum*, 19 Gr. 165; *McVeon* v. *Tiffin*, 13 Ont. App. 1. But an incumbrancer claiming priority to the plaintiff, but whom the Master finds to be subsequent, may also appeal from the report on the question of priority: *McDonold* v. *Rodger*, 9 Gr. 75. Party added claiming priority to plaintiff.

The Master may himself discharge the order adding a party who subsequently appears to be an unnecessary party: *Kline* v. *Kline*, 3 Chy. Ch. 161. Master may discharge order.

A party improperly added as a party in the Master's office is not limited to the time mentioned in this *Rule* within which to object that he should not have been made a party; he may take the objection on an appeal from the report, or upon the hearing on further directions, if any, if sufficient appears on the Master's report to enable

Rules 406, 407.

the Court to deal with tha question: *Cowan* v. *Allen*, 26 S. C. R. 292; *McLaughlin* v. *Stewart*, 1 O. L. R. 295.

Where, instead of a motion to set aside the order, an appeal is sought to ha hrought therefrom, then ths procedure would seem to be governed hy *Rules* 502-504.

Master may classify and appoint solicitors to represent different classes.

406. Where, at any time during the reference, it appears to the Master that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor: and where the parties constituting such class cannot agree upon the solicitor to represent them, the Master may nominate him. C.R. 662.

Solicitor appointed by Master to represent a class binds all of the class.

Where the Master appoints a solicitor to set for a class, all the individuals composing that ciass are hound hy ths acts of ths solicitor so appointed, and cannot repudiate them, unless they appoint a separate solicitor: *Re McConnell*, 3 Chy. Ch. 423.

A solicitor so appointed ia entitled to act for tha class, not only in the Master's office, hut also in proceedings arising out of, or connected with, the proceedings in the Master's office: *Ib.* But where s solicitor was *ex parte* appointed to represent creditors it was held that he could not recover his costs against creditors who had not proved their claims, and who had no notice of his appointment: *Monteith* v. *Merchants Bank*, 12 P. R. 288; 23 C. L. J. 415.

As to the appointment of a solicitor to rapresent creditors generally: see *Re Drury Nickel Co.*, 16 P. R. 525; where orders of thst kind wera not favourably regarded.

Solicitor not to be appointed to represent a class already represented.

The Master should not appoint a separate soiicitor for parties who are sufficientiy rapresented hy the plaintiff; and where *primâ facie* the plaintiff represents the class (see *Rules* 79-85), if the Master appoints a separate solicitor ha should stata the rsason for so doing in his report: *Gorhnm* v. *Gorham*, 17 Gr. 386.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class subsequently incnrred will not ordinarily he allowed against the estate under administration: *Re Etna Insurance Compony*, 17 Gr. 160.

Any member of a cinss refusing to he represented by the solicitor nominated hy the Master, and insisting on being represented by a different solicitor: sea *Rule* 657.

Master may change conduct of reference.

407. Where a party prosecuting a reference, does not proceed with due diligence, the Master may, upon the application of any other person interested, commit to him the prosecution of the reference. C.R. 663.

The Master, in his discretion, may entertain an application to change the conduct of the reference *ex parte*: *Stephenson* v. *Nicolls*, 14 Gr. 144; hut ordinarily the application should he made on notice: 1 Sm. Pr., 2nd ed., 312; and see *Sims* v. *Ridge*, 3 Mer, 458; *Edwards* v. *Acland*, 5 Mnd. 31; and *Rule* 213.

An appeal lies from the order of the Master changing the conduct of the reference: *Stephenson* v. *Nicolls*, 14 Gr. at pp. 147, 149, and in *Wyatt* v. *Sodler*, 5 Sim. 450, the Court on a substantive motion changed the conduct of the reference, after the Master had refused an application for that purpose. But the application must in the first instance be made to the Master: *Miller* v. *McNaughton*, 1 Chy. Ch. 206. Rules 408, 409. Master's order subject to appeal.

Where there has been great delay in prosecuting a judgment in a creditor's suit, a creditor may apply to have the conduct of the cause, though it has become defective by the death of the defendant: *Cook* v. *Bolton*, 5 Russ. 282; and see *Re Shaw*, 14 Gr. 524; *Patterson* v. *Scott*, 4 Gr. 145. Creditor may apply.

A party to whom the conduct of the reference is committed is entitled to inspect and take copies of briefs and documents in the possession of the party, or his solicitor, from whom the carriage of the reference has been taken: *Bennett* v. *Baxter*, 10 Sim. 417; and see *Heslop* v. *Metcalf*, 8 Sim. 622, and notes to *Rule* 389, *supra*, p. 913. Party conducting reference entitled to inspect papers.

An order taking the conduct of the reference from the plaintiff, does not preclude him from applying to amend a clerical error in the judgment, or order, under *Rule* 521: *Whitehead* v. *North*, Cr. & Ph. 78. This *Rule* only enables the Master to transfer the conduct of proceedings in his office. Plaintiff may apply to amend order of reference, though conduct taken fr him.

Where there has been undue delay in prosecuting a reference the Court may stay the proceedings altogether: see *Re Leslie*, 23 Ont. 143.

408. A reference shall be proceeded with as far as possible *de die in diem* and when an adjournment is ordered, the Master shall note in his book the reason thereof and shall when practicable fix the time when it is to be resumed so as to avoid the service of a new appointment. C.R. 664. Reference to be proceeded with on day fixed and de die in diem.

The Master may proceed with a reference in vacation, and make his report: *Marples* v. *Rosebrugh*, 17 P. R. 104. Master may proceed in vacation.

"It is the bounden duty of the Master to observe these *Orders* to the letter, wherever it is not absolutely impracticable to follow them literally," *per* Spragge, C.; *Falls* v. *Powell*, 20 Gr., at p. 468.

The proceedings on the reference should be from time to time recorded in the Master's book referred to in this *Rule*: see *Rule* 421. All consents or undertakings should be duly entered therein, and signed by the parties to prevent misunderstandings: see *Rule* 421: *Beaudry* v. *Gallien*, 5 O. L. R. 73.

409. The Master shall (unless he dispenses with it) in the first instance issue an appointment to consider. Upon the return of the appointment he shall fix a time at which to proceed with the reference and shall give any special directions he thinks fit, as to:— Appointment to consider proceedings on return.

(*a*) The parties who are to attend on the several accounts and inquiries;

(*b*) The time when each proceeding is to be taken;

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(*c*) The mode in which any accounts referred to him are to be taken or vouched;

(*d*) The evidence to be adduced in support thereof;

(*e*) The manner in which each of the accounts and inquiries is to be prosecuted;

Any such directions may be afterwards varied or added to, as may be found necessary. C.R. 665.

Where judgment erroneous, Master may refuse to proceed on it.

Where a judgment is manifestly erroneous, the Master may properly refuse to proceed upon it until it has been corrected: *Swainson* v. *Bartley*, 18 C. L. J. 15; and see *Commercial Bank* v. *Graham*, 4 Gr. 419; *Mitchell* v. *Strathy*, 28 Gr. 80; *Adamson* v. *Adamson*, *Ib.*, at p. 224; but the mistake must be very obvious to warrant the Master in refusing to proceed.

Warrant to consider.

Formerly a warrant to consider a judgment, or order, only required one day's service: see *Sutherland* v. *Rogers*, 2 Cby. Ch. at p. 192; other warrants required two clear days' service: *Ib.*; except warrants to settle report, which required four days' service: see *Rule* 424, note. The present *Rules* make no express provision as to Master's warrants.

The warrant must be underwritten so as to explain clearly what proceedings are to be taken under it: *Denison* v. *Denison*, 3 Chy. Ch. 349.

Who to appear on creditors' claims against estate.

In any cause, or matter, for the administration of the estate of a deceased person, no person, other than the personal representative, is, except by the leave of the Master, entitled to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt or liability. The Master may direct any person to appear, either in addition to, or in the place of, the personal representative, upon such terms as to costs and otherwise as may seem proper: see *Rule* 88.

As to mode of taking and verifying accounts generally: see *Rules* 418, 419, 420, 422; and as to taking accounts of creditors' claims against the estate of a deceased person: see *Rules* 413-415, 435.

The ruling of the Master is not conclusive, and the Court may, on appeal, give a party leave to attend proceedings whom the Master has excluded: *Davis* v. *Combermere*, 8 Jur. 76. But it would seem that any objection to the Master's ruling should be brought up by way of appeal, and not as a substantive motion.

Evidence is inadmissible before the Master to contradict, or controvert, any matter of fact on which the judgment, or order, of reference is based; *e.g.*, in an action for infringing a patent, if the judgment is granted declaring that the defendant has infringed it, and a reference is granted to assess the damages, it is not competent for the defendant to show that the patent has been subsequently revoked: *Poulton* v. *The Adjustable Cover & B. B. Co.*, 1908, 2 Ch. 430.

Powers of Master to take accounts with rests.

410. Under an order of reference, the Master shall have power:—

(*a*) To take the accounts with rests or otherwise;

(*b*) To take account of money, rents and profits received or which, but for wilful neglect or default, might have been received. Rule 410. To inquire as to wilful neglect and default.

(*c*) To set occupation rent; To set occupation rent.

(*d*) To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so; To allow for improvements.

(*e*) To make all just allowances; To make just allowances.

(*f*) To report special circumstances; To report special circumstances; and to inquire as to all matters relating to accounts.

(*g*) And generally, in taking the accounts, to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specifically referred. C.R. 667.

C. R. 666 provided that to enable the Master to exercise all or any of the powers conferred upon him by, or to take the accounts and make the inquiries referred to in the *Rules*, it should not be necessary that any of the matters therein mentioned should have been stated in the pleadings, or that the evidence thereof should have been given before the judgment or order of reference, or that the judgment or order should contain any specific direction in respect thereof: see *Sculthrope* v. *Burn*, 12 Gr. 427. That Rule has not been continued, but probably no change is thereby intended to be made in the practice.

That *Rule* enabled the Master to take an account as mentioned in this *Rule*, although there was nothing in the pleadings: *McLennan* v. *Heward*, 9 Gr. at pp. 178, and 187; and though no evidence had been given as to any such matters at the trial.

It was formerly held that under a common administration order obtained on motion without bill, by any person but the personal representative himself, there could be no inquiry as to wilful neglect, or default: *Harrison* v. *McGlashan*, 7 Gr. 532. But where the order was obtained by the personal representative himself, such an inquiry might be made: *Ledgerwood* v. *Ledgerwood*, 7 Gr. 584.

The case of *Carpenter* v. *Wood*, 10 Gr. 354, though not referring to *Harrison* v. *McGlashan*, is said in effect to have overruled it; and the practice was stated by Boyd, C., to be now settled that under C. RR. 666, 667, the inquiry as to wilful neglect and default, might be made in all cases under the common administration order: *Re Allan*, 9 P. R. 277. It is probable, that notwithstanding the omission of C. R. 666, the present *Rules* have the same effect. Inquiry as to neglect and default etc., can now be made without special direction.

If the Master refuses to exercise the power to take the accounts in the manner mentioned in *Rule* 410, his ruling will be appealable; but it has been said to be more proper to bring the question up on further directions: see *Sieveright* v. *Leys*, 1 Ont. 375.

Where the judgment gives further relief than claimed by the pleadings, it has been held that the judgment is not to be construed

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by reference to the pleadings if it is unambiguous: *Smith* v. *Goldie*, 11 P. R. 24.

The Master is bound to have regard to the special terms of a judgment, or order, of reference, as well as the provisions of this *Rule* in taking accounts or making inquiries: *Patterson* v. *Dart*, 24 O. L. R. 609.

Interest.—The Master has power to allow interest against an accounting party, though not expressly directed so to do by the judgment, or order, under which the account is taken: *Earle* v. *Burland*, 6 O. L. R. 327; and it is immaterial that the accounting party is merely a constructive trustee: *Ib.* Interest is not chargeable, however, as a matter of course against an accounting party: *Phillips* v. *Homfroy*, 44 Ch. D. 694; 39 W. R. 45; 62 L. T. 897; *London, Chatham & D. Ry. Co.* v. *South Eastern Ry. Co.*, 1893, A. C. 429; and see the Jud. Act, ss. 34-35 and notes, *supra*, pp. 195, *et seq.*

Rule in Ontario as to rate of interest.

In this Province prior to the repeal of the usury laws, the rule was to charge interest at the rate of 6 per cent., and where according to the English cases a higher rate of interest than 4 per cent. would be charged, to take the account with half-yearly rests: see *Landman* v. *Crooks*, 4 Gr. 353; *Small* v. *Eccles*, 12 Gr. at p. 40. Since the abolition of the usury laws, an accounting party chargeable according to the English cases with more than 4 per cent., may now be charged, either with a higher rate of interest than the legal rate, according to the value of money, as was done in *Wightman* v. *Helliwell*, 13 Gr. 330 (where an executor was charged with 8 per cent. simple interest); or it would seem he may be charged with compound interest at the legal rate: *Wiard* v. *Gable*, 8 Gr. 458; *Erskine* v. *Campbell*, 1 Gr. 570; or even at a higher rate if the money has been used in trade: *Wightman* v. *Helliwell*, 13 Gr. at p. 343; *Small* v. *Eccles*, 12 Gr. 40, or, at the option of the *cestui que trust*, with the actual profits realized. Prior to 63 & 64 Vict. c. 29 (D.) which reduced the legal rate of interest to 5 per cent., a trustee who had kept no accounts, and made no attempt to keep the trust moneys separate from her own, was charged with interest at 6 per cent. on the yearly balances in her hands: *Zimmerman* v. *Wilcox*, 35 C. L. J. 688.

Interest on sums neglected to be paid over.

But where the trustee, or executor, has neglected to pay over sums in his hands to the parties entitled, he is chargeable with interest at the legal rate on such sums, no matter what the amount, from the time the payment ought to have been made: *McLennan* v. *Heward*, 9 Gr. at p. 190.

Where, from the circumstances of the estate, the executors are not justified in making permanent investments, they will be charged only with the interest actually received while the money is on deposit: see *Re McIntyre, McIntyre* v. *London, &c.*, 7 O. L. R. 648.

In re Honsberger v. *Kratz*, 10 Ont. 621; 21 C. L. J. 400, Boyd, C., laid down the rule on which executors and trustees should be charged with interest, as follows:—(1) An executor or trustee who negligently retains funds in his hands which he should have paid over, or made productive for the estate, is to be charged with simple interest thereon at 6 per cent. (2) An executor, or trustee, who, in violation of his trust, has used the money for his own purposes (though not in trade or speculation), is to be charged at such rate as is the then current value of money. (3) An executor, or trustee, who makes a gain out of the trust by embarking the money in speculation or trading adventures, is to be charged either with the profits,

or compound interest. Since this rule was laid down the legal rate of interest has been reduced to five per cent.: R. S. C. c. 120, s. 3; and in the last case not more than 5 per cent. would now be chargeable except in case of liabilities existing at, or prior to, 7th July, 1900, to which the old rate of six per cent. would apply. Where under the third case mentioned a trustee is charged with profits, it is not the course of the Court to charge him also with interest on such profits: *Silkstone & H. M. Co.* v. *Edey*, 1900, 1 Ch. 167. Rule 410.

Where the executor, or trustee, retains trust money in his hands, under a *bonâ fide*, though mistaken, belief that it is his own, he may be exonerated altogether from payment of interest: *Bruere* v. *Pemberton*, 12 Ves. 386; *Dovenport* v. *Stafford*, 14 Beav. 319; or he may be ordered to pay simple interest: *Inglis* v. *Beatty*, 2 Ont. App. 453; and where there has been great delay on the part of the *cestui que trust* in making claim to the trust fund: *Browne* v. *Cross*, 14 Beav. 105, provided such delay can be said to amount to acquiescence: *The Life Assurance Co.* v. *Siddal*, 3 De G. F. & J. 72; *Blain* v. *Terryberry*, 12 Gr. 221, the trustee or executor may be relieved from paying interest thereon: but see *Boys' Home* v. *Lewis*, 4 Ont. 18. Where retained under bona fide belief of ownership. Neglect of c. q. t. to demand payment.

A direction to invest a trust fund for infants, is not properly executed by the deposit of the money in a savings bank at 3½ per cent. interest, even though made with the consent of the statutory guardian of the infant *c. q. t.*; and the trustees are liable for interest at the legal rate: *Spratt* v. *Wilson*, 19 Ont. 28; but see *The Trustee Act* (R. S. O., c. 121), s. 29. Neglect of trustee to invest.

An executor who paid over money under what proved to be a mistaken construction of his testator's will, was held nevertheless bound to pay interest thereon to the parties properly entitled; but not to a person who had acquiesced in the misapplication of the fund: *In re Hulkes. Powell* v. *Hulkes*, 33 Ch. D. 552; 55 L. T. 209; and see *In re Deane, Bridger* v. *Deane*, 42 Ch. D. 9; *National Trustees* v. *General Finance Agency*, 1905, A. C. 378; 92 L. T. 736. Payment to wrong person.

A trust to invest in "public securities," was formerly violated by investing in municipal debentures: *Ewart* v. *Gordon*, 13 Gr. 40; but as to debentures and other securities in which trustees may now invest: see *The Trustee Act* (R. S. O. c. 121), ss. 28-30; and a direction to carry on a business will not justify an executor in embarking more capital in it: *Smith* v. *Smith*, 13 Gr. 81.

Where trustees, or executors, lend money to themselves at a lower rate than could have been obtained by investing it according to the trust, they will be chargeable with the higher rate, but not with rests: *Smith* v. *Roe*, 11 Gr. 311, at p. 315; and see *Forbes* v. *Ross*, 2 Cox, 116. Executors lending money to themselves.

In cases of simple neglect to invest, the Master is not justified in charging interest against the trustee until the balance amounts to a sum sufficient for an ordinary investment. $400 was considered a reasonable sum for this purpose: *McLennon* v. *Heword*, 9 Gr. 178; and see *Re Jones*, 49 L. T. 91; *Re McIntyre*, *supra*, p. 930.

Where an executor, or trustee, has properly deposited the trust fund for safe keeping, or not unreasonably kept it in his hands unemployed, he may be relieved from payment of interest, except such as he has actually received; but if he has not kept it apart from his own

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moneys, or has used it, he will be liable for interest on it: *Beaton* v. *Boomer*, 2 Chy. Ch. 89; *Re McIntyre*, *supra*, p. 930.

Or not investing as directed.

But where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. Thus where a trustee was authorized to invest in Government securities, or mortgages, and he invested in bank stock, which proved a loss; he was charged with what would have been obtained had the investment been made in Government securities, although a larger rate of interest could have been obtained on mortgages: *Paterson* v. *Lailey*, 18 Gr. 13; and see *Cameron* v. *Bethune*, 15 Gr. 486; and *Re Gobourie*, *Casey* v. *Gabourie*, 13 Ont. 635.

Or on best terms.

Nor is an executor, or trustee, liable for neglect in not calling in investments made by the testator, in order to invest at a higher rate of interest, although authorized so to do: *Smith* v. *Roe*, 11 Gr. 311. Where a trust company was appointed executor of an estate, and took over certain securities of the estate, and without giving any security or covenant, paid interest at a lesser rate than that received from the securities, to the beneficiaries, on the ground that they had "guaranteed" the payment of interest on the fund, it was held that the transaction could not be supported, and that the company was accountable for the interest actually received: *Hiddingh* v. *Denyssen*; *Hiddingh* v. *De Villiers*, 12 App. Cas. 107, 624; 57 L. T. 886.

Where a trustee by investing money in an unauthorized investment obtains a higher rate of interest than would have been obtained from an authorized investment, and pays such interest to the tenant for life; the remainderman has no equity to have such excess treated as capital and added to the principal: *Slade* v. *Chaine*, 1908, 1 Ch. 522; 98 L. T. 352.

Improper use of trust fund.

An administratrix who allowed the moneys of the estate in her hands to be used by her husband, was charged with simple interest at the legal rate; it not being shown that the money had been used in trade, or that any larger sum had been realized: *Fielder* v. *O'Hara*, 14 Gr. 223; and see *Zimmermon* v. *Wilcox*, 35 C. L. J. 688. Where a trustee mixes the trust fund with his own money in his bank account, he cannot attribute investments made out of the common fund, to his private account, until he has fully restored the trust fund, and his *c. q. t.* is entitled to the benefit of all such investments: *In re Oatway*, 1903, 2 Ch. 356.

No interest on sums charged to executor, he has not actually received.

An executor, or trustee, charged with principal sums which have never come to his hands, but which have been lost by his neglect, is not always chargeable with interest thereon as well: *Vanston* v. *Thompson*, 10 Gr. 542; *Re Shaw*, 15 Gr. 626; *Re Crowter*, *Crowter* v. *Hinsman*, 10 Ont. 159; unless his neglect, or default, amounts to acquiescence in the spoliation of the estate: *Sovereign* v. *Sovereign*, 15 Gr. 559; *Cudney* v. *Cudney*, 21 Gr. 153; *Archer* v. *Severn*, 13 Ont. 316.

The commencement of a suit does not stop interest running: *McLennan* v. *Heward*, 9 Gr. 178; *McMillan* v. *McMillan*, 21 Gr. 369; but see *Blogg* v. *Johnston*, L. R. 2 Chy. 225.

As against executors, interest should not, ordinarily, be charged, until after the lapse of a year from the testator's death.

Where a trustee or executor has made advances to the trust estate, he may be allowed simple interest on the balances of principal due to

him from year to year, but not compound interest: *Finch* v. *Prescott*, L. R. 17 Eq. 554. Rule 410.

Principal and Agent.—An agent who hed used moneys of his principal, with his consent, wes only cherged simple interest: *McLennan* v. *Heword*, 9 Gr. 178; and where the state of accounts could not be ascertained until they had been taken by the Court, interest on the balance was charged only from the dete of the Master's certificete: *Turner* v. *Burkinshow*, L. R. 2 Chy. 488; and see *Blogg* v. *Johnston*, *ib.*, 225. Principal and agent, interest as between.

Where the principel wss fonnd iudebted to the agent, interest on the balance was allowed from the filing of the declaretion in the action by the egent to recover the amount: *Ridley* v. *Sexton*, 19 Gr. 146.

Legatees.—Interest on legacies ordinarily runs from the end of e yesr from the death of the testator, in the absence of any express direction in the will to the contrary: see *Smith* v. *Scoton*, 17 Gr. 397; even though the income of the whole estate he bequeathed to enother for life: *Toomey* v. *Tracey*, 4 Ont. 708; or the legecy be payahle out of a particular fund which is not got in until after the yeer has expired: *Wolford* v. *Walford*, 1912, A. C. 658; 107 L. T. 657; and see *Re Olive*, *Olive* v. *Westerman*, 50 L. T. 355; hut this rule does not apply to sums sppointed by will, under a power; es to such sums, interest runs from the death of the testator: *Deedes* v. *Graham*, 20 Gr. 258. But no interest can usually he recovered on arrears of annulties, beqneathed hy will: *Goldsmith* v. *Goldsmith*, 17 Gr. 213; *Crone* v. *Crone*, 27 Gr. 425; end see *Snorr* v. *Bodenoch*, 10 Ont. 131; 21 C. L. J. 401; nor on annuities granted to secure a loan, as against land on which the annuity is charged, even though judgment may have been recovered therefor: *Beomish* v. *Farmer*, Ir. R. 1 Eq. 466; and see *Ashburner* v. *Moguire*, 2 W. & T. L. Cas. 317. But where an annulty was payahle under a covenant, it was held that interest on arrears might be allowed agsinst the estate of the covenantor: *Re Selvin*, *Worsley* v. *Morshall*, 1912, 1 Ch. 332; 106 L. T. 35. A legecy pnyahle after the death of an annultent benrs interest from such deeth: *Re Scodding*, 4 O. L. R. 632. Legatees.

Where the income of a specific sum is given to a legetee for life and, after such legatees' death, the corpus is hequeathed to another legatee absolutely, interest runs in fevour of the latter from the desth of the tenant for life, even though he die within n year from the testator's death: *Re White*, *White* v. *Shenton*, 101 L. T. 780.

Legacies hy persons *in loco parentis* to infant legatees, where there is no other provision for main'enance of the legatees, will bear interest from the death of the testator: *In re McIntyre*, 9 O. L. R. 408; *Re West*, *Westhead* v. *Aspland*, 1913, 2 Ch. 345; 109 L. R. 39. Legacies for maintenance.

Where a legacy is vested in trustees upon an express trust, more than six yeers' arrears of interest ere recoverahie: *Loring* v. *Loring*, 12 Gr. 374.

Where, by misteke, a legatee has been paid hy an executor before his legacy was due, he cannot he required to give credit as egainst subsequently accruing instalments of his legacy, for interest on the payments made before they were due: *Border* v. *Clark*, 20 Ont. 522; 18 A. R. 435. Premature payment to legatee.

A legatee receiving more than his share may he ordered to refund, with interest: *Dovidson* v. *Boomer*, 17 Gr. 509; *Uffner* v. *Lewis*, 5 O. L. it. 684; hut see *Re Horne*, 1905, 1 Ch. 76, where a trustee, who Refunding.

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was himself a beneficiary, having in a distribution paid himself too little, his executors were held not entitled to compel other beneficiaries to refund, nor to impound accruing income to make an equalization.

Fund deficient to meet annuity.

Where there is a deficiency of assets to meet an annuity given by a testator, or other person, the annuitant is entitled to have his annuity valued, and the value paid to him, where there is no gift over of the *corpus* of the fund after the death of the annuitant: *In re Sinclair*, 1897, 1 Ch. 921.

Where a specific legacy is given "as a general legacy, and not as a specific legacy," in the event of a deficiency of assets; it abates as if it were in fact a general legacy: *In re Compton*, Vaughan v. *Smith*, 1914, 1 Ch. 119.

Creditors overpaid.

Creditors.—As to creditors overpaid their proportion of the assets, and ordered to refund: see *Chamberlen* v. *Clarke*, 1 Oat. 135; 9 Ont. App. 273; *Uffner* v. *Lewis*, 3 O. L. R. 208; *sed vide*, *S. C.*, 5 O. L. R. 684.

Policies of insurance.

Policies of Insurance.—Interest does not begin to run until the party claiming is in position to give a full discharge: *Toronto Savings Bank* v. *Canada Life Assce. Co.*, 14 Gr. 509; and see *Matthew* v. *Northern Ass. Co.*, 9 Ch. D. 80.

Partnership accounts.

Partnership Accounts.—In the absence of any agreement to the contrary, advances of capital made by a partner do not bear interest: *Hill* v. *King*, 9 Jur. N. S. 527; 3 D. J. & S. 418; *Cooke* v. *Benbow*, 3 De G. J. & S. 1; *Stevens* v. *Cook*, 5 Jur. N. S. 1415; but see *Miller* v. *Craig*, 6 Beav. 433. This applies not only to the original capital put in, but also to subsequent advances made by a partner on capital account: *Jardine* v. *Hope*, 19 Gr. 76.

No interest allowed on capital.

Neither is interest chargeable on capital agreed to be advanced by a partner, but not advanced by him: *Wilson* v. *McCarthy*, 13 C. L. J. 303; *Rishton* v. *Grissell*, L. R. 5 Eq. 326.

As to temporary loans—quaere.

As to advances in the way of temporary loans there seems to be no settled rule. In *Cooke* v. *Benbow*, *supra*, Turner, L.J., thought interest should not be allowed: and see *De Hertel* v. *Supple*, 14 Gr. 421. But in *Ex parte Chippendale*, 4 D. M. & G. 36, Knight Bruce, LJ., was of the contrary opinion; and see *Re German Mining Co.*, 17 Jur. 745, 747; *Pim* v. *Harris*, 10 L. R. Ir. Eq. 442.

Interest allowed on sums in the hands of a partner, or not accounted for.

Interest is chargeable on sums in the hands of a partner, and not accounted for: *Hutcheson* v. *Smith*, 5 Ir. Eq. 117; or improperly applied: *Evans* v. *Coventry*, 8 D. M. & G. 835. But a partner in possession of partnership property is not obliged to account on the footing of wilful default: *Rowe* v. *Wood*, 2 J. & W. 556; *Davidson* v. *Thirkell*, 3 Gr. 330, at pp. 347-8.

No interest on capital withdrawn, or profits

Interest is not chargeable on withdrawal of capital, unless fraudulent or improper: *Cooke* v. *Benbow*, *supra*; *Meymott* v. *Meymott*, 31 Beav. 445; nor on undrawn profits: *Dinham* v. *Bradford*, L. R. 5 Chy. 519.

Interest payable on capital where stopped by dissolution.

Where capital carries interest during the continuance of a partnership, it does not do so after a dissolution: *Watney* v. *Wells*, L. R. 2 Chy. 250; *Rhodes* v. *Rhodes*, John 653; although the business is carried on for the purposes of a sale: *Watney* v. *Wells*, *supra*; unless where

the capital is treated as a debt: *Wood* v. *Scales*, L. R. 1 Chy. 369; *Barfield* v. *Loughborough*, L. R. 8 Chy. 1; or in the case of a sleeping partner: *Parsons* v *Hayward*, 4 D. F. & J. 474. Rule 410.

After the Master's report, simple interest at the legal rate runs on the amount found due: *Bonville* v. *Bonville*, 35 Beav. 129; *Brewer* v. *Yorke*, 46 L. T. 289. Interest when it runs.

Losses resulting from investments of partnerships moneys, are to be borne by the partners, in the same proportions as they are entitled to share in the profits of the partnership business: *Storm* v. *Cumberland*, 18 Gr. 245. Losses how borne.

Taking the Account with rests.—Taking an account with "rests" means, either that the accounting party is charged with compound interest on the amount found due from him; or that the surplus income remaining after satisfying the interest due to him, is applied at certain periods in reduction of the principal. The amalgamation of principal and interest, or the application of income to pay off the principal, may take place yearly, half-yearly, or at other times more or less frequently, and these periods are termed "rests." In *Robinson* v. *Cumming*, 2 Atk. 410, Lord Hardwicke said rests were only ordered in accounts of realty, and not of personalty, but this is no longer the rule. When the Master declines to take an account with rests, if it is intended to appeal from his decision, he should be required to report the facts, so as to enable the Court to judge of the propriety of his decision: *Sievewright* v. *Leys*, 1 Ont. 375; but it has been said that the preferable method is to bring the question up on further directions: *Ib.*, *sed quære*. Taking account with rests, what it is.

Rests, as against Executors and Trustees.—In taking accounts against an executor, or trustee, he is to be charged "with what he ought to have made, with what he actually did make, or with what he must be presumed to have made": *per* Esten, V.C., *Smith* v. *Roe*, 11 Gr. 312. The principle on which the Court proceeds in charging an executor, or trustee, with interest, is that of restoring to the *cestui que trust* his own, and of fairly compensating him for loss directly attributable to the neglect, or breach of duty, by the trustee; and on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position: *per* Moss, C.J.: *Inglis* v. *Beatty*, 2 Ont. App. at p. 490. It is not that of punishment to the executor, or trustee: *Attorney-General* v. *Alford*, 4 D. M. & G. 843; *Burdick* v. *Garrick*, L. R. 5 Chy. 233; *Vyse* v. *Foster*, L. R. 8 Chy. 309; L. R. 7 H. L. 318. Compound interest may in some cases be a convenient mode of making this compensation, but in other cases it may be oppressive, and sound more as punishment than compensation, and therefore in such cases it ought not to be charged: see *Fielder* v. *O'Hara*, 14 Gr. 223. Rests—when allowed as against executors, and trustees.

In England the amount of interest with which an executor, or trustee is charged, depends on the circumstances: (1) When he is guilty of mere neglect, and gets no personal benefit, he is charged with simple interest at 4 per cent.: *Forbes* v. *Ross*, 2 Cox, 116; *Rocke* v. *Harte*, 11 Ves. 58; *Robinson* v. *Robinson*, 1 D. M. & G. 247; *Tebbs* v. *Carpenter*, 1 Mad. 290; *Mousley* v. *Carr*, 4 Beav. 49; *Attorney-General* v. *Alford*, 4 D. M. & G. 843; or 3 per cent. compounded: *In re Barclay*, 1899, 1 Ch. 674; or with the interest he should have received with half-yearly rests: *Gilroy* v. *Stephen*, 46 L. T. 761. (2) Where he is guilty English rule when executor, or trustee, guilty of mere neglect.

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When guilty of positive breach of trust,—or has employed trust fund in his own business.

of a positive breach of trust, or has employed trust money for his own benefit, he is charged with 5 per cent.; or, at the option of the beneficiary, with the profit actually made: *Jones* v. *Foxall*, 15 Beav. 388. The neglect to comply with a specific direction for investment, has been held to be such a positive breach of trust: *Crackell* v. *Bethune*, 1 J. & W. 586; *Berwick* v. *Murray*, 7 D. M. & G. 519; *Mosley* v. *Ward*, 11 Ves. 581; and where the trust directed accumulation, the accounts have been taken with rests: *Raphael* v. *Boehm*, 11 Ves. 92; *Knott* v. *Collee*, 16 Beav. 77; *Jones* v. *Foxall*, 15 Beav. 388; *Re Barclay*, 1899, 1 Ch. 674; and where a breach of trust, and the employment of the trust fund for his own benefit, in trade, or speculation, concur, whether there be any direction for accumulation, or investment, or not, the trustee is charged with 5 per cent., sometimes with: *Burdick* v. *Garrick*, L. R. 5 Chy. 233; and sometimes without rests, or, in the option of the beneficiary, with the profits actually realized from the fund: *Flocton* v. *Bunning*, L. R. 8 Chy. 323; *Saltmarsh* v. *Borrett*, 31 Beav. 349; *Docker* v. *Somes*, 2 My. & K. 655; *Heathcote* v. *Hulme*, 1 J. & W. 122; *Sutton* v. *Sharpe*, 1 Russ. 146; *Robinson* v. *Robinson*, 1 D. M. & G. 247; *Re Davis*, 1902, 1 Ch. 314; 86 L. T. 523. In *Walker* v. *Woodward*, 1 Russ. 107, annual rests were ordered, but this was said to have been obtained by surprise: see *Attorney-General* v. *Solly*, 2 Sim. 518. In *Jones* v. *Foxall*, 15 Beav. 388; *Williams* v. *Powell*, 15 Beav. 461; *Heighington* v. *Grant*, 1 Ph. 600; rests were ordered. In *Docker* v. *Somes*, 2 My. & K. 655; *Palmer* v. *Mitchell*, 2 My. & K. 672; *Macdonald* v. *Richardson*, 1 Giff. 81; accounts of profits arising from employment of trust funds in trade were ordered; and see *Crowshay* v. *Collins*, 15 Ves. 218; 1 J. & W. 207; 2 Russ. 325; *Willett* v. *Blanford*, 1 Ha. 253; *Wedderburn* v. *Wedderburn*, 22 Beav. 84. Where a trustee raised money on the security of the trust estate in conjunction with his own property, he is bound to account to his *cestui que trust* for a proportionate part of the money so raised: *Rochefoucauld* v. *Boustead*, 1898, 1 Ch. 550. The paying in money to the general account of a firm of solicitors, of which the trustee was a partner, was held not to be a using of the money in his own business, so as to render him liable for compound interest: *Burdick* v. *Garrick*, L. R. 5 Chy. 233. Where an infant is interested, an inquiry will be directed whether it is for his advantage to take interest, or profits: *Burden* v. *Burden*, cited in *Heathcote* v. *Hulme*, 1 J. & W. 134-5. No special direction seems to be necessary to authorize the Master to make that inquiry in Ontario.

Where, however, trustees have improperly dealt with a trust fund but have invested it in such a way as to yield much larger profits than could have been obtained had it been dealt with strictly according to the trust, the *cestuis que trustent* are not at liberty to take the benefit of the investments and at the same time hold the trustees liable as for breach of duty; if they reprobate the transaction, they must account for the extraordinary profits they have received: see *Smith* v. *Nelson*, 92 L. T. 313.

The rule that a trustee shall not make a profit out of the trust estate beyond the amount agreed, was held not to preclude a trustee company from employing directors of the company to act in the capacity of solicitor, auctioneer and manager for remuneration: *Bath* v. *Standard Land Co.*, 1911, 1 Ch. 618; 104 L. T. 867.

Mortgagee when liable to account with rests.

Mortgagees in Possession.—Where a mortgagee in possession, has, in that character, received rents and profits, or is chargeable with an occupation rent, in excess of the interest due, the Master may strike a balance periodically, and apply the surplus to the reduction

of the principal; this is called taking the account with rests: *Thorneycroft* v. *Crockett*, 2 H. L. C. 239; *Wilson* v. *Cluer*, 3 Beav. 136; *Schofield* v. *Ingham*, 1 C. P. Coo. 477; *Thompson* v. *Hudson*, L. R. 10 Eq. 497; and see Fisher on Mortgages, 5th ed., sec. 1793, *et seq.* And where a mortgagee, after having been paid in full, has continued in possession, he may be charged with compound interest on his receipts: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Lloyd* v. *Jones*, 12 Sim. 490; *Ashworth* v. *Lord*, 36 Ch. D. 545; 58 L. T. 18. Rule 416.

In *Coldwell* v. *Hall*, 9 Gr. 110, VanKoughnet, C., stated it to be the settled practice of the Court, "that when a mortgagee enters, his money being in arrear, he is not liable to account for the rents received by, or chargeable against, him, with rests, until he is paid off in full." And see *Wilson* v. *Cluer*, 3 Beav. 136; *Wilson* v. *Metcalfe*, 1 Russ. 530; *Poul* v. *Johnson*, 12 Gr. at p. 482; *Davis* v. *Moy*, 19 Ves. 384; *Finch* v. *Brown*, 3 Beav. 70; *Lotter* v. *Dashwood*, 6 Sim. 462. But if he enters when nothing is in arrear, it seems the account may be taken with rests from the beginning of the possession: *Nelson* v. *Booth*, 3 D. & J. 119.

But the mere fact of nothing being due when possession is taken, is not conclusive as to the right to have the account taken with rests; every attendant circumstance must be regarded: *Horlock* v. *Smith*, 1 Coll. 287. Thus a mortgagee who has taken possession of leaseholds to prevent a forfeiture is not liable so to account, though nothing was in arrear when he entered: *Potch* v. *Wild*, 30 Beav. 99; and see *Gordon* v. *Eakins*, 16 Gr. 363.

If a mortgagee holds bills, or notes, for arrears when he enters, he is nevertheless not liable to account with rests, if they are dishonoured: *Dobson* v. *Land*, 4 D. & S. 575.

Rests may be made when a mortgagee in possession sets up an unfounded claim to the equity of redemption, or resists the mortgagor's right to redeem: or, when overpaid, has denied that his mortgage was satisfied: *Incorporated Society* v. *Richards*, 2 Dr. & W. 258; *Crippen* v. *Ogilvie*, 15 Gr. 569; *Montgomery* v. *Colland*, 14 Sim. 79.

Where the mortgagee is in occupation, and is charged with an occupation rent more than sufficient to pay the interest, the account may be taken with rests, if the mortgage debt was not in arrear when he entered, subject to the qualifications above mentioned, from the time he entered, or, if then in arrear, then from the time he was paid in full: *Wilson* v. *Metcalfe*, 1 Russ. 530; *Binnington* v. *Horwood*, T. & R. 477; *Coldwell* v. *Hall*, 9 Gr. 110; where the account is taken with rests, it would seem that the proper time for making the rests is at the time of each payment of rent, whenever the payment exceeds the interest then in arrear.

The mere fact that a mortgagee resides with the owner of the equity of redemption on the mortgaged property, does not render him liable to account as a mortgagee in actual occupation: *Paul* v. *Johnson*, 12 Gr. 474.

A person entering as a *bonâ fide* purchaser from a mortgagee is not liable to account as a mortgagee in possession, in the event of his purchase being held invalid: *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *Carroll* v. *Robertson*, 15 Gr. 173. But a mortgagee who entered claiming to have purchased the equity of redemption, but who was held to be still redeemable, was ordered to account with rests: *Aitchison* Purchaser from mortgagee.

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v. *Coombs*, 6 Gr. 643; this point is not noticed in the report, but see the decree, D. B. 4, fo. 676; but see *Parkinson* v. *Hanbury*, *supra*.

Notice to tenants to attorn.

The mere giving of notice by a mortgagee to his mortgagor's tenant to pay his rent to the mortgagee, does not, unless the tenant attorns and pays his rent to the mortgagee, create any tenancy between the tenant and the mortgagee; the mere fact that he continues in possession after the notice is not enough: *Towerson* v. *Jackson*, 1891, 2 Q. B. 484; 65 L. T. 332.

Sales by mortgagees.

A mortgagee in possession from time to time effecting sales under a power of sale is not liable to account for rents and profits with rests at each sale: *Ainsworth* v. *Wilding*, 1905, 1 Ch. 435; 92 L. T. 679.

Surplus after sale.

A mortgagee who has sold under a power of sale and retains the surplus in his hands is liable to pay interest on it to the party entitled (unless there are circumstances which render it unjust), but mere non-claim, even for four years, is not such a circumstance: *Eley* v. *Read*, 76 L. T. 39; *Charles* v. *Jones*, 35 Ch. D. 544; 56 L. T. 848; *Heath* v. *Chinn*, 98 L. T. 855.

No special direction now necessary.

Prior to Chy. O. 220 (*Rule* 410), the account could not be taken against a mortgagee with rests, without an express direction in the decree to that effect: *Webber* v. *Hunt*, 1 Mad. 13. Under *Rule* 410, no express direction in the judgment is necessary; but the Master of course cannot properly take the account with rests in cases where it would not, under the former practice, have been ordered by the Court.

Mortgagor.

Mortgagor.—Under a mortgage providing for payment of compound interest, a mortgagee in possession cannot recover more than simple interest, unless he shows that the rents and profits were insufficient to meet the interest as it fell due: *Wrigley* v. *Gill*, 1906, 1 Ch. 165; 94 L. T. 179. Where a mortgagor tenders payment which is refused, he is liable for interest subsequent to the tender unless he shows that he kept money idle and made no profit from it: *Edmondson* v. *Copeland*, 1911, 2 Ch. 301; 105 L. T. 8; see *Rule* 309.

Statute of Limitations.

Statute of Limitations.—A mortgagee in occupation is liable to account for more than six years' occupation rent prior to the commencement of the action; the Statute of Limitations is no bar: *Coldwell* v. *Holl*, 9 Gr. 110; *S. C.*, 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Where a mortgagee after he has received sufficient from rents and profits to pay off his mortgage, continues in possession for ten years, the right of the mortgagor is barred: *In re Metropolis & Counties P. I. Bg. Socy.*, 1911, 1 Ch. 698; 104 L. T. 382, he is not in as trustee.

Statute of Limitations, how far a bar to recovery of interest.

As against the person of the debtor, arrears of interest, or rent, payable under a covenant (except a covenant in a mortgage made on or after 1st July, 1894), accruing, or acknowledged in writing, or by part payment, to be due, at any time within twenty years of the commencement of the action, have been held recoverable, even though such interest, or rent, be charged upon, or payable out of land: *The Statute of Limitations* (R. S. O. c. 75), s. 49; *Allan* v. *McTavish*, 2 Ont. App. 273; and see *Boice* v. *O'Loane*, 3 Ont. App. 167; *McMahon* v. *Spencer*, 13 Ont. App. 430; but see *contra*, *Sutton* v. *Sutton*, 22 Ch. D. 511; 48 L. T. 95; *Feornside* v. *Flint*, *Ib.*, 154; 22 Ch. D. 579; where it was held that the remedy on a collateral bond was barred, after the lapse of the time for bringing an action in respect of the land mortgaged by the principal security: and see *Shaw* v. *Crompton*, 1910, 2 K.

B. 370; *Lewin* v. *Wilson*, 9 S. C. R. 677; *Re Powers*, 30 Ch. D. 291; *Kirkland* v. *Peatfield*, 1903, 1 K. B. 756. In *Mocdonold* v. *Macdonald*, 11 Ont. 187, Prondfoot, J., refused to follow *Sutton* v. *Sutton*, *supra*, on the gronnd that he was bound by the contrary decision of the Court of Appeal in *Allan* v. *McTovish*, *supra*; and in *McDonald* v. *Elliott*, 12 Ont. 98; 22 C. L. J. 229; but see *Trimble* v. *Hill*, 5 App. Cas. 342, and *per* Osler, J.A., 13 Ont. App. 434; and *per* Burton, J.A., 14 Ont. App. 256; *Jacobs* v. *Beover*, 17 O. L. R. 496. Rule 410.

In the case of mortgages made on or after 1st July, 1894, the period will be 10 years: *The Statute of Limitations* (R. S. O. c. 75), s. 49 (1, *k*).

Altbough no more than six yenrs' arrears of interest accrued prior to action can be recovered in an action for foreclosure, or sale, the rule is different in redemption actions; in such actions if the mortgagor is personally liable on a covenant, or otherwise, for payment of the debt, he will not be allowed to redeem except on payment of all arrears for which he is liable: *Dingle* v. *Coppen*, 1899, 1 Ch. 726; 79 L. T. 693; but where he is not personally liable for payment of the mortgage debt, only six years' arrears are recoverable: *McMicking* v. *Gibbons*, 24 Ont. App. 586.

As against land, no arrears of rent, or interest, in respect of any sum of money charged upon, or payable out of, any land, or rent, or in respect of any legacy charged upon land, can be recovered hut within six years after the same shall have respectively become due, or next after any acknowledgment of the same, in writing, has been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent: R. S. O. c. 75, s. 18; but a bond given by third parties as security for a mortgage debt was held not to be barred under R. S. O. c. 75, s. 18: see *Re Powers*, 30 Ch. D. 291; 53 L. T. 647. But where any prior mortgagee, or other incumbrancer, has been in possession of any land, or in receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrance, on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the time of six years: see R. S. O. c. 75, s. 19.

An acknowledgment by one of two executors against the will of the other, is not sufficient in England to bind the land: see *Astbury* v. *Astbury*, 1898, 2 Ch. 111; but see *The Devolution of Estates Act* (R. S. O. c. 119), s. 3.

Where a testator charges his debts on his lands, such debts are recovcrable thereout within ten years from the testator's death, and not merely that part payable out of the land on a due administration of the realty and personalty: *Re Raggi*, *Bross* v. *Young*, 108 L. T. 917.

Payments.—Where a covenant for payment of a debt is given by a principal and surety, payments by the principal on account of the debt, which will prevent the Statute of Limitations from running in his favour, will also prevent the Statute from running in favonr of ths surety, tbough he be no party to the payments: *In re Frisby*, 43 Ch. D. 106; but see *Paxton* v. *Smith*, 18 Ont. 178. Payments, effect of, on Statute of Limitations.

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And payments made by a vendor of the equity of redemption in pursuance of an agreement with his vendee, will prevent the Statute from running in favour of the vendee, though he be no party to the payments: *Trust & Loan Co.* v. *Stevenson*, 20 Ont. App. 66; and see *Dibb* v. *Walker*, 1893, 2 Ch. 429; 68 L. T. 610.

Where a payment is made by cheque, the date on which the cheque is delivered is the date of the payment, and not the date the cheque is cashed, notwithstanding it be post dated, and, by arrangement, not presented for some days after its delivery: *Marreco* v. *Richardson*, 1908, 2 K. B. 584; 99 L. T. 486.

Partnership accounts, when barred by Statute of Limitations.

Partnership Accounts.—In England it has been held, that the Statute of Limitations cannot be set up as a bar to an action for an account, so long as a partnership continues: *Betjeman* v. *Betjeman*, 1895, 2 Ch. 474; 73 L. T. 2; *The Pongola*, 73 L. T. 512; but in Canada it has been held by the Supreme Court that the statute may be set up as between partners, or at all events that long delay may be evidence of acquiescence: *Toothe* v. *Kittredge*, 24 S. C. R. 287. Where the partnership has expired, or been dissolved, more than six years before action, the Statute of Limitations may be pleaded as a bar to the taking of partnership accounts: *Noyes* v. *Crowley*, 10 Ch. D. 31; and see *Storm* v. *Cumberland*, 18 Gr. 245; *Carroll* v. *Eccles*, 17 Gr. 529; this latter decision, however, would seem to be qualified by *Wright* v. *Morgan*, *infra*, but see *Rule* 143.

Where a Master is directed to take an account, he should allow whatever interest is proper to be allowed up to the date of his report, as, on the hearing on further directions, interest will not be allowed on the amount found due anterior to the date of the report: *Phillips* v. *Homfray*, 44 Ch. D. 694; 39 W. R. 96; 62 L. T. 897.

Where the Statute of Limitations is intended to be relied on as a bar to the whole claim, it should be specially pleaded: *Rule* 143; but it would seem that it may be set up in the Master's office as a bar to part of the claim, without having been pleaded: *Wright* v. *Morgan*, 1 Ont. App. 613; *Cottonoch* v. *Urquhort*, 6 P. R. 28; where no claim for interest is made by the pleadings, and there is no covenant, six years' arrears only are recoverable: *Wiley* v. *Ledyard*, 10 P. R. 182; 20 C. L. J. 142.

Wilful neglect and default; English rule regarding.

Wilful Neglect and Default.—Under the present English practice, the accounts cannot be taken on the footing of wilful default without a special direction in the judgment, or order, of reference; and where wilful default is not pleaded, no order can be made on the footing of wilful default, either at the trial, or at any subsequent time; but where wilful default has been alleged and a case made for it in the pleadings, an account may be directed on the footing of wilful default, either at the hearing or trial of the action, or at any subsequent stage: *Re Symons, Luke* v. *Tonkin*, 47 L. T. 684; *Barber* v. *Mackrell*, 12 Ch. D. 534; 41 L. T. 23, 201, where *affidavits* raising a case of fraud, were treated as pleadings; and see *Job* v. *Job*, 6 Ch. D. 562; *Mayer* v. *Murray*, 8 Ch. D. 424; *Re Bowen, Bennett* v. *Bowen*, 47 L. T. 114; 20 Ch. D. 538; *Re Barclay*, 1899, 1 Ch. 674; but see *Re Wrightson, Wrightson* v. *Cooke*, 1908, 1 Ch. 789.

Ontario rule.

In Ontario no statement in the pleadings is necessary, in order to authorize the Master to take accounts in any proper case, on the footing of wilful default: see *supra*, p. 929. Mortgagees in possession were always liable, as of course, to account on the footing of wilful

neglect and default, and the effect of *Rule* 410, is to place trustees, executors, and others, liable for wilful default, upon the same footing in this respect as mortgagees in possession. Clause (*b*) of *Rule* 410, applies in terms only to accounts of realty, but it has been held that under clause (*g*), the Master may inquire as to wilful neglect and default, in all cases referred to him without any special direction so to do: *Carpenter* v. *Wood*, 10 Gr. 354. Wherever wilful neglect and default is charged against an accounting party, the Master is to determine whether or not he is liable to account on that footing, and, if so, the amount that is due; he should not report the facts as "special circumstances": *Wolmsley* v. *Bull*, 3 Chy. Ch. 344; and in his report he should distinguish between sums actually received, and those charged by reason of wilful default, in order to enable the Court to deal with the question of costs: *Moodie* v. *Leslie*, 12 Gr. 537. Rule 410.

Executors and Trustees. — The Master may make the inquiry, though no case of wilful neglect or default is averred in the pleadings, or proved at the trial: *Carpenter* v. *Wood*, 10 Gr. 354, and see *supra*, p. 909. Formerly it was thought that the inquiry could not be made under the common administration order obtained in Chambers: *Harrison* v. *McGlashan*, 7 Gr. 531; except when obtained by the personal representative himself: *Ledgerwood* v. *Ledgerwood*, *Ib.*, 584; but the practice is now settled that the inquiry may be made in every case, per Boyd, C., *Re Allan*, *Pocock* v. *Allon*, 9 P. R. 277; *Sullivon* v. *Harty*, 9 P. R. 500. Executors and trustees, when liable for wilful neglect and default.

Executors are not liable for loss of interest arising from their delay in taking out probate; the remedy of any person likely to suffer loss from any such delay is to cite the executor in the Surrogate Court: *Re Stevens*, 1897, 1 Ch. 422; 76 L. T. 1898, 1 Ch. 162; 77 L. T. 508.

An executor improperly delaying to sell lands which, by the will are saleable for the payment of debts, in order to benefit himself, is liable to account for rents and profits: *Emes* v. *Emes*, 11 Gr. 325; and executors, without authority, intermeddling with, and assuming the management of, the realty, are liable to account as if duly empowered to act as trustees: *Chisholm* v. *Bornord*, 10 Gr. 479; but in such a case they are not entitled to any compensation for so doing: *Dogg* v. *Dogg*, 25 Gr. 542; see now *The Devolution of Estates Act* (R. S. O. c. 119), ss. 3, 4.

But it is the duty of the Court in all cases where executors, or trustees, are concerned, to administer equity in such a manner that honest and respectable men shall not be deterred from accepting the office, and if there is a doubt, where men have acted honestly and *bonâ fide* in discharge of their duty, although they have made mistakes, the doubt should be determined in favour of the executor or trustee: *Re Owens*, 47 L. T. 61; *In re Speight*, 22 Ch. D. 727; 48 L. T. 279; 9 App. Cas. 1; 50 L. T. 330; but this does not apply to mistakes in law: *National Trustees Co.* v. *General Finance Agency*, 1905, A. C. 373; 92 L. T. 736. But it must be remembered that in England, executors, and trustees, have no statutory right to compensation for their services as they have in Ontario: see *The Trustee Act* (R. S. O. c. 121), s. 67, Executors and trustees, entitled to benefit of doubt.

Where a person becomes beneficially entitled to a trust fund, which, prior to his interest vesting in possession, he has actively assented to being applied otherwise than according to the terms of the trust,

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neither he, nor his representatives, have any right to sue for the breach of trust: *Evans* v. *Benyon*, 37 Ch. D. 329; 58 L. T. 700.

Where a testator expressed the fullest confidence in one of the trustees named in his will, and directed the other trustees to be guided by his views as to sale, disposal, and reinvestment, of his American securities, and declared that his trustees should not be responsible for any loss occasioned thereby, it was held that the co-trustees were not answerable to legatees for loss occasioned by unauthorized investments of their moneys, made by the trustee: *Burritt* v. *Burritt*, 29 Gr. 321. But, as regards creditors, it seems they might not be discharged: *Doyle* v. *Blake*, 2 Sch. & L. 239.

A trustee is liable for not taking proper steps to get the trust fund into his hands: *Re Robinson, Billing* v. *Brogden*, 38 Ch. D. 546; 59 L. T. 650; but see *Tudball* v. *Medlicott*, 59 L. T. 370; *Zimmerman* v. *Wilcox*, 35 C. L. J. 688. He is liable for neglect to collect debts due to the trust estate: *Re Greenwood, Greenwood* v. *Firth*, 105 L. T. 509.

While the Court will not require from executors, and trustees, any greater care than a prudent man ordinarily bestows on the management of his own property, yet it will require them to give full explanations of all their dealings, and of the causes why outstanding assets were not collected, or property of the estate has disappeared; and a trustee, or executor, who cannot account for the one or the other, will be chargeable with them: *Chisholm* v. *Barnard*, 10 Gr. 481; *Zimmerman* v. *Wilcox*, *supra*; a trustee is not liable for losses arising through the default of agents to whom he may have properly confided the management of the trust: *Re Speight*, 22 Ch. D. 727; *Speight* v. *Gaunt*, 9 App. Cas. 1; and see *Re Brier*, 26 Ch. D. 238; even though the trustee is remunerated for his services: *Jobson* v. *Palmer*, 1893, 1 Ch. 71; nor for the default of a co-trustee who has been *bonâ fide* allowed to convert registered bonds into bonds payable to bearer for the purpose of facilitating a sale thereof, and who has taken advantage of the fact by converting the bonds to his own use: *Re Gasquoine*, 1884, 1 Ch. 470; 69 L. T. 822; 70 L. T. 196; *Shepherd* v. *Harris*, 1905, 2 Ch. 310; nor for the money of the estate obtained by a co-trustee by fraud, to which he is no party: *Ib.*; *Re McLatchie*, *Preston* v. *Leslie*, 33 Ont. 179; nor for losses arising from mere errors of judgment: *Re Chapman*, 1896, 2 Ch. 763; 75 L. T. 196; but he is for the loss occasioned by employing improper agents: *Fry* v. *Tapson*, 28 Ch. D. 268; 51 L. T. 326; for negligently allowing the money of the estate to remain in the hands of proper agents: *McCarter* v. *McCarter*, 7 Ont. 243; *Cann* v. *Cann*, 51 L. T. 770; *Re Mitchell*, 52 L. T. 178; *Dewar* v. *Brooke*, 52 L. T. 489; and for losses occasioned by neglecting to supervise the actions of agents: *Low* v. *Gemley*, 18 S. C. R. 685; but not for moneys misappropriated by a co-executor: *Re Crowter*, *Crowter* v. *Hinsman*, 10 Ont. 159; *Re McLatchie*, *Preston* v. *Leslie*, *supra*; unless he has knowingly allowed them to remain in his co-executor's hands uninvested without making any effort to secure the fund from loss.

Executors have a fair discretion in taking, or delaying, legal proceedings against a debtor; and a delay in suing, even though causing a loss of the debt, is not necessarily such negligence as subjects them to any liability: *Re Owens*, 47 L. T. 61. In the absence of special circumstances, an executor is only liable for his own individual receipts, and not for those of his co-executors: *Re Crowter*, *supra*; but he is liable for the receipts of any agent jointly employed by himself and his co-executor: *Harrison* v. *Patterson*, 11 Gr. 105.

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There is no fixed rule as to the relative proportions which loans made by trustees ought to bear to the value of the property. As a general rule more than two-thirds the value should not be advanced; but a trustee who, in the honest exercise of his discretion, lends a little more than two-thirds, is not liable in the event of the security proving insufficient: *Re Godfrey*, 23 Ch. D. 483; 48 L. T. 853; and see *Re Pearson*, 51 L. T. 692. In the case of loans on the security of business premises, one-half is, in England, considered the limit: see *Palmer* v. *Emerson*, 1911, 1 Ch. 758; 104 L. T. 557.

Where trust funds are lost through improper investments, the trustees are all equally liable, and as a general rule one trustee who has merely passively assented to the breach of trust has no right to be indemnified by his co-trustee who has acted honestly in making an improper investment: *Bahin* v. *Hughes*, 31 Ch. D. 390; 54 L. T. 188; *Bacon* v. *Camphousen*, 58 L. T. 851; but see *Re Partington*, 57 L. T. 654.

Depositing money in a bank at interest may be a breach of trust: see *Perpetual Executors* v. *Swan*, 1898, A. C. 763.

As to the amount with which a trustee is chargeable, where the trust fund is lost through investment in proper, but insufficient, securities: see *The Trustee Act* (R. S. O. c. 121), ss. 31, 32.

Where a trustee who is also a beneficiary has consented to an improper investment, he cannot call upon his co-trustee to bear any portion of the loss which he, as a beneficiary, thereby sustains: *Chillingworth* v. *Chambers*, 73 L. T. 208; and see *The Trustee Act*, s. 36.

To accept a valuation made on behalf of the borrower is improper: *Walcott* v. *Lyons*, 54 L. T. 786; and see *Re Somerset*, *Somerset* v. *Poulett*, 68 L. T. 613; 69 L. T. 744; 42 W. R. 145 (where the solicitors for the mortgagees acted also for the mortgagor); as is also neglecting to obtain a formal valuation: *Re Olive*, 34 Ch. D. 70; 55 L. T. 83; *Re Stuart*, 1897, 2 Ch. 583; and see *Re Partington*, *supra*, where trustees were held liable for neglecting to give proper instructions to the valuators; and see *Leeroyd* v. *Whiteley*, 12 App. Cas. 727; 58 L. T. 93.

Trustees investing trust money on insufficient security in breach of trust, are not entitled to an option of taking the security; and the order for realizing the security need not contain any such option: *Re Solmon*, 42 Ch. D. 351; 62 L. T. 270, although, of course, if they pay up what is due to the trust they are entitled to the benefit of the securities unrealized: see also *Head* v. *Gould*, 1898, 2 Ch. 250; 78 L. T. 739.

Where a sale by a trustee to himself is set aside as a breach of trust, he is liable to account for rents and profits received by him, but is not chargeable with interest thereon: *Silkstone & H. M. Co.* v. *Edey*, 1900, 1 Ch. 167.

Executors cannot be charged with losses arising from their having carried out the express directions of their testator: *Re Hurst*, 63 L. T. 665; and where they have so carried on a business of the deceased pursuant to the directions in his will, or even without such directions, but with the consent of his creditors, they are entitled to indemnity from the estate against any loss, and creditors, whose claims have been thus contracted, are entitled to stand in the executors' place against the testator's estate: *Dowse* v. *Gorton*, 1891, App. Cas. 190; 64 L. T. 809; *Re Brooke*, 71 L. T. 398; but they are not, without express

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authority, justified in embarking more capital in such business: *Smith* v. *Smith*, 13 Gr. 81; nor are they entitled to indemnity when they continue the testator's business without any direction in his will so to do: *Re Oxley, Hornby* v. *Oxley*, 110 L. T. 626; (*Re Brooke*, *supra*, p. 943, overruled).

Application of rule in Clayton's case.

The rule in *Clayton's Case*, 1 Mer. 572, applies as between two *cestuis que trustent*, where money has been paid into the private bank account of the trustee: see *Re Stenning*, 1895, 2 Ch. 433; 73 L. T. 207.

Mortgagee in possession, liable for wilful neglect and default.

Mortgagees.—A mortgagee in possession is bound to account, as of course, for what he has, or but for his wilful default might, or ought to have received: *Choplin* v. *Young*, 33 Beav. 330; *Parkinson* v. *Honbury*, L. R. 2 H. L. 1; *Hughes* v. *Williams*, 12 Ves. 493; *Kensington* v. *Bouverie*, 7 D. M. & G. 134; *Quarrel* v. *Beckford*, 1 Mad. 274. But he is not liable for more than he has actually received, unless it is clearly proved that he knew a greater rent might, and could, have been obtained, and that he refused or neglected to obtain it: *Merriam* v. *Cronk*, 21 Gr. 60; *Coldwell* v. *Hall*, 9 Gr. 110, 114; *Metcalfe* v. *Campion*, 1 Moll. 238; *Hughes* v. *Williams*, 12 Ves. 493; *Brondon* v. *Brandon*, 10 W. R. 287; *Cocks* v. *Groy*, 1 Giff. 77.

Rents not received.

A mortgagee not in possession is not chargeable with rent which a tenant of the mortgagor had promised to pay him, but did not: *Waddell* v. *McColl*, 14 Gr. 211.

Where, prior to the execution of a mortgage, a tenant in possession had paid rent in advance to the mortgagor, the mortgagee cannot afterwards recover such rent from the tenant: *Green* v. *Rheinberg*, 104 L. T. 149.

A mortgagee in possession who lets the mortgaged premises subject to a proviso that the lessee shall buy goods from him, is bound to account for the rent that could have been obtained for the premises without such a restriction as to trade, but he is not bound to account for the profits so made: *White* v. *City of London Brewery Company*, 39 Ch. D. 559; 60 L. T. 19; affirmed, 42 Ch. D. 237; 61 L. T. 741.

Agreement between mortgagee and mortgagor, subsequent incumbrancers not bound by.

Where a mortgagee takes possession at a rent agreed on between him and the mortgagor, he is only liable to account to the mortgagor on the footing of the agreement, but such agreement is not binding on any subsequent incumbrancer, and, as to him, the Master may charge the mortgagee with a fair occupation rent, though it exceeds the amount agreed to by the mortgagor: *Court* v. *Hollond*, 29 Gr. 19, and see *Gilmour* v. *Roe*, 21 Gr. 284; *Gregg* v. *Arrott*, Ll. & Goo. *temp. Sugd.* 246.

But where a mortgagor agreed with a mortgagee in possession, that the rents and profits should be applied in payment of the mortgagor's indebtedness for goods purchased from the mortgagee, it was held that a subsequent incumbrancer had no right to insist that the rents and profits should be applied in reduction of the mortgage debt: *Mitchell* v. *Soylor*, 1 O. L. R. 458.

Sales under powers.

A mortgagee selling under a power of sale is not liable for wilful neglect and default for selling adjacent premises *en bloc*, and not in parcels, even though a loss may have resulted from his so doing, provided he acted *bonâ fide*: *Wilson* v. *Taylor*, 4 O. W. N. 253, 1376.

Mortgagee becoming purchaser.

Where a mortgagee directly, or indirectly, becomes the purchaser at a sale made by himself under a power of sale in his mortgage, the

sale may be set aside, and he may be required to account as a mortgagee in possession: *Farrar* v. *Farrars Limited*, 40 Ch. D. 395; 60 L. T. 121; *Martinson* v. *Clowes*, 21 Ch. D. 857; 46 L. T. 882; *Hodson* v. *Deans*, 1903, 2 Ch. 647; 89 L. T. 92. Rule 410.

A *bonâ fide* sale by a mortgagee under a power to one of several mortgagors, without notifying the others of the intended sale, cannot be impeached by the latter: *Kennedy* v. *De Trafford*, 1897, A. C. 180; 76 L. T. 427; and a *bonâ fide* sale to his own solicitor was upheld: *Nutt* v. *Easton*, 1899, 1 Ch. 873; 1900, 1 Ch. 29; 80 L. T. 353; 81 L. T. 530; and see *Kaiserhof Hotel Co.* v. *Zuber*, 23 O. L. R. 481; 25 O. L. R. 194. Sale to one of several mortgagors.

Where a sale of part of the land has been made under a power of sale in the mortgage, the expenses of sale are to be deducted from the gross proceeds of sale, and the balance only is to be brought into the account; and, without special direction, the mortgagor is not entitled to have a rest made in the account of rents and profits at the date of each sale: *Ainsworth* v. *Wilding*, 1905, 1 Ch. 435; 92 L. T. 679. Costs of sale.

A mortgagee who concurs in a sale by a mortgagor, and permits the surplus of the purchase money to be paid to the mortgagor, to the prejudice of the subsequent incumbrancers, is liable therefor to the latter: *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954; 53 L. T. 442. Application of purchase money.

A puisne mortgagee who has cut timber on mortgaged property is liable to account to the prior mortgagee for the proceeds, where the mortgaged land proves an insufficient security: *McLeod* v. *Avey*, 16 Ont. 365. Timber.

Vendor and Purchaser.—After the time fixed for completion of the contract, the vendor is liable for rents and profits, but usually only for those actually received: *Howell* v. *Howell*, 2 My. & Cr. 486, unless he allows the rent to fall in arrear, when he will be held accountable for the arrears: *Aclond* v. *Gaisford*, 2 Mad. 28; *Wilson* v. *Clapham*, 1 J. & W. 36; formerly a special case must have been made at the hearing to entitle a purchaser to have the account taken on the footing of wilful default: *Sherwin* v *Shakspear*, 5 D. M. & G. 517, 532; *Phillips* v. *Sylvester*, L. R. 8 Chy. 173. But this is no longer necessary in Ontario: see *supra*, p. 909. Where no time was named in the contract for delivery of possession, the purchaser was held entitled to the rents from the date of the contract: *Brady* v. *Keenan*, 6 P. R. 262; and see *Dudley* v. *Bercsy*, 2 Chy. Ch. 364, as to the liability of a vendor in possession. Vendor, after time fixed for completing, is liable to purchaser for rents and profits.

No more than six years' arrears of interest on purchase money can be recovered from a purchaser as a charge on the land, whether he has been in possession or not: *Airey* v. *Mitchell*, 21 Gr. 512; *Gunn* v. *Trust & L. Co.*, before Boyd, C., 19th January, 1882; but in some cases where more than six years' arrears were recoverable against the estate of a deceased person, the excess beyond six years was allowed to avoid circuity of action: *Carroll* v. *Robertson*, 15 Gr. 173; *Taylor* v. *Hargrove*, 19 Gr. 271; *Howeren* v. *Bradburn*, 22 Gr. 96; *Weaver* v. *Vandusen*, 27 Gr. 481. Interest on purchase money.

Principal and Agent.—A bailiff at Common Law was liable to account for what he might have made of the lands, but for his wilful default: Seton, 779; *Wheeler* v. *Horne*, Willes, 208; Co. Lit., 172 *a*; and Bailiff liable for neglect and default.

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an agent acting under a power of attorney is liable so to account, though the power be defective: *Bradburn* v. *Shanly*, 7 Gr. 569. But a solicitor who paid off a mortgage for a client, and entered into the receipt of rents, was held not to be liable on the footing of wilful default, his possession being that of his client: *Word* v. *Carttar*, L. R. 1 Eq. 29.

Persons not Liable to Account for Wilful Default:—

Partners.

Partners in possession of partnership property are not liable to account on the footing of wilful default: *Davidson* v. *Thirkell*, 3 Gr. 330, at p. 348; *Royce* v. *Wood*, 2 J. & W. 556; but one partner may have a demand against another for compensation for negligence or fraud: *Bury* v. *Allen*, 1 Coll. 589; *Doupe* v. *Stewart*, 13 Gr. 637.

Tenants in common.

Tenants in Common who have received more than their share, though liable to account for the excess: *Lorimer* v. *Lorimer*, 5 Mad. 363; *Turner* v. *Morgan*, 8 Ves. 145, are not answerable for wilful default: *Wheeler* v. *Horne*, Willes, 208.

Tenants for life.

Tenants for Life.—A tenant for life may cut down timber in the proper course of husbandry, in order to bring the proper proportion of land into cultivation, and perhaps destroy such timber, but he cannot cut down timber, even for that purpose, and sell it for his own benefit: *Drake* v. *Wigle*, 22 C. P. 341; *Saunders* v. *Breakie*, 3 Ont. 603; but he may sell it, in order to buy with the proceeds more suitable timber for making necessary repairs to buildings on the premises: *Hixon* v. *Reavely*, 9 O. L. R. 6.

He is not liable for permissive waste: *Potterson* v. *Central Canada Loan Co.*, 29 Ont. 134; nor for repairs: *In re Fremon*, 1898, 1 Ch. 28; and a legatee for life of leasehold premises is not liable on the covenants in the lease: *Re Tomlinson*, 1898, 1 Ch. 232.

Purchasers for value.

Purchaser for Value evicted by a person having a better title, of which he is fixed with constructive notice, is not liable to account on the footing of wilful default: *Howell* v. *Howell*, 2 My. & Cr. 478.

Persons in possession by fraud.

Persons who have obtained Possession by Fraud, are not liable to account on the footing of wilful default: *Murray* v. *Palmer*, 2 Sch. & L. 474; *Trevelyan* v. *Charter*, 9 Beav. 140; 4 L. J. N. S. 209; 11 Cl. & F. 74.

Occupation rent, when chargeable.

Occupation Rent.—A person liable to account for rents and profits may, generally, if he has been himself in actual occupation of the property in question, be charged with a fair rent for the time he has so occupied—which account of rent is liable to be taken with rests, wherever rests would be charged if rents and profits had been received: but see *Silkstone & H. M. Co.* v. *Edey*, 1900, 1 Ch. 167.

As against vendors.

Vendors.—A vendor who continues in occupation after the time fixed for completion may be charged with an occupation rent: *Legott* v. *Metropolitan Ry. Co.*, L. R. 5 Chy. 716; *Dyer* v. *Hargrave*, 10 Ves. 505; but not in cases where the purchaser could, and ought to have taken possession: *Dakin* v. *Cope*, 2 Russ. 170; nor where—the purchaser making default in payment—the vendor continues to carry on his business: *Leggott* v. *Metropolitan Ry. Co.*, *supra*.

Purchasers.

Purchasers.—Where a conveyance is set aside, an occupation rent may be charged against a purchaser who has been in occupation:

Bloomer v. *Spittle*, L. R. 13 Eq. 427; *Neesom* v. *Clarkson*, 2 Ha. 163; but see *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1. Rule 418.

Mortgagees.—A mortgagee may be charged with an occupation rent, if it be proved that he has actually occupied the mortgaged premises: *Trulock* v. *Robey*, 15 Sim. 265. Any agreement as to the amount of the rent made between mortgagor and mortgagee, though binding between them, is not binding on others interested in the equity of redemption who are not parties to it: *Court* v. *Holland*, 29 Gr. 19; *Gregg* v. *Arrott*, Ll. & G. temp. Sngd. 246. And where rent is paid in advance to a prior mortgagee, and applied, with the consent of the mortgagor, in discharge of other liabilities than the mortgage debt, a subsequent assignee of the equity of redemption is entitled to have all rents accruing subsequent to the assignment applied in reduction of the prior mortgage, notwithstanding the payment and application in advance: *Gilmour* v. *Roe*, 21 Gr. 284. A mortgagee who continues in occupation after payment in full, is chargeable with interest on the occupation rent, with rests: *Wilson* v. *Metcalfe*, 1 Russ. 537; *Quarrel* v. *Beckford*, 1 Mad. 269; *Lloyd* v. *Jones*, 12 Sim. 491; *Ashworth* v. *Lord*, 36 Ch. D. 545; 58 L. T. 18. Mortgagee, liability of, for occupation rent.

A mortgagee in occupation is entitled to set off, against the occupation rent, with which he is charged, the arrears of interest, so far as they were recoverable against the land at the time the rent accrued; *i.e.*, for six years prior to its accruing: *Walton* v. *Bernard*, 2 Gr. 358; *Horrison* v. *Jones*, 10 Gr. 99. A prior mortgagee is not bound to account to a subsequent mortgagee on the footing of a mortgagee in possession, merely because there is an attornment clause in the prior mortgage, if he has not actually taken possession: *Western District Bank, Limited* v. *Turner*, 47 L. T. 433; *Stonley* v. *Grundy*, 22 Ch. D. 478; 48 L. T. 106. May set off arrears of interest.

Tenants in Common.—A tenant in common who has been in exclusive occupation, cannot be charged with an occupation rent, if he has not ousted his co-tenant: *Rice* v. *George*, 20 Gr. 221; *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson*, 10 P. R. 4; except where his co-tenant is an infant: *Courcier* v. *Courcier*, 26 Gr. 307. But he cannot recover for substantial repairs, and improvements: *Rice* v. *George*, *supra*; nor even for incumbrances paid off by him, unless he also submits to account for an occupation rent: *Teasdale* v. *Sanderson*, 33 Beav. 534; *Rivet* v. *Desourdi*, 12 C. L. J. 203. But a tenant in common who has been in exclusive occupation, and has ousted his co-tenant, is liable to account for an occupation rent: *Pascoe* v. *Swan*, 27 Beav. 508. Tenants in common, how far liable for occupation rent.

Heirs.—Prior to *The Devolution of Estates Act* (R. S. O. c. 119), an heir-at-law was liable to account to a dowress for an occupation rent: *Bamford* v. *Bamford*, 5 Ha. 203. Heir-at-law.

Devisee.—Under the law as it stood previous to *The Devolution of Estates Act*, devisees in possession of land devised, charged with a legacy, were not bound to account for back rents, when the land proved insufficient to satisfy the legacy: *Gorfitt* v. *Allen*, 37 Ch. D. 48; *Re Oliver*, 82 L. T. 583. Devisee.

Trustees, express or constructive, in occupation of the trust property, are liable to account to their *cestuis que trustent* for an occupa- Trustees.

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tion rent: *Mill* v. *Hill*, 3 H. L. C. 828; *Lamont* v. *Lamont*, 7 Gr. 236; *Zimmerman* v. *Wilcox*, 35 C. L. J. 686.

Mistake of Title.—No occupation rent should be charged against a person who has been in occupation under a mistake of title, in respect of the increased value thereof arising from improvements made by him, which are not allowed to him: *McGregor* v. *McGregor*, 3 Ont. 617; *Munsie* v. *Lindsay*, 10 P. R. 173. Where occupation rent is charged in respect of property which has been improved by the occupant, according to the value as increased by the improvements, interest should be allowed on the outlay for the improvements: *Munsie* v. *Lindsay*, 11 Ont. 520.

Persons in possession under void deeds, how far entitled to be allowed for improvements.

Improvements:—

Persons in Possession of Lands under void Deeds, making lasting improvements, by which the value of the estate has been enhanced, may, within certain limits, be allowed for such improvements: *Jortin* v. *South Eastern Railway Co.*, 2 Sm. & G. at p. 73; *Quarrel* v. *Beckford*, 14 Ves. at p. 179; and whether in, as actual, or constructive, trustees: *Williamson* v. *Seeber*, 3 Y. & C. Ex. 171; *Cawdor* v. *Lewis*, 1 Y. & C. Ex. 427; *Bridge* v. *Brown*, 2 Y. & C. C. C., 191; *Bevis* v. *Boulton*, 7 Gr. 39; or as solicitors: *Robinson* v. *Ridley*, 6 Mad. 2; or agents: *Trevelyan* v. *White*, 1 Beav. 588; or as mortgagees believing themselves absolutely entitled: *Neeson* v. *Clarkson*, 2 Ha. 176; *S. C.*, 4 Ha. 97; or as a *bonâ fide* purchaser under the void deed: *Ashton* v. *Innis*, 26 Gr. 42; *Churcher* v. *Bates*, 42 U. C. Q. B. 466; *Pegley* v. *Woods*, 14 Gr. 47; *Gummerson* v. *Banting*, 18 Gr. 516; and the claim for such improvements may be actively enforced, and allowed, whether the party claiming them be plaintiff or defendant: *Ib.*; but see *Re Brazill*, *Barry* v. *Brazill*, 11 Gr. at p. 256; and even though the party claiming advereely be an infant: *Bevis* v. *Boulton*, *supra*; and see *Bichn* v. *Bichn*, 18 Gr. 497; *Wood* v. *Wood*, 16 Gr. 471.

But when possession had been taken in pursuance of an immoral agreement which was void, it was held that there could be no lien for improvements: *Moon* v. *Clarke*, 30 C. P. 417.

Purchaser.—A purchaser failing to complete his purchase is not entitled to be allowed for improvements: *Re Yoggie*, 1 Chy. Ch. 52.

Tenants in common.

Tenants in Common are entitled to contribution from their co-tenants for the cost of repairs made to prevent the property from going to ruin; Co. Lit., 200 b.; Fitzherbert, N. B., 127; but not for ordinary repairs: *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 50 L. T. 124; *Re Jones*, *Forrington* v. *Forrester*, 1893, 2 Ch. 461; *Curry* v. *Curry*, 25 Ont. App. at p. 277; unless they submit to be charged with rents and profits: *Ib.*

The right of a tenant in common in partition proceedings to be paid for improvements is restricted to such as are made by him after the tenancy has commenced in fact: *Lasby* v. *Crewson*, 21 Ont. 255.

Where land held in common is sold under a paramount mortgage, money expended by one of the tenants in common in permanent improvements will be allowed to him in distributing the surplus: *Re Cook's Mortgage*, 74 L. T. 652.

Tenants for life.

Tenants for Life are not entitled to charge for repairs as against the inheritance, however substantial or lasting: Lewin, 9th ed., 642;

Re Smith, 4 Ont. 518; *sed vide*, *Conway* v. *Fenton*, 40 Ch. D. 512; nor are they chargeable with repairs: *In re Freman*, 1898, 1 Ch. 28; nor liable to account for permissive waste: *Patterson* v. *Central Canada Loan Co.*, 15 Ont. 134; and see p. 13, *supra*. Rule 410.

Tenants at Will.—Improvements made by a tenant at will cannot be allowed: *Foster* v. *Emmerson*, 5 Gr. 135; but improvements made on wild land by a son, to whom his father had promised to give it by way of advancement, which he failed to do, were allowed as against the co-heirs of the father: *Biehn* v. *Biehn*, 18 Gr. 497; *Hovey* v. *Ferguson*, see 18 Gr. 498; but see *Foster* v. *Emmerson*, *supra*. Tenants at will, improvements by

Trustees.—Substantial and lasting improvements, and repairs, made by a trustee on the trust property, are usually allowed to him: *Bevis* v. *Boulton*, 7 Gr. 39; *Mill* v. *Hill*, 3 H. L. C. 828; *Smith* v. *Bonnistecl*, 13 Gr. at p. 35; *Ex parte Hughes*, 6 Ves. 624; *Ex parte James*, 8 Ves. 352; *Campbell* v. *Walker*, 5 Ves. 682; *Davey* v. *Durant*, 1 De G. & J. 535; *King* v. *Anderson*, 8 Ir. R. Eq. 625, 636. Repairs are allowed, even in the case of actual fraud: *Baugh* v. *Price*, 1 G. Wms., 320; and in one case improvements also: *Oliver* v. *Court*, 8 Price, 172; but see *contra*, *Kenney* v. *Browne*, 3 Ridg. 518; *Stratton* v. *Murphy*, 1 Ir. R. Eq. 361. Trustees are entitled to be allowed for improvements on trust estate.

Receivers.—A receiver has been allowed for improvements made, without the previous sanction of the Court: *Tempest* v. *Ord*, 2 Mer. 55. Receivers.

Committee of Lunatic.—A committee has been allowed for improvements made, without previous sanction: *Re Shaw*, 15 Gr. 618; *Re Churchill*, 3 Jur. 719. Committee.

Personal Representative.—An unauthorized expenditure by an executrix in improving the realty, was allowed, so far as the value of the estate has been enhanced, and those interested had benefited by it: *Morley* v. *Matthews*, 14 Gr. 551. But where an administratrix had occupied and improved the realty, in a suit by her for administration, such improvements were disallowed as against infant heirs; but she was not charged with any increase of rental in consequence of such improvements: *Re Brazill*, *Borry* v. *Brazill*, 11 Gr. 253. Personal representative.

Mortgagee.—The ordinary rule is, that a mortgagee will not be allowed for improvements further than is proper to keep the premises in necessary repair. But if buildings are incomplete, or ruinous, he may complete, or pull them down, and rebuild, and the rebuilding, or repairing, may be done in an improved manner, and more substantially than before, so that the work be done providently, and that no new, or expensive, buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it: Fisher, Mortg., 5th ed., s. 1781. And while the mortgagee in possession is not allowed to charge for lasting improvements which are not requisite for the purpose of keeping the property in necessary repair, he is not, on the other hand, chargeable with the increased rents and profits which are directly traceable to such improvements made by him: see Jones on Mortgages, s. 1127. Mortgagee. Mortgagees entitled to be allowed for necessary repairs. But only such as are necessary for preservation of property.

Mortgagees in possession are entitled to be allowed for necessary repairs, as just allowances. Under *Rule* 410, no special direction in

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the judgment is necessary to enable the Master, in a proper case, to allow substantial improvements.

A mortgagee in possession cannot charge the mortgaged property with improvements that are not necessary for its preservation: *Harrison* v. *Jones*, 10 Gr. 99; unless with the consent of the parties entitled to the equity of redemption: *Kirby* v. *Kirby*, 5 Gr. 587. And improvements made even with the mortgagor's sanction must not be such as to improve him out of his property: *Snndon* v. *Hooper*, 6 Beav. 246; Fisher, Mortg. s. 1783. But a mortgagee is not bound to give the mortgagor notice before making any reasonable permanent improvement: *Shepherd* v. *Jones*, 47 L. T. 604; 21 Ch. D. 469.

Wrongdoers not allowed for improvements.

Wrongdoers.—A mere wrongdoer, entering without colour of right, is not usually allowed for improvements made by him: *Townsley* v *Neil*, 10 Gr. 72; *Scott* v. *Hunter*, 14 Gr. 376; nor persons entering with actual notice of a paramount title: *Wyoming* v. *Bell*, 24 Gr. 564; *Smith* v. *Gibson*, 25 C. P. 248; *Kilborn* v. *Workman*, 9 Gr. 255; *Grassett* v. *Carter*, before Boyd, C., 2nd Sept., 1884.

Exceptions to rule.

But it would seem that mere legal fraud will not deprive a party of the right to improvements: *McLaren* v. *Fraser*, 17 Gr. at p. 569; and see *Nevills* v. *Nevills*, 6 Gr. 121, 139; and the owner standing by and not objecting, may preclude himself from getting back his estate, except on the terms of paying for improvements: *Davis* v. *Snyder*, 1 Gr. 134; *McBride* v. *McNeil*, 27 O. L. R. 455.

Mistake of title, improvements made under, how far recoverable.

Improvements made under Mistake of Title.—Lasting improvements made under a *bona fide* mistake of title may now be allowed, and the person making them and his assigns are entitled to a lien on the land therefor: *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 37; *Fawcett* v. *Burwell*, 27 Gr. 445; *McGregor* v. *McGregor*, *Ib.*, 470; *McCarthy* v. *Arbuckle*, 29 C. P. 529; *Carrick* v. *Smith*, 34 U. C. Q. B. 389; *Skae* v. *Chapman*, 21 Gr. 549; *Munsie* v. *Lindsay*, 10 P. R. 173; 19 C. L. J. 186; *Plumb* v. *Steinhoff*, 2 Ont. 614; or the property may be vested in the person making the improvement on payment therefor, where it is in the nature of a trifling encroachment on adjoining land: *Ward* v. *Sanderson*, 48 C. L. J. 231. But improvements made with actual knowledge of the paramount title will not be allowed under that Act: *Wyoming* v. *Bell*, 24 Gr. 564; *Smith* v. *Gibson*, 25 C. P. 248; *The Commissioners of Q. V. Park* v. *Coit*, 22 Ont. App. 1; and see *Kilborn* v. *Workman*, 9 Gr. 225. Improvements made after action commenced cannot be allowed: *O'Grady* v. *McCaffray*, 2 Ont. 309; *Bright* v. *Campbell*, 53 L. T. 428; but improvements made after notice of an adverse claim were allowed: *Corbett* v. *Corbett*, 12 O. L. R. 268.

By mortgagee.

Improvements made under mistake of title by a person in as mortgagee, but believing himself to be absolute owner, are allowed more liberally than improvements made by a mortgagee knowing that he is a mortgagee: *Carroll* v. *Robertson*, 15 Gr. 173.

By mortgagor.

Improvements made by a purchaser from a mortgagor under the erroneous belief that the mortgage had been discharged, cannot be claimed as against the mortgagee: *Beaty* v. *Shaw*, 14 Ont. App. 600.

By husband.

A husband is not entitled to be paid by his wife for improvements made by him on her lands while in his occupation: *Till* v. *Till*, 15 Ont. 133.

A mortgagee of a person making lasting improvements under mistake of title is an "assign," and as such entitled to the extent of his mortgage, to the benefit of the lien for such improvements: *McKibbon* v. *Williams*, 24 Ont. App. 122. Rule 410

Where a mortgagee is charged with rents, or improved rents, arising from his improvements, he should either be allowed for such improvements: *Constable* v. *Guest*, 6 Gr. 510; *Patterson* v. *Dort*, 24 O. L. R. 609; or he should not be charged with the rent, or improved rent, arising therefrom: *McGregor* v. *McGregor*, 5 Ont. 617; 19 C. L. J. 78; *Muasie* v. *Lindsey*, 10 P. R. 173; *Bright* v. *Campbell*, 53 L. T. 428; and see *Curry* v. *Curry*, 17 P. R. 379; 25 Ont. App. 267.

A person who had *bona fide* purchased under a power of sale contained in a mortgage, notwithstanding the sale was held invalid, was allowed improvements made by him as far as they enhanced the value of the property, and was not restricted to such improvements as a mortgagee in possession would have been entitled to make, he acting himself to be a mortgagee: *Carroll* v. *Robertson*, 15 Gr. [illegible], and see *McLaren* v. *Fraser*, 17 Gr. 567; *Dovey* v. *Durant*, 1 De G. & J. 534. But where a purchaser from a mortgagee, who had obtained a decree for foreclosure, which was defective owing to there being outstanding claims, which were not foreclosed, entered, and made improvements having notice of the outstanding title, such improvements were disallowed as against the unforeclosed parties: *Russell* v. *Romanes*, 3 Ont. App. 635; and see *Romanes* v. *Herns*, 22 Gr. 469. Improvements by purchaser when sale invalid allowed [illegible] have known [illegible] defe

What Improvements Allowed.—The Master is not necessarily bound to allow the actual cost of improvements, but should limit the allowance to the benefit which the property has derived therefrom: *Paul* v. *Johnson*, 12 Gr. at p. 479. The clearing of land for farming purposes is a permanent improvement under *The Dower Act* (R. S. O. c. 70), s. 29 (*b*); *Robinet* v. *Pickering*, 44 U. C. Q. B. 337. What improvements allowed.

After action commenced, the only improvements which can ordinarily be allowed, are such as are made to save the premises from deterioration: *Hawn* v. *Cashion*, 20 Gr. 518; and see *O'Grody* v. *McCaffray*, 2 Ont. 309.

Trustees with power to invest in the purchase of real estate, may be allowed for erecting a new building where an increased income can be obtained thereby: *Re Henderson*, 23 Gr. 45.

A rector cannot make a lease with a covenant to pay for improvements, which will be binding on his successor: *Kirkpatrick* v. *Lyster*, 13 Gr. 323; 18 Gr. 17; unless there be some statutory provision empowering him so to do. Covenant to pay for improvements in rectorial lease invalid.

Where a mortgagor released his equity of redemption, and two months afterwards the mortgagee agreed to reconvey, upon being repaid principal and interest, and all costs of improvements made by him, on a bill to redeem, the mortgagee was held entitled to recover for all permanent improvements, although the estate might not have been increased in value to an amount equal to the sum expended: *Brotherton* v. *Hetherington*, 23 Gr. 187. Mortgagee submitting to redemption entitled to all improvements.

Costs, and other Expenses:—

Mortgagees.—A mortgagee is entitled to charge against the estate the costs of defending the title to the mortgaged estate, for the benefit of all parties interested in the equity of redemption; and also Costs and expenses recoverable by mortgagees.

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the costs of proceedings taken to perfect his security, *e.g.*, the costs of an equitable mortgagee of investigating the title for the purpose of preparing a legal mortgage, and the costs of preparing such legal mortgage are recoverable: *National Provl. Bank* v. *Gomes*, 53 L. T. 955; 54 L. T. 696; 31 Ch. D. 582; also the costs of an action brought against a surety of the mortgagor: *Sachs* v. *Ashby*, 88 L. T. 393; also, costs of a suit to redeem, brought by a subsequent incumbrancer, and dismissed: *McKinnon* v. *Anderson*, 17 Gr. 636; 18 Gr. 684; but not the costs of defending his own title to the mortgage, unless those interested in the equity of redemption had concurred in, or assisted, the litigation: *Parker* v. *Watkins*, John. 133; nor yet the costs of an unsuccessful litigation undertaken by him without the concurrence of the mortgagor: *Wells* v. *The Trust and Loan Co.*, 9 Ont. 170.

Formerly solicitor trustee not entitled to profit costs.

Where a mortgagee is a solicitor and takes legal proceedings in person to recover the mortgage debt, he was formerly, upon redemption, not entitled to charge the mortgagor with his profit costs: *Re Wallis*, 25 Q. B. D. 176; 62 L. T. 674; but only his costs out of pocket: *Stone* v. *Lickorish*, 1891, 2 Ch. 363; 64 L. T. 29; and see *Field* v. *Hopkins*, 44 Ch. D. 524; 62 L. T. 102; but where the proceedings were taken by his partner, the latter might recover the proportion of such profit costs to which he was entitled: *Re Doody, Fisher* v. *Doody*, 1893, 1 Ch. 129; *Re Rollit*, 96 L. T. Jour. 199; and see *Eyre* v. *Wynn-Mackenzie*, 1894, 1 Ch. 218; but a solicitor mortgagee could not recover profit costs against the mortgagor because he also acted as solicitor for his co-mortgagee who was not a solicitor: *Re Doody, Hibbert* v. *Lloyd*, 1893, 1 Ch. 129; 67 L. T. 650; and it was held that a solicitor mortgagee, who was a trustee, was not entitled to profit costs of suits brought by him in respect of the mortgaged property: *Sclofor* v. *Colton*, 29 L. T. O. S. 309; 3 Jur. N. S. 630; 5 W. R. 744; but see *contra*, *Re Donaldson*, 27 Ch. D. 544; 51 L. T. 622, and a covenant to pay profit costs to a solicitor mortgagee was void in equity as an attempt to clog the right of redemption: see *Eyre* v. *Wynn-Mackenzie*, *supra*.

Now he is.

But now under *The Solicitors Act* (R. S. O. c. 159), ss. 68, 69, a solicitor is entitled to recover profit costs, for all proceedings or business done by him connected with the making, execution, or collection of a mortgage made to him as trustee, alone, or jointly with others.

In *Re Griffith*, 50 L. T. 434, it was said by Cotton, L.J., that in a foreclosure action "the mortgagor must pay all the costs of the mortgagee, including those payable by the latter to his solicitor."

Costs of sales.

The mortgagee may also be allowed the expenses of sales, and of receiving the purchase money: Fisher, Mortg., 5th ed., sec. 1785, and also the costs of an abortive sale, where it has fallen through without the default of the mortgagee: *Forrer* v. *Lacy*, 31 Ch. D. 42; 50 L. T. 121. But he is not entitled to a commission on a sale in addition to the costs, even though he has stipulated for it: *Eyre* v. *Hughes*, 2 Ch. D. 148; *Broad* v. *Selfe*, 9 Jur. N. S. 835.

Where a mortgagee had made a sale of part of the land, but before it was completely carried out found another purchaser at a better price, a payment to the assignee of the rights of the first purchaser, to obtain a release from him, was allowed in the mortgage account: *Laws* v. *Toronto General Trusts Corp.*, 8 O. L. R. 522.

Costs of taking possession, etc.

A mortgagee of a ship is also entitled to the expenses of taking and holding possession, advertising it for sale, and insurances: *Wilkes* v. *Saunion*, 7 Ch. D. 188.

Where the mortgage so provides, a mortgagee may recover a commission for renewing notes held as collateral to the mortgage, but not unless the notes are actually renewed, even though the mortgagor has had all the time he would have had, had they been renewed: *Bucknell* v. *Vickery*, 64 L. T. 701; also bonuses and commissions agreed to at the time of the advance, where the security is of a speculative character: *Gordiner* v. *Munro*, 28 Ont. 375. Rule 410.

He is not entitled to charge for personal trouble in collecting rents: *Bonithon* v. *Hockmore*, 1 Vern. 316; *Longstaffe* v. *Fenwick*, 10 Ves. 405; *Godfrey* v. *Watson*, 3 Atk. 518; *Leith* v. *Irvine*, 1 M. & K. 277; not even if he has stipulated for it with the mortgagor: *French* v. *Baron*, 2 Atk. 120; *Barrett* v. *Hartley*, L. R. 2 Eq. 789; *Chambers* v. *Goldwin*, 9 Ves. 271. But the mortgagee is entitled to an allowance for an agent, or bailiff, collecting rents where the property is of such a character that a prudent owner, whose time was of value, would appoint an agent: *Union Bank* v. *Ingram*, 16 Ch. D. 53. But in the case of services rendered by solicitor mortgagees: see *supra*, p. 952. Cannot charge for personal services, but may for agent's services collecting rents.

Insurance.—Sums paid for insurance by a mortgagee cannot, in the absence of a special contract, be charged against the mortgaged estate: *Bellamy* v. *Brickenden*, 2 J. & H. 137; *Brook* v. *Stone*, 13 W. R. 401; *Dobson* v. *Land*, 8 Ha. 216; *Russell* v. *Robertson*, 1 Chy. Ch. 72; 6 U. C. L. J. 143; but see *Scholefield* v. *Lockwood*, 11 W. R. 555. But in the case of a trustee, such payments may be allowed, without any express stipulation to that effect in the instrument creating the trust: *Heron* v. *Moffatt*, 22 Gr. 370. Insurance, when recoverable.

Where a subsequent account is directed to be taken, sums properly paid for insurance since the last account, may be allowed under the head of just allowances, without any express direction: *Bethune* v. *Calcutt*, 3 Gr. 648.

Prior Incumbrances.—A mortgagee paying off prior incumbrances, is entitled to recover the amount paid, and interest on the principal, at the rate in his own mortgage, and on the interest and costs, at the legal rate: *McMaster* v. *Hector*, 8 C. L. J. 284; and see *Teeter* v. *St. John*, 10 Gr. 85. But a tenant in common in sole possession paying off incumbrances, is not entitled to be allowed therefor, unless he submits to account for an occupation rent: *Rivet* v. *Desourdi*, 12 C. L. J. 203. Prior incumbrances.

Trustees and Personal Representatives.—Trustees are entitled to recover, as against the beneficiaries, the expense of bailiffs, surveyors, and accountants, where necessarily employed, and also the necessary legal expenses of carrying the trust into effect: *Wilkinson* v. *Wilkinson*, 2 S. & S. 237; *McNamara* v. *Jones*, 2 Dick. 587; *Henderson* v. *McIver*, 3 Mad. 275. Trustees entitled as against c. q. t. to expenses of bailiffs, etc.

The costs and expenses of taking care of a specific legacy before such legacy is assented to, are payable out of the specific legacy, or by the specific legatee: *Re Pearce*, *Crutchley* v. *Wells*, 1909, 1 Ch. 819; 100 L. T. 699; and estate duty payable in respect of a *donatio mortis causa* was held to be not "a testamentary expense" within the meaning of a will providing for the testamentary expenses of the testator's estate: *Re Hudson*, *Spencer* v. *Turner*, 1911, 1 Ch. 206; 103 L. T. 718.

As to what expenses come under the head of "testamentary expenses": see *Re Clemow*, 1900, 2 Ch. 182; *Re Treasure*, 1900, 2 Ch. 648.

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Trustees are also entitled to be allowed the costs paid to the representatives of a deceased trustee properly incurred by the latter in reference to the trust; also the costs incurred by them, on being appointed to the trust, of examining into the state of the trust property, the validity of the power under which they were appointed, and the costs paid of the donee of the power in making the appointment: *Harvey* v. *Oliver*, 57 L. T. 239.

So also a trustee is entitled to have his costs out of the trust estate even though, by reason of subsequent events, the trust becomes invalid: *In re Holden*, 20 Q. B. D. 43.

Where trustees were authorized by a will to carry on a business, with power to appoint one of their number manager thereof at a salary, the payment to a trustee of such salary was disallowed as against creditors of the testator's estate, it being insolvent: *Re Salmen, Salmen* v. *Bernstein*, 107 L. T. 108, but this decision turns to some extent on the ground that in England a trustee acts gratuitously.

Solicitor trustee when entitled to charge for professional services.

Formerly a trustee acting as solicitor for himself in any action was only entitled to costs and expenses out of pocket, properly incurred: *Moore* v. *Frowd*, 3 My. & Cr. 45, 50; *Robinson* v. *Pett*, 2 W. & T. Lead. Ca. Eq. 214; *Re Corsellis*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. 167; unless there was a special power to charge for professional services: *Re Sherwood*, 3 Beav. 338; *Moore* v. *Frowd*, *supra*; *Re Wyche*, 11 Beav. 209; but even then, no charge could be allowed for doing professionally, anything that he would have been bound to do himself, if not a solicitor: *Harbin* v. *Dorby*, 28 Beav. 325; *Re Chapple*, 27 Ch. D. 584; 51 L. T. 748; *Re Cholinder*, 1907, 1 Ch. 58; 96 L. T. 196; and what he could not charge for professionally himself, he could not recover for, if done by a partner though not a trustee: *Christophers* v. *White*, 10 Beav. 523; *Collins* v. *Corey*, 2 Beav. 128; but the partner might recover any part of such costs to which he was entitled for his own benefit: *Clack* v. *Carlon*, 7 Jur. N. S. 441; 9 W. R. 568; but where a solicitor trustee was one of several trustees, and acted for them, he might recover profit costs against the trust estate. The rule on this point was laid down in *Crodock* v. *Piper*, 1 Mac. & G. 664; 17 Sim. 41, viz., that where a solicitor (or his firm) appears in a suit on behalf of himself and a co-trustee, and the expense has not thereby been increased, then the solicitor (or his firm, as the case may be), is entitled to the usual full costs: see *Re Doody*, 1893, 1 Ch. at p. 138; *In re Barber, Burgess* v. *Vinicome*, 34 Ch. D. 77; 55 L. T. 882; *Re Thorpe*, 1891, 2 Ch. 360; 64 L. T. 654; but this rule was held not to extend to professional services rendered by a solicitor trustee to the trust estate out of Court; *Re Williams*, 4 O. L. R. 501. Though the rule so laid down has been frequently regretted, and its propriety questioned, and it was held that it should not be extended, it was nevertheless established: *Re Corsellis*, 34 Ch. D. 675; 55 L. T. 167; *Re Doody*, *supra*; *Re Mimico Sewer Pipe Co.*, 26 Ont. 289; see also *Re McNab*, 19 C. L. T. 74; and its principle applied to counsel fees, where the solicitor trustee was also counsel in the case: *Strachan* v. *Rutton*, 15 P. R. 109; but see Lewin, 9th ed., 300; *Manson* v. *Baillie*, 2 Macq. 80. See also *Re Roberts*, 43 Ch. D. 52, and a collection of the authorities in 20 C. L. J. 218. The profit costs of professional services which could not be recovered against the *c. q. t.*, or out of the trust estate, might be recoverable by the trustee against a third party: *Colonial Trust Co.* v. *Cameron*, 24 Gr. 548; *Meighen* v. *Buell*, 25 Gr. 604; *Re Donaldson*, 27 Ch. D. 544;

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51 L. T. 622; but see *Re Corselis, Lawton* v. *Elwes*, 33 Ch. D. 160; 34 Ch. D. 675; 55 L. T. 167; and 82 L. T. Jour. 280; 23 C. L. J. 146. Rule 410.

It must ha remembered, however, that the English cases on this point are all founded on the principia that according to English Law a trustea is not to be allowed to maka any profit out of the trust, and is entitled to no compensation for his services: aea per Lord Hatherley in *Clack* v. *Carlon*, 7 Jur. N. S. 441, although in *Meighen* v. *Buell*, 24 Gr. 508, Spragge, C., was of opinion that ona important consideration in disallowing such costs is the removal of the temptation to unnecessary litigation. How far tha English cases on the right of solicitor trustees to costs should ha followed, seems open to some question, having regard to the difference in the law of Ont. as to a trustee's right to compensation for his services: seo *The Trustee Act* (R. S. O. c. 121), s. 67; *Re Leckie*, 36 C. L. J. 136.

The rule which denied a professional trustee tha right to charge for professionnl services rendered to the trust estate, has moreover now been materially modified by *The Trustee Act* (R. S. O. c. 121), s. 67 (4), whereby it is provided that: "Where a barrister or solicitor is trustee, guardian, or personal representative, and has rendered necessary professional services to tha estate, regard may be had in making the allowance (*i.e.*, the allowance of compensation for services) to such circumstance, and the allowance shall be increased hy such amount as may be deemed fair and reasonable in respect of such services." R.S.O. c. 121, s. 67 (4).

Having regard to the provisions of *The Trustee Act* and *The Solicitors Act* abova referred to, it would seem to be clear that the former rules prohibiting aolicitor trustees, or mortgagees, from recovering profit costa from their *c. q. t.* or mortgagors are, in effect, ahrogated, and this right to remuneration being now recognized hy statute, the quantum will be, the ordinary taxahle charges. Solicitor mortgagees

Where costs had been taxed and allowed to tha solicitors of an executor in an administration action, it was held that the Court had no jurisdiction, on an interlocutory appiication in that action, to compel tha executor to account for, and refund, a share of the profit costs, to which, under a secret arrangement with the solicitors, he was entitled; but that a naw action would have to be brought to compel him to sccount therafor: *Re Thorpe*, 1891, 2 Ch. 360; 64 L. T. 554.

Even though a will empowers a trustea to charge for his professional services, still, in the absence of express power to do so, trustees, or executors, cannot settle the amount payahle out of tha estate for such services to one of themselves, so aa to oind tha *cestui que trust* and preclude him from the right to have such costs taxed if ha desires it: *Re Fish*, 1893, 2 Ch. 413; 69 L. T. 233.

Where an executor and trustee is authorized hy will to charge the estate for his professional services as solicitor, that right is in the nature of a legacy, and cannot he asserted in competition with creditors: *Re White*, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. 793; 78 L. T. 770; *Re Salmen, Salmen* v. *Bernstein, supra*, p. 954; *sed vide The Trustee Act* (R. S. O. c. 121), s. 67; *Harrison* v. *Patterson*, 11 Gr. 105, 113.

A retaining fee paid hy trustees to their solicitor in an administration suit, may ha allowed under certain circumstances: see *Chisholm* v. *Barnard*, 10 Gr. 479; and see *Hayes* v. *Hayes*, 29 Gr. 90; hut thay are not entitled to any allowance for gratuitous services of an agent: *Chisholm* v. *Barnard*, 10 Gr. 479. Retaining fee and costs paid by trustee, how far recoverable.

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Costs paid by an executor, administrator, or trustee, to his solicitor, in respect of business of the trust estate, may be allowed, but the Master should examine the bill, and without strictly taxing it, should moderate it, by deducting such charges, if any, as are improper: *McCargar* v. *McKinnon*, 17 Gr. 525; *Hayes* v. *Hoyes*, 26 Gr. 90; and where the costs have been paid out of the trust estate, and *bonâ fide* received by the solicitor without notice of any breach of trust on his client's part, he cannot be made to refund the costs so received to the estate, even though it should turn out that the trustee has disentitled himself to get the costs out of the estate: *Re Blundell, Blundell* v. *Blundell*, 58 L. T. 933; and see *Brinsden* v. *Williams*, 1894, 3 Ch. 385; 71 L. T. 77.

A personal representative is not liable to pay costs incurred by a beneficiary in reference to the estate, and for its protection, before the grant of probate, or letters of administration: *Re Watson*, 19 Q. B. D. 234; 57 L. T. 215.

Trustees' expenses are a lien on trust estate.

Trustees' expenses are a lien upon the trust estate, and have priority to the costs of suit: *Morison* v. *Morison*, 7 D. M. & G. 214; 2 S. & G. 564; *Gount* v. *Toylor*, 2 Ha. 413; *Hughes* v. *Rees*, 10 P. R. 301; unless the payments are not strictly authorized, and the estate is insufficient: *Robison* v. *Killey*, 30 Beav. 520; or they have misconducted themselves: *Rose* v. *Sharrod*, 11 W. R. 356.

A personal representative is entitled to be recouped out of the estate any costs he may be put to, or incur, without impropriety or fraud, in connection with the estate; and he is entitled to set-off, against the claims of next of kin, or other beneficiaries, costs of an unsuccessful litigation, which they have been ordered to pay him: *Re Jones*, 1897, 2 Ch. 190; 76 L. T. 454.

Just allowances.

Just Allowances.—Several of the matters which may be allowed under the head of "just allowances" have already been discussed in the preceding notes to this *Rule*.

Compensation to executors and trustees.

Allowances to Executors, and Trustees.—Compensation for care, pains, and trouble, may be allowed by the Master to trustees under any deed, settlement, or will; or to any other trustee, however the trust is created; and to executors, and administrators; and to any guardian appointed by any Court; or to any testamentary guardian: *The Trustee Act* (R. S. O. c. 121), s. 67; *Re Commissioners of Cobourg*, 22 Gr. 377; *Re Toronto Horbour Commissioners*, 28 Gr. 195. The Act is retrospective: *Thompson* v. *Freemon*, 15 Gr. 384; *McMillan* v. *McMillan*, 21 Gr. 365; *Zimmerman* v. *Wilcox*, 35 C. L. J. 688. The Surrogate Judge has also power to allow compensation to trustees under wills, and to executors, and administrators: *The Trustee Act*, s. 67 (3); and he may now allow compensation to professional trustees for services rendered by them to the trust estate as barristers, and solicitors: see *Ib.*, s. 67 (4). But where an action is pending in the Supreme Court for the administration of an estate, it is improper for the Surrogate Judge to interfere by ordering the allowance of compensation to the executors, or trustees: *McLennan* v. *Heward*, 9 Gr. 279; *Cameron* v. *Bethune*, 15 Gr. 436. And the Master is bound to exercise his own discretion as to the compensation to be allowed, regardless of any order of a Surrogate Judge made under such circumstances: *Biggar* v. *Dickson*, 15 Gr. 233.

A trustee of municipal debentures issued in aid of a railway, who holds them in trust, to be handed to the company in a certain event, is entitled to compensation, and has a lien on the debentures therefor: *Re Tilsonburgh, L. Erie & P. Ry. Co.*, 24 Ont. App. 378. Rule 410.

A person acquiring lands under circumstances which constituto him a constructive trustee thereof for another, is entitled to be recouped his purchase money, and the lasting improvements made by him to the amount which the value of the property has been thereby enhanced: *Rowley* v. *Ginnever*, 1897, 2 Ch. 503; 77 L. T. 302.

A trustee does not lose his right to compensation where part of the trust fund has been lost under circumstances for which he is not responsible, as, for instance, where the loss was occasioned by the fraud of a properly selected agent to whom he had entrusted it: *Jobson* v. *Palmer*, 1893, 1 Ch. 71; 67 L. T. 797.

No fixed rule as to amount of compensation.

No fixed rule can be laid down as to the amount of compensation proper to be allowed, as it must necessarily depend on the circumstances of each case: see *Robinson* v. *Pett*, 2 W. & T. L. C. Eq. 214. Usually the amount is fixed by a percentage on the amount of money passing through the hands of the trustee, or executor. In some cases five per cent. has been allowed: *Bold* v. *Thompson*, 17 Gr. 154; *McLennan* v. *Heward*, 9 Gr. 178; *Chisholm* v. *Barnard*, 10 Gr. 479; *Re Batt, Wright* v. *White*, 9 P. R. 447; *Re Fleming*, 11 P. R. 272, 426; *Archer* v. *Severn*, 13 Ont. 316; *Re McIntyre, McIntyre* v. *London & Western Trust Co.*, 7 O. L. R. 548. But this may in some cases be more, and in some less, than an adequate compensation. In *Torrance* v. *Chewett*, 12 Gr. 407, four per cent. was allowed; and in *McMillan* v. *McMillan*, 21 Gr. 381, two and a-half per cent. was allowed. The Master may, instead of a percentage, allow a lump sum, but only on proper evidence as to the services rendered: *Stinson* v. *Stinson*, 8 P. R. 560; *Denison* v. *Denison*, 17 Gr. 306. In fixing compensation, it has been suggested that it would be proper to adopt a sliding scale, similar in principle to that on which the poundage of Sheriffs is fixed; see observations of Spragge, V.C., in *Thompson* v. *Freeman*, 15 Gr. at p. 387. In that case, the estate amounted to nearly $300,000, and five per cent. on the amounts disbursed, which included investments, and reinvestments, made in the course of fifteen years, was considered excessive; and on appeal, the allowance was reduced to five per cent. on investments of sums of $600, and three per cent. on investments over that amount.

Usually a percentage on receipts and payments.

But a lump sum may be allowed

A sliding scale suggested.

Allowance of percentage on investments and reinvestments disapproved.

But in a later case it was considered vicious in principle, to allow any commission on investments, or reinvestments, on the ground that it offered an inducement to trustees to be constantly, and unnecessarily, calling in and changing the investments: *Re Berkeley's Trusts*, 8 P. R. 193; followed in *Re Williams*, 4 O. L. R. 501. No commission should be allowed for merely receiving the trust estate until it has also been duly accounted for: *Ib.*, *Re McIntyre, McIntyre* v. *London & Western Trust Co.*, 7 O. L. R. 548.

Where trust property consisting of land was exchanged, with the consent of the *cestui que trust*, for stock in a land company, from which nothing had been realized by way of income, and both land and stock were said to be valueless, a percentage on the nominal value of the stock was held to be an improper way of fixing the trustees' compensation; and a lump sum to cover their care and trouble was allowed instead: *Re Prittie*, 13 P. R. 19.

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Legacies given to executors as compensation

A legacy given to a person appointed executor is *primâ facie* intended as a compensation, and if the legatee renounce, he is not entitled to the legacy: Williams on Executors (9th ed.), 1147; *Re Appelton, Barber* v. *Tebbitt*, 52 L. T. 906; and the fact that legacies are left to other executors of unequal amount is not sufficient to destroy the presumption: *Ib.*

Where a legacy is given to executors or trustees without any stipulation that it is to be a compensation for their trouble, they are not precluded from claiming a further sum under the statute, if the legacy is inadequate: *Denison* v. *Denison*, 17 Gr. 306; *Hiddingh* v. *Denyssen*; *Hiddingh* v. *De Villiers*, 12 App. Cas. 107, 624; 57 L. T. 885; *Re Fish*, 1893, 2 Ch. 413; 69 L. T. 233; *Frecborn* v. *Vandusen*, 15 P. R. 264; and so also in the case of a devise: *McClenaghan* v. *Perkins*, 5 O. L. R. 129; but where it is expressly stated to be in lieu of compensation, it would seem that no further compensation can be allowed under *The Trustee Act* (R. S. O. c. 121), s. 67; *Williams* v. *Roy*, 9 Ont. 534; 21 C. L. J. 236; *Kennedy* v. *Pingle*, 27 Gr. 305. Such a legacy precludes any presumption that the executor is entitled beneficially to the undisposed of residue: *Loveless* v. *Clarke*, 24 Gr. 14; but see *Boys' Home* v. *Lewis*, 4 Gnt. 18.

Do not abate.

Such a legacy, in the event of a deficiency of assets, does not abate with other legacies, even though it exceeds what the executor would be entitled to under the statute: *Anderson* v. *Dougall*, 15 Gr. 405; and such legacies bear interest at the expiration of a year from the testator's death: *Anderson* v. *Dougall*, *per* Strong, V.C., on appeal from report, 8th and 14th Dec., 1870; but see *Re White*, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. 703; 78 L. T. 770.

Bear interest.

Where a legacy is given to an executor for compensation, and is followed by a bequest of residue to him *quo* executor "to be at his discretion," the latter gift is for the benefit of the next of kin: *Re Howell, Liggins* v. *Buckinghom*, 1914, 2 Ch. 173.

Where the executor is also a residuary legatee, he is entitled to commission on the receipt, but not on the payment, of the share of the residue to which he is beneficially entitled: *Boys' Home* v. *Lewis*, 19 C. L. J. 139; *Re Fleming*, 11 P. R. 272, 426.

Where, on appeal from the Master, the Court increased the allowance for compensation, the Court of Appeal refused to interfere: *McDonold* v. *Dovidson*, 6 Ont. App. 320.

When trust fixes compensation

Where the amount of a trustee's compensation is fixed by the trust deed, the Master cannot reduce the amount: *Heron* v. *Moffatt*, 7 P. R. 438; nor can he increase it: *The Trustee Act* (R. S. O. c. 121), s. 67 (5).

Master cannot allow less.

Executors are entitled to some compensation for moneys received by them *pendente lite*, but not so much as in other cases: *Re Honsberger*, 10 Gnt. 521; *Thompson* v. *Fairboirn*, 11 P. R. 333.

Misconduct how far it disentitles executor to compensation.

Misconduct in the management of the estate may, but does not necessarily, disentitle an executor, or trustee, to compensation for what he has properly done: see *Kennedy* v. *Pingle*, 27 Gr. 305; *Sieveright* v. *Leys*, 1 Gnt. 375; *Gould* v. *Burritt*, 11 Gr. 523; *City Bank* v. *Maulson*, 3 Chy. Ch. 334; *Hoover* v. *Wilson*, 24 Ont. App. 424; *McClenoghan* v. *Perkins*, 5 O. L. R. 129; *Zimmerman* v. *Wilcox*, 35 C. L. T. 688. But commission cannot be allowed on moneys which were not actually received, but charged against the executor, or trustee, on the ground of wilful default: *Bald* v. *Thompson*, 17 Gr. 154.

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Nor is the fact that a balance is found against an executor, part of which is occasioned by the allowance of a surcharge, alone sufficient to disentitle him to compensation: *Stevenwright* v. *Leys*, 1 Ont. 375; *McCardle* v. *Moore*, 2 Ont. 229. Formerly, an executor, not being a trustee of the realty, was not entitled to receive the rents thereof, and if he did, he was a mere intermeddler, and not entitled to any compensation in respect of such rents: *Dagg* v. *Dagg*, 25 Gr. 542; and see *Re Brazill. Barry* v. *Brazill*, 11 Gr. 253. Since *The Devolution of Estates Act*, however, the rights of personal representatives in regard to the real estate are materially changed.

Where a suit was brought by an executor unnecessarily, the Court refused to allow him any commission: *Graham* v. *Robson*, 17 Gr. 318. But where executors had acted improperly, the Court, although allowing them compensation refused them their costs of suit: *Kennedy* v. *Pingle*, 27 Gr. 305. The omission to keep a regular set of books is not, alone, a sufficient ground for refusing trustees compensation: *Life Association of Scotland* v. *Walker*, 24 Gr. 293.

When one executor incurs greater responsibility than another, a larger proportion of the compensation will be allotted to him: *Re Fleming*, 11 P. R. 272.

Executors' compensation is prior to claim of creditors.

An allowance to trustees, or executors, for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105, at p. [illegible] (but see *contra*, *Re White*, 1898, 1 Ch. 297; 2 Ch. 217; 77 L. T. [illegible] 78 L. T. 770); or of *cestui que trust*: *The Life Association of Scotland* v. *Walker*, 24 Gr. 293; and a trustee may retain it from time to time out of moneys received, and is not bound to wait until the expiration of his trust: *Heron* v. *Moffatt*, *supra*, p. 958.

Expenses.

A trustee who properly employs an agent to collect rents, is entitled to an allowance for his own care and responsibility, in addition to the sum paid to the agent, (in this case the trustee was allowed two and one-half per cent.): *Re Prittie*, 13 P. R. 19; and see *Both* v. *Standard Land Co.*, *infra*, p. 960.

Where a testator's estate was worth $200,000, an expenditure of $3,000 for a burial plot and monument was allowed: *Archer* v. *Severn*, 13 Ont. 316.

Trustees' entitled to credit pro tanto for defective securities;

Trustees who have invested the trust fund, at the instance of one of their number, in a defective security, are nevertheless entitled to credit for the value of such security: *Larkin* v. *Armstrong*, 9 Gr. 300; and see *The Trustee Act* (R. S. O. c. 121), s. 22.

And for sums paid for maintenance

An allowance may be made to executors, for sums paid for the maintenance, and education, of infant *cestuis que trustent*, out of the capital of the fund to which they are entitled, where the income thereof is insufficient: *Stewart* v. *Fletcher*, 16 Gr. 235.

Where compensation is allowed to a personal representative, or trustee, it should be credited at the end of each year: *Hoover* v. *Wilson*, 33 C. L. J. 458.

Liquidators.

Liquidators.—As to the allowances to liquidators in winding-up proceedings: see *Re Central Bank*, 22 Ont. 247; 26 C. L. J. 24.

Company trustees.

Company Trustees.—Where a company acts as a trustee, or receiver, it may recover sums paid to directors for special services ren-

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dered by them for the trust as auctioneers, solicitors, or managers: *Burk* v. *Standard Land Co.*, 1911, 1 Ch. 618; 104 L. T. 867.

Claims not referred cannot be allowed.

Claims not Referred to Master, cannot be allowed.—The authority to make "just allowances" does not authorize the Master to allow claims which are not referred to him by the judgment to take an account of, however reasonable they may appear to be. The Master may, however, report such a claim as "a special circumstance," and on the hearing on further directions, or otherwise, an application may be made to the Court for its allowance: *Fielder* v. *O'Hara*, 2 Chy. Ch. 255; *Kellor* v. *Taché*, 1 Chy. Ch. 788; *Stewart* v. *Fletcher*, *supra*

Special circumstances.

Special Circumstances:—

Notwithstanding this *Rule* the Master may refuse to report as special circumstances, facts which would be immaterial on a hearing on further directions, or which would lead to evidence in relation to matters not necessary to the inquiry directed by the judgment: *Braun* v. *Aumond*, 19 Gr. 72. But he may, at the request of any party, report specially as to any matters which he may deem proper for the information of the Court: *Rosebotch* v. *Porry*, 27 Gr. at p. 199; and he ought to report any matter bearing on the question of costs: *Simpson* v. *Horne*, 28 Gr. at p. 7; *Hoyes* v. *Hayes*, 29 Gr. 90. And the Master may, at the request of a party, report specially as to matters not particularly referred to him, but which form the subject of charges of fraud in the pleadings: *Ib.*

Master may report.

In a mortgage suit the Master may report specially, as to the existence of a claim of the wife of a mortgagor to dower in the surplus: *Rowe* v. *Wert*, 13 C. L. J. 326; 7 P. R. 252.

The Master should not report circumstances, showing an accounting party to have been guilty of wilful neglect, and default, as a "special circumstance," but he should himself determine whether or not the party is so liable, and if so, find the amount due on that footing: *Walmsley* v. *Bull*, 2 Chy. Ch. 344.

Claims which are not referred to the Master to take an account of, cannot be allowed by the Master, but may be reported as "special circumstances:" see *Fielder* v. *O'Hara*, *etc.*, *supra*.

Where money has been received by a trustee during his minority the Master should report the amount so received, notwithstanding the infancy: *Re Garnes*, *Garnes* v. *Applin*, 31 Ch. D. 147; 54 L. T. 141.

General powers of Masters to inquire as to all matters relating to accounts.

General Powers of Master:—

Rule 410 (*g*) provides that, generally, in taking the accounts, the Master is to inquire, adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred to him.

The general powers here given, enable the Master to inquire as to, and to take the accounts on the footing of wilful default, in accounts of personalty, as well as of realty, and he is not limited to the matters of inquiry specially enumerated in this *Rule*: *Carpenter* v. *Wood*, 10 Gr. 354. But the Master cannot inquire into the validity of the instrument upon which the plaintiff's judgment was obtained: *Bickford* v. *Grand Junction Ry. Co.*, 1 S. C. R. 696, see p. 725 *et seq.*; not even at the instance of parties added in his office: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133; and see *Re Munsie*, 20 C. L. J. 112; *Wiley* v. *Ledyard*, 10 P. R. 182; 20 C. L. J.

142; nor when the judgment awards larger relief than was claimed by the pleadings can the Master restrict the inquiry as to damages, or otherwise, to the relief claimed by the pleadings: *Smith* v. *Goldie*, 11 P. R. 24; neither can he extend the inquiry under a general reference "to take accounts" to matters beyond the scope of the pleadings: *Rowland* v. *Burwell*, 12 P. R. 607; *Bennicourt* v. *Le Gendre*, 1900. A. C. 173. But the mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts, reserving further directions, was held not to preclude the defendants from taking the objection that the plaintiff is not in fact a creditor, and consequently has no *locus standi*, and from insisting, on the hearing on further directions, that his action should on that ground, be dismissed: *Bank of Toronto* v. *Beaver & T. M. I. Co.*, 28 Gr. 87; and see *Barton* v. *Barton*, 3 K. & J. 512, 517; *Houseman* v. *Houseman*, 1 Ch. D. 535. Rule 411.

But it will be seen that it is only matters *relating* to the accounts which are referred to him to take, as to which he has these general powers: he cannot allow claims altogether outside of the accounts he is directed to take, and not necessarily connected therewith. Such claims, though they cannot be allowed by the Master, may, however, be reported by him as "special circumstances," and the Court, in its discretion, may on further directions, or on special application for that purpose, allow them: *Fielder* v. *O'Hara*, 2 Chy. Ch. 255; and see *Wiley* v. *Ledyard*, *supra*, p. 960.

Under these general powers, in an administration suit where a creditor made a claim by virtue of a partnership with the testator, it was held that the partnership accounts might be taken in order to establish the claim: *Kline* v. *Kline*, 3 Chy. Ch. 137; and the Master may inquire as to a stated account set up in the defence, though no evidence was given of it at the hearing: *Edinburgh Life Association* v. *Allen*, 23 Gr. 230; *Holgate* v. *Shutt*, 28 Ch. D. 111; but *semble*, not as to usury, as affecting the amount recoverable on a security: see *Penn* v. *Lockwood*, 1 Gr. 547. Stated accounts.

Where it appears in an administration action that the accounts of the personal representative have been passed in the Surrogate Court under *The Surrogate Court Act* (R. S. O. c. 62), s. 71, the Master will not go behind such account, when the plaintiff was represented in the Surrogate Court: *Gibson* v. *Gardner*, 13 O. L. R. 521.

The Master cannot, under these general powers, set off costs so as to interfere with the lien of a solicitor on a fund: *Bell* v. *Wright*, 24 S. C. R. 656.

Where a settlement is come to between the parties, pending a reference, if it is disputed, the Master, under his general powers, may inquire as to its terms and report thereon: *Corry* v. *Lemoine*, 18 P. R. 482.

411. The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be Master may cause parties to be examined, and may order production of documents.

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left or deposited in his office, he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he deems expedient. C.R. 669.

All officers of the Court have power to administer oaths, and to examine witnesses, for the purposes of proceedings before them: see Jud. Act, sec. 119.

Any party to a reference pending before a Master is entitled to require the evidence to be given orally, and may object to affidavits being received: see *Rule* 270, and see *per* Mowat, V.C., *Brady* v. *Walls*, 17 Gr. et p. 702.

The Master is competent to order discovery of all matters arising out of the judgment, but if discovery is sought as to other matters a new action may be necessary: see *Korkis* v. *Weir*, 110 L. T. 794.

Witnesses in M. O.

Witnesses.—A *subpœna* may issue, as of course, to secure the attendance of witnesses before a Master: *Hannum* v. *McRae*, 17 P. R. 567; 18 P. R. 185.

Any party to an action is now eligible as a witness in his own behalf: see *The Evidence Act* (R. S. O. c. 76), s. 6.

Master may order witnesses to be examined.

C. R. 668 expressly provided that witnesses may, by direction of the Master, be examined before a special Examiner. This *Rule* has not been continued, but presumably the Master has still that power under *Rule* 347. The Master should, ordinarily, himself take the evidence, and it is only where that course is, for any reason, impracticable, that he should depute the taking of evidence to another. The *Rules* seem to contemplate that as far as possible witnesses should be examined in the Counties where they reside: see *Rule* 345, and *Connolly* v. *Connor*, *infra*, p. 963, but in many cases it will be found to be a saving of expenses to bring the witness to the Master. This should, as a rule, be done where the witnesses are within the jurisdiction, and there is likely to be a conflict of evidence, and it is important for the Master to see the witnesses.

The Master may direct witnesses to be examined before any other Master, or Examiner, of the Court, without the consent of the parties: *Re Casey*, *Biddell* v. *Casey*, 1 Cny. Ch. 198.

Foreign commission.

The Master may also grant an order for a commission to issue to take evidence out of the jurisdiction: see *Rules* 209, 277, 433.

The Master cannot grant an order for a commission *ex parte*, *McLennan* v. *Helps*, 3 Chy. Ch. 193; except where the reference is *ex parte*.

As to when a commission may be granted: see notes to *Rule* 277.

As to proceedings under a commission: see *Rules* 277-290.

Where an application is made to the Master for a commission to cross-examine a plaintiff resident abroad, on an affidavit filed by him in support of his account, the Master cannot properly refuse it, so long as the plaintiff relies on the affidavit in support of his claim: *Townend* v. *Hunter*, 3 C. L. T. 310; *Horlick* v. *Eschweiler*, 11 O. L. R. 140.

The Master's order for a commission should follow, as nearly as may be, the form of order given in the *Rules*: see Form No. 73; H. & L. Forms No. 777: and for form of Commission, see No. 60. Rule 411.

The Master has no power to order a witness, or a party, out of the jurisdiction, to come within the jurisdiction for the purpose of examination as a witness: *Connolly* v. *Connor*, 12 O. L. R. 304. It was said in this case that the Master cannot name himself as Commissioner. Foreign party, or witness.

As to cross-examination on an affidavit in the Master's Office: see note to *Rule* 227, *supra*, p. 691.

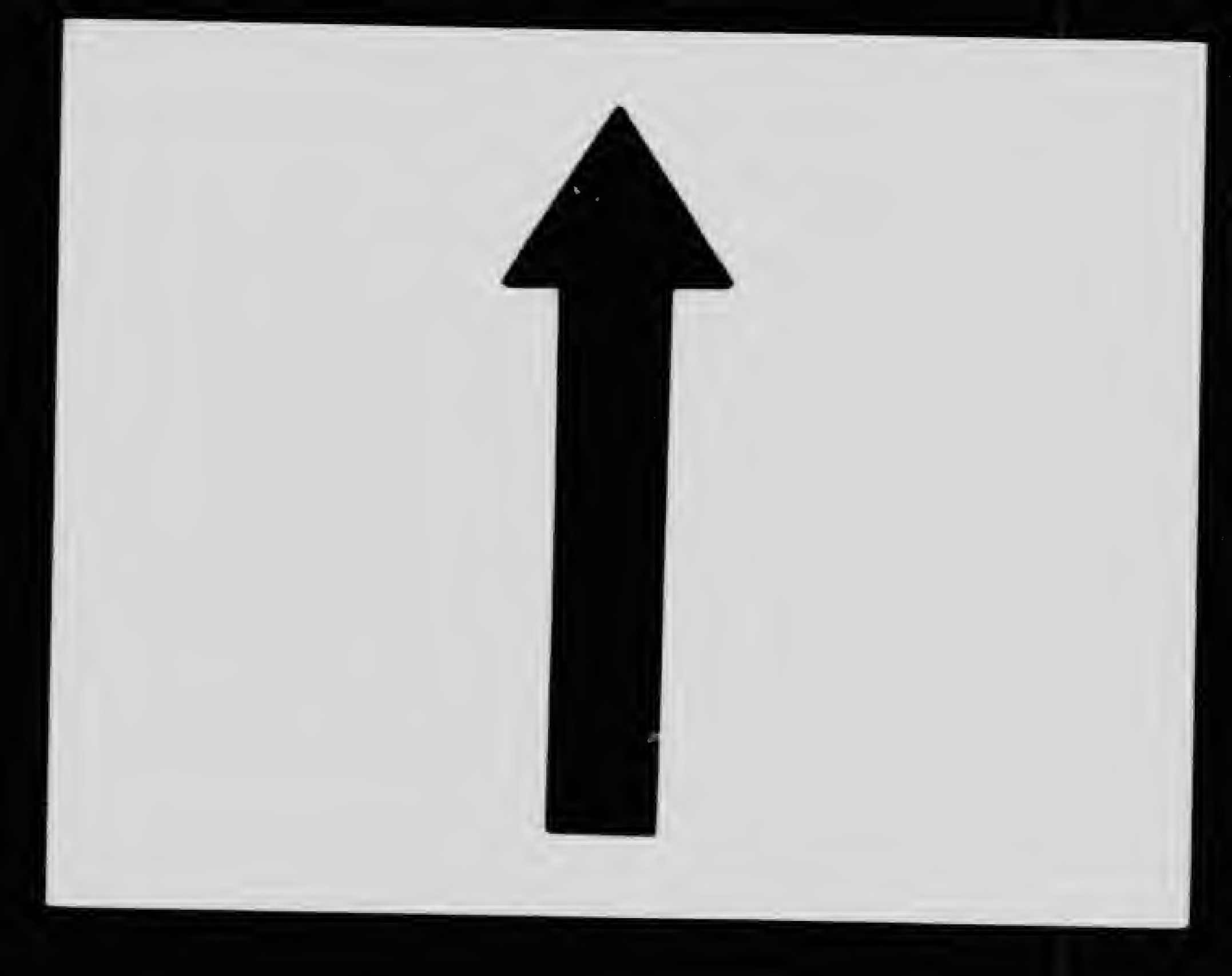
In an action by, or against, heirs, next of kin, or personal representatives, or assigns, of a deceased person: *The Evidence Act* (R. S. O. c. 76), s. 12; or by or against a lunatic or an inmate of a lunatic asylum: *Ib.*, s. 13, the evidence of any opposite, or interested party, must be corroborated. As to the nature of the corroboration required: see *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12; *Stoddart* v. *Stoadart*, 39 U. C. Q. B. 203; *McKoy* v. *McKoy*, 31 C. P. 1; *Adamson* v. *Adomson*, 28 Gr. 238; *Brown* v. *Copron*, 24 Gr. 91; *Re Robbins*, 23 Gr. 162; *Halleron* v. *Moon*, 28 Gr. 319; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Re Lows*, *Lows* v. *Laws*, 28 Gr. 382; *Parker* v. *Parker*, 32 C. P. 113; *Birdsell* v. *Johnson*, 24 Gr. 202; *Findley* v. *Pedon*, 26 C. P. 483; *Rose* v. *Hickey*, 3 Ont. App. 309; *Re Murroy*, 29 Gr. 443; 9 Ont. App. 369; *Burn* v. *Burn*, 20 C. L. J. 148; *Re Curry*, 32 Ont. 150; *Thompson* v. *Coulter*, 34 S. C. R. 261; *Davis* v. *Walker*, 5 O. L. R. 173; *Wilson* v. *Howe*, 5 O. L. R. 323; *Scott* v. *Allen*, 26 O. L. R. 571; *Cowley* v. *Simpson*, 31 O. L. R. 200; *McGregor* v. *Curry*, 31 O. L. R. 261; *Lloyd* v. *Powell Duffryn S. C. Co.*, 111 L. T. 338. In England there is no such statute, nor any absolute rule as to corroboration in such a case: *Re Griffin*, 1899, 1 Ch. 408; 79 L. T. 442. Corroboration when necessary.

The whole case need not be proved by independent testimony: *Radford* v. *Mocdonold*, 18 Ont. App 167. It is sufficient if the evidence of the interested party is strengthened by evidence which appreciably helps the judicial mind to believe one or more of the material facts deposed to: *Ib.*; and see *Green* v. *McLeod*, 23 Ont. App. 676: *Secor* v. *Gray*, 3 O. L. R. 34; *Wilson* v. *Howe*, *supra*. And where a wife made a claim against her husband's estate for moneys advanced to pay premiums on a policy on his life, and it was shewn that the money was paid by a third party out of moneys of the wife in his hands, in which payment the wife reluctantly acquiesced, and that the policy was entirely in the husband's control and disposition, it was held that corroborative evidence of a contract to repay the money was not necessary: *Elliott* v. *Bussell*, 19 Ont. 413.

The testimony of one interested witness cannot be accepted as corroboration of another interested witness's testimony: *Taylor* v. *Regis*, 26 Ont. 483.

No corroboration is necessary as to matters occurring after the death of a deceased person affecting his estate: *McClenaghon* v. *Perkins*, 5 O. L. R. 129.

A witness may be cross-examined in the Master's office on the whole case. The Master cannot properly confine the cross-examination to the evidence given in chief. But in some cases, it may be proper to exercise his discretion, as to the party to pay the fees of the examination: *Crondell* v. *Moon*, 6 U. C. L. J. 143. Cross-examination of witnesses.



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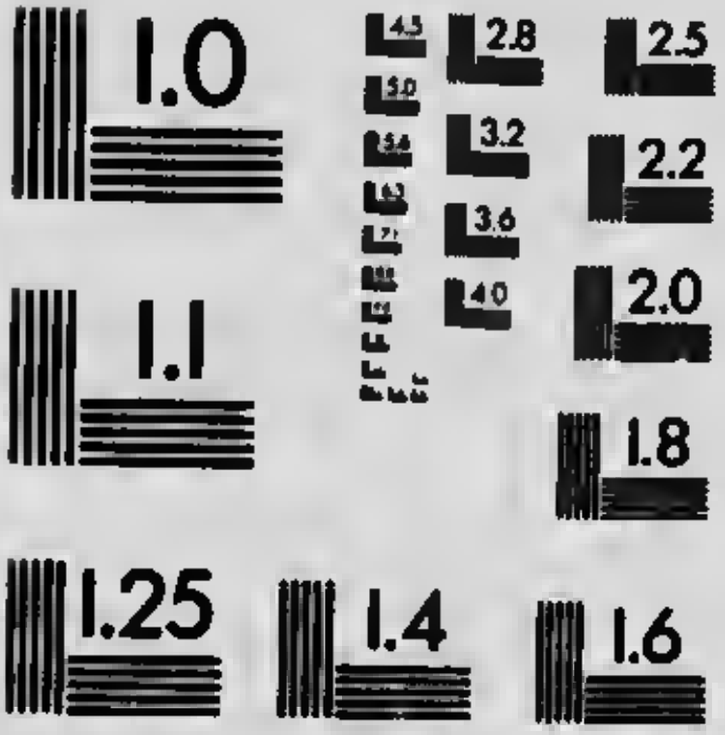

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Rule 412.

Where a party is examined as a witness on his own behalf and dies before he can be cross-examined, his evidence is nevertheless admissible: *Randall* v. *Atkinson*, 30 Ont. 242, 620.

Not to be recalled.

The Master should not allow a witness who has been examined, to be recalled in order to supplement his testimony, except in cases where the Court itself would allow him to be re-examined: see *Patterson* v. *Scott*, 1 Gr. 582.

Depositions in other actions.

Depositions in Another Action, or Books of Account, how far Evidence.—As to how far evidence taken in another action, and books of account of third parties are receivable in evidence in the Master's Office: see *Court* v. *Holland*, 8 P. R. 219.

Production of documents.

Production of Books and Papers.—When books are in constant use, and the party required to produce them offers to allow them to be inspected in his counting house, the Master should not require them to be left in his office, in the absence of any special ground for so doing: *Re Ross*, 8 P. R. 86; 5 Ont. App. 82; but the usual affidavit on production must be filed, though the deposit of the books in the Master's office be dispensed with: *Ib.*; *Darling* v. *Darling*, 19 C. L. J. 329.

In taking accounts in an action for infringement of a patent, the defendant is bound to disclose the names of customers to whom he has sold the goods infringing the patent: *Saccharin Corporation* v. *Chemical & Drugs Co.*, 1900, 2 Ch. 556; 83 L. T. 206.

Remedy for default in production.

Default.—Where default has been made in the production of documents, or the attendance of a witness to be examined, an application may be made to commit for contempt. The application should be made to a Judge, and not to the Master in Chambers, or to any County Court Judge, or Local Master: *Keefe* v. *Ward*, 18 C. L. J. 166; 2 C. L. T. 260. For Form of certificate of default: see H. & L. Forms, Nos. 1067-1069; *Sutherland* v. *Rogers*, 2 Chy. Ch. 191.

Master may advertise for creditors, heirs or next of kin, etc. Time to be limited for coming in.

412. The Master may cause advertisements for creditors or for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require: and in such advertisements he shall appoint a time within which such persons are to come in and prove their claims, and unless they so come in, they are to be excluded from the benefit of the order. A claim may nevertheless be received by the Master at any later time. C.R. 670.

Advts. for creditors where dispensed with.

The Master may dispense with an advertisement for creditors in an administration action, where the personal representative has, before action, duly advertised under *The Trustee Act* (R. S. O. c. 121), s. 56: *Cuthbert* v. *Wharmby*, W. N. 1869, 12; *Re Bracken Doughty* v. *Townson*, 1889, 43 Ch. D. 1; 61 L. T. 531; but he should state in his report that he has done so, and the reason for so doing. But mere lapse of time, even of twenty years, from the death of the deceased person, whose estate is being administered, is not sufficient to warrant

the Master in dispensing with an advertisement for creditors, and the Court has referred causes back to the Master to advertise for creditors, where the Master has omitted to do so, merely in consequence of the lapse of time. Rule 412.

There is no rule of practice rendering it necessary in every case for the sufficiency of publication of notices to creditors, under Imp. Act, 22 & 23 Vict. c. 34, s. 29, to have an advertisement in the *Times* or other London daily papers in addition to the *Gazette*: *Re Bracken*, 43 Ch. D. 1; 61 L. T. 531; and it is not necessary that an advertisement in Ontario should be published in the *Ontario Gazette*: *Re Cameron*, 15 P. R. 272.

In administration actions the advertisement for creditors (see Form 46), provides that the claims are to be sent to the personal representative, a similar direction should be made in advertisements for creditors, in other actions: see *Rule* 2. Advertisement for creditors, form of.

Every advertisement for creditors issued pursuant to a judgment or order, should, therefore, direct every creditor, by a time to be thereby limited, to send to such party as the Master, or other officer, before whom the inquiry is, directs, or to his solicitor, to be named and described in the advertisement, the name and address of the creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement should be according to Form 46, and see H. & L. Forms, No. 974, and, at the time of directing such advertisement, a time must be fixed for adjudicating on the claims: *Rules* 413, 772.

For form of advertisements for creditors in an administration action: see Form 46; H. & L. Forms, No. 974, and of advertisements for heirs or next of kin: see H. & L. Forms, No. 997. Forms of advertisements.

A month at least should be allowed for creditors to file claims, three weeks was considered too short a time: see *Wood* v. *Weightman*, L. R. 13 Eq. 434. Time for sending in claims.

An application of a creditor to prove after the time has elapsed is usually granted; but on the terms of not disturbing any division of assets which has actually been made: *Re Metcalfe, Hicks* v. *Moy*, 13 Ch. D. 236; 42 L. T. 383; 49 L. J. Ch. 192; *Re McMurdo, Penfield* v. *McMurdo*, 1902, 2 Ch. 684; *Harrison* v. *Kirk*, 1904, A. C. 1; 89 L. T. 566; and see notes to *Rule* 413, *infra*. Special application necessary.

Inquiries as to heirs and next of kin, etc.—A master making inquiries for heirs, next of kin, etc., should not presume the death of an absentee without advertising: *Macdonald* v. *Boughner*, 6 O. W. N. 172.

After the time fixed by the advertisement a claim should not be received, unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as he directs. After expiry of time limited by advertisement for filing claims.

Where the action has been constituted as provided by *Rules* 79-87, heirs, and other persons interested, whose presence as original parties is dispensed with by that *Rule*, are nevertheless to be served with a copy of the judgment, as provided by *Rule* 87, unless the Master dispenses with service. If they are neither served, nor service on them dispensed with, they are not bound by the accounts or proceedings: *Uffner* v. *Lewis*, 27 Ont. App. 242. Where any of such persons Persons interested to be served with copy of judgment.

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cannot be found to be served with the judgment, the Master may order substitutional service on them: *Rule* 16. Service out of the jurisdiction may be authorized: see *Rules* 3 (*j*), 25. It is doubtful whether persons on whom service of a judgment is dispensed with, would be bound by the proceedings: see *Ufner* v. *Lewis*, *supra*, p. 965, and *supra*, p. 467.

Master to proceed on claims brought in.

413. The Master shall consider the claims brought in before him pursuant to such advertisement, upon a day to be fixed by him when settling the advertisement, and if any claim is to be contested shall cause notice of contestation to be served upon the claimant fixing a day when he will adjudicate upon the claim. C.R. 671. *Amended.*

Mode of proving claims of creditors.

Claims of creditors are not required to be verified by affidavit: see Form 46 and *Rule* 415. If a claim be disputed, the claimant may be required, at the instance of an opposing party, to establish his claim by oral evidence. Where the claim is evidenced by some written document, the production of the document and proof of its due execution, if disputed, and the claimant's affidavit of the amount due, is usually a sufficient *primâ facie* case, and the onus then rests with the party opposing the claim to adduce evidence: see *Court* v. *Holland*, 8 P. R. 213; and see *Rule* 474 and notes. A claimant may be cross-examined on his affidavit: *Cast* v. *Poyser*, 3 Jur. N. S. 38; 26 L. J. Ch. 353; and see *Rule* 227.

Parties entitled to attend on proof of claims.

In actions for the administration of a deceased person's estate, no party other than the personal representative, unless by leave of the Master, can appear on the claim of any person, against the estate of the deceased in respect of a debt, or liability. But the Master may direct any person to appear, in addition to, or in place of, the personal repreaentative, upon such terms as to costs or otherwise as may seem proper: aee *Rule* 88; and see *Rules* 406, 409, 657.

Where the personal representatives of a deceased person carry on the business of the deceased, the creditors of the estate, and the creditors of the business, do not necessarily rank *pari passu* in the event of a deficiency of assets: see *Re East, London County & W. Bank* v. *East*, 111 L. T. 101.

In creditors' actions plaintiff must prove claim, and any creditor may dispute any other creditor's claim.

In a creditor's action, the plaintiff must prove his claim, if required, in the Master's office, even though he may have proved it at the trial, and any creditor may dispute the claim of any other creditor: *Field* v. *Titmuss*, 1 Sim. N. S. 218; *Owens* v. *Dickenson*, Cr. & Ph. 48, subject to *Rule* 88; and the Master has power to adjudicate upon all questions arising between creditors *inter se*: *Merchants Bank* v. *Monteith*, 10 P. R. 458. The mere fact that a plaintiff claiming to be a creditor has obtained a judgment directing the taking of accounts and making of inquiries, does not preclude the defendants upon such reference from taking the objection that the plaintiff is not a creditor, and has consequently no *locus standi*, and from insisting, on the hearing on further directions, that his action should on that ground be dismissed: *Bank of Toronto* v. *Beaver & T. M. I. Co.*, 28 Gr. 87; see *Barton* v. *Barton*, 3 K. & J. 512, 517; *Houseman* v. *Houseman*, 1 Ch. D. 535.

Creditors coming in after time has expired.

Creditors who have omitted to send in their claims within the time limited, may be allowed to come in and prove their claims, before report, by leave of the Master; and after report, on application in

Chambers, so long as the fund remains in Court: *Lashley* v. *Hogg*, 11 Ves. 602; *Angell* v. *Haddon*, 1 Msd. 529; *Re Metcalfe*, 13 Ch. D. 236; W. N. 1879, 166; *Cotton* v. *Vonsittart*, 9 C. L. J. 312; *Andrews* v. *Moulson*, 1 Chy. Ch. 316; the statement in the advertisement that in default of coming in and proving their claims within the time limited, the creditors will be barred, is merely *in terrorem* and not conclusive: *Harrison* v. *Kirk*, 1904, A. C. 1; 89 L. T. 566. But a creditor coming in after a dividend has been paid, is only entitled to prove against the residue of the fund for a similar proportion of his debt; he is not permitted to disturb any prior dividend: *Gillespie* v. *Alexander*, 3 Russ, 130; *Greig* v. *Somerville*, 1 R. & M. 338; *Todd* v. *Studholme*, 3 K. & J. 324. Rule 414.

A creditor proving a claim, and objecting to the form of the decree could, under the former practice, only obtain relief by rehearing the cause: *Mulholland* v. *Hamilton*, 12 Gr. 413; *Willis* v. *Willis*, 20 Gr. 396. And a petition of a creditor to vary a decree was refused with costs: *Mulholland* v. *Hamilton*, *supra*. Creditor objecting to form of decree might rehear.

A creditor whose claim is disallowed, may appeal at once on a certificate of disallowance, without waiting for a general report: *Re Clagett*, *Fordham* v. *Clagett*, 20 Ch. D. 637; 46 L. T. 70. Appeal by creditor.

Where persons come in claiming to be heirs, next of kin, etc., they should bring in a pedigree showing their title which should be proved by certified copies of registers of burials, births, marriages, etc., if possible, and the persons named in such certificates must, by proper evidence, be identified with the persons through whom the claimants derive title, unless their claim is admitted.

Parties residing out of the jurisdiction coming into the Master's office to prove claims, cannot be ordered to give security for costs: *Palmer* v. *Lovett*, 14 P. R. 415, overruling *Re Rees*, *Lockhart* v. *Toronto General Trusts Co.*, 10 P. R. 425; but in the event of their failing to substantiate their claims they may be ordered to pay costs occasioned thereby: see Jud. Act, s. 74 (4).

Where a residuary legatee is indebted to the testator's estate but his debt is not actually due, the executor is not entitled to retain his share of the residue to answer future instalments of his debt: *Re Abrahams*, *Abrahams* v. *Abrahams*, 1908, 2 Ch. 69; 99 L. T. 240.

Interest.—As to the allowance of interest on claims in the Master's office: see *Re Ross*, 29 Gr. 385, and notes to the Jud. Act, ss. 34, 35, and *Rule* 410.

A Referee has power to allow interest on the amount of a loss by fire referred to, or ascertained by, him: *Atty.-Gen.* v. *Ætna Ins. Co.*, 13 P. R. 459.

As to interest on mortgages: see notes to *Rules* 61, 410, 474.

414. The executor or administrator, or such other person as the Master directs, shall examine the claims sent in pursuant to the advertisement, and ascertain, as far as he is able, which of such claims is just and proper. C.R. 707. Creditors' claims to be examined.

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Affidavit to be made by persons examining creditors' claims.

When to be filed.

415. The executor or administrator, or one of the executors or administrators, or such other person as the Master directs, shall on or before the day appointed to consider the claims, file an affidavit, verifying a list of the claims sent in pursuant to the advertisement, and stating which of such claims are just and proper to be allowed, and the reasons for such belief. C.R. 708. *Amended.*

For form of affidavit: see H. & L. Forms No. 987.

Affidavit of creditor dispensed with unless required.

C. R. 704 expressly provided that "A creditor need not make an affidavit, or attend in support of his claim (except to produce his security, if any), unless he is served with a notice requiring him to do so as hereinafter provided" but that Rule has not been continued, but its omission from these *Rules* is probably not intended to effect any change in the practice.

Notice of proceedings in the Master's office should be given to the parties, though they have not appeared on the motion for the administration order: *Re Pattison, Jackson* v. *Matthews*, 12 Gr. 47, and see *Rule* 403.

Where the Master requires a creditor to attend and prove his claim, the notice so to do may be transmitted to him or his solicitor by post, unless the Master otherwise directs: see *Rule* 437.

Notice to be sent creditors.

The executor or administrator, or such other person as the Master directs is to send notice:—

Where claim allowed without proof.

(1) To every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of the allowance; and the notice may be according to Form No. 48; H. & L. Forms No. 991.

Where proof of claim is required.

And (2) To every such creditor as the Master directs,—to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in the notice (which may be according to Form No. 49; H. & L. Forms, No. 992) not less than seven clear days after the service of the notice, and being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with the notice, his claim, or such part thereof as aforesaid, will be disallowed, unless the Master thinks fit to give further time: see C. R. 711, that Rule has not been continued, but probably the procedure there laid down should still be followed.

Corroborative evidence.

When a creditor's claim is disputed, he may be required to produce corroborative evidence thereof: see *The Evidence Act* (R. S. O. c. 76), ss. 11-13; and see cases in notes to *Rules* 411 and 608.

A judgment obtained without fraud, or collusion, is conclusive evidence in actions between creditors in relation to the property of the debtor, of the indebtedness of the latter, and of the amount of such indebtedness: *Candee* v. *Lord*, 2 Com. N. Y. Rep. 269; *Martin* v. *Boulanger*, 8 App. Cas. 296; 49 L. T. 62; and see *Bowerman* v. *Phillips*, 15 Ont. App. 679; *Re Hague, Traders Bank* v. *Murray*, 13 Ont. 727; unless such judgment were recovered in a foreign Court in circumstances which would not make it binding on the deceased: see *supra*, pp. 209-212.

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Parties entitled to appear on adjudication on creditor's claim.

No person, except the personal representative, is entitled (except by leave of the Master) to appear on the claim of any person not a party to the cause, against the estate of the deceased, in respect of any debt, or liability. But the Master may direct any other party to the cause to appear, either in addition to, or in place of, the personal representative, upon such terms as to costs or otherwise as he shall think fit; see *Rule* 88.

Creditors, when allowed costs.

Creditors merely sending in their claims pursuant to advertisement, ought not to be allowed any costs of so doing; but where they are required to go into formal proof thereof, the Master may fix a sum for costs, or allow taxed costs of proving the claim: see Jud. Act, s. 74 (4); *Rule* 652.

Master cannot employ experts.

The Master has no power to employ experts to assist him in coming to a conclusion on the claims of persons claiming to be creditors: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Mortgagee's claim.

Deficiency of assets.

Subject to the provisions of *The Trustee Act* (R. S. O. c. 121), s. 63, a mortgagee is entitled to prove against the general estate, and hold his security for any amount the general estate is insufficient to pay: *Re Stewart, Stewart* v. *Stewart*, 10 Gr. 169. Where, on a deficiency of assets, some creditors are paid more than their proportion, they may, on the petition of a creditor who has not been paid his proportion, be ordered to refund the excess: *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273; but where the personal representative has made the payment after due notice as provided by *The Trustee Act*, s. 56, he is protected from liability, and has no right to recover the overpayment: *Leitch* v. *Molson's Bank*, 27 Ont. 621.

Solicitor purchasing creditors' claims.

Where the solicitor of a plaintiff in an administration action, had purchased, after judgment, and pending an inquiry thereunder as to debts, two claims against the estate for less than the sum due, it was held that the officer to whom the action was referred had no jurisdiction to certify that the solicitor was a trustee for the creditors for any surplus he might receive over and above what he had paid for the claims: *Re Tillet, Field* v. *Lydall*, 32 Ch. D. 639; 54 L. T. 604; and it was also held that such a contention could not be raised at the hearing on further directions, except by consent of the solicitor.

In the administration, in Ontario, of the estate of a person domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors: *Milne* v. *Moore*, 24 Ont. 456.

As regards the estates of persons dying after 13th April, 1897, claims for three months' salary or wages are entitled to priority of payment over ordinary creditors: see *The Wages Act* (R. S. O. c. 143), s. 6.

Right of the Crown.

In England the Crown has a prerogative right to be paid in priority to other creditors: *In re West London Commercial Bank*, 38 Ch. D. 364; *Attorney-General* v. *Leonard*, 38 Ch. D. 622; *Rex* v. *Ward*, 2 Ex. 301 n.; *Maritime Bank* v. *The Queen*, 17 S. C. R. 657; *Commissioners of Taxation* v. *Palmer*, 1907, A. C. 179; *Attorney-General* v. *Curator of Intestate Estates*: *Ib.*, 519; but see *Clarkson* v. *Attorney-General*, 15 Ont. 632; 16 Ont. App. 202; and see now *The Trustee Act* (R. S. O. c. 121), s. 53, which in effect repeals 9 Hen. 8, c. 18.

Master's power as to settlement of conveyances.

416. Under every order whereby the delivery of deeds or execution of conveyances is directed or becomes necessary, the Master shall give directions as to delivery of

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such deeds, settle conveyances where the parties differ, and give directions as to the parties to the conveyances and as to the execution thereof. C.R. 672.

Additional powers of Master as to settlement of conveyances.

Under this *Rule* the Master to whom an action is referred, may, without any special directions, settle all necessary conveyances in case the parties differ, or in case there be any parties interested in the sale who are under any disability except coverture; and see further as to sales: *Rules* 438-457. Under this *Rule* the Master has power to deal with questions arising on the conveyance as to the payment off of incumbrances; and when a party applied to the Court instead of to the Master, no costs were given: *Stammers* v. *O'Donohoe*, 29 Gr. 64.

A covenant on the part of an infant for payment is not a proper covenant to be inserted in a mortgage: *Brown* v. *Grady*, 31 Ont. 73.

A conveyance, on a sale by the Court, is not to be settled until after the payment of the purchase money into Court: see *Rule* 437.

In determining who are the proper parties to a conveyance the primary thing to be considered, is, in whom the legal estate of the property to be conveyed is vested. Hence where the property of a company in liquidation is sold, or property in the hands of a receiver, the conveyance should not be made by the liquidator or receiver, but by the parties in whom the legal estate is vested: unless it be that only an equitable estate is the subject of the sale, in which case the person in whom it is vested should be the person to convey.

Vesting order.

A vesting order may be made in lieu of a conveyance, on an application in Chambers: Jud. Act, s. 72: see *supra* p. 235 *et seq.*, and *Rule* 207 (4).

Form of accounts to be brought in by accounting party.

417. Where an account is to be taken, the accounting party, unless the Master otherwise directs, shall bring in the same in debit and credit form, verified by affidavit. The items on each side of the account shall be numbered consecutively, and the account shall be referred to by the affidavit as an exhibit, and shall not be annexed thereto. C.R. 673.

Personal rep. bound to make up accounts.

When a personal representative of a deceased person is required to account in respect of the dealings of the deceased, he is bound to make up the accounts of such dealings, from the books in his possession: *Strathy* v. *Crooks*, 6 Gr. 162.

Objection to accounts.

A party may be estopped by acquiescence from moving to set aside accounts brought in, in an improper form: *Weale* v. *Rice*, C. P. Coo. 438.

Cross-examination.

The deponent may be cross-examined on an affidavit verifying accounts. A party who is to be cross-examined on an affidavit verifying accounts, is entitled to detailed notice of the points in respect to which he is to be examined: *Re Lord*, *Lord* v. *Lord*, L. R. 2 Eq. 605. A notice that all the items but one are objected to, is insufficient: *McArthur* v. *Dudgeon*, L. R. 15 Eq. 102; and see *Rule* 420 *infra*. Such cross-examination may take place before the account is vouched: *Meacham* v. *Cooper*, L. R. 16 Eq. 102.

The affidavit under this *Rule*, and the production of the vouchers, is *primâ facie* sufficient to warrant the Master in passing the accounts, and where voluminous accounts had been passed under this *Rule*, the pointing out of one or two items as *primâ facie* objectionable, was held insufficient to warrant the re-opening of the account: *In re Curry*, 17 P. R. 379; affirmed, 25 Ont. App. 267. Rules 418, 419.

Where the accounting party is out of the jurisdiction, the adverse party is entitled to a commission to cross-examine him: *Horlick v. Eschweiler*, 11 O. L. R. 140.

418. The Master may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *primâ facie* evidence of the truth of the matters therein contained. C.R. 674. Master may direct books of account to be taken as prima facie evidence.

This *Rule* was adapted from Imp. Stat. 15 & 16 Vict. c. 86, s. 54. Every sum of $8 and under, is allowed without a voucher, upon the oath of the accounting party: see *Everard v. Worren*, 2 Ch. Ca. 249; but his oath must be positive, and not on belief only: *Robinson v. Cumming*, 2 Atk. 410; and it would seem that the aggregate of such items should not exceed $400 in amount: Bennett's M. O. 86. Greater latitude in proving other items is also allowed when the account is of long standing: *Ib.* Receipts, or other vouchers, must be produced, but when they are lost, or accidentally destroyed, secondary evidence will be let in: *Ib.*; and it is to such cases, or when, for any other reason, it is impossible to vouch the account in any other way, that this *Rule* is intended to apply: *Lodge v. Prichard*, 3 D. M. & G. 906; and see *Ewart v. Williams*, 7 D. M. & G. 67. In partnership cases, however, the books of account of the firm are admissible by virtue of the general law, without any special direction: *Gething v. Keighley*, 3 Ch. D. 547, 551. Books of trustees of a will were allowed to be taken as *primâ facie* evidence for a period of 21 years, as against a *cestui que trust* who had access to them, but had not actually inspected them: *Banks v. Cartwright*, 15 W. R. 417; and see *Sleight v. Lawson*, 3 K. & J. 292; *Ogden v. Bottoms*, 1 Jur. N. S. 791; *Hardwick v. Wright*, 15 W. R. 963. Sums of $8 and under allowed without voucher. Vouchers to be produced. Books of account when admissible.

419. Before proceeding to the hearing and determining of a reference, the Master may appoint a day for the purpose of entering into the accounts and inquiries, and may direct the production and inspection of vouchers, and if deemed proper the cross-examination of the accounting party on his affidavit, with a view to ascertaining what is admitted and what is contested between the parties. C.R. 678. Appointment to ascertain what is admitted and what is contested.

Admissions before the Master should be entered in his book (see *Rule* 421), and subscribed by the parties or their solicitors: *Foster v. Allison*, 11 P. R. 233; 21 C. L. J. 418. Admissions made by a solicitor without the authority of his client have been allowed to be withdrawn on the terms of the items admitted being taken to be *primâ* Admissions.

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facie correct, and the onus being cast on the party withdrawing the admission, of showing that they are wrong: *McBean* v. *McBean*, 11 P. R. 439; 22 C. L. J. 348.

As to the costs occasioned by any party improperly refusing to admit facts: see *Rule* 671; *McIntyre* v. *Canada Co.*, 18 Gr. 370.

Party seeking to charge accounting party must give notice of particulars.

420. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, shall give notice thereof to the accounting party, stating as far as he is able the amount sought to be charged and the particulars thereof in a short and succinct manner. The Master may direct any party who seeks to falsify an account to deliver particulars of the item objected to. The particulars shall refer to the item by number. C.R. 680. *Amended.*

Accounting party entitled to notice of items he is to be cross-examined on.

An accounting party who is intended to be cross-examined on his affidavit verifying his accounts, is entitled to notice of the items on which he is to be cross-examined: *Re Lord*, Lord v. *Lord*, L. R. 2 Eq. 605; *Wormsley* v. *Sturt*, 22 Beav. 398; *Re Curry*, 17 P. R. 379; 25 Ont. App. 267; and it is not sufficient to inform him that all the items except one are objected to, but the notice must specify the points on which the cross-examination is to proceed: *McArthur* v. *Dudgeon*, L. R. 15 Eq. 102; and see *Glover* v. *Ellison*, 20 W. R. 408; and, unless he has been thus duly notified, he may refuse to be sworn: *McArthur* v. *Dudgeon*, *supra*; see Eng. Chy. O. 30, of 16th October, 1852.

The two concluding clauses of this *Rule* are new.

Master's Book, how to be kept.

421. The Master shall keep in his office a book in which he shall enter proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise, and it shall not be necessary to issue or serve any formal order or document embodying such directions to bind the parties attending the reference. C.R. 681. *Amended.*

In the book referred to in this *Rule* any admissions which are made during the proceedings before the Master, should be entered and signed by the parties or their solicitors making the same: *Beaudry* v. *Gallien*, 5 O. L. R. 73.

It is apparently assumed by this *Rule* that the party affected by any order or direction entered in the Master's Book is present, either in person, or by his solicitor, at the time it is made. If he is not in fact present, or represented, though notified of the appointment, it would seem safer to issue and serve a formal order on the party intended to be affected thereby, as it would probably be hard to punish him for disobedience of an order of which he had had no actual notice.

Where a party, or his solicitor, has notice *semble*, he may be punished in case of default, as if he had been personally served with the order.

Rules 422-424.

422. In giving directions, and in regulating the manner of proceeding before him, the Master shall devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and with that view, may dispense with any proceeding ordinarily taken, which he conceives to be unnecessary, or substitute a different course of proceeding for that ordinarily taken. C.R. 683.

Master to devise simplest and speediest method of prosecuting references.

Where it is necessary for the purpose of any motion to the Court to prove what has taken place in the Master's office, the Master certifies as shortly as he conveniently can, the several proceedings had in his office in any cause or matter, and the dates thereof.

Certificate of Master as to proceeding in his office.

For forms of certificates: see H. & L. Forms, Nos. 1066-1069, 1085. As to appealing from a certificate: see *Rules* 502, 503.

The Master is not authorized under this *Rule* to employ the services of experts: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555. But he may appoint experts to examine into matters referred to him so as to enable them to give evidence before him, on which to act; and the costs of persons so appointed are taxable between party and party: *McKay* v. *Keefer*, 12 P. R. 256.

The master should allow amendments of account, when such amendments would be allowed before judgment: *Court* v. *Hollond*, 4 Ont. 688.

423. Where the Master directs parties not in attendance before him to be notified to attend at some future day, or for different purposes at different future days, it shall not be necessary to issue separate appointments, but the parties shall be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for the taking of the same. C.R. 684.

Appointments for several days may be included in one appointment.

For forms of appointments: see Bennett's M. O. App. I.; H. & L. Forms, Nos. 994, 995.

Where parties in person, or by their solicitors, in attendance on the Master, are notified by the Master, of proceedings to be taken before him, no appointments need be issued as to such parties, in relation to such proceedings.

Parties notified by Master not to be served with appointment.

Parties making default upon appointments made in their presence, or in presence of their solicitors, would appear to be subject to the same consequences as if an appointment had been served upon them.

Parties notified, liable for default as if served.

424. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make note to that effect in his book; and after such entry no further evidence shall be received, or proceedings had, without the special permission of the Master; and the

Master to notify parties when hearing concluded, and to note it in his book.

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Thereafter no evidence to be given, except by leave.

Master shall then fix a day to settle his report and shall cause notice of such day to be given to all parties interested not then in attendance, unless for special reason such notice is dispensed with. C.R. 687. *Amended.*

The Master should not make any *ex parte* communications to any of the parties as to his decision, and he should draw his report himself, and not delegate it to the solicitor of any of the parties, and all parties interested should have equal facilities for knowing the result, and being present at the settlement of the report: *Knarr* v. *Bricker*, 16 P. R. 363.

Master's report and certificate.

There is no difference between a report and a certificate of a Master, "though we apply the term 'report' to the more lengthened productions of a Master, and the term 'certificate' to his shorter statements. It is, I think, clear that all his reports are certificates, and all his certificates are reports." per Shadwell, V.C., *Channel* v. *Mortin*, 4 Sim. 344; *In re Molphy*, 17 P. R. 247.

Parties served with the judgment under *Rule* 87, who do not give notice to the plaintiff that they desire to attend the proceedings, need not be served with an appointment to settle the report: *Green* v. *Measures*, W. N. 1866, 122; *Lee* v. *Sturrock*, W. N. 1876, 226.

It would seem that a warrant to settle a report formerly required four days' service: see Bennett's M. O. 20; Beames' Ord. in Chy. 259.

A report or certificate should not, in a contested matter, be made *ex parte*, when intended to be used as evidence against the opposite party: see *Re Ryon* v. *Simonton*, 13 P. R. 299; *sed vide*, *Jones* v. *Macdonald*, 14 P. R. 109.

Application to open reference.

When the Master has closed the reference, an application to let in further evidence may be made to him at any time before the report is signed: *Re Ritchie, Sewery* v. *Ritchie*, 23 Gr. 66. After report, the application can only be made to the Court: *O'Donohue* v. *Hembroff*, 9 C. L. J. 312; or a Judge: see note to *Rule* 502. But to warrant such application being granted, the applicant must, in general, make such a case as would entitle him to a new trial: *Waddell* v. *Smyth*, 3 Chy. Ch. 412; and see *Patterson* v. *Scott*, 1 Gr. 582; *Sounders* v. *Saunders*, 45 L. T. 628; *Carradice* v. *Currie*, 19 Gr. 108; *Mason* v. *Seney*, 12 Gr. 143; *Hosking* v. *Terry*, 8 Jur. N. S. 977.

Master not functus officio till he has fully reported.

A Master is not *functus officio* until he has made his report on all the matters referred to him: *Rae* v. *Geddes*, 3 Chy. Ch. 404; but after he has made his report he should not certify as to any matters before him in the course of the inquiry upon which he has made his report, unless required by the Court so to do: *Rosebatch* v. *Porry*, 27 Gr. 193; the same rule applies to taxing officers: *Langtry* v. *Dumoulin*, 10 P. R. 444.

Masters' Reports.—Masters' reports are either General, Special, or Separate.

General report.

A General Report is that which comprises the conclusion which the Master has come to, upon all the matters referred to him by the judgment, or order under which he has proceeded.

Separate report.

A Separate Report is that which embraces one or more separate matters of the reference, and the conclusion the Master has come to

thereon; and is limited thereto, apart from the other matters referred. A report on sale is a familiar illustration of a *separate* report. Rule 434.

Where an order directed a taxation of the plaintiff's costs *including therein* the remuneration of receivers and managers appointed in the action, and to certify the balance after setting off certain costs of the defence, it was held to be improper for the Master to make a separate report of the plaintiff's costs alone: *Re Silkstone & H. M. Co. v. Edey*, 1901, 2 Ch. 652.

A Special Report, is a report of special circumstances found by the Master, as a guide to the Court for some further direction upon the facts so reported. Special report.

Special reports on matters which the Master has power himself to adjudicate upon, and dispose of, are not to be made, unless specially directed by the judgment or order, of reference: see Bennett's M. O. 18, 19: *Walmsley v. Bull*, 2 Chy. Ch. 344, and other cases, *infra*.

A report should not be dated before the costs included therein have been revised, when revision is necessary: *Waddell v. McColl*, 14 Gr. 211.

A report, like a judgment, should state results only, and should not set forth the evidence, arguments, or reasons, on which the conclusions are arrived at: *Sovereign v. Sovereign*, 15 Gr. 559; *Booth v. Ratté*, 21 S. C. R. 637. Report, what it should state.

Where the Master is specially directed to state his reasons, they should be stated briefly: *McCargar v. McKinnon*, 15 .. 361. All unnecessary prolixity in reports is to be avoided: *S. C.*, 17 Gr. 525.

The report should not go beyond the order, or judgment, of reference, or the Court will not respect it: see Beames' Orders, 23; and see *Clouster v. McLeon*, 10 Gr. 576; and see *Imperial Trusts Co. v. N. Y. Security Co.*, 5 O. W. R. 641. And matters should not be reported specially, or as special circumstances, which the Master has himself power to adjudicate upon: *e.g.*: whether or not an accounting party is chargeable on the footing of wilful default, etc.; *Walmsley v. Bull*, 2 Chy. Ch. 344; whether a particular debt is, or is not, an asset of an estate being administered: *Clouster v. McLeon*, 10 Gr. at p. 578. Should not go beyond order of reference. Nor report specially unnecessarily.

A Master's report was set aside where he had exceeded his authority by reporting on matters not referred to him: *Doull v. McIlbreith*, 14 S. C. R. 739.

But the Master should state in his report such matters as may be necessary for the information of the Court on further directions, or to enable it to dispose of the question of costs: *e.g.*, the priorities of creditors: *Lavin v. O'Neill*, 13 Gr. 179; and of the legatees: *Clouster v. McLean*, 10 Gr. 576, should be stated; and where a separate solicitor is appointed to represent a class which is *primâ facie* sufficiently represented by the plaintiff, or some other party to the action, the reason for the appointment should be stated: *Gorham v. Gorham*, 17 Gr. 386; and where an advertisement for creditors has been dispensed with, the fact, and the reason for it, should be stated in the report: see *Rule* 412 note. Where the Master dispensed with service of judgment on parties required to be served therewith, by *Rule* 203 (3) he was formerly required to state his reasons therefor, in his report: see Chy. O. 587, Holmested's Rules and Orders, 349, but that provision is not But should report matters necessary to dispose of costs.

Rule 425.

embodied in these *Rules*, although it would seem to be a practice which should still be followed.

Sums charged against an accounting party, on the footing of wilful default should be distinguished in the report from sums actually received: *Moodie* v. *Leslie*, 12 Gr. 537.

Final report, when to be made.

The Master should not make a final report in an action until he is in a position to deal with all the matters referred to him: *e.g.*, it is improper to make a final report in an action to wind up a partnership, finding a balance due from one partner to another, until all the assets are realized: *Smith* v. *Crooks*, 3 Gr. 321. But when the Master is not able to make a final report, he may, when necessary, make a *separate* report as to certain of the matters referred to him, and on which he is able to report.

Report privileged.

The report of a Master is absolutely privileged, and no action for libel will lie for anything contained in it: see *Burr* v. *Smith*, 101 L. T. 194.

Points intended to be raised on appeal to be taken before Master.

Parties must raise before the Master, in respect of any matters presented in his office for his decision, all points which they may afterwards desire to raise upon appeal.

It would seem that the Court may, in its discretion, entertain appeals on grounds not distinctly taken before the Master, but in such cases may order the appellant, even if successful, to pay the costs of the appeal.

Or Court may refuse to entertain the appeal.

Although the Court might formerly allow an appeal on a ground not taken before the Master, it might refuse so to do. Thus, the Court refused to allow the Statute of Limitations to be raised on appeal, it not having been raised before the Master: *Brigham* v. *Smith*, 18 Gr. 224; and see *Clouster* v. *McLean*, 10 Gr. 576.

In order to avoid any question as to whether or not any point intended to be raised on appeal, has been taken before the Master, it is safer to deliver the objection in writing, or to have it noted in the Master's book; but this is not absolutely necessary.

See further as to appeals from reports: *Rules* 502-504, and notes.

Death, etc., of Master.

Death or Removal of Master.—Where a Master dies, or becomes incapacitated, pending the reference, an order may be obtained referring the cause to another Master with power to adopt the proceedings already taken: *Anon.*, 4 Jur. 858.

For forms of reports on sales: see Form No. 53; H. & L. Forms, No. 1051; and of reports in administration actions: Form No. 51; H. & L. Forms, No. 1082, and in mortgage actions: *Ib.* Nos. 1070-1072, 1076-1080; in partition actions: *Ib.*, No. 1083; in partnership action: *Ib.*, No. 1032; on a receiver's account: *Ib.* 1081; in redemption action: *Ib.*, No. 1077; and see *Rules* 425, 431.

Accounts, affidavits, etc., not to be set out in report.

425. In the report no part of any account, affidavit, deposition, examination or pleading used in the Master's office, shall be stated or recited, but the same may be referred to by date or otherwise. C.R. 689.

As to form of reports: see note to *Rule* 424.

Rules 426-429.

426. Reports affecting money in Court, or to be paid into Court, shall set forth, in figures, in a schedule, a brief summary of the sums found by the report, and paid or payable into or out of Court, and the funds or shares to which the sums of money are respectively chargeable. C.R. 690.

Schedule to be attached as to moneys in Court, or payable into Court.

An omission to observe this *Rule* may prevent the report from being acted on in the Accountant's office.

427. As soon as the Master's report is settled and signed it shall be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor. C.R. 691.

Report to be issued to party prosecuting reference, or if he decline it, then to any other party.

428. Pending a reference to a Master all affidavits, papers and documents relating thereto required to be filed shall be filed with the Master, but every report or certificate of a Master shall be filed in the office in which the proceedings were commenced and upon the completion of the reference the papers shall be transferred to the office in which the proceedings were commenced. C.R. 693 and 700.

Reports where to be filed.

Under the former Con. Rule 84, reports of Local Masters were required to be filed in their own office; under the present *Rule* all reports are required to be filed in the office where the proceedings were commenced: see *Rules* 761 and 762, and notes.

429. Any party affected by a report may file the same or a duplicate thereof. He shall forthwith serve notice of filing. C.R. 694.

Any party may file report, or duplicate.

The filing of a report is a necessary preliminary to its confirmation: *Rule* 502. It must be filed in the office where the proceedings were commenced: *Rule* 428. If in Toronto, in the Central Office, if elsewhere, then in the office from which the writ issued.

Report must be filed before appeal, and before it can be enforced.

The report, or certificate, of a Master, or a Taxing Officer, must be filed before an appeal can be had therefrom: *Hoyes* v. *Hoyes*, 8 P. R. 546; *Longtry* v. *Dumoulin*, 10 P. R. 444; or before any process can issue thereon: *Jellett* v. *Anderson*, 8 P. R. 387. And where it appoints a time for the payment of money it should be filed before the day for payment: *Mills* v. *Dixon*, 2 Chy. Ch. 53; and be confirmed, where the report is one requiring confirmation: *Mountain* v. *Porter*, 1 Chy. Ch. 207.

As to delay in filing a duplicate report by a party intending to appeal: see *Caisse* v. *Burnham*, 6 P. R. 201.

Rule 430.

The time for appealing runs from the date of service of notice of filing: *Rule* 502.

Notice of filing need not be served on defendants who have not appeared: *Toronto General Trusts Corp. v. Craig*, 2 O. L. R. 238.

Payment of money into bank, how to be directed in report.

430.—(1) Where the Master is directed to appoint money to be paid at some time and place, he shall appoint the same to be paid into some Bank to the joint credit of the party to whom the same is made payable, and the Accountant. The party to whom the same is made payable may name the Bank into which he desires the same to be paid.

Party may pay money to the sole credit of the party entitled thereto or to the joint credit of such party and the Accountant.

(2) Where money is paid into a Bank, in pursuance of such appointment, the party paying may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Accountant; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without order.

(3) When money is paid to the joint credit of the Accountant and the party entitled, the Accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified, or of his solicitor, or in the absence of such consent upon the order of a Judge. C.R. 695.

Object of Rule.

This *Rule* does not relate to the payment of money into Court, (as to that: see *Rule* 727 *et seq.*), but it is intended to provide for the payment of money in cases where the payee is required to do some act as a condition of his receiving the money; *e.g.*, in specific performance actions, where the vendor is required to execute a conveyance; or in mortgage actions, where the mortgagee, or incumbrancers, are required to release and discharge their incumbrances, etc.

How paid out.

Money paid into a bank under this *Rule*, is paid out on a joint cheque of the officer of the Court and of the party to whose credit it is paid in. The cheque will be signed by the officer either upon an order, obtained for that purpose, being produced, or without order, upon filing the written consent of the solicitor of the party paying the money in, and production of the judgment or order, and Master's report showing the person entitled to receive the same.

If the money be paid in to the sole credit of the party entitled under *Rule* 430 (2), he may draw it out at his pleasure.

Order for when necessary.

Where the party paying money in, refuses to consent to its payment out to the party entitled, the latter may move in Chambers for an order to the officer to sign the cheque: *Bernard* v. *Alley*, 2 Chy. Ch. 91; *Weeks* v. *Stourton*, 11 Jur. N. S. 278. Although the refusal to consent appears to have been without reason, the applicant in

Bernard v. *Alley* was refused his costs. The application must be made on notice: *Totten* v. *McIntyre*, 2 Chy. Ch. 462. Rules 431-434.

A report appointing the payment of money, should be filed before the day named for the payment: *Mills* v. *Dixon*, 2 Chy. Ch. 53; and confirmed, where the report is one requiring confirmation: *Mountain* v. *Porter*, 1 Chy. Ch. 207. Report should be filed before day appointed for payment.

If the bank closes its office on or before the day named for payment, and default be made, an application must be made in Chambers to appoint a new day and to name another bank, and the order must be served: *King* v. *Connor*, 1 Chy. Ch. 274.

431. Where, by a report, any money in Court is found to belong to infants, the Master shall require proper evidence of the age of the infants to be given before him and shall in his report state the date of birth and age at the time of his report of each of such infants or shall certify specially his reason for not so doing. C.R. 696. Master to report age of infant beneficiaries.

For a similar provision in regard to judgments and orders: see *Rule* 513.

432. In administration suits, reports shall, as far as possible, be according to Form 51. C.R. 697. Reports in administration suits.

For Form: see H. & L. Forms No. 1082.

The Master should not, in an administration action, attach to his report a copy of the will of the testator whose estate is administered: *McCargar* v. *McKinnon*, 15 Gr. 361; and see *Rule* 425.

433.—(1) The Master shall have the same power, authority, and jurisdiction, as the Master in Chambers, in respect to all matters referred to him, or which may arise in his office. Master in Ordinary to have jurisdiction in Chambers.

(2) Where he acts as under this Rule the fees (payable in stamps) shall, in respect of such business, be the same as are payable for the like business to the Master in Chambers. C.R. 698.

434. Any Official Referee, upon the request of the Master in Ordinary, or of a Judge, may sit for the Master in Ordinary, and while sitting for him shall have all the authority and power of such Master, but shall not be entitled to any fees to his own use. C.R. 699. Official Referee may sit for Master and have like powers.

Under this *Rule* the Master in Ordinary may appoint a deputy, but not a local master. As to the appointment of deputies for Local Masters: see Jud. Act, s. 89.

As to the appointment of deputies for other officers absent, or ill: see *Rule* 760.

Rule 435.

Computation of interest on debts and legacies.

435. In taking accounts in administration proceedings interest shall be computed on the deceased's debts from the date of the judgment or order, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. C.R. 703.

Master not to proceed ex parte.

The Master ought not to proceed *ex parte*, even though the defendant did not appear on the motion for administration: *Jackson* v. *Matthews*, 12 Gr. 47: *Rule* 403.

Proof of persons necessary to be served with judgment.

Before proceeding to take the accounts, the Master should require the necessary evidence to be brought before him, to show who are the parties, if any, who ought to be served with an office copy of the judgment as prescribed by *Rule* 87. The Master should direct on whom the judgment is to be served, and he may also dispense with service, on any parties, as he may think fit: *Ib.*; but see *Rule* 403.

Service may be dispensed with.

Service may be dispensed with on parties whose apparent interest is small, and where there is difficulty in effecting service, and other parties in the same interest are already represented, or directed to be served with the judgment; mere difficulty in effecting service would not alone be sufficient ground for dispensing with service.

Persons who are served with an office copy of a judgment under *Rule* 87 do not thereby become parties to the action, they merely acquire a right to attend the proceedings on giving notice of their desire to do so to the plaintiff's solicitor, but they are bound by the proceedings as though they were actually parties to the action: *English* v. *English*, 12 Gr. 441; and see *supra*, p. 463; and where they do not attend the proceedings in the Master's office, they are not entitled to notice.

Persons served do not become parties to the action.

But on notice to plaintiffs' solicitor may attend proceedings.

Persons so served may give notice to the plaintiff of their desire to attend the proceedings, and are then entitled to be served with the appointments in the Master's office, and with notice of the motion for distribution; but where a person served with the judgment does not notify the plaintiff of his desire to attend the proceedings, he is not entitled to notice of the proceedings in the Master's office, nor of the motion for distribution: see *Rule* 87, note.

Persons so attending, however, are not, as of course, entitled to the costs of so doing out of the estate, and unless the Court is satisfied that there was some good reason for their so attending they will be left to bear their own costs in any event; and may be ordered to pay the extra costs occasioned by their unnecessary attendance: see *Rule* 657.

Persons served under *Rule* 87 cannot be required to account: see *supra*, p. 465.

Master may add parties.

Where the Master finds that any persons not coming within *Rule* 87, ought to be made parties, and enabled to attend the proceedings he may add them as parties under *Rule* 404. Persons added under that *Rule* become parties to the action, as if they had been originally made parties to the writ, or originating notice, and thereafter their names are added as defendants in the title of the action.

Rule 436.

Interest to be allowed on debts.

Judgment for administration operates as a judgment in favour of all creditors.

Rate of interest payable.

The direction contained in this *Rule*, as to the allowance of interest on debts, applies to debts not bearing interest, prior to the date of the judgment. The judgment for administration, operates as a judgment for all the creditors of the estate for the amount of their respective debts, and consequently from that date they bear interest; but where a creditor is entitled to interest from any prior date, by virtue of any statute, or any contract, expressed or implied, the Master may allow such interest. But where a sum is payable at a certain day, with interest, there is no implied contract to pay interest at the same rate after default; and even where the same rate has been paid for many years after default, there is no implied contract to continue doing so: *Re Roberts, Goodchap* v. *Roberts*, 14 Ch. D. 49; 42 L. T. 666; *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Simonton* v. *Graham*, 8 P. R. 495. As to what is a sufficient demand of interest within the Jud. Act, s. 35 (2), *supra*, p. 197; see *Geake* v. *Ross*, 32 L. T. 666.

Interest on legacies.

General legacies payable out of personalty bear interest from the expiration of a year from the testator's death, unless the testator was the legatee's debtor, or being a parent of, or standing in *loco parentis* to, the legatee has made no provision for the maintenance of the legatee who is an infant: even though the fund out of which it is payable is reversionary, unless it distinctly appears that interest is not to run till the fund falls into possession: *Walford* v. *Walford*, 1912, A. C. 658; 107 L. T. 657. Interest on legacies charged on land, bear interest from the testator's death: *Ashburner* v. *Maguire*, 2 White & Tudor's L. C. (7th ed.), 852; but where the legacy is payable out of the proceeds of the sale of land, the interest does not run until a year from the death: *Turner* v. *Buck*, 18 L. R. Eq. 301; but where the sale was postponed by the testator till after the death of a tenant for life, and the rents were directed to be applied as if the sale had taken place, a legacy payable out of the proceeds, was held to bear interest from the death of the tenant for life: *Re Waters, Waters* v. *Boxer*, 42 Ch. D. 517; 61 L. T. 431; and see *Re Scadding*, 4 O. L. R. 632. Where, for the convenience of the estate, the payment of a legacy is postponed by the testator, the legacy bears interest nevertheless from a year from the testator's death: *Re Olive, Olive* v. *Westerman*, 50 L. T. 355; as to interest on a legacy to an infant executor: see *Re Gardner, Long* v. *Gardner*, 67 L. T. 552; and see further as to interest on legacies, *Re Judkin*, 25 Ch. D. 743; 50 L. T. 200.

See further as to the allowance of interest: notes to *Rule* 410, p. 930 *et seq.*, *supra*.

Creditors to be notified when their claims are payable out of Court.

436. Where an order is made for payment of money out of Court to creditors, the person whose duty it is to prosecute the order shall send each creditor, or his solicitor (if any), a notice that the cheques may be obtained from the Accountant; and shall deposit with the Accountant any papers necessary to enable the creditors to receive their cheques. C.R. 714.

Creditors who have proved claims, but who are not parties to the action, are not entitled to notice of a hearing on further directions, nor of an application for distribution: *Lavin* v. *O'Neill*, 13 Gr. 179.

Rules 437-438.

Creditors who have received more than their share, may be ordered to refund, on the application of a creditor who has not received his proper proportion: *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273; but the right may be barred by the Statute of Limitations, if not prosecuted within six years from the date of the overpayment. *Blake* v. *Gale*, 31 Ch. D. 196; or may be lost by acquiescence: S. C. 55 L. T. 234.

For form of notice: see Form No. 50; H. & L. Forms No. 993.

Notice, how to be sent to creditors.

437. Every notice required to be given to a creditor or claimant shall, unless the Master otherwise directs, be transmitted by registered letter to the creditor or claimant at the address given in the claim sent in, or, in case the creditor or claimant has employed a solicitor, to such solicitor at the address given by him. C.R. 715.

General provisions where a sale is ordered.

438. Where a sale is ordered, the Master may cause the property to be sold either by public auction, private contract, or tender, or part by one mode and part by another, as he may think best for the interest of all parties. C.R. 716.

Conduct of sale.

Conduct of the Sale.—The party having the carriage of the order or judgment, directing a sale, is the party usually entitled to the conduct of the sale.

Conduct of sale under trusts of will or settlement.

C. R. 717 provided that, "where the trust of any will or settlement are being administered and a sale is ordered of any property vested in the trustees of such will or settlement upon trust for sale or with power of sale by the trustees, the conduct of the sale shall be given to the trustees, unless otherwise ordered. And see Eng. R., March. 1879, r. 7.

C. R. 717 has not been continued, and, therefore, subject to the Master's discretion, now, as in other cases, the plaintiff would have the conduct: *Re Marshall*, W. N. 1879, 12.

The conduct of the sale was given to a defendant in an action by one trustee, who was also tenant for life, against the three other trustees: *Re Gardner*, *Gardner* v. *Beaumont*, 48 L. J. Chy. 644.

The mere extent of the interest of any party in the property, or the possession by him of title deeds, does not give any right to conduct the sale. Usually the plaintiff having the carriage of the judgment, or order, will also have the conduct of the sale: *Dale* v. *Hamilton*, 10 Ha. App. vii. But where it is for the benefit of all parties, the conduct of the sale may be given to a defendant: *Hewitt* v. *Nanson*, 7 W. R. 5; *Dixon* v. *Pyner*, 7 Ha. 331; or where all parties to the action wish to bid, it may be given to an independent solicitor: *Ramsay* v. *McDonald*, 8 P. R. 283.

Duty of solicitor conducting sale.

It is the duty of the solicitor of the party having the conduct of the sale, to prepare the advertisement, to procure its settlement by the Master, and to see to its publication, pursuant to the Master's direction, to make the necessary arrangements with the auctioneer, to

attend the sale, to see that the contracts are duly signed by the purchasers, and that the deposits, if any, required to be paid by purchasers are duly paid, to prepare the necessary affidavits proving the sale, and procure the report on sale to be settled and filed, to deliver abstracts, answers to requisitions, and objections, and to attend any reference as to the title; to attend the settlement of the conveyances, and procure their execution by all necessary parties to the action; and to enforce, if necessary, by motion, the due performance by the purchasers of their contracts. He is usually styled "the vendors' solicitor," and as such he acts for the purpose of the sale, and as regards the purchaser, for all the parties to the action who are interested in the land directed to be sold: *Dolby* v. *Pullen*, 1 R. & M. 296; *Street* v. *Hallett*, 6 P. R. 312; but his own client must bear any loss occasioned by such solicitor's malfeasance, such as the misappropriation of the purchase money: *Mulkins* v. *Clarke*, 11 P. R. 350. Rule 439.

Every party to the action is bound to facilitate the sale: *Knott* v. *Cottee*, 27 Beav. 33. Interference by other parties, with the party having the conduct of the sale, may be restrained by injunction: *Dean* v. *Wilson*, 10 Ch. D. 136. Duty of parties.

The party having the conduct of the sale, is not at liberty to bid, unless leave to do so is granted specially: see *Rule* 442.

Where a sale has proved abortive for want of bidders, the property may be advertised and put up again for sale without further order: *Sherwood* v. *Campbell*, 1 Chy. Ch. 299. Abortive sale.

439. The party having the conduct of the sale shall bring into the Master's office a draft advertisement, which shall shew:— Draft advertisement to be brought in. What it is to contain.

(*a*) The short style of cause;

(*b*) That the sale is in pursuance of an order of the Court;

(*c*) The time and place of sale;

(*d*) A short and true description of the property to be sold;

(*e*) The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots;

(*f*) What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with or without interest;

(*g*) If there is an upset price or reserve bid it shall be so stated.

(*h*) Any particulars in which the proposed conditions of sale differ from the standing conditions. C.R. 720 and 721.

Rule 439.

Any particulars in which the proposed conditions of sale differ from the standing conditions, are to be set out in the advertisement. This *Rule*, therefore, renders it unnecessary to bring in any particulars and conditions of sale, apart from those necessarily required to be embodied in the advertisement.

Advertisements of sale, how to be framed.

Advertisements of sale should be framed as concisely as possible, and all matter which conveys no necessary information to intending purchasers should be excluded. The introduction of "puffing" is to be avoided: *Baxter* v. *Finlay*, 1 Chy. Ch. 230; *Buchan* v. *Wilkes*, *Ib.* 231. The advertisement should set out the improvements: *Heward* v. *Ridout*, 1 Chy. Ch. 244; and the existence of a favourable lease, if any: *McAlpine* v. *Young*, 2 Chy. Ch. 171. But any omissions of this kind, must, as a general rule, be objected to at the time of settling the advertisement, or before the sale has taken place: *Creswick* v. *Thompson*, 6 P. R. 52. But, where a material fact was omitted from the advertisement, *e.g.*, that a lease was subject to a ground rent, the purchaser was discharged from his purchase: *Jones* v. *Rimmer*, 14 Ch. D. 588; 43 L. T. 111; 49 L. J. Ch. 775.

Defects in advertisements, when to be corrected.

Misrepresentation in, effect of.

Misdescription in the advertisement, where it amounts to a material misrepresentation, is also a ground for compensation to the purchaser: *Stammers* v. *O'Donohoe*, 28 Gr. 207; also material verbal misrepresentations: *Webb* v. *Roberts*, 16 O. L. R. 279; even after conveyance: *Bull* v. *Harper*, 6 P. R. 36; or may entitle the purchaser, at his option, to be relieved from his purchase: *Mathias* v. *Yetts*, 46 L. T. 497; *Redgrave* v. *Hurd*, 20 Ch. D. 1; 45 L. T. 485; 51 L. J. Ch. 113; but he is not entitled to compensation if he bought with knowledge of the facts: *Re Edwards & Daniel*, 62 L. T. 445; and see *infra*, pp. 1002 *et seq.*

The misdescription of a street number, there being other sufficient description, was held to be immaterial: *Foster* v. *Anderson*, 16 O. L. R. 565; 12 S. C. R. 251—and a misdescription of the depth of a city lot followed by the words "more or less" though it amounted to 11 feet 6 inches, was held not to entitle the purchaser to compensation, the price having been fixed by reference to the lot generally and not by its frontage or depth per foot: *Wilson* v. *Simpson*, 22 22 O. L. R. 452.

Where a misstatement in the advertisement has been verbally corrected at the sale by the auctioneer, but such correction was not heard by the purchaser, the latter is not entitled to compensation, though *semble*, the vendor might not be entitled to enforce the contract specifically: *Re Hare & O'Moore*, 1901, 1 Ch. 93; 83 L. T. 672.

Where leaseholds subject to onerous covenants are offered for sale, such covenants should be disclosed to the purchaser; and an acceptance of the title in ignorance of such covenants will not be binding on the purchaser: *Re Haedicke & Lipski*, 1901, 2 Ch. 666; 85 L. T. 402; *Molyneux* v. *Howtrey*, 1903, 2 K. B. 487; 89 L. T. 350.

Special conditions of sale not to be resorted to without cause.

Special Conditions.—Unnecessarily stringent conditions of sale ought not to be sanctioned by the Master; thus where the title, or the proof of it, was involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title, or any title deeds, or copies thereof, other than such as are in his possession, or prove an abstract," was condemned by the Court: *McDonald* v. *Gordon*, 2 Chy. Ch. 125; and see *Dance* v. *Goldingham*, L. R. 8 Chy.

902; *Dunn* v. *Flood*, 25 Ch. D. 629; 49 L. T. 670; 28 Ch. D. 586; 52 L. T. 699; *Re Rayner*, 53 L. T. 495. Trustees were restrained from selling without a reserved bid: *Downey* v. *Dennis*, 14 Ont. 219. Rule 439.

In sales by the Court, if a good title can be made, the parties are not at liberty to relieve themselves by special conditions from the obligation to make such a title, and the Court will not provide by conditions for imaginary defects, *per* Mowat, V.C., *McDonald* v. *Gordon*, 2 Chy. Ch. 125; *Piers* v. *Piers*, Sau. & Sc. 414. "It is the uniform practice of a Court of Equity, not to set up for sale a title knowing it to be bad:" *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Lahey* v. *Bell*, 6 Ir. Eq. 122; Sugden, V. & P., 14th ed., 100, and see *Hume* v. *Bentley*, 5 De G. & S. 527.

Where a contract stated that the land was sold "subject to the conditions of the Incorporated Law Society" it was held that the conditions for the time being of the Incorporated Law Society were incorporated into the contract, and it was not open to the objection that it did not sufficiently comply with the Statute of Frauds: *Pickles* v. *Sutcliffe*, 114 L. T. Jour. 172; and the same rule would doubtless apply to the incorporation of the standing conditions of the Court referred to in *Rule* 441.

A condition of sale is bad, as misleading, if it requires the purchaser to assume as true what the vendor knows to be false; or if it states that the state of the title is not accurately known, when in fact it is known to the vendor: see *Nash* v. *Wooderson*, 78 L. T. Jour. 59. And a purchaser purchasing at a sale by the Court under such conditions is entitled to have a good title made, notwithstanding the conditions; but where the conditions on the face of them purport to give only a good holding title, that is all the purchaser, even though relieved from the conditions, can insist on: *Re Banister*, *Broad* v. *Munton*, 12 Ch. D. 131. Condition requiring purchaser to assume as true, what is false, is bad.

And where a sale was had, under a condition that precluded the purchaser from objecting to the title prior to the document chosen as the root of the title, but the purchaser inquired into the prior title and refused to complete, on the ground that the prior title was bad, the Court, being of opinion that the objection was well founded, refused to enforce the sale against the purchaser, and discharged him from his purchase: *Else* v. *Else*, L. R. 13 Eq. 196; *Williams* v. *Wood*, 16 W. R. 1005; *Bennett* v. *Wheeler*, 1 Ir. Eq. 16; *Hume* v. *Bentley*, 5 De G. & S. 527; and see *Dunn* v. *Flood*, *supra*; but see *Re National Provincial Bank* v. *Marsh*, 71 L. T. 629.

Where a sale was had under a condition that no objection or requisition should be made by the purchaser by reason of the non-acknowledgment of a deed dated 18th December, 1841, by a married woman, who was a party to it, and it turned out that the deed in question was the conveyance to the vendor, and that the married woman had one-fifth interest in the estate, and that the vendor, though in possession, had not acquired a title under the Statute of Limitations, the Court refused to enforce the contract against the purchasers: *Re Cumming to Goldbolt*, 78 L. T. Jour. 31.

Where a sale was had upon condition that in case the vendor should be unable or unwilling to remove or comply with any objection or requisition made by the purchaser, he might rescind the sale, and the purchaser delivered requisitions which the vendor answered, but

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the purchaser considered the answer insufficient, and the vendor then gave notice that he rescinded the contract, it was held that the purchaser could not, by subsequently waiving his objections, prevent the rescission from taking effect: *Dames* v. *Wood*, 51 L. T. 109. Where there was such a condition, and it appeared that the purchasers objected to a prior contract for sale appearing on the registry, and they offered to give time for the removal of their objection, if the vendor would give an indemnity against the prior contract, and they threatened action if this was not accepted, the vendor, in good faith rescinding, was held entitled to do so: *Woolcott* v. *Peggie*, 15 App. Cas. 42; see also *Re 163rd Starr Bowkett Building Society* v. *Sibun*, 61 L. T. 346; but such a power to rescind can not be exercised except in good faith: *Smith* v. *Wallace*, 1895, 1 Ch. 385; *Re Weston & Thomas*, 1907, 1 Ch. 244; 96 L. T. 324; and where a requisition is reasonable a vendor is not entitled to rescind arbitrarily, and notwithstanding his rescission, specific performance may be ordered: *Quinion* v. *Horne*, 1906, 1 Ch. 596.

Where the conditions limit a time for making objections to the title, and provide that objections not made within the time shall be deemed to be waived, such conditions will be strictly binding on the purchaser, except in the case of an objection showing that the vendor has no title: *Armstrong* v. *Nason*, 25 S. C. R. 263.

Under a condition of sale giving the vendor the right to rescind in the event of his being unable or unwilling to answer any requisition or objection to the title, there is no difference between the case of a vendor selling having no title, and selling a defective title; in either case can he avail himself of the condition: *Bowmon* v. *Hyland*, 8 Ch. D. 588; *Re Jackson & Haden*, 1905, 1 Ch. 603; 1906, 1 Ch. 412; 92 L. T. 591; 94 L. T. 418; *Re Deighton*, 1898, 1 Ch. 458; 78 L. T. 430.

After a judgment for specific performance, the right of a vendor to rescind under a special condition is subject to the control of the Court: *Halkett* v. *Dudley*, 1907, 1 Ch. 590; 96 L. T. 539.

The expense of procuring title deeds not in the vendor's possession to which the purchaser is entitled, must be borne by the vendor in the absence of any condition to the contrary, and *semble*, a condition that the vendor shall not be bound to produce them for verification of the abstract is not a sufficient condition to the contrary: *Re Duby & Jesson*, 1898, 1 Ch. 419.

Where time is made "of the essence of the contract," in case of default, the opposite party may treat the contract as rescinded without further notice; but this will not entitle a vendor to retain purchase money paid on account (otherwise than as a deposit on sale): *Labelle* v. *O'Connor*, 15 O. L. R. 519. Where the purchaser makes default, he forfeits his deposit: see notes to *Rule* 448: Where after default the opposite party treats the contract as still subsisting, that may amount to a waiver of the condition: *Devlin* v. *Rodkey*, 22 O. L. R. 399; and see *Re Crabbe & Little*, 14 O. L. R. 631.

The standing conditions of sale are those referred to in *Rule* 411.

Where an advertisement is not settled in proper form, it may, on motion in Chambers, be referred back to the Master to be re-settled, and if necessary to appoint a new day for the sale: *Heward* v. *Ridout*, 1 Chy. Ch. 244; such an application if in the nature of an appeal

from the Master would seem to be beyond the jurisdiction of the Master in Chambers, and to be proper to be made to a Judge. Rule 440.

Reserved Bid.—The Master may, without order, fix an upset price, or reserved bidding at the time the advertisement is settled, and if he does, it is to be notified in the conditions of sale. Master may fix upset price or reserved bidding.

In order to enable the Master to fix a reserved bid, an affidavit made by some competent surveyor must be filed. See H. & L. Forms, No. 1040. Reserved bid, how fixed.

According to the English practice, affidavits for the purpose of enabling the Judge to fix reserved biddings are to state the value of the property by reference to an exhibit, so that the value may not be disclosed by the affidavit when filed: Eng. (1883) R. 883.

The amount of the reserved bid should not be stated in the conditions of sale, but merely the fact that the sale is to be subject to a reserved bid.

Where the Master omitted on the settling of the advertisement to fix a reserved bid, on motion in Chambers, leave to fix a reserved bid, and re-advertise was granted: *Fraser* v. *Bens*, 1 Chy. Ch. 71.

Where the sale takes place elsewhere than before the Master, a note of the amount of the reserved bid under a sealed cover is to be delivered to the auctioneer, or person selling the estate, with instructions not to open it until the biddings are closed, and not to make the amount of it known even then. How communicated to auctioneer.

A *bonâ fide* purchaser cannot be prejudiced by any mistake made in fixing the reserved bid: *Re Jelly*, 3 O. L. R. 72.

Where a sale takes place subject to a reserved bid, all the biddings are subject to the condition that they are equal to, or greater, than the reserved price, so that the highest bidder cannot insist on a sale to him, though the auctioneer declares him to be the buyer, unless his bid fulfils the condition: *McManus* v. *Fortescue*, 1907, 2 K. B. 1; 98 L. T. 444.

The advertisement is published by the party conducting the sale, at such times and in such manner as the Master appoints. Advertising sale.

Where a sale is postponed, a note of such adjournment published at the foot of the original advertisement will suffice, without incurring the expense of an entirely fresh advertisement: *Thompson* v. *Milliken*, 15 Gr. 197. Postponement of sale.

Sales are not to be postponed except in extreme cases. Where, pending the time appointed in a mortgage suit for redemption, the mortgagor made an assignment in insolvency, but the plaintiff proceeded with the suit without adding the assignee; a motion by the latter to stay the sale on the ground that he had no notice of settling the advertisement was refused: *Hoskins* v. *Johnston*, 8 P. R. 257.

440. Upon the return of the appointment to settle the advertisement the Master shall also fix the time and place of sale, name an auctioneer, where one is to be employed, give direction for publication, fix the upset price or Duty of Master on settling advertisement.

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reserve bid, and make every other necessary arrangement preparatory to the sale. C.R. 722.

Formerly sale must be by auction, unless otherwise ordered, but now, Master may direct sale by tender, etc.

Formerly all sales directed by the Court of Chancery had to be by auction, unless the order, or decree, expressly authorized a sale in some other way. Even after an abortive attempt to sell by auction, a sale in any other way could not be had except by express order: *Berry* v. *Gibbons*, L. R. 15 Eq. 150. Now, where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold either by public auction, private contract, or tender, or part by one mode, and part by another, as he may think best for the interest of all parties; and he may fix an upset price, or reserved bidding, but such price or bidding, must be so fixed at the meeting held by him for the settling of the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale: *Rule* 442. The Master is not justified in accepting a tender from the person having the conduct of the sale: *Romsey* v. *McDonald*, 8 P. R. 283.

Sales by auction, highest bidder, right of.

Where land is offered for sale by auction, unless in the particulars or conditions of sale it is stated that the land will be sold subject to a reserved price, or a right of the seller to bid, the sale is to be deemed, and taken, to be without reserve; and upon any sale without reserve, it is unlawful for the seller, or a puffer, to bid, or for the auctioneer knowingly to take any bidding from a seller, or puffer: see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), ss. 51, 52; *Heron* v. *Moffatt*, 22 Gr. at pp. 375-6; *Johnston* v. *Boyes*, 1899, 2 Ch. 73; 80 L. T. 488. Upon a sale without reserve it is not open to the vendor to refuse a bid, however small: *O'Connor* v. *Woodward*, 6 P. R. 223; *McAlpine* v. *Young*, 2 Chy. Ch. 171; and the vendor is liable to the highest bidder for breach of contract if he refuses to accept his bid: *Johnston* v. *Boyes*, *supra*; and see 117 L. T. Jour. 455; 121 L. T. Jour. 176; but see *Fenwick* v. *Macdonald*, 41 Sc. L. R. 688, reversed, 6 F. 850, where it was held that as the bidder might withdraw his bid at any time before the hammer falls, so also the vendor might withdraw the property from sale: *Rainbow* v. *Hawkins*, 1904, 2 K. B. 322; 91 L. T. 149. The offer of property subject to a reserved bidding, does not involve also a right for the seller to bid, or to employ a puffer; thus, where a sale was advertised under a decree subject to a reserve bid, but no right on the part of the seller to bid was reserved, but a puffer was employed whose bids did not exceed the reserved bid, the sale was, on the application of the purchaser, set aside: *Gittiot* v. *Gittiot*, 18 W. R. 203; L. R. 9 Eq. 60, and if a limited right to bid be reserved, and the limit be exceeded, the sale is voidable: *Porfitt* v. *Jepson*, 46 L. J. C. P. 529.

Limited right of vendor to bid cannot be exceeded

Mortgage actions, mortgagor's duty as to advertisement.

Under a judgment for sale in a mortgage action it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and, if he considers too much is offered for sale, he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that so soon as sufficient has been realized by the sale to pay off the plaintiff's and other claims, the remaining lots, if any, will be withdrawn, if that course is intended to be pursued: *Beaty* v. *Rodenhurst*, 3 Chy. Ch. 344.

Properties widely apart should not be included in one parcel; thus shops in a village, and a farm three-quarters of a mile away, were

held to have been improperly included in one parcel: *Aldrich v. Canada Permanent L. & S. Co.*, 24 Ont. App. 193. Rules 441, 442.

Where the Master enlarged the time appointed for sending in tenders, it was held that he had a right to do so, and that the highest tender in at the time originally appointed was not necessarily to be accepted; notwithstanding it was advertised that the sale would be then "peremptorily closed": *Re Alger, etc.*, 21 Ont. 440.

Where property is offered for sale subject to incumbrances, they must be accurately described; and where the agreement for sale stated that the land was to be subject to a "mortgage incumbrance of $750, bearing interest at the rate of 7 per cent. per annum," and it turned out that the mortgage was for $3,000, with interest at 10 per cent. per annum, payable half-yearly, to be reduced if punctually paid to 7 per cent., with an agreement to release the land, which was the subject of the contract, on payment of $750; it was held that the agreement did not convey an accurate statement as to the nature of the incumbrance, and that the purchaser was entitled to be relieved from the contract: *Re Booth & McLean*, 21 Ont. 452.

The Master, or his clerk, may conduct the sale if no auctioneer is employed: see *Rule* 443. Master, or his clerk may act as auctioneers.

441. The standing conditions of sale shall be those set forth in Form No. 52. C. R. 723. Standing conditions of sale.

See Form No. 52; H. & L. Forms, No. 1043.

Any conditions varying from, or in addition to, the standing conditions must be stated at length in the advertisement: *Rule* 439 (*h*).

Where the owner of the equity of redemption is dead, and his heirs are out of the jurisdiction, or unknown, a sale may be directed in an action against a subsequent mortgagee, and the Provincial Attorney-General as representing the deceased mortgagor, but the circumstances under which the sale is directed, must be stated in the particulars of sale: *Smith v. Good*, 14 Gr. 444.

As to special conditions: see note to *Rule* 439.

Even without the standing condition for a re-sale in case of default by the purchaser, and payment by him of any deficiency, the law implies such a contract: *Re Hornibrook*, 12 P. R. 591.

The fact that the standing conditions are incorporated into the contract by reference does not render the contract open to the objection that it does not comply with the Statute of Frauds: see *Pickles v. Sutcliffe*, 114 L. T. Jour. 127.

Where, as the standing condition provides, the deposit is payable to the vendor's solicitor; if he makes away with it, it cannot be recovered from the auctioneer: *Brown v. Farebrother*, 59 L. T. 822; but the client of the solicitor is responsible to the other parties interested, to make good the loss: *Mulkins v. Clarke*, 11 P. R. 350.

442. All parties may bid, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary position. C.R. 725. All parties may bid except party having conduct of sale, trustees, etc.

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Leave to hid not granted to party having conduct of sale.

Nor to executor, receiver, guardian ad lit, nor trustee.

Leave to hid will not nsually be granted to the party having the conduct of the sale: ***Phillips*** v. ***Conger***, 1 O. S. 583; ***Domville*** v. ***Berrington***, 2 Y. & C. 723; ***Sidney*** v. ***Ranger***, 12 Sim. 118, nor to his servants, or agents: see ***Martinson*** v. ***Clawes***, 21 Ch. D. 857; 46 L. T. 882; 51 L. J. Ch. 594; except upon the terms of traneferring the conduct of the sale to an independent solicitor, if none of the other partlee will take it: ***Ramsay*** v. ***McDonald***, 8 P. R. 283. Leave to hid has also heen refueed to an executor, in an administration action: ***Geldard*** v. ***Randall***, 9 Jur. 1085; to a receiver: ***Alven*** v. ***Bond***, 1 Flan. & K. 195; and see ***Nugent*** v. ***Nugent***, *infra*; to a guardian *ad litem*: see Seton, 5th ed., 295; ***Crawford*** v. ***Boyd***, 6 P. R. 278. Leave will not, in general, he given to trusteee to hid, unlees all the *cestuis que trustent* who are *sui juris* consent, and no other purchaser at an adequate price can he found: ***Tenant*** v. ***Trenchard***, L. R. 4 Chy. 537, 547; ***Farmer*** v. ***Dean***, 32 Beav. 327; and eee ***Ricker*** v. ***Ricker***, 27 Gr. 576; 7 Ont. App. 28; 18 C. L. J. 274; 2 C. L. T. 399, and a truetee who has obtained leave to hid, is not exonerated from his duty of protecting the interest of his *cestui que trust*: *Ib.*, hut see *Boswell* v. *Coaks*, 48 L. T. 929; 51 L. T. 242; 55 L. T. 32; 23 Ch. D. 302; 27 Ch. D. 424; 11 App. Cas. 232. Where a trustee, who was also entitled to a lien on the trust estate for advances, had failed to realize the trust estate hy sale at auction, or hy tender, he wae himself permitted to become the purchaser: ***Hutton*** v. ***Justin***, 2 O. L. R. 713. Although a vendor cannot himself become the purchaeer unless he has obtained special leave to hid, yet it would seem that there is no objection to a Joint Stock Company in which he is a shareholder becoming the purchaser: see *Farrar* v. *Farrars*, 40 Ch. D. 395; 59 L. T. 619. But where a trustee for sale, or the vendor, has a secret understanding not amounting to a contract, that the purchaser will re-sell the property to him. the sale will he set aside though no actual fraudnlent intent he proved: *Re Postlethwaite, Postlethwaite* v. *Rickman*, 59 L. T. 58; but this case was reversed on appeal owing to the great lapse of time: 60 L. T. 514.

Leave to bid, how obtained.

Leave for parties, not otherwise entitled, to bid, is sometimes contained in the order, or judgment, directing the sale, hut an order for that purpose is usually ohtained in Chambers on notice to the other parties interested. The Master formerly had no power to grant such leave: *Re Laycock, McGillivroy* v. *Johnson*, 8 P. R. 548, hut may now do so in the exercise of his jurisdiction in Chambers under *Rule* 433.

Effect of party not authorized to bid becoming purchaser.

Where a party not authorized to hid, has hid without leave, and hecomee the purchaeer, the sale will not necessarily he set aside, but the property may, on the applicatlon of the other parties interested. he ordered to he put up for sale again at the expense of the party so hidding. and if no more can he realized he may he held to his purchase: *Wilson* v. *Greenwood*, 10 Sim. 101; *Sidney* v. *Ranger*, 12 Sim. 118; *Crawford* v. *Boyd*, 6 P. R. 278; and see *Martinson* v. *Clowes*, 52 L. T. 706.

A receiver cannot, without the leave of the Court, purchase for his own henefit property to which the action in which he is receiver relates. even though the sale he made hy some third person, *e.g.*, a mortgagee of the property: if he huys, he will be deemed to have hought for the benefit of those interested in his receivership: *Nugent* v. *Nugent*, 1907. 2 Ch. 292; 1908. 1 Ch. 546; 97 L. T. 279; 98 L. T. 354.

443. The Master or his Clerk shall conduct the sale where no auctioneer is employed. C.R. 727.

Rules 443, 444.

Master, clerk or auctioneer may conduct sale.

An auctioneer selling land is not required to be licensed under *The Municipal Act* (R. S. O. c. 192), s. 412: *Regina* v. *Chapmon*, 1 Ont. 582; but an assignee for the benefit of creditors cannot act as auctioneer at a sale of goods without a license: *Reg.* v. *Rawson*, 22 Ont. 467.

Biddings.

Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale: see *Rule* 444.

Sale without reserve.

Where the sale is to be without reserve, the vendor is not at liberty to refuse any bid, however small, nor can the vendor, or a puffer, bid, unless the right to bid is expressly reserved in the conditions of sale. And where the right to bid is limited to one or more bids, the vendor may not exceed it. And where the sale is subject to a reserved bid, a puffer cannot also be employed: see note to *Rule* 440; but where a stranger, at the instance of the mortgagor, made a fictitious bid at a sale of the mortgaged property under a judgment of the Court, it was held that a purchaser could not avoid the sale on the ground that he had been thereby induced to bid more than he otherwise would; *Union Bank* v. *Munster*, 37 Ch. D. 51; 57 L. T. 877; but see *Gillat* v. *Gilliat*, in note to *Rule* 440, *supra*, p. 988.

Vendor, or puffer may not bid.

Where the sale is without reserve, but the vendor, after a bid has been made, withdraws the property from sale, the highest bidder may, nevertheless, apply to be declared the purchaser: *McAlpine* v. *Young*, *supra*, p. 988. It would seem that such an application should be made in the first place to the Master to report on the sale, and if he refuses to report the highest bidder the purchaser, an appeal would lie from him to the Court in the ordinary way: see *Rules* 502-504. In *McAlpine* v. *Young*, the application appears to have been made in Chambers in the first instance.

Acceptance of an invalid bid.

Where the auctioneer has accepted the bid of a vendor, or puffer, who had no right to bid, and declared him the purchaser, it would seem that the highest bidder lawfully bidding, would be entitled to set aside the sale, and have himself declared the purchaser.

Withdrawal of bid.

Semble, a bid, like every other offer, may be withdrawn before acceptance, even though it is otherwise stipulated in the conditions of sale: *Kaiserhof Hotel Co.* v. *Zuber*, 23 O. L. R. 481; 25 O. L. R. 194.

Agreement not to bid.

An agreement between intending purchasers not to bid against each other, on a verbal agreement that in the event of any one of them becoming the purchaser he will resell part to the other of them is not invalid, and may be specifically enforced as against the one becoming the purchaser: *Can. Pac. Ry.* v. *Grand Trunk Ry.*, 14 O. L. R. 41; 39 S. C. R. 220; and see *Brock* v. *Soul*, in note to *Rule* 447, *infra*, p. 995.

444. The purchaser shall at the time of sale sign an agreement to purchase. C.R. 728.

Purchaser to sign contract.

Contract.

The agreement to be signed by the purchaser should identify the property purchased, by reference to the particulars and conditions of sale, and should in other respects be a sufficient agreement to satisfy the requirements of the Statute of Frauds; but it is possible that a contract upon a sale by the Court might be enforced though these formalities had not been complied with: see Daniel's Pr., 6th ed., 1104.

Rule 445.

Contract, how to be signed.

The purchaser should sign his name, and his address and quality should also be stated. If his signature is not plain, or initials are used, it is desirable that a note of his full name should be written at the foot. Where any person purchases as agent for another, it should be so expressed in the signature, otherwise he will be treated as the purchaser, unless an affidavit showing the fact to be otherwise, is produced on the settlement of the report on sale: see Dan. Pr., 6th ed., 1083.

The auctioneer has authority to sign the contract for the purchaser, but he must sign it at the time of the sale, he cannot do so afterwards, nor can he delegate the authority to sign for the purchaser to his clerk, or any other person: *Bell* v. *Balls*, 76 L. T. 254.

Deposit at sale, how to be paid.

445. The deposit shall be paid to the vendor, or his solicitor, at the time of sale, and shall forthwith be paid by him into Court, in the name of the purchaser. C.R. 729.

Solicitor neglecting to pay in deposit, liability of.

If the solicitor for the vendor neglects to pay the deposit into Court, he may be compelled to do so by order, on application of the purchaser: *Crooks* v. *Glenn*, 1 Chy. Ch. 354. And where he neglected to pay in the deposit, and in consequence of his not having done so the judgment was not in the hands of the Accountant, so that the purchaser could not obtain a direction to pay in the balance of his purchase money, the solicitor was ordered to pay the interest which would have accrued on the whole purchase money, if the money had been duly paid into Court: *Smith* v. *Dunn*, 3 C. L. T. 217.

Misappropriation of deposit.

Where the deposit was paid by the auctioneer to one of a firm of solicitors having the conduct of the sale, who misappropriated it, the other members of the firm were held liable for it: *Biggs* v. *Bree*, 45 L. T. 648; 46 L. T. 8; and see *Thompson* v. *Robinson*, 15 Ont. 662; 16 Ont. App. 175. The auctioneer is not bound to accept a cheque for the deposit: *Johnston* v. *Boyes*, 1899, 2 Ch. 73; 80 L. T. 488.

The client of the solicitor making default is responsible to the other parties to the action for his misfeasance: *Mulkins* v. *Clarke*, 11 P. R. 350; but an auctioneer who pays the deposit to the solicitor pursuant to the conditions of sale is discharged from liability: *Brown* v. *Fairbrother*, 59 L. T. 822. Where at a sale out of Court by a mortgagee he had accepted a cheque for the deposit which proved bad, and the sale fell through in consequence of the purchaser turning out to be worthless, it was held that the mortgagee was nevertheless entitled to add the costs of the abortive sale to his debt: *Farrer* v. *Lacey*, 31 Ch. D. 42; 50 L. T. 121; 53 L. T. 515.

If sale goes off for default of purchaser, deposit is forfeited.

Where the sale is not completed through the default of the purchaser, he forfeits his deposit to the vendor: *Rosenberg* v. *Cooke*, 8 Q. B. D. 162; *Whelan* v. *Couch*, 26 Gr. 74; *Smith* v. *Butler*, 1900, 1 Q. B. 694; 82 L. T. 281; *Tilt* v. *Knapp*, 9 P. R. 314; *Re Hornibrook*, 12 P. R. 591; *Sprague* v. *Booth*, 1909, A. C. 576; *Griffiths* v. *Vesey*, 1906, 1 Ch. 796; 94 L. T. 574; and all other payments made on account of purchase money: *Gibbons* v. *Cozens*, 29 Ont. 356; see standing conditions of sale: Form No. 52, clause 6; and note to *Rule* 448, *infra*, p. 997; (but see *Cornwall* v. *Henson*, 1899, 2 Ch. 710; 81 L. T. 113; 1900, 2 Ch. 298; 82 L. T. 735); even though there be no stipulation to that effect: *Ex parte Barrell*, *Re Parnell*, L. R. 10 Chy. 512; *Dunn* v. *Vere*, 19 W. R. 151; and see *Howe* v. *Smith*, 50 L. T. 573; *Hall* v. *Burnell*, 1911, 2 Ch. 551; 105 L. T. 409; *Fletcher* v. *Campbell*, 29 O. L. R. 501; *Catton* v. *Bennett*, 26 Ch.

D. 161; 51 L. T. 70; and even though specific performance is refused: *Scott* v. *Alvarez*, 1895, 2 Ch. 603; 73 L. T. 43. And this is so, even where the contract is invalid, and could not be legally enforced: *Thomas* v. *Brown*, 35 L. T. 247; but see *Casson* v. *Roberts*, 31 Beav. 613; or where there is a defect in the vendor's title, which the purchaser is precluded, by the conditions, from objecting to: *Rosenberg* v. *Cooke*, *supra*, p. 992; nor can the deposit be recovered though the purchaser shows that the title is bad, where he has bought subject to a condition which precludes him from objecting to the title: *Scott* v. *Alvarez*, *supra*; and where a good holding title is shown, but not one which the Court would force on a purchaser, if the purchaser refuses to complete, he cannot, in such circumstances, recover the deposit: *Re Turner & Thomas*, 88 L. T. Jour. 81; but in *Labelle* v. *O'Connor*, 15 O. L. R. 519, it was held that the forfeiture did not extend to instalments paid on account of purchase money, or otherwise than as a deposit; but *Gibbons* v. *Cozens*, *supra*, p. 992, does not appear to have been referred to. See also note to *Rule* 448, *infra*. Rule 446.

A deposit, which has been forfeited for default of the purchaser, cannot be recovered back on the ground that upon a re-sale of the property a fatal defect in the title was discovered: *Soper* v. *Arnold*, 35 Ch. D. 384; 14 App. Cas. 429.

The deposit is only recoverable where there is a breach of contract by the vendor: *Re Turner & Thomas*, *supra*, and see *Carroll* v. *Cottell*, 4 M. & W. 734. When deposit recoverable.

Where a sale has been improperly conducted, and the purchaser has notice that such is the case, he may refuse to carry out the purchase, and recover his deposit: *Locking* v. *Holstead*, 16 Ont. 32.

Where a resale is ordered in consequence of a purchaser's default, and an order is made for payment of any deficiency arising on such resale by the purchaser; in estimating the deficiency on the resale the purchaser was held entitled to credit for the deposit paid on the original sale: *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176; 101 L. T. 708; and see *Morch* v. *Banton*, 48 C. L. J. 148. Deposit to be credited in estimating deficiency on resale.

Though the vendor's solicitor is entitled to his costs of receiving the deposit on sale, and paying it into Court, out of the fund, he must look to the purchasers for his costs of receiving, and paying into Court any other instalments of the purchase money, which it is their duty to pay into Court: *Re Robertson*, 24 Gr. 555. Costs of paying in purchase money.

In England the auctioneer, or solicitor, appointed to receive the deposit, is required to give security duly to account therefor: Dan. Pr. 6th ed., 1080. But this has not been customary in Ontario.

In sales out of Court, a vendor's solicitor, who has received a deposit of the purchase money, and applied it on account of his costs due by his client, cannot be made to refund it at the suit of the purchaser: *Ellis* v. *Goulton*, 1893, 1 Q. B. 350.

446. After the sale is concluded, the auctioneer, where one is employed, shall make an affidavit as to the result of the sale, and where no auctioneer is employed, the Master or his Clerk shall certify the result. C.R. 730. Affidavit of auctioneer, or certificate of Master of result of sale.

For form of affidavit of auctioneer: see H. & L. Forms, No. 1048.

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Report on sale, form of.

The report on sale is to be according to Form No. 53; see H. & L. Forms, No. 1051.

The solicitor having the conduct of the sale usually takes the necessary steps to procure the report on sale; but it would seem that a purchaser may himself take out the report on sale, and get it confirmed, where he is the sole purchaser: *Crooks* v. *Glenn*, 1 Chy. Ch. 354; or, *semble*, he may take a separate report as to his own purchase, where he is not the sole purchaser.

Opposing sale before Master.

The confirmation of a sale may be opposed before the Master, and the sale disallowed, on grounds which would justify a motion to set it aside: *Beaty* v. *Rodenhurst*, 3 Chy. Ch. 344; *Rodgers* v. *Rodgers*, 13 Gr. 143.

Opposing sale in Chambers.

A motion to confirm a sale will not be entertained in Chambers, where an irregularity has occurred, unless the sale has been approved of by the Master: *Thomas* v. *McCroe*, 2 Chy. Ch. 456; and see *Cayley* v. *Colbert*, *Ib.*, 455. Where the Master's directions have not been observed, the party having the conduct of the sale will have to show, at his own expense, that no person interested has been injured by the non-observance of the direction, otherwise the Master will not confirm the sale: *Royal Canadian Bank* v. *Dennis*, 4 Chy. Ch. 68.

Where a party bidding and becoming the purchaser had no right to bid.

Where some person not having authority to bid, has improperly bid and been declared at the auction to be the purchaser, the Master should not declare the sale void, but should report the sale, stating the facts as to the improper bid; and it is then open to the other parties to move to have the property again put up for sale, at the expense of the party so bidding improperly, and holding him to his purchase if no higher price is realized: *Crawford* v. *Boyd*, 6 P. R. 278, note p. 280; or the purchaser may, on notice to all parties interested, move to confirm the sale to him. When the person so bidding has also had the conduct of the sale, the sale will not as a general rule be confirmed, if any party objects.

Until confirmation of report on sale, property at risk of vendor.

Until confirmation of the report on sale, the property is at the risk of the vendor, and in the event of fire, the loss occasioned thereby must fall on him: *Stephenson* v. *Boin*, 8 P. R. 166, 258; *S. C.*, 16 C. L. J. 15, 115; but as to sales out of Court: see *Rayner* v. *Preston*, 43 L. T. 18; *S. C.*, in Appeal, 44 L. T. 787; 18 Ch. D. 1; *Gill* v. *Canada Fire and Marine Insurance Co.*, 1 Ont. 341; *Castellain* v. *Preston*, 8 Q. B. D. 614; 46 L. T. 569; 19 C. L. J. 143; 49 L. T. 29; *Keefer* v. *Phœnix Ins. Co.*, 26 Ont. App. 277.

Even when the sale has proved abortive for want of bidders, the report needs confirmation before it can be acted on: *Robert* v. *Caughell*, 6 O. L. R. 381.

Sale may be objected to on motion.

447. Objection to the sale shall be by motion to set aside the same; and notice of the motion shall be served upon the purchaser, and on the other parties and biddings shall be opened only on special grounds. C.R. 732.

C. R. 732, provided expressly that the motion was to be to the Court or a Judge. The present *Rule* is silent and *semble* as being a matter coming within *Rule* 207 (4), it may be made in Chambers to the Master in Chambers, or Local Master, or Local Judge, having

jurisdiction in Chambers, and it would seem that the Master under whose authority the sale has been made would have jurisdiction to entertain such a motion: *Rule* 433. Rule 447.

The motion to set aside the sale, or open the biddings, must generally be made before the confirmation of the report, but see *Ricker* v. *Ricker*, 27 Gr. 576, and *S. C.*, in appeal, 7 Ont. App. 282. Formerly, a mere offer to give an increased price was sufficient ground for opening the biddings but this is no longer the case: *Roberts* v. *Duric*, 1 Chy. Ch. 211; now, special grounds affecting the validity of the sale, must be established: *Creswick* v. *Thompson*, 6 P. R. 52; and the fact that the purchaser is one of the parties to the suit makes no difference in the rule: *Mitchell* v. *Mitchell*, 6 P. R. 232; and it applies to sales by tender, or private contract: *Re Bartlett, Newman* v. *Hook*, 44 L. T. 17. Great delay, is an answer to such an application, unless misconduct is shewn on the part of the purchaser: *Crooks* v. *Crooks*, 2 Chy. Ch. 29. The fact that property was suffered to be knocked down at an undervalue to a son of the testator, under the belief that he was bidding for himself, when in fact he had been employed by a third person to bid for him, was held sufficient to warrant a re-sale: *Rodgers* v. *Rodgers*, 13 Gr. 143; and see *Re Follis, Kilbourn* v. *Coulter*, 6 P. R. 160; and where a vendor has a secret understanding with the purchaser of the property that the purchaser is to resell it to the vendor, the sale will be set aside though no fraudulent intent be proved: see *Re Postlethwaite, Postlethwaite* v. *Rickman*, 59 L. T. 58; but this decision was subsequently reversed on appeal owing to the great lapse of time: *S. C.*, 60 L. T. 514. Motion to "open biddings," when made. Grounds on which motion may be made.

But the fact that a defendant was prevented from bidding, by promises made by the purchaser to give him the benefit of the purchase, is no ground for opening the biddings, such fact, if established, would constitute the purchaser a trustee, and the trust must be established by action: *Brock* v. *Saul*, 2 Chy. Ch. 145. Purchaser as secret trustee.

Where the next friend of a plaintiff who had the conduct of the sale, had bid without authority, a re-sale was ordered, the next friend being held to his purchase in case a greater price could not be obtained, and he was ordered to pay the costs: *Crawford* v. *Boyd*, 6 P. R. 278; and see *Ramsay* v. *McDonald*, 8 P. R. 283. Purchase by next friend of party having conduct.

The existence of mere irregularities in the proceedings prior to the sale, does not affect the validity of the sale as against a *bonâ fide* purchaser: *Dickey* v. *Heron*, 1 Chy. Ch. 149; *Gunn* v. *Doble*, 15 Gr. 655; *Shaw* v. *Crawford*, 4 Ont. App. 371; *McLean* v. *Grant*, 20 Gr. 76; *Collins* v. *Denison*, 2 Chy. Ch. 465; but see *Foresters* v. *Pegg*, 19 P. R 254; and the biddings will not be opened to his prejudice on the ground of mistake in fixing the amount of the reserved bid: *Re Jelly*, 3 O. L. R. 72. Mere irregularity not sufficient ground to set aside sale.

Where a sale took place after an order had been made staying it, but of which the auctioneer, and the purchaser, had no notice, the Court refused, after confirmation of the report, to set aside the sale: *Freehold Building Society* v. *Choate*, 3 Chy. Ch 144.

But where, through a misstatement in the advertisement, the property was knocked down at an under-value, and less than the purchaser himself would have otherwise given, a re-sale was ordered: *Jones* v. *Clarke*, 1 Gr. 368. But it would seem that if the purchaser, without any misrepresentation, or undue concealment, by the vendor, Misstatements in advertisements may be.

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gets a less benefit from his purchase than he expected, that would be no ground for relieving him from his contract: *James* v. *Freeland*, 3 Gr. 302; *Commercial Bank* v. *McConnell*, 7 Gr. 323. Where the property offered for sale was described as held under a lease, when in fact it was held under an under-lease, that was held to be such a misdescription as entitled the purchaser to a rescission of the contract: see *Broom* v. *Phillips*, 74 L. T. 459; so a misrepresentation that the property was subject to no restrictive covenants, where there were in fact such covenants, was held to entitle the purchaser to avoid the sale: *Wauton* v. *Coppard*, 1899, 1 Ch. 92; 79 L. T. 467. Misrepresentations in the advertisement as to facts visible to the eye, amounting to mere exaggeration, do not warrant a release of the purchaser from his contract: *Crooks* v. *Davis*, 6 Gr. 317; but see *Stammers* v. *O'Donohoe*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358; *Gale* v. *Hubert*, 6 Gr. 312; and see *Rule* 448, notes.

Where land was stated in the advertisement to be in the occupation of a tenant at a yearly tenancy, but, before the sale, the tenant had written intimating his intention of giving up the land, but the letter being written before the proper time for giving such notice the vendor had answered, "you will of course send me a formal notice at the right time," and after the sale the tenant gave the formal notice; it was held that the non-disclosure of the previous correspondence did not entitle the purchaser to rescind: *Davenport* v. *Charsley*, 54 L. T. 372.

A purchaser will not be relieved from his purchase because, by his own mistake, he had been declared to be the buyer of a different lot from that which he intended to buy: *VanPraagh* v. *Everidge*, 1902, 2 Ch. 266; but see *Wesner Drilling Co.* v. *Tremblay*, 18 O. L. R. 439.

After confirmation of report, purchaser may pay his purchase money into Court.

448. The purchaser may pay his purchase money, or the balance thereof, into Court without further order; and after confirmation of the report on sale, upon notice to the party having the conduct of the sale, he may if he so desires obtain a vesting order; and when he is entitled to be let into possession, if possession is wrongfully withheld from him, an order against any party in possession for the delivery thereof to him may be made upon his application or upon the application of the vendor. C.R. 733, *amended*.

Default in payment of purchase money, effect of.

Payment of Purchase Money.—Where the purchaser makes default in paying his purchase money into Court pursuant to the conditions of sale, the vendor may move to compel him to pay in the amount overdue, and, in default of payment, for a re-sale of the property.

Deposit at sale to be paid into Court.

The deposit paid at the sale, is to be paid into Court: see *Rule* 445.

When the plaintiff's solicitor makes default in paying in the deposit, the other parties interested in the purchase money will not suffer thereby, but the plaintiff's share will be charged with the amount of the defalcation: *Mulkins* v. *Clarke*, 22 C. L. J. 267; 11 P. R. 350

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Where, by the conditions of sale, the purchase money is payable into Court, payment to the solicitor of the party entitled to it, is not a good payment, and is therefore no ground for dispensing with payment of it into Court: *Blackburn* v. *Sheriff*, 1 Chy. Ch. 208; except upon the production of the written consent of all parties beneficially interested duly verified; but where the deposit is payable to the vendor, payment to his solicitor as his agent is sufficient: *Ellis* v. *Goulton*, 1893, 1 Q. B. 350. Where the vendor's solicitor receives purchase money, which the purchasers are bound to pay into Court, the expense of payment in, must be borne by the purchasers, the estate, or fund, is not chargeable with such costs: *Re Robertson*, 24 Gr. 555.

Payment of purchase money to solicitor when not a discharge.

But the purchaser will not be compelled to pay in his purchase money unless he has accepted the title: *Crooks* v. *Street*, 1 Chy. Ch. 95; *Street* v. *Hallett*, 6 P. R. 312; *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood* v. *Pierce*, 7 P. R. 427; or, has waived the right to investigate the title, by delay: *Ontario Bank* v. *Sirr*, 6 P. R. 216; or by taking possession: *Patterson* v. *Robb*, 6 P. R. 114; and see *Crooks* v. *Glenn*, 8 Gr. 239; *O'Keefe* v. *Taylor*, 2 Gr. 305.

Payment of purchase money not compelled until title accepted.

But possession may be taken in accordance with the contract, in circumstances not amounting to a waiver, or acceptance of title: see *Mitcheltree* v. *Irvine*, 13 Gr. 537; *Darby* v. *Greenlees*, 11 Gr. 351; *Wardell* v. *Trenouth*, 24 Gr. 465. Merely obtaining the keys of a building for the purpose of viewing the premises, is not a taking possession: *People's Loan Co.* v. *Bacon*, 27 Gr. 294.

If the purchaser makes default a re-sale may be ordered, and the defaulting purchaser may be ordered to pay any deficiency: *Re Hornibrook*, 12 P. R. 591; *Noble* v. *Edwards*, 5 Ch. D. 378. In the event of a re-sale being ordered by reason of the default of the purchaser, in the absence of any condition to the contrary, under the standing conditions of sale, Form No. 52, his deposit and all other payments on account are forfeited and cannot be recovered by him, even though the property should realize a larger price on the re-sale: *Tilt* v. *Knapp*, 9 P. R. 314; 2 C. L. T. 597; *Ex parte Barrell*, L. R. 10 Chy. 512; *Thomas* v. *Brown*, 35 L. T. 237; *Rosenberg* v. *Cook*, 8 Q. B. D. 162; and see *Whelan* v. *Couch*, 26 Gr. 74; *Collins* v. *Stinson*, 10 Q. B. D. 142; 48 L. T. 828; but see *Casson* v. *Roberts*, 31 Beav. 613; and a purchaser who has forfeited his deposit by default, is not entitled to recover it, in the event of the title proving bad on a subsequent resale of the property: *Soper* v. *Arnold*, 35 Ch. D. 384; 56 L. T. 330; 37 Ch. D. 96; 57 L. T. 747; 14 App. Cas. 429; 61 L. T. 702; see also note to *Rule* 445.

Deposit forfeited, when.

The costs of the re-sale, and also any deficiency on the subsequent sale, are also usually ordered to be borne by the defaulting purchaser: *Re Hornibrook*, 12 P. R. 591; and see *Griffiths* v. *Vesey*, 1906, 1 Ch. 796; 94 L. T. 574, but, in estimating the deficiency, the deposit, and all other payments, if any, paid on the original sale must be taken into account: *Shuttleworth* v. *Clews*, 1910, 1 Ch. 176; 101 L. T. 708; but where the land sold at an advance, and the profit was more than sufficient to cover the costs of the re-sale, the defaulting purchaser was relieved from the payment of the latter costs: *Tilt* v. *Knapp*, *supra*; *Ontario Bank* v. *Sirr*, *supra*.

Costs of re-sale and deficiency, how borne.

Interest on Purchase Money.—Rents and Profits.—The liability of the purchaser for interest, depends on the terms of the contract of sale: *Re Dingman & Hall*, 17 Ont. App. 398. In the absence of any special stipulation in the contract, it would seem that the liability to pay interest commences on the day fixed by the contract for comple-

Interest on purchase money, from what time payable.

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tion of the contract, from which time the purchaser also becomes entitled to possession, and to all rents and profits, subsequently accruing: *Esdaile* v. *Stephenson*, 1 S. & S. 122; *People's Loon Co.* v. *Bacon*, 27 Gr. at p. 301; *Vansant* v. *Burke*, 38 U. C. Q. B. 104; but see *Harrison* v. *Joseph*, 8 P. R. 293. But where the contract provided for payment of the purchase money by instalments, but was silent as to the time when possession should be given, the purchaser was held entitled to the rents, and profits, from the date of the contract: *Brady* v. *Keenan*, 6 P. R. 262. A purchaser is entitled to a propor proportion of all rents paid to the vendor in advance: *Liscombe* v. *Gross*, 6 P. R. 271; and where rents are received by a vendor pending the completion of the contract, he is not entitled as against the purchaser to appropriate such payments to rents in arrear prior to the contract: *Plews* v. *Samuel*, 1904, 1 Ch. 464; 90 L. T. 533.

Delay in completion.

A purchaser cannot be compelled to pay interest during delay, under a condition that "the purchaser in default" shall pay interest, where the delay is due to the vendor: *Jones* v. *Gardiner*, 1902, 1 Ch. 191.

Where the contract provides for payment of interest in the event of any delay in completion not attributable to the vendor, the purchaser cannot relieve himself from liability to pay interest by depositing the money in a bank on notice to the vendor: *Re Riley to Streatfield*, 34 Ch. D. 386; 56 L. T. 48; *Re Dingman & Hall*, *supra*, p. 997; but where delay arises attributable to the vendor, the purchaser may relieve himself from the payment of interest beyond what the money earns, by depositing it in a bank on notice to the vendor; but the deposit must be made to a separate, and not to his general, account: *Stevenson* v. *Davis*, 21 Ont. 642; 19 Ont. App. 591, this case was varied by the Supreme Court, but not on this point; 23 S. C. R. 629.

A delay, caused by the vendors having made a *bonâ fide* mistake as to the origin of their title, was held not to be caused by wilful delay on their part, the real cause of the delay being the purchaser's inability to find his purchase money: *Re Mayor of London & Tubbs*, 1894, 2 Ch. 624; *S. C. sub nom. Tubbs & Mayor of London*, 70 L. T. 719; so also delay occasioned by the time occupied in remedying a defect in the title, which was not, and could not be, known to the vendor at the time of entering into the contract: *Re Woods & Lewis*, 1898, 1 Ch. 433; 78 L. T. 250, 665; 1898, 2 Ch. 211.

But a vendor has been held to be guilty of wilful delay, where, knowing the facts, he has named too short a time for the completion of the contract: *Re Hetling & Merton*, 1893, 3 Ch. 269; 68 L. T. 749; 69 L. T. 266; or from a mistaken construction of the contract, has improperly refused to deliver an abstract of title: *Re Pelly*, 80 L. T. 45.

Vendor's delay.

A stipulation for payment of interest, notwithstanding any delay in the completion of the contract, does not entitle a vendor to interest during delays in completion created by himself, or through an ineffectual attempt to rescind the contract, the purchaser being out of possession, and the rents not being equal to the interest: *Hayes* v. *Elmsley*, 21 Ont. 562; 19 Ont. App. 291 (this case was subsequently reversed by the Supreme Court, 23 S. C. R. 623, but not on this point): *Re Young & Harston*, 31 Ch. D. at p. 174; see also *Stevenson* v. *Davis*, 21 Ont. 642, *supra*.

Rule 448. Liability of purchaser qualified by delay of vendor making title.

Tha liahility of the purchnssr tn pay interest, may, in ths absence of express stipulation ae to the payment of interest: *Re Thompson, Biggnr* v. *Dickson*, 2 Chy. Ch. 196, he qualified by delay on the part of tbe vendor. either in making title, or giving possession. In such a case interest will not begin to run until tbe purchaser could safely hsve taken possession, and a difficulty respecting the conveynnce, may justify his not tnking possession: *Rne* v. *Geddes*, 3 Chy. Ch. 404; *Re McLean & Wnlter*, 19 Ont. 161; *Re Hetling & Merton*, 1893, 3 Cb. 269; 68 L. T. 749; 69 L. T. 266; and see *Re Wilson's & Steven's Contract*, 1894, 3 Cb. 546; 71 L. T. 388. Where there are several parcels included in the purcbase, possession cannot be safely taken of nny until tbe title is mada to all: *Lnird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385; so also the liability of a purchaser for tbe payment of interest may be qualified by tbe delay of tbe vendor in delivering tbs conveyance: *Stevenson* v. *Dnvis*, 21 Ont. 642, judgment of Armour, C.J., wbicb was affirmed by ths Supreme Court, 23 S. C. R. 629; and even wbere the purcbaser has entered into possession he may be entitled to compensation for ths damages be austains in keeping his purcbass money idle, owing to tbs delay of the vendor in delivering tbe conveyance: *Ib.* The measure of such damages, is the excess of interest payahle on the purchass money, over and above the net rental of tbe property in tbe condition it was in wben the purchaser entered into possession: *Ib.* Where tbe property is unproductive, ths purchaser may, whsre the completion of tbe contract is delayed by tbe vendor, be exonerated from payment of interest; wbere it is productive, hut tbe rents and profits, ara less than tbs interest, tbe vendor may be allowed to retain tbe rents, etc., and tbe purchaser may be relieved from paying interest; and wbere the rents exceed tbe interest, tbe purchaser may, notwithstanding tbe delay, be orderd to pay interest from the date fixed for completion, taking tbe rents and profits: *Bnnk of Montreal* v. *Fox*, 6 P. R. 217; *The People's Loan Co.* v. *Bacon*, 27 Gr. 294; unless the delay is attributabls to the vendor: *Hnyes* v. *Elmsley*, 21 Ont. 562; 23 S. C. R. 623.

Purchaser's delay.

Wbere conditiona of sale provide for payment of interest after tbe day fixed for completion, and completion is delayed by an objection to tbs title taken by the purchaser, which is at first upheld, but ultimately, on appeal, is dlaallowed by the Court, tbe purcbaser is liable for interest from the date fixed for completion: *Re Bayly-Worthington & Cohen*, 1909, 1 Ch. 648; 100 L. T. 650.

Rent accruing before completion.

Wbere a contract provided that the vendor sbould be entitled to the rents and profits up to completion, and part of tbe property consisted of a quarry, wbicb was under lease, it waa held that the vendor was entitled to tbe rent payable under the lease, and that it could not be treated as purcbaae money for part of tbe *corpus* of the property: *Leppington* v. *Freeman*, 60 L. T. 357.

Interest on purchase money.

Wbere a purcbaser is let into poaaession, pending an investigation of title, be is bound to pay interest, although ths possession extend beyond six years: see *Birch* v. *Joy*, 3 H. L. C. 565, wbere the purchaser was in possession forty years before the completion, and the agreement provided that interest sbould not run until the completion of the contract, aee also *Toft* v. *Stevenson*, 5 D. M. & G. 735; but it would seem tbat no more than six years arrears can be recovered as against tbe land: *Airey* v. *Mitchell*, 21 Gr. 510, overruling on this point, *Grent Western Ry. Co.* v. *Jones*, 13 Gr. 355; but where the

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purchaser dies, and no intervening incumbrance exists, in order to prevent circuity of action, the full amount recoverable under *The Statute of Limitations* (R. S. O. c. 75), s. 49, against the personal representative, may be recovered even against the land: *Airey* v. *Mitchell*, *supra*, p. 999: *Howeren* v. *Bradburn*, 22 Gr. 96.

Growing crops, purchaser entitled to.

Growing crops on the land at the time of sale pass to the purchaser, unless expressly excepted in the conditions of sale: *McDowall* v. *Phippen*, 1 Ont. 143; *Manson* v. *Monson*, 10 P. R. 155; 20 C. L. J. 33; and he is entitled to compensation if they are removed before he gets possession: *Ib.*

A mortgagor after default cannot give a chattel mortgage on his growing crops so as to defeat the right of his mortgagee thereto: *Bloomfield* v. *Hellyer*, 22 Ont. App. 232; and even before conveyance a purchaser may apply to the Court to restrain parties bound by the sale from exercising even a legal right to his prejudice as purchaser: *Re Powers*, 63 L. T. 626.

Rescission of contract.

Where the purchaser pays his purchase money, and is let into possession, but upon a reference it is found that a good title cannot be made, and the contract is rescinded, the purchaser is bound to redeliver possession on being repaid his purchase money, and if he insists on interest on the purchase money, he must submit to account for the rents and profits: *Simmers* v. *Erb*, 21 Gr. 289; and see *Turley* v. *Evans*, 13 C. P. 214.

Mortgage parol evidence admitted to show terms of.

Where the contract provided for giving a mortgage to secure part of the purchase money, but omitted to state that the mortgage was to bear interest, parol evidence to show that that was the real understanding of the parties was admitted: *Gould* v. *Hamilton*, 5 Gr. 192.

Delivery of possession to purchaser, effect of.

Delivery of Possession.—Where the conditions of sale provide that possession may be taken by the purchaser without waiving his right to investigate the title, he may take possession without waiving his right: *Bolton* v. *London School Board*, 7 Ch. D. 766; but, in the absence of any such condition, if a purchaser at a sale under a judgment, enters into possession without the sanction of the Court, and exercises acts of ownership by making repairs and improvements, he may be held to have accepted the title: Dani. Pr., 6th ed., 1093; *Wallace* v. *Hesslein*, 29 S. C. R. 171; *Re Mulholland & Morris*, 20 O. L. R. 27; and at any rate may be ordered to pay his purchase money into Court, notwithstanding his objecting to the title: *Potterson* v. *Robb*, 6 P. R. 114; but where, after a purchaser had taken possession, the vendor's solicitor delivered an abstract of title and answered requisitions, it was held that the vendor had waived the right to treat the taking of possession as an acceptance of title: *Aldwell* v. *Aldwell*, 6 P. R. 183; and see *Gordon* v. *Harnden*, 18 Gr. 231. Where, under the conditions of sale, a purchaser is entitled to possession, the letting him into the receipt of the rents and profits, is not a sufficient delivery of possession: *The People's Loan Co.* v. *Bacon*, 27 Gr. 294.

Summary application for possession.

A summary application for delivery of possession under this *Rule* can only be made against parties to the action, or strangers who have obtained possession *pendente lite*: *Bank of Montreal* v. *Wallace*, 13 Gr. 184; *Trust & Loan Co.* v. *Start*, 6 P. R. 90; where a stranger is in possession, who has not obtained possession *pendente lite*, an action must be brought.

Rule 448. Purchaser accepting conveyance, effect of.

Where the purchaser accepts a conveyance or vesting order, knowing that a stranger to the suit is in adverse possession, he cannot afterwards claim compensation for delay in recovering possession: *Bull* v. *Harper*, 6 P. R. 36; *Joliffe* v. *Baker*, 46 L. T. 966; 11 Q. B. D. 255; unless possession is withheld contrary to the express stipulation of the contract: *Barber* v. *Barber*, 11 P. R. 137; 21 C. L. J. 418.

Notice to purchaser of adverse possession.

Adverse Possession.—Notice to the purchaser that a person, other than the vendor, is in possession is notice to the purchaser of the possessor's rights, but not necessarily of his lessor's, or other person's, through whom he claims: and notice that the rents of the property are received by an estate agent is not notice of the rights of the person for whom he receives them, nor does it put the purchaser on inquiry: *Hunt* v. *Luck*, 1902, 1 Ch. 426.

Purchaser to see to discharge of incumbrances.

Incumbrances.—A purchaser before accepting a conveyance, or vesting order, or consenting to the payment out of his purchase money, should see that all incumbrances are paid off, which the vendors are bound to discharge. After conveyance, or vesting order, his right to have incumbrances discharged out of his purchase money is gone, and he must rely on his covenant if any: *Bull* v. *Harper*, 6 P. R. 26; *S. C.*, before Spragge, C., February 1, 1673; *Re Buck*, *Peck* v. *Buck*, 6 P. R. 98; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. 966; unless perhaps, where he was ignorant of such incumbrances when he accepted the conveyance: see *Re Turner & Skelton*, 13 Ch. D. 130; *Henning* v. *McDougall*, 6 P. R. 200; but see 68 L. T. Jour. 387; *Robson* v. *Robson*, 10 P. R. 324; or unless no title at all has been conveyed, as where the land had been sold for taxes: *Turrill* v. *Turrill*, 7 P. R. 142; and see *Jones* v. *Clifford*, 3 Ch. D. 779. But a conveyance by the vendor to a third party, even though made at the purchaser's request, will not prevent the latter, after the conveyance, from claiming to have incumbrances discharged, to which the covenants in the deed may not extend, but which, under the contract of sale, the vendor was bound to pay off: *McLennan* v. *Cheguin*, 37 U. C. Q. B. 301.

Acceptance of conveyance, effect of.

Outgoings, how payable.

Ground rent and other outgoings, accruing whilst the purchaser is kept out of possession through the default of the vendor, are held to be payable by the latter: *People's Loan Co.* v. *Bacon*, 27 Gr. 294; and see *Fisken* v. *Wride*, 11 Gr. 248; *sed quære*, if this is so, where the purchaser, on the completion of the contract, receives the rents and profits, for the period during which such outgoings accrued. Where the contract is not completed at the appointed time owing to the default of the purchaser, subsequent outgoings paid by the vendor are chargeable to the purchaser: *Borsht* v. *Tagg*, 1900, 1 Ch. 231, and this, notwithstanding that, under the contract, the vendor is entitled to the rents and profits up to the time of completion in lieu of interest: *Ib.*

Purchaser entitled to registered title.

A purchaser is entitled to have instruments registered against the title creating an apparently adverse claim, removed by the vendor even though they be registered by persons having no apparent title: *Keefer* v. *McKay*, 10 P. R. 345; *Re Taylor & Martyn*, 14 O. L. R. 132.

A vendor, however, cannot be required to procure the discharge of a mortgage in fee made by a person, since deceased, who had only a life estate: *Re Ponton & Swanston*, 16 Ont. 669.

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Where a vendor contracts to sell only such right or interest (if any) as he has, he is nevertheless bound to convey such right or interest free from any existing incumbrances created by himself: *Gould v. Birmingham, Dudley & District Bank*, 58 L. T. 560.

But where it turns out that his interest is subject to taxes, the purchaser is not entitled to have the taxes paid out of the purchase money. In such a case, however, where it appeared that the purchaser had bought under a mistake he was allowed to rescind the sale on payment of the costs of sale: *Wesner Drilling Co. v. Tremblay*, 18 O. L. R. 439.

Taxes by whom payable.

Taxes.—The vendor is bound to pay a proportionate part of all taxes accruing up to the time fixed for the completion of the contract, even though not actually imposed at the time: *Bank of Montreal v. Fox*, 6 P. R. 217; *People's Loan Co. v. Bacon*, 27 Gr. 294; *Re Alger & Sarnia Oil Co.*, 23 Ont. at p. 591; 19 Ont. App. 446; unless the by-law imposing the taxes, expressly provides that they shall not form a charge on the land until a day after that when the title is made out: *Harrison v. Joseph*, 8 P. R. 293; or, under the contract for sale, the vendor is not bound to pay them: see *Wesner Drilling Co. v. Tremblay*, *supra*.

Where the purchaser pays taxes accrued before the time he is let into possession, he is entitled to be refunded out of his purchase money: *Fourex v. Alcombrack*, 13 C. L. J. 226.

As to taxes imposed for local improvements: see *The Local Improvement Act* (R. S. O. c. 193), s. 53, and *The Landlord and Tenants Act* (R. S. O. c. 155), s. 27; *Croydon v. Hammill*, 20 Ont. 199; *Armstrong v. Auger*, 21 Ont. 98; *Re Taylor & Martyn*, 14 O. L. R. 132.

Compensation, when allowed to purchaser.

Compensation.—Although a vendor is allowed great latitude in the statements or exaggerations, he may make, as to the general qualities, and capabilities, of land he is about to offer for sale, still he will not be permitted to make misstatements, and misrepresentations, as to matters of fact, which would naturally have the effect of inducing parties resident at a distance to bid for the property. Therefore, where an advertisement of sale described the property as being "a farm of eighty-four and a half acres, twenty acres cleared and fenced," on the faith of which the plaintiff purchased, when, in fact, there was not any clearing, or fencing, compensation for the misrepresentation was allowed: *Stammers v. O'Donohoe*, 28 Gr. 207; 8 Ont. App. 161; 11 S. C. R. 358; and see *Re Murray & Kerr*, 13 Ont. 414; but see *Osborne v. Farmers & M. B. Soc'y*, 5 Gr. 326. Where a material misrepresentation has been made by the vendors, it is not necessary for the purchaser to prove that the representation was known by the vendors to be false, or was made recklessly; and, in the absence of evidence to the contrary, the purchaser will be presumed to have bought on the faith of such representation: *Redgrave v. Hurd*, 45 L. T. 485; 20 Ch. D. 1; *Jones v. Rimmer*, 43 L. T. 111; *Webb v. Roberts*, 16 O. L. R. 279; see, however, *Joliffe v. Baker*, 11 Q. B. D. 255; 48 L. T. 966; *Smith v. Land & House Property Co.*, 49 L. T. 532; 51 L. T. 718; but where it is shewn that the purchaser bought with knowledge that the statement was untrue, compensation will be refused: *Cormichael v. Ferris*, 8 P. R. 289; and see *Curran v. Little*, 8 Gr. 250; but see *Lett v. Randall*, 49 L. T. 71. So also, where the purchaser is a party to the action.

Misrepresentation in advertisements.

and has been party to settling the conditions of sale, he cannot, it would seem, be entitled to compensation for any misrepresentation therein: see *Hopcraft* v. *Hopcraft*, 76 L. T. 391. As to the effect of a verbal correction by the auctioneer of misstatements in the advertisement, but not heard by the purchaser: see *In re Hare & O'More*, 1901, 1 Ch. 93; 83 L. T. 672, and see 110 L. T. Jour. 419. Rule 448. Evidence of misrepresentation.

But the fact that the purchaser was in actual occupation of the property before the sale, does not disentitle him to compensation for a deficiency in the area represented by the particulars to be sold: *Re Aspinalls & Powell*, 60 L. T. 595.

The purchaser may be entitled to compensation for delay in making out the title: *Dudley* v. *Berczy*, 3 Chy. Ch. 81; or in completing the contract: *Jones* v. *Gardiner*, 1902, 1 Ch. 191; 86 L. T. 74; if there is any bad faith on the part of the vendor: *Rowe* v. *Gordon*, 36 Ch. D. 619; or want of reasonable diligence in completing, and not merely delay due to conveyancing difficulties: *Jones* v. *Gardiner*, *supra*, p. 998; or for delay in delivering possession: *Thomas* v. *Buxton*, L. R. 8 Eq. 120; *Munson* v. *Monson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Co.* v. *Bomosh*, 35 Ch. D. 390; or for delay in delivering the conveyance *Hoyes* v. *Elmsley*, 21 Ont. 562; *Stevenson* v. *Davis*, *Ib.*, 642, judgment of Armour, C.J., afterwards affirmed 23 S. C. R. 629, by the Supreme Court; or for destruction of the property by fire before the confirmation of the sale: see *Stephenson* v. *Boin*, 8 P. R. 258; but see *Rayner* v. *Preston*, 14 Ch. D. 297; 43 L. T. 18; 18 Ch. D. 1; 44 L. T. 787; 50 L. J. Ch. 472. So also, for the existence of a public sewer on the premises sold in which other persons have rights of user: *Re Brewer & Honkin*, 80 L. T. 127. So, also, for deficiency of land; thus, where 300 acres "more or less," was advertised, and the land only contained 244 acres, compensation was awarded: *Wardell* v. *Trenouth*, 24 Gr. 465; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; and see *Canada Permanent L. & S. Co.* v. *Young*, 18 Gr. 566; *Re Fowcett & Holmes*, 61 L. T. 105; and where there was a discrepancy between a plan referred to in the particulars, and the particulars, as to the acreage offered for sale, it was held that the plan governed: *Gordon-Cumming* v. *Houldsworth*, 1910, A. C. 537; and see *Eastwood* v. *Ashton*, 1913, 2 Ch. 39; 108 L. T. 759, reversed 1914, 1 Ch. 68; 109 L. T. 784. But a vendor who sells a parcel of land at so much per acre, which turns out to contain a greater number of acres than represented in the advertisement, is not, after conveyance, entitled to payment for the excess: *Cottingham* v. *Cottingham*, 5 Ont. 704; 11 Ont. App. 624; and see *Sen* v. *McLeon*, 23 C. L. J. 352; 14 S. C. R. 632. Compensation for delay in making title. Or delivering possession. Or deficiency of land.

The right of a purchaser to compensation for deficiency in quantity may be excluded by the conditions of sale: *Re Terry & White*, 32 Ch. D. 14; 54 L. T. 353. Where, however, the purchaser, by the conditions of sale, is deprived of the right to compensation for deficiency, and such deficiency is material, specific performance of the contract would not be decreed at the suit of the vendor, except on the terms of his making compensation for the deficiency: *Ib.*

A purchaser may also be entitled to compensation for failure to make title to part of the property sold, although he may be precluded by the conditions of sale, from objecting to carry out the sale on that ground: *English* v. *Murray*, 49 L. T. 35, and see *Re Jackson & Haden*, 53 W. R. 428; 1905, 1 Ch. 603; 1906, 1 Ch. 412; 92 L. T. 591; 94 L. T. 418. So also, where a purchaser could only make title to an undivided Or failure to make title to all of land sold.

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moiety of the land sold, the purchaser was held entitled to specific performance with an abatement of one-half of the purchase money: *Kennedy* v. *Spence*, 24 O. L. R. 535; and where a vendor assumed to sell the fee, but it turned out he had only a life estate, specific performance with compensation was ordered: *Ontario Asphalt Co.* v. *Montreuil*, 29 O. L. R. 534.

Compensation for dilapidation.

A purchaser is also entitled to compensation for dilapidations committed by parties in possession, after sale, and before completion: *Fisken* v. *Wride*, 11 Gr. 245; *Thomas* v. *Buxton*, *supra*, p. 1003; and he is entitled to compensation for the removal of growing crops: *Manson* v. *Manson*, 10 P. R. 155; 20 C. L. J. 33; *Royal Bristol Socy.* v. *Bomash*, 35 Ch. D. 390; 59 L. T. 179; or for removal of the soil; and the acceptance of a conveyance in ignorance of the damage done, will not estop him from claiming compensation: *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456; 65 L. T. 657; *Phillips* v. *Sylvester*, L. R. 8 Ch. 173; 27 L. T. 840. Where a vendor is liable for all "outgoings" up to the time fixed for completion, he must bear the expense of the removal of dangerous buildings on the property ordered to be removed under statutory powers in that behalf before, though not actually removed till after, completion: *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

The existence of a surface water drain draining other lands into a culvert under the land sold is a latent defect for which a purchaser is entitled to compensation, and it is latent, though part of the drain is exposed to view: *Shepherd* v. *Croft*, 1911, 1 Ch. 521; 103 L. T. 874.

For suppression of material facts.

Compensation may also be awarded for the suppression of material facts; thus, where the property offered for sale was a mill site, and mill, and the vendor had previously sold the right to take water for the purpose of floating logs, which fact was not communicated to the purchaser, it was held that this was a subject for compensation: *Wardell* v. *Trenouth*, 24 Gr. 465; or the contract may be rescinded: see *Heywood* v. *Mallalieu*, 49 L. T. 658. Notwithstanding a condition of sale that misdescription should not avoid the sale, it was held that describing the vendor's title as a lease, whereas it was an underlease, entitled the purchaser to rescind the contract: *Re Beyfus & Masters*, 39 Ch. D. 110; 59 L. T. 740.

Defects which come within the terms of any covenants are not to be excluded from their operation, on the ground that they appear on the face of the conveyance, or are otherwise known to the purchaser: *Page* v. *Midland Ry. Co.*, 1894, 1 Ch. 11, overruling *Hunt* v. *White*, 37 L. J. Ch. 326; 16 W. R. 478.

Conditions as to compensation for misrepresentation.

A vendor can only insist on specific performance of the contract, with compensation for misrepresentations in the advertisement pursuant to a condition in that behalf, where the misrepresentation is comparatively trifling, but not where it is substantial: *Jacob* v. *Revell*, 1900, 2 Ch. 858.

After conveyance, right to compensation for defects in title is gone.

After conveyance, or vesting order, the purchaser's right to compensation for defects in title to which his covenants, if any, do not extend, is usually gone: *Greswolde* v. *Barneby*, 83 L. T. 708; *Allen* v. *Richardson*, 13 Ch. D. 524; *Manson* v. *Thacker*, 7 Ch. D. 620; *Egleson* v. *Howe*, 3 Ont. App. 566; *Re Buck*, *Peck* v. *Buck*, 6 P. R. 38; *Kincaid* v. *Kincaid*, 6 P. R. 93; *Follis* v. *Porter*, 11 Gr. 412; *McCall* v. *Faithorne*, 10 Gr. 324; *Joliffe* v. *Baker*, 11 Q. B. D. 255; 48 L. T. 966; *Besley* v. *Besley*, 9 Ch. D. 103; *Clayson* v. *Leech*, 61 L. T. 69;

but where there is an express condition for compensation, see *Bos v. Helsham*, L. R. 2 Ex. 72; *Re Turner & Skelton*, 13 Ch. D. 130; 41 L. T. 668; *Palmer v. Johnson*, 12 Q. B. D. 32; 13 Q. B. D. 351; 51 L. T. 211; and where the conveyance has been made to a third party: see *McLennan v. Cheguin*, 37 U. C. Q. B. 301; and *Clarke v. Ramuz*, 1891, 2 Q. B. 456; 65 L. T. 657. Rule 448.

But misstatements in the advertisement of a sale by the Court, or suppression of material facts, may form the ground for compensation even after conveyance, so long as the fund remains in Court: *Cann v. Cann*, 3 Sim. 447; *Bull v. Harper*, 6 P. R. 36; *Turrill v. Turrill*, 7 P. R. 142; and see *Horner v. Williams*, Jo. & Ca. 274; *Re Perriam, Perriam v. Perriam*, 49 L. T. 710, and see *Palmer v. Johnson*, 13 Q. B. D. 351; or the sale, may, after, or before, conveyance, be set aside: *Nash v. Wooderson*, 52 L. T. 49; *Brewer v. Brown*, 78 L. T. Jour. 79; and so also stipulations in the advertisement for the delivery of possession, if not carried out, may be the subject of compensation even after a vesting order has been taken, so long as the purchase money remains in Court: *Barber v. Barber*, 11 P. R. 137; and where a purchaser has, by mistake, or inadvertence, taken a vesting order before an incumbrance has been discharged which he is entitled to have discharged, so long as the purchase money remains under the control of the Court, it may be ordered to be applied in discharge of the incumbrance: *Fleming v. McDougall*, 8 P. R. 200. Exception where misstatements in advertisements.

The Court will not enforce specific performance of a contract, with compensation for misdescription, where the sale was made by a vendor in a fiduciary capacity, and any *cestui que trust* would have a right to complain of the sale, if so enforced, as a breach of trust: *Osborne v. Farmers & M. B. Socy.*, 5 Gr. 326; *Mortlock v. Buller*, 10 Ves. 292; *Goodwin v. Fielding*, 4 De G. M. & G. 104; *Sneizely v. Thorn*, 1 Jur. N. S. 125; *Dunn v. Flood*, 28 Ch. D. 586; 49 L. T. 670; *Re Douglas*, 1902, 2 Ch. 296; and see *Jacob v. Revell*, 1902, 2 Ch. 850; and it is immaterial whether the trustees are plaintiffs, or defendants: *Ib.; sed vide Sea v. McLean*, 23 C. L. J. 352; 14 S. C. R. 632; nor will the Court enforce the contract when the title is doubtful: see *Re Hollis Hospital*, 1899, 2 Ch. 540; *Williams v. Scott*, 1900, A. C. 499, 82 L. T. 727. Specific performance, when not enforced.

Insurance Pending Completion.—Where a vendor insures the property sold, pending completion, for the benefit of himself and his assigns, the insurance will enure to the benefit of the purchaser, for whom the vendor will be trustee for the balance, if any, of the insurance money which remains after satisfying the amount due to the vendor for purchase money: *Keefer v. Phœnix*, 29 Ont. 394; 26 Ont. App. 277; 31 S. C. R. 144. Insurance of property sold.

Rescission of Contract.—The misrepresentation of material facts may entitle the purchaser to have the contract rescinded: *Gale v. Hubert*, 6 G. R. 312; *Redgrave v. Hurd*, 20 Ch. D. 1; *Broom v. Phillips*, 74 L. T. 459; *Moorhouse v. Hewish*, 22 Ont. App. 172; and the giving of time to a vendor to make good a representation, on the faith of which the purchaser bought, does not prevent the purchaser from claiming a rescission if, at the end of that time, it is not made good: *Tibbatts v. Boutler*, 73 L. T. 534. Rescission of contract. Misrepresentation, ground for rescission.

As to special conditions enabling the vendor to rescind: see notes to *Rule* 439.

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Where the vendor has the right to rescind, he may exercise it, notwithstanding the issue of a writ by the purchaser for specific performance: *Isaacs* v. *Towell*, 78 L. T. 619.

Where the vendor fails to make title to part of the property sold, the purchaser is entitled to rescind and recover back his deposit with interest, and the costs he has been put to: *Re Jackson & Haden*, 1905, 1 Ch. 403; 1906, 1 Ch. 412; 92 L. T. 591; 94 L. T. 418; and where the vendor under an open contract has failed to disclose a material defect which is known to him, but which the purchaser could not be expected to discover himself in the exercise of ordinary care, the purchaser is entitled to rescind the contract, and recover his deposit, and costs: *Carlisle* v. *Salt*, 1906, 1 Ch. 335; 94 L. T. 58.

The fact that a tenant of the premises sold, was, unknown both to the vendor and purchaser at the time of sale, keeping a disorderly house on the premises, was held to be no ground for rescission at the instance of the purchaser, nor any bar to the vendor's obtaining specific performance of the contract: *Hope* v. *Walters*, 1899, 1 Ch. 879; 1900, 1 Ch. 257; 80 L. T. 355.

Purchaser not entitled to improvements on rescission.

In the absence of fraud by the vendor, or other special circumstances, where the contract is rescinded by reason of the vendor's failure to make title, the purchaser cannot recover for improvements made while he is in possession under the contract: *Rankin* v. *Sterling*, 3 O. L. R. 646; Dart. V. & P. (6th ed.), 1085; nor is he ordinarily entitled to damages for loss of his bargain, unless the contract fails through in consequence of the failure of the vendor to do his best to complete it: *Ib.*, and see *Day* v. *Lighton*, 1899, 2 Ch. 320; 81 L. T. 306. He is entitled to his costs of investigating and endeavouring to clear up the title: Dart, V. & P., 6th ed., 1085; and occasioned by his becoming the purchaser: *Hollwell* v. *Seacombe*, 1906, 1 Ch. 426.

Costs recoverable on rescission.

As to the costs recoverable by the purchaser where the vendor rescinds pursuant to a condition: see *Isaacs* v. *Towell*, 1898, 2 Ch. 285.

Where a contract is rescinded in circumstances entitling a purchaser to a refund of his deposit, or any other payment on account of his purchase money, he is entitled to a lien on the land therefor: see note to *Rule* 454.

Reference as to title, when ordered.

Reference as to Title.—The inclination of the Court is in favour of giving the purchaser a reference as to title, if he desires it. And it is only when the evidence is clear that the purchaser intended to waive, and has actually waived, his right of examining the title, that a reference will be denied: *Mitchelltree* v. *Irwin*, 13 Gr. at p. 543; and see *Jackson* v. *Jessup*, 6 Gr. 157.

On an application by the vendor to compel the purchaser to pay his purchase money into Court, a reference as to title may be ordered, if the purchaser has neither accepted, nor waived his right to examine the title: *Crooks* v. *Street*, 1 Chy. Ch. 95; *Street* v. *Hallett*, 6 P. R. 312; *McDermid* v. *McDermid*, 8 P. R. 28; 15 C. L. J. 136; *Ellwood* v. *Pierce*, 7 P. R. 427.

Where a reference as to title is directed in general terms, it must be understood that the reference is to inquire whether a good title can be made, having regard to the contract: *Upperton* v. *Nickolson*, L. R. 10 Eq. 228; L. R. 6 Chy. 436.

Waiver.—The right to a reference may be waived by long delay, in either demanding an abstract, or making any objection to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 216; and see *Rae* v. *Geddes*, 18 Gr. 217; or by taking possession: *Denison* v. *Fuller*, 10 Gr. 498; *Commercial Bank* v. *McConnell*, 7 Gr. 323; *Wallace* v. *Hesslein*, 29 S. C. R. 171; *Patterson* v. *Robb*, 6 P. R. 114; *O'Connor* v. *Beatty*, 2 Ont. App. 497; but see *Wardell* v. *Trenouth*, 24 Gr. 465; *Darby* v. *Greenlees*, 11 Gr. 351; *Mitcheltree* v. *Irwin*, 13 Gr. 537; *Crooks* v. *Glenn*, 8 Gr. 239; *Morin* v. *Wilkinson*, 2 Gr. 157; *O'Keefe* v. *Taylor*, *Ib.*, 305; *Jackson* v. *Jessup*, 6 Gr. 156. But if, after possession taken, the vendor proceeds with the investigation of title, and answers requisitions, the taking of possession will be no waiver: *Burroughs* v. *Oakley*, 3 Sw. 159; *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Harnden*, 18 Gr. 231. Rule 449. Waiver of right to reference, what constitutes.

The right of a purchaser to investigate the title may be also waived by his accepting a conveyance, or vesting order: *Bull* v. *Harper*, 6 P. R. 36. So also writing a letter apologizing for non-payment of the purchase money, although making no reference to the title; or accepting a release of dower from a person interested in the estate; or the giving of a mortgage to secure the purchase money, are circumstances from which an acceptance of title may be inferred: *McDonald* v. *Garrett*, 8 Gr. 290; but see *Jackson* v. *Jessup*, 6 Gr. 157. But though the purchaser by taking possession and dealing with the property may waive his right to compel the vendor to make out a good title, he may yet be relieved from payment of his purchase money before completion, on showing that the vendor has no title at all: *Denison* v. *Fuller*, 10 Gr. 498. Circumstances from which a waiver may be inferred.

In applying the doctrine of waiver, a distinction is to be observed between the case of a contract, providing that a good title shall be shown, and that possession may be taken before completion, and the case of a purchaser taking possession before completion without any express stipulation in that behalf. There is also a broad distinction between a purchaser going into, or remaining in, possession, and making structural alterations, knowing of the existence of an incurable objection; and one entering with knowledge of objections which are curable. In the former case he may, although entitled to have the title otherwise made out, be held to have waived the particular incurable objection: *Re Gloag & Miller*, 23 Ch. D. 320; 48 L. T. 629; but where the title was by possession, and the purchaser after objecting to the evidence of possession as being insufficient, continued in possession and made improvements, it was held not to be a waiver of his right to have a good title made out: *Rankin* v. *Sterling*, 3 O. L. R. 646. Possession taken with knowledge of incurable defects; effect of.

449. The vendor shall, forthwith upon demand, deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within 7 days, he shall be deemed to have accepted the abstract as sufficient, but if objections are served, the vendor shall answer them within 14 days; and if the purchaser is still dissatisfied, and the parties cannot agree, either party may obtain from the Master an appointment to consider the abstract. C.R. 735. Delivery of abstract. If no objection served abstract to be deemed sufficient.

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Objections to abstract; how disposed of.

This, and the five following *Rules*, apply to all cases where a reference as to title is made to a Master, or Official Referee, as well as to sales by the Court: *Rule* 455. But where a sale is made out of Court, subject to certain conditions as to the delivery of objections to title within a specified time, and before action objections are delivered, the purchaser, on an action for specific performance being subsequently brought, cannot, in the Master's office, deliver any further objections: *Imperial Bank* v. *Metcalfe*, 11 Ont. 467; except by leave of the Court; the Master has no power to grant such leave: *Clarke* v. *Langley*, 10 P. R. 208.

Abstract, delivery of.

In sales by the Court, the solicitor of the party conducting the sale, is considered the vendor's solicitor, and it is from him the abstract must be demanded, and it is his duty to prepare, and deliver it.

Demand of abstract.

The vendor is only required to deliver an abstract on demand. The demand should be in writing: see *The Criminal Code* (R. S. C. c. 146), s. 419. Wilful falsification of pedigree, or concealment of deeds, renders a vendor criminally liable: *Ib.*, and also civilly liable in damages: *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 55.

Where after reasonable notice a vendor refuses to deliver a proper abstract of title, the purchaser is entitled to rescind the contract, and claim a return of his deposit. Fourteen days has been held to be a reasonable time to limit for its delivery in the case of a sale out of Court: *Compton* v. *Bagley*, 65 L. T. 706.

Neglect of purchaser to demand abstract, effect of

The purchaser may, if he pleases, investigate the title, without making the demand. And where he made no demand of an abstract, and made no objection to the title, for twenty-three months, he was held to have waived his right to object to the title: *Ontario Bank* v. *Sirr*, 6 P. R. 276; and see *Rae* v. *Geddes*, 18 Gr. 217.

Where a purchaser neglects to demand an abstract of title, but brings a suit for specific performance in which the usual reference as to title is directed, and an inquiry when the title was first shown; although the Master found the title was first shown in his office, yet as no demand of abstract had been made previous to the suit, the purchaser was ordered to pay the costs of it: *London & Canadian L. & A. Co.* v. *Graham*, 12 P. R 651.

Neglect of vendor to deliver abstract.

Where the vendor neglects, on demand, to deliver an abstract, the purchaser may move to compel him to do so. Or it would seem if the delay is unreasonable, he may apply to be discharged: see *Walton* v. *Armstrong*, 11 Gr. 379. The purchaser is entitled to a solicitor's abstract, and not merely a registrar's abstract, unless there be an express condition of sale to the contrary.

Although the taking of possession by the purchaser, may amount to a waiver of title, yet if the vendor afterwards delivers an abstract, or proceeds with the investigation of the title, he cannot set up the waiver: *Aldwell* v. *Aldwell*, 6 P. R. 183; *Gordon* v. *Hornden*, 18 Gr. 231.

Abstract, nature of.

An abstract of title is a brief statement of all material deeds, and facts, necessary to be proved, in order to establish a good title in a vendor. For form of a solicitor's abstract: see H. & L. Forms, No. 1055.

Where all matters essential to a good title are manifest in the abstract, and the vendor is able and willing to verify it, a good title

is *shown*; and a good title is *made* when the abstract is verified: *Granger* v. *Latham*, 14 Gr. 209, and other cases cited on p. 1010. Rule 450.

After the receipt of the abstract, the purchaser may deliver objections to the abstract *e.g.*, that assuming the chain of title therein set out to be proved, it does not show a good, or any title, in the vendors; or that the effect of any instrument is not sufficiently abstracted. This class of objections is confined to the sufficiency of the abstract *per se*. The objections should be specific, and point out clearly the alleged defect. Objection to abstract, how made.

As to the determination of questions thus raised: see *Rule* 451, *infra*; *McManus* v. *Little*, 3 Chy. Ch. 263. After the abstract has been made perfect or accepted as sufficient, the next step is its verification, and any defects in the proofs form the subject of objections to, or requisitions on, the title, as provided by *Rules* 452-454. Determination of.

The purchaser should not deliver objections, and requisitions, on title, until all objections to the abstract are disposed of, or he will be held to have waived all objections to the abstract: *McManus* v. *Little*, 3 Chy. Ch. 263. Objections to title, delivery of.

For forms of objections to the abstract: see H. & L. Forms, No. 1055.

450. The Master shall determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can, and if the vendor neglects or refuses to do so, may permit the purchaser to supply defects therein, at the vendor's expense. C.R. 736. Master to determine question as to sufficiency of abstract.

A perfect abstract may be defined to be one in which is set forth the deeds and documents and facts, showing that the vendor has a good title to the estate or interest which is the subject of the sale. Objections to the abstract, are quite distinct from objections to title, and are usually based on the fact, that if all the documents and facts set out in the abstract were proved, a good title in the vendor would not be established.

The omission from the abstract of a document whose contents sufficiently appeared by a document abstracted, was held to be no objection to the abstract: *Re Ebsworth & Tidy*, 42 Ch. D. 23.

Where the objections to the abstract are not removed within fourteen days after service of the objections, it is not necessary to obtain any order of reference, i norder to obtain the Master's decision; but the vendor, or purchaser, may carry the abstract and objections into the Master's office, and obtain a warrant to consider the abstract. Objections to abstract may be referred to Master.

If the Master holds the abstract to he insufficient, and the vendor neglects or refuses, to supply the defects, the purchaser may be permitted to do so. This, of course, will not always he in the power of a purchaser; hut where deeds are registered, the purchaser may frequently obtain the necessary information to perfect the abstract from the Registry office. Vendor may supply defects in abstract.

A condition of sale that "the examination of title is to he at the expense of the purchaser, who is to call for only those deeds and

Rules 451, 452.

papers in my possession and under my control," does not relieve the vendor from delivering an abstract of title, even though such an abstract be not among the papers in his possession or control: *Re Boustead & Warwick*, 12 Ont. 488.

Verification of abstract.

The vendor is usually bound to verify the abstract, by the production of all documents abstracted, or by proper secondary evidence, where the non-production of the originals is sufficiently accounted for; and by producing affidavits of all facts necessary to be proved in order to make out title: see *Rule* 452; *Re Halifax Coml. Banking Co. & Wood*, 79 L. T. 183; 1898, W. N. 174 (16).

Where a leasehold is sold, it is doubtful whether a purchaser can be compelled to accept the title, if the vendor is only a sub-lessee, if that fact has not been disclosed to the purchaser before sale; he cannot be compelled to accept such a title when the head lease comprises other property, unless that fact has been disclosed prior to the making of the contract: *Re Lloyds Bank & Lillington*, 1912, 1 Ch. 601; 106 L. T. 56. Where these objections appear on the face of the abstract, they would be properly taken as objections to the abstract, as not showing a title which the purchaser is bound to accept.

Good title, when shewn

A good title is not shown until it is both exhibited by the abstract, and the vendor is able and willing to verify it: *Granger* v. *Latham*, 14 Gr. 209; *Parr* v. *Lovegrove*, 4 Drew. 176; 6 Jur. N. S. 600; but see *Loird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385; *London & Canadian L. & A. Co.* v. *Graham*, 12 P. R. 651; *Groham* v. *Stephens*, 27 Gr. 434.

Although the conditions of sale may intimate that a vendor has a paper title, yet though he has not, if he has a good possessory title, the purchaser may be compelled to accept it: *Re Atkinson & Horsell*, 1912, 2 Ch. 1; 106 L. T. 548.

Master not to make a report, but to mark objections allowed or disallowed.

451. The Master shall not make a report on the abstract, but shall mark the objections as allowed or disallowed, and when he finds the abstract perfect, or as perfect as the vendor can make it, he shall certify to that effect thereon; and such certificate shall be final without filing, unless appealed from in the same manner as from a Master's report. C.R. 737.

Where the Master made a report on the title, instead of marking the objections "allowed," or "disallowed," the Court refused to entertain an appeal from his report, but referred the matter back to the Master, to be dealt with as provided by *Rule* 453: *Cockenour* v. *Bullock*, 12 Gr. 73.

As to the time for appealing from a Master's report: see *Rules* 502-3.

Verification of abstract. Notice to deliver objections and requisitions.

452. After acceptance or confirmation of the abstract, the verification shall be proceeded with, and the vendor shall with all diligence afford the purchaser all the means of verification in his power, in the manner and according to the practice usual with conveyancers; and after having done so, he may serve a notice on the purchaser to make

objections or requisitions, if any, within 7 days, or that otherwise he will be deemed to have accepted the title. C.R. 739. Rule 452.

The abstract is accepted as sufficient, if the purchaser does not serve any objection within seven days after its delivery: *Rule* 449. It is confirmed, if the Master disallow the objections, and no appeal is had from his finding within the time limited by *Rules* 502, 503. After abstract confirmed, no further objection allowed.

Verification of Abstract.—The practice of conveyancers is for the vendor's solicitor to give notice of a time and place (usually his own office), where the abstract will be verified. Sometimes the deeds and evidences of title, are sent to the purchaser's solicitor. So far as the title deeds are concerned, the abstract is verified by the production of the originals, or such of them as are in the vendor's possession, and by producing certified copies of the deeds, or registered memorials where the originals are not in the vendor's possession. Sometimes, however, notarial copies are furnished, *e.g.*, where a deed covering other lands is in the hands of some third party. In verifying the abstract the production of the title deeds is sufficient proof of their due execution, unless evidence is adduced casting doubt upon their authenticity: see Coventry, 41. As to how far registered memorials are evidence, and as to how far recitals in deeds are evidence of the facts recited, see *The Vendors and Purchasers Act* (R. S. O. c. 122), ss. 2, 3; *Sanders* v. *Malsburg*, 1 Ont. 178; 18 C. L. J. 206; *Allan* v. *McTavish*, 28 Gr. 539; *Reg.* v. *Guthrie*, 41 U. C. Q. B. 148; *Canada Permanent Loan & Savings Co.* v. *Ross*, 7 P. R. 79; *Re Halifax Coml. Banking Co. & Wood*, 1898, W. N. 174 (16); 79 L. T. 183; for cases before the Statute: see *Wishort* v. *Cook*, 15 Gr. 237; *Gough* v. *McBride*, 10 C. P. 166; *Re Higgins*, 19 Gr. 303; S. C., 4 Chy. Ch. 128; *Russell* v. *Fraser*, 15 C. P. 375. Verification of abstract. Title deeds, how proved.

Where the vendor relies on a possessory title, the possession must be proved by affidavits, and the purchaser is entitled to cross-examine the deponents: *Re Boustead & Worwick*, 12 Ont. 488; *McIntosh* v. *Rogers*, 12 P. R. 389; *sed vide* as to costs, *Dome* v. *Slater*, 21 Ont. 375. Possessory title, how proved.

The evidence in such a case must not only establish possession for the required period, but should also negative the existence of any fact mentioned in the Statute which would prevent, or stop, its running: *Chapman* v. *Bunbury*, 31 C. L. J. 103; 15 C. L. T. 57.

Facts necessary to be proved in order to make out the title, *e.g.*, death, intestacy, heirship, etc., are required to be proved by certificates of births, marriages and deaths, and certificates of the Surrogate Clerk as to intestacy, and affidavits; but statutory declarations of such facts, taken on a former devolution of the title, are usually accepted as evidence, and need not be corroborated by affidavits made in the action. By *The Vendors and Purchasers Act* (R. S. O. c. 122), s. 2, recitals, statements and descriptions of facts, matters, and parties contained in Statutes, deeds, instruments, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient proof of such facts, matters and descriptions; and see *Re Ponton & Swanston*, 16 Ont. 669; *Re Marsh & Granville*, 24 Ch. D. 11; 48 L. T. 947. As to registered memorials as evidence: see *The Vendors and Purchasers Act*, s. 2 (*b*), (c). Other facts, how proved.

Rule 452.

Deeds must be registered at vendor's expense.

Where the title is a registered title, all instruments in the chain of title must be registered, and any unregistered deeds in the chain of title, must be registered at the expense of the vendor: *Kitchen* v. *Murray*, 16 C. P. 69; *Brody* v. *Wolls*, 17 Gr. 699; *Fahner* v. *Ran*, 1 Chy. Ch. 246; *Sweetnom* v. *Sweetnam*, 6 P. R. 83; *Laird* v. *Paton*, 7 Ont. 137; 20 C. L. J. 385; *Taylor* v. *Martyn*, 14 O. L. R. 132. Where a registered deed appears on the abstract, it is not sufficient verification of the abstract to produce a deed apparently between the same parties as the registered deed, but bearing no certificate of registration, without in some way establishing the identity of the deed produced with that registered: *McIntosh* v. *Rogers*, 12 P. R. 389.

Copies, when to be furnished by vendor.

In the absence of any express condition of sale to the contrary, the vendor is bound to furnish, at his own expense, to the purchaser, copies of all instruments relating to the title which are not of record: *Re Charles*, 4 Chy. Ch. 19. He is also bound to furnish copies of all deeds registered by memorial, but it was held not of deeds registered in full: *Ib.*; but see *Harrison* v. *Joseph*, 8 P. R. 293; but in a later case it was held by Street, J., that the vendor is bound to produce and deliver to the purchaser certified copies of all deeds, of which he cannot produce the originals, whether registered in full or not: *McIntosh* v. *Rogers*, 12 P. R. 389; and see *Bobier & Ontario Invt. Assoc.* 16 Ont. 259.

Liability of vendor to furnish qualified by conditions.

The ordinary liability of a vendor to produce all necessary evidence to make out a good title, and to deliver, on completion, the original deeds, or copies of such as are not in his possession, may be qualified by special conditions of sale. Where special conditions are imposed, they have to be set out in full in the advertisement; see *Rule* 439 (*h*). Special conditions of this kind should not be unnecessarily stringent, as they are calculated to damp the sale. Thus, where the proof of title was involved in no difficulty, a condition of sale that "the vendor is not to be bound to give any evidence of title, or any title deeds, or copies thereof, other than such as are in his possession, or prove any abstract," was held to be very objectionable, and one that should not be sanctioned by the Master, even by consent: *McDonald* v. *Gordon*, 2 Chy. Ch. 125.

Vendor may be bound, notwithstanding such conditions to prove title.

But it seems that even such a condition would not exempt a vendor from otherwise showing a good title: *Canada Permanent Building Society* v. *Wallis*, 8 Or. 368; *McIntosh* v. *Rogers*, 12 P. R. 389; 14 Ont. 97; *Secus*, where the vendor purports to sell only such title as he has, but even then, if it can be shown by the purchaser that the vendor has no title at all, the contract will not be specifically enforced against the purchaser: *Leslie* v. *Preston*, 7 Gr. 434; *Jones* v. *Clifford*, 3 Ch. D. 779; *Darlington* v. *Hamilton*, Kay. 550; but see *Hume* v. *Pocock*, L. R. 1 Chy. 379; *Hume* v. *Bentley*, 5 De G. & S. 520; even where a vendor advertises to sell only such title as he has, he is bound to convey that title free from any subsisting incumbrance: *Goold* v. *Birmingham, Dudley & District Bank*, 58 L. T. 560. The Court will not knowingly pass off a bad title, by the aid of special or misleading conditions: *Else* v. *Else*, L. R. 13 Eq. 196; Seton, 5th ed., 294, 1854.

Court will not pass off a bad title knowingly.

Crown bonds.

The vendor is bound to procure the discharge of Crown bonds affecting the land: *Re Charles*, 4 Chy. Ch. 19. Crown bonds of the Province of Ontario, are no longer a charge on land of the obligor, unless registered against it: R. S. O. (1897) c. 113; *Re Franklin*, 8 P. R.

470; although that Act is now repealed (see R. S. O. 1914, Sc[illegible], Rule 453.
yst the effect of the repeal is not to revive the former law: see *The Interpretation Act* (R. S. O. c. 1), s. 14; nor are Crown bonds of the Dominion a charge on land, unless registered: R. S. C. c. 103, s. 3.

Taxes and incumbrances.

The vendor is not bound to give evidence, negativing the existence of arrears of taxes, or other incumbrances: *Thompson* v. *Milliken*, 9 Gr. 359. As to punishment for concealing incumbrances, or falsifying pedigree, etc., after written demand of abstract: see *The Criminal Code* (R. S. C. c. 146), s. 419. But he is bound to have removed from the register or otherwise nullified, any registered instrument, appearing to create an adverse interest in the land, even though such instruments purport to be made by parties having no apparent title: *Keefer* v. *McKoy*, 10 P. R. 345. The vendor is also bound to remove certificates of *lis pendens* registered against the land: *Bohler & Ont. Invt. Assoc.*, 16 Ont. 259.

As soon as the vendor's solicitor considers that the verification of the abstract is complete, he should serve notice on the purchaser to deliver objections, and requisitions.

Notice to deliver objections, service of

The Master has no jurisdiction to permit further objections to be delivered after the time limited by this *Rule*, but the Court on special application for that purpose may permit further objections to be delivered: *Clarke* v. *Langley*, 10 P. R. 208. And where under the conditions of sale, the time for putting in objections has expired before the reference to the Master takes place, no further objections can be delivered in the Master's office: *Imperial Bank* v. *Metcalfe*, 11 Ont. 467. Notwithstanding, that since the decision in *Clarke* v. *Langley* jurisdiction in Chambers has been conferred on the Master in Ordinary, that decision is probably still law: but see *Rule* 207 (4).

Objections, and requisitions to whom to be delivered.

453. Upon being served with such notice, the purchaser, if dissatisfied, shall serve his objections or requisitions within the time thereby limited; and the like course shall be followed upon such objections or requisitions as is prescribed in relation to the abstract. C.R. 740.

Requisitions on title.

Requisitions on, and Objections to, Title.—If the purchaser is dissatisfied with the proofs of title adduced by the vendor, he must deliver his objections and requisitions within seven days after receipt of notice so to do, or he will be deemed to have accepted the title: *Rule* 452. For form of objections to and requisitions on title: see H. & L. Forms, No. 1063. As to the construction of conditions for the delivery of objections to title in the case of sales out of Court: see *Noson* v. *Armstrong*, 22 Ont. 542; 21 Ont. App. 183; 25 S. C. R. 263.

Objections to title.

Stipulations as to time for delivery of objections to title do not prevent objection, even after the stipulated time, to an entire want of title: *Ib.*

The existence of an easement, undisclosed by the particulars, was held a valid objection, although the property was offered "subject to any existing public and private rights of way, and other rights and easements of whatever nature": *Heywood* v. *Mallalieu*, 49 L. T. 658; and a condition providing that the purchaser was deemed to

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have purchased with knowledge of the qualities and conditions of the property purchased was held not to apply to an underground culvert: *Re Puckett & Smith*, 1902, 2 Ch. 258; 87 L. T. 189; and see *Shepherd* v. *Croft*, 1911, 1 Ch. 521; 103 L. T. 874; and *Pemsel* v. *Tucker*, *infra*. The existence of registered deeds by parties apparently having no title is a valid objection: *McKoy* v. *Keefer*, 10 P. R. 345; the fact that the sale was by trustees under unnecessarily depreciative conditions is also a valid objection: *Re Rayner*, 53 L. T. 495.

The existence of a public road across the land was held a valid objection to the title, although a resolution of the Municipal Council to close it had been passed: *Kronsbien* v. *Gage*, 10 Gr. 572; so also the existence of a right of way: *Ashburner* v. *Sewell*, 1891, 3 Ch. 405; 65 L. T. 524; or a public sewer: *Re Brewer & Honkin*, 80 L. T. 127; or underground culvert: *Re Puckett & Smith*, *supra*; or a drain, the legal title to which is in third parties; or an agreement by the vendor with the owner of adjoining property not to interfere with his lights: *Pemsel* v. *Tucker*, 1907, 2 Ch. 191. So also is an outstanding claim to dower: *Gamble* v. *Gummerson*, 9 Gr. 193. So also is the lunacy of a previous owner of the land: *Francis* v. *St. Germain*, 6 Gr. 636. So also is the fact that the vendor, an attorney, claimed through a will prepared by himself: *Grove* v. *Bastard*, 2 Phil. 621. So also is the fact that the title came through a will, whereby the testator purported only to devise a moiety: *Stapylton* v. *Scott*, 16 Ves. 273; and where the validity of the vendor's title depended on the fact of his having purchased without notice: *Freer* v. *Hesse*, 4 D. M. & G. 495; but a supposed equity in a person who died upwards of fifty years ago, where the possession since that time had been in another, and the vendor had a good legal title, was held no objection: *Dewitt* v. *Thomas*, 10 Gr. 21. *McIntosh* v. *Rogers*, 12 P. R. 389; *Imperial Bank* v. *Metcalfe*, 11 Ont. 467; *Re Shortt & Howard*, before Boyd, C., 21st March, 1888.

Trusts.

Where trusts affecting the title are accidentally disclosed to the purchaser, he may require the production of the trust deed: *Re Bloiberg & Abrahams*, 1899, 2 Ch. 340; and where a title is traced through a trustee for sale, who has himself become the purchaser, the burden is on the vendor of showing by clear affirmative evidence, that the trustee and *c. q. t.* were at arm's length, and that the latter had full information of all material facts, and adopted what was done. In the absence of such evidence the Court would not compel an unwilling purchaser to complete: *Williams* v. *Scott*, 1900, A. C. 499; 82 L. T. 727.

Threatened litigation.

And where litigation is threatened in respect of the property, specific performance would not be enforced until, at all events, it is reasonably clear that the claim in respect of which it is threatened is without foundation: see *George* v. *Thomas*, 90 L. T. 505.

Possession, inquiry should be made as to.

inquiry should always be made as to the possession. If a stranger is in possession, the purchaser should insist on his being ejected by the vendor. Under *The Registry Act* (R. S. O. c. 124), s. 73, it would seem that possession is no longer constructive notice of the title of the person in possession as against a party claiming under a registered title: *Bell* v. *Wolker*, 20 Gr. 569; *Grey* v. *Ball*, 23 Gr. 390; *Sherbonean* v. *Jeffs*, 15 Gr. 574; *Building & Loan Ass.* v. *Poops*, 27 Ont. 470; nor of the title of the person through whom the person in possession claims: see *Hunt* v. *Luck*, 1901, 1 Ch. 45; 83 L. T. 449; 86 L. T. 68; not even though there be actual notice of the possession. *Ib.*; *Cooley*

v. *Smith*, 40 U. C. Q. B. 543; *Roe* v. *Broden*, 24 Gr. 589; but where the person in possession is tenant under a lease for a term not exceeding seven years, his interest is protected though his lease is not registered: *The Registry Act* (R. S. O. c. 124), s. 71 (2); *Latch* v. *Bright*, 16 Gr. 653; and see *Green* v. *Rheinberg*, 104 L. T. 149. As to the effect of possession in cases to which *The Registry Act* does not apply: see *Attorney-General* v. *McNulty*, 11 Gr. 281, 581; *Gray* v. *Coucher*, 15 Gr. 419; and as to what may amount to actual notice sufficient to take a case out of the protection of *The Registry Act*: see *Rose* v. *Peterkin*, 13 S. C. R. 677. Rule 453. No longer constructive notice of title.

In investigating the title, the purchaser at a sale by the Court, is not bound to inquire into the regularity of the proceedings in the action; if the judgment appears to be regular on its face, he will be protected: *Shaw* v. *Crawford*, 4 Ont. App. 371; *Gunn* v. *Doble*, 15 Gr. 655; *McLean* v. *Grant*, 20 Gr. 76; but see *Forsters* v. *Pegg*, 19 P. R. 254. He must, however, ascertain that all proper necessary parties are bound by the judgment: *Lechmere* v. *Brasier*, 2 J. & W. 287; *Calvert* v. *Godfrey*, 6 Beav. 97; *Bennett* v. *Hamill*, 2 Sch. & Lef. 577; and that the sale was in accordance with the judgment: *Colclough* v. *Sterum*, 3 Bli. 181; *Talbot* v. *Minnett*, 6 Ir. Eq. 83. An order of the Court is not invalidated as against a *bonâ fide* purchaser under it, on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service: see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 56; but *semble*, a purchaser having notice of the irregularity in the proceedings cannot be compelled to rely on the statutory indemnity: see *Life Interest Corp.* v. *Hand-in-Hand*, 1898, 2 Ch. 230. Purchaser need not inquire as to regularity of proceedings. But must see that all necessary parties are bound, etc.

Where the requisitions and objections, or any of them, are not answered, either party may carry in the objections, or such of them as are not answered, before the Master, as provided by *Rule* 449, and get his decision thereon: see *Rule* 453. Requisitions, how adjudicated on.

Where a sale is made subject to a condition that the vendor may rescind the contract in case the purchaser should take any objection, or make any requisition, which the vendor should be unable, or unwilling, to answer or comply with, such right must be fairly exercised, and a vendor will not be allowed to temporise with the purchaser whilst endeavouring to effect a sale to some one else: *Smith* v. *Wallace* 1895, 1 Ch. 385; 71 L. T. 814.

Where it is found that the vendor has sold land which he cannot convey himself, the purchaser may rescind; he is not bound to wait and see if the vendor can procure a conveyance by a third party: *Re Cooke*, 78 L. T. 106, 108. Matters of conveyance, what are.

But where the vendor has a good equitable title, and a right to call for the conveyance of the legal estate, a purchaser cannot repudiate the contract because the legal estate has not been got in before the date fixed for completion: *Re Huckleshy and Atkinson*, 102 L. T. 214.

There are some objections which are not strictly objections to the title, but are considered "matters of conveyance." Thus, the existence of outstanding incumbrances, or satisfied mortgages—where the vendor is entitled to require the party appearing entitled thereto, to join in the conveyance to the purchaser, or to release or discharge his incumbrance,—are not objections to the title. But where the

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vendor is unable to procure such conveyance, or release, such incumbrances then constitute an objection to the title: see *Re Great Northern Ry. Co. v. Sanderson*, 25 Ch. D. 788; 50 L. T. 87; *McLean v. Walker*, 19 Ont. 161. See also Fry, Sp. Perf., 2nd ed., sec. 1357 *et seq.*, and *Martin v. McGee*, 19 Ont. 705; and 18 Ont. App. 384; *Re Deighton & Harris*, 1898, 1 Ch. 458; 46 W. R. 341.

Ordinarily a purchaser is entitled to a conveyance of the legal estate, but when the vendor was able to convey a good equitable title, an objection that the legal estate was outstanding, delivered after the time limited for delivery of objections had expired, was held to be too late: *Pryce-Jones v. Williams*, 1902, 2 Ch. 517; 87 L. T. 260.

On refusal of vendor to verify abstract, Master may authorise purchaser to do so.

454. In case of the refusal or neglect of the vendor to verify the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense. C.R. 741.

Costs of reference as to title, how borne.

Costs of Reference as to Title.—In sales by the Court, the purchaser is entitled to his costs of the reference, where the title proves good, on grounds not appearing on the abstract: *Fielder v. Higginson*, 3 V. & B. 142; and will not be ordered to pay the vendor's costs, though the title is proved according to the abstract: *Flower v. Hartop*, 8 Beav. 200; *Holland v. King*, 1 W. R. 80; Dart. V. & P. 1210; unless the objections are frivolous and vexatious: *Thorpe v. Freer*, 4 Mad. 466; *Peers v. Sneyd*, 17 Beav. 151; Seton, 5th ed., 1875; *Platt v. Blizzard*, 29 Gr. 46; *Hurd v. Robertson*, 7 Gr. 42; *Laird v. Paton*, 7 Ont. 137. A special application is necessary for an order for such costs: *Flower v. Hartop, supra*.

Though the title be a possessory one, and be first proved in the M. O., a purchaser may be ordered to pay the costs of the reference where he has acted unreasonably: see *Dame v. Slater*, 21 Ont. 375.

A purchaser will be ordered to pay the costs of an unsuccessful application to be relieved from his purchase: *Osborne v. Osborne*, 18 W. R. 421.

Purchaser's lien for costs.

Where a good title cannot be made, the purchaser is entitled to a lien on the land sold, for the deposit and costs, including those for investigating the title: *Yeilding v. Westbrook*, 31 Ch. D. 344; 54 L. T. 531; *Kitton v. Hewett*, 1904, W. N. 21; *Hurd v. Robertson*, 7 Gr. 142; *Re Furneaux & Aird*, 122 L. T. Jour. 109; and where the vendor rescinds under a condition enabling him to do so, the purchaser is entitled to his costs: see *Isaacs v. Towell*, 1898, 2 Ch. 285.

Rules 449-454, apply to all references as to title.

455. The foregoing six Rules shall apply to all cases of reference to the Master as to title, as well as to sales by the Court. C.R. 742.

Payment of purchase money out of Court.

456. Purchase money shall not be paid out of Court except upon consent of the purchaser or his solicitor, or upon proof being made to the Accountant that the purchaser has received a conveyance or vesting order in

respect of the property for which the money in question was paid into Court. C.R. 743. Rule 457.

This *Rule* embodies what has always been the practice in the Accountant's office.

457. No conveyance shall be settled until evidence is produced of the purchase money having been paid into Court, and, where a mortgage is taken for part of the purchase money, until evidence is given to the said officer of such mortgage having been registered and deposited with the Accountant. C.R. 970. Conveyance of lands—evidence to be produced to officer settling.

C. R. 970 only applied to sales of infants' lands under C. R. 960, *et seq.*, and to sales in actions or other proceedings in Court, in which infants are interested. The present *Rule* applies, apparently, to all sales, whether infants are interested or not.

C. R. 734 provided that the Master is to settle all necessary conveyances for the purpose of carrying out the sale in case the parties differ, or in case there are any persons under any disability (other than coverture) interested in such sale; but the omission of that Rule is probably not intended to alter the practice; usually the judgment or order directing the sale expressly authorizes the Master so to do. See *Rule* 416. Settlement of conveyance.

Conveyance.—In all sales by the Court, therefore, the Master to whom the action is referred, is to settle the conveyance in case the parties differ, or there be any parties not *sui juris* interested, without any special reference; and see *Rule* 416. But no conveyance of property sold under the order of the Court is to be settled until evidence is produced to the officer settling the same of the purchase money having been paid into Court, or of the payment into Court having been dispensed with; and, in cases where there is a mortgage for a part of the purchase money, until evidence is given to the officer settling the conveyance that such mortgage has been registered and deposited with the Accountant as required by this *Rule*. The proper evidence of the payment of the purchase money into Court and of the deposit of the mortgage is the certificate of the Accountant, or of his Chief Clerk. The order for dispensing with payment into Court can only be made by a Judge in Chambers, the Master in Chambers, or Master in Ordinary, and the Local Masters have no power to make such orders: *Rules* 208 (10), 209; but Local Judges may in certain cases do so, under *Rule* 210.

It is the purchaser's duty to prepare, and tender, the conveyance for execution: *Stephens* v. *DeMedino*, 4 Q. B. 422; *Bolton* v. *Hugel*, 35 U. C. Q. B. 407; *Watt* v. *Porker*, 2 Chy. Ch. 33; *Mooney* v. *Prevost*, 20 Gr. 416; *Burns* v. *Boyd*, 19 U. C. Q. B. 547; *Stevenson* v. *Davis*, 23 S. C. R. 629, at p. 633, unless the contract provides otherwise, and the fact that it was stipulated that the deed was to be prepared at the vendor's expense was held to impose on the vendor the duty of preparing it: *Foster* v. *Anderson*, 16 O. L. R. 565; 42 S. C. R. 251; and a provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule: *Stevenson* v. *Davis*, 23 S. C. R. 629; but see *Porker* v. *Watt*, 25 U. C. Q. B. 115; *Harrison* v. *Livingston*, T. T. 1 & 2 Vict.; *Monck* v. *Stuart*, 4 U. C. Q. Purchaser's duty to prepare and tender conveyance.

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B. 203; *Prindle* v. *McCon*, *Ib.*, 228; *Scott* v. *Reikie*, 15 C. P. 200; *McDonald* v. *Snitsinger*, 5 U. C. Q. B. 312; *Rogers* v. *Lake*, 9 U. C. Q. B. 264; *Smith* v. *Doon*, 15 U. C. Q. B. 634; *Thoyer* v. *Street*, 11 C. P. 243; *Koster* v. *Holden*, 16 C. P. 331; and in the event of the parties differing, or in case of infants, or lunatics, being interested, it must be settled by the Master, before engrossment, or tender for execution.

Settlement of by Master when necessary.

Tender of conveyance.

Tha purchaser sufficientiy tenders ths conveyance for execution under the standing conditions of sale, hy delivering tha same to the vendor's solicitor: *Weiss* v. *Crofts*, 6 P. R. 151.

Covenants.

Equitable interests.

The purchaser cannot require a covenant by a *cestui que trust* for title: *Cottrell* v. *Cottrell*, L. R 2 Eq. 330; nor where the legal estate is conveyed can ha reqnire parties to ths action, having merely equitable estates, to join in the conveyanca. Therafore, upon a sale of mortgaged premises, he cannot require the mortgagor to join in the deed: *Ross* v. *Steele*, 1 Chy. Ch. 94; nor the wife of the mortgagor: *Moore* v. *Shinners*, 1 Chy. Ch. 59. Where, in consequence of the infancy of some of the vendors, a settlement of the conveyance by the Master is rendered necessary, the purchaser's costs will be ordered to be paid out of his purchase money: *Re McMorris*, 3 Chy. Ch. 430.

Plan.

Where, for the proper identification of the property sold, it is necessary that there should be a plan, the purchaser is entitled to attach to, or incorporate a plan in the deed: see *Re Sansom & Narbeth*, 1910, 1 Ch. 741, and as to the effect of a plan so incorporated: see *Eastwood* v. *Ashton*, 1913, 2 Ch. 39.

Dower, purchaser entitled to release of.

The purchaser is entitled to a conveyance with bar of dower of vendor's wife; if she refuses to bar dower, ths purchaser is entitled to an abatement, or to rescind the contract: *Kendrew* v. *Shewan*, 4 Gr. 578; *Von Norman* v. *Beoupre*, 5 Gr. 599; or to have a portion of the purchase money, sufficiant to answer the dower, set apart until the wife's death, and tha interest thereon paid to the vendor during his wife's life: see *Skinner* v. *Ainsworth*, 24 Gr. 148; and *Loughead* v. *Stubbs*, 27 Gr. 387; hut the wife of a mortgagea cannot be compelled to join in a conveyance to a purchaser: *Simpson* v. *Simpson*, 1 Chy. Ch. 265, except where ths mortgagee's title has become absolute by the foreclosure of the equity of redemption, and even then only when the mortgagee has tha legal estata: see *The Dower Act* (R. S. O. c. 70), s. 4. As to the mods of computing dower in an equity of redemption where the dower has not been assigned, but the widow has been in possession of the land: see *Re Percy*, 11 Ont. 374.

Purchaser may take vesting order in lieu of conveyance.

The purchaser is entitled to a conveyance with ordinary covenants: and for the principle for determining what are "usual covenants" see *Re Lander & Bogley*, 1892, 3 Ch. 41; 67 L. T. 521; Davidson on Conveyancing, vol. 5, pt. ii., pp. 51-54; 3 Bythw. 122; *Re Can. Pac. Ry. & Toronto*, 4 O. L. R. 134; 27 Ont. App. 54; 5 O. L. R. 717; 1905, A. C. 33; *De Soysa* v. *De Piess Pol.*, 1912, A. C. 194; 105 L. T. 642; but he may, if he chooses, taka a vesting order; hut a purchaser cannot be compelled to take a vesting order instead of a conveyance: *Lavlant* v. *Seamen*, 8 Ont. App. 557. Wherever the Court has authority to order the execution of a conveyance, it may make a vesting order: see Jud. Act, s. 72, *supra*, p. 235. Ths vesting order is granted in Chambers on production of tha report on sale duly confirmed, and proof that the purchase money has been duly paid, or secured, according to the report. Where the purchasa money is to be paid into Court its payment must be proved hy the production of the certificate of the

Application for, how made.

Accountant, or his Chief Clerk. The vendor's solicitor is entitled to notice of the application: *Boulton* v. *Stegman*, 1 Chy. Ch. 199; and, where infants are interested, the guardian *ad litem* is usually notified also: *Thorne* v. *Chute*, 2 Chy. Ch. 221; but see *Boulton* v. *Stegman*, *supra*. Where the owner of the legal estate became the purchaser, a vesting order was refused: *Bowen* v. *Fox*, 1 Chy. Ch. 387; and see Jud. Act, s. 72, and notes, *supra*, pp. 235-237. Rule 458.

As to execution of deeds, by the Trust & Loan Co.: see 25 Vict. c. 72; *Trust & Loan Co.* v. *Monk*, 14 Gr. 385; by The Canada Company: *Woodhill* v. *Sullivan*, 14 C. P. 265; *Fell* v. *South*, 24 U. C. Q. B. 196. Deeds by T. & L. Co. & Canada Co.

The Canada Company is not exempted from giving ordinary covenants for title: see *Scarlett* v. *Canada Co.*, 1 Chy. Ch. 90. Covenants by Canada Co.

Where, in consequence of the absence of one of the vendors from the jurisdiction, the execution of the conveyance prepared, and tendered by the purchaser, could not be procured, and a vesting order was then obtained, the purchaser was held entitled to the extra costs so occasioned: *Re McMorris*, 3 Chy. Ch. 430; and see *Lowrason* v. *Buckley*, 3 Chy. Ch. 270. Costs of vesting order.

Even before conveyance a purchaser may apply to the Court to restrain any party bound by the sale from exercising even a legal right to his prejudice as purchaser: *Re Powers*, 63 L. T. 626.

Completion of Sale.—On the completion of the sale the purchaser is entitled to the delivery of all title deeds relating to the property purchased, unless otherwise provided by the conditions of sale; or unless the vendor is entitled to retain them as mortgagee; and the expense of procuring such of the title deeds as are not in the vendor's possession must be borne by the vendor in the absence of any conditions of sale to the contrary, and *semble*, a condition that the vendor shall not be bound to produce them for the verification of the abstract is not such a condition to the contrary: *Re Duthy & Jesson*, 1898, 1 Ch. 419.

Trustees purchasing lands for the trust should see that the original title deeds are delivered up, and are guilty of negligence if they omit to obtain them: see *Walker* v. *Linom*, 1907, 2 Ch. 104; 97 L. T. 92.

The purchaser is also entitled to require the vendor to deliver to him possession of the premises: see *Rule* 448 and notes p. 1000.

Deeds of land in Ontario, executed in England, do not require to be stamped under the English Stamp Acts: *Murray* v. *Vonbrocklin*, 1 Chy. Ch. 300.

Where a vendor is guilty of unreasonable delay in procuring the execution and delivery of the conveyance, the purchaser may be entitled to compensation for any damage he may suffer in consequence thereof: see *supra*, p. 1003, *et seq.*

An application to compel a party to execute a conveyance must be on notice: *Westacott* v. *Cockerline*, 2 Chy. Ch. 442.

458. Where a Master is to appoint a committee, guardian or receiver, the name proposed and the names of his proposed sureties shall be given in the appointment and the Master shall appoint the committee, guardian or receiver, and settle and approve of the proposed security, Master to appoint committee, guardian or receiver and settle and approve security.

Rule 458.

and when the security has been duly filed, shall sign a written appointment. C.R. 762 and 763.

As to the appointment of Receivers: see Jud. Act, s. 17 and notes, *supra*, p. 74.

Evidence to be produced on settling security.

In order to enable the Master to settle the security to be given, affidavits must be filed proving the amount of property likely to come to the hands of the committee, guardian, or receiver. The amount of the security required will vary according to the circumstances; usually security will be required to be given by the appointee, with at least two sureties, in double the amount of the probable annual rents of realty, and double the probable amount of personal estate, likely to come to his hands.

The husband of a married woman who is declared a lunatic, has no absolute right to be appointed her committee: *Re Davy*, 1892, 3 Ch. 38; 67 L. T. 180.

On return of warrant, bond to be brought in.

At the time appointed, the party prosecuting the order should bring into the Master's office the draft of the bond proposed as security, which, after approval, should be engrossed, and executed, and filed.

Bond, how to be given.

The bond must now be made to the "Accountant of the Supreme Court of Judicature for Ontario, his successors and assigns": Rule 720; Jud. Act, s. 105 (1), see *supra*, p. 284.

Where a guarantee company has been approved by the Lieutenant-Governor in Council, its bond may be accepted as security: *The Guarantee Companies Securities Act* (R. S. O. c. 190), s. 3; and no affidavit of justification is necessary: *Ib.*, s. 35; and see *Carpenter* v. *Solicitor to the Treasury*, 46 L. T. 821; and *The Public Officers Act* (R. S. O. c. 15), s. 9. The solicitor of any of the parties is not eligible as a surety: *Re Gibson*, 13 P. R. 359.

The security is for the protection of the parties to the litigation, but not for the benefit of third persons with whom the receiver has dealings in the course of his receivership: *In re British Power Traction Co.*, 1910, 2 Ch. 470; 103 L. T. 451; and third persons dealing with a receiver have no greater rights than the receiver has: *Ib.*

Party desiring to propose another person as receiver, to give notice.

Any other party desirous of proposing another person as receiver, should serve notice of his intention so to do upon the other parties, naming in the notice the person proposed by him as receiver, and his sureties, and should bring into the Master's office the bond proposed by him as security.

If the receiver is named by the Court, "on his giving security," no other person can be named in the Master's warrant, or by any of the parties, and if the person named in the order fails to give the security, a further order will be necessary to enable the Master to appoint some one else.

Receiver's appointment, when effectual.

A receiver appointed "upon his giving security," is not effectually constituted receiver as against third parties until he has given the security: *Edwards* v. *Edwards*, 1 Ch. D. 454; 2 Ch. D. 291; but if no security be required, he is legally clothed with the character of receiver from the date of his appointment: *Taylor* v. *Eckersley*, 2 Ch. D. 302; 5 Ch. D. 740.

Rule 458. Parties not eligible.

A party to the action cannot propose himself as receiver unless leave to do so be embodied in the order: *Davis* v. *Duke of Marlborough*, 2 Sw. 118.

Security.

The giving of security for the due performance of his duty by the receiver will not be dispensed with, where infants or other persons not *sui juris* are interested: *Tylee* v. *Tylee*, 17 Beav. 583; nor even where all the parties are *sui juris* and consent, if it is referred to the Master to appoint the receiver: *Manners* v. *Furze*, 11 Beav. 30; but it may be, if the parties themselves nominate the receiver: *Ib.* Where a receiver is required to give additional security his omission to do so may be a ground for removing him from office, but he cannot be proceeded against for contempt of Court for not doing so: *Re Dominion Provid. B & E. Assoc.*, 24 Ont. 416.

Where a person is appointed receiver without salary, he is entitled to be paid out of property in question the premiums paid by him to a guarantee company for becoming his surety: *Harris* v. *Sleep*, 1897, 2 Ch. 80; 76 L. T. 458.

A receiver appointed by the Court can look only to the assets under the control of the Court for his indemnity or remuneration. He is not entitled to be indemnified personally by the parties at whose instance, or with whose consent he was appointed: *Boehm* v. *Goodall*, 1911, 1 Ch. 155; 103 L. T. 717.

Interference with receiver, when a contempt of Court.

Interference by third parties with the property in question, before the appointment is completed, is not a contempt of Court: *Taylor* v. *Eckersley*, *supra*, p. 1020; and see *Fox* v. *Toronto & Nipissing Ry. Co.*, 29 Gr. 11.

After the appointment of the receiver is complete, any interference with the property committed to his charge and in his possession, either by parties to the action, or third parties having notice of his appointment, is a contempt of Court, unless the leave of the Court has been first obtained: *Angel* v. *Smith*, 9 Ves. 335; *Russell* v. *East Anglian Ry. Co.*, 3 Mac. & G. 104; *Ames* v. *Birkenhead Docks*, 20 Beav. 353; even though such interference be by persons claiming by title paramount to that of the parties to the action in which the receiver is appointed: *Ib.*; *Evelyn* v. *Lewis*, 3 Ha. 475; *Hawkins* v. *Gathercole*, 1 Drew. 17; *Randfield* v. *Randfield*, 1 Dr. & Sm. 314; *Whadcoat* v. *Shropshire Ry. Co.*, 95 L. T. Jour. 272; and the Court will not permit any one, without its sanction, to intercept or prevent payment, or delivery to the receiver, of any money or property which he has been appointed to receive: *Ames* v. *Birkenhead Docks*, 20 Beav. 353; but where goods in the possession of a receiver were sold for taxes, and neither the bailiff, nor purchaser had notice of the receiver's rights, the Court refused to hold the sale void: *Gibson* v. *Lovell*, 18 Gr. 197.

Master not to make report appointing a receiver; but to sign appointment.

Where the Master has approved the securities, they are to be duly executed and filed, and the Master then appoints the committee, guardian, or receiver, by signing a written appointment.

For Form of appointment: see H. & L. Forms, Nos. 1033, 1343, which may be varied when committees of lunatics, and guardians of the person or estate of infants, are to be appointed.

Master's appointment of receiver to be filed.

The appointment should also be filed by the party who has procured the appointment to be made, and it may be moved against within 14 days by any party interested: see *Rules* 502, 503.

Rule 458.

Receiver, an Officer of the Court.

A receiver, when appointed, is an officer of the Court, and stands in the position of trustee to all who are interested in the estate or fund. In making the appointment, the Master should endeavour to select a person acceptable to all parties, as well as otherwise fit and competent for the duties he will be called on to perform: *Simpson* v. *Ottawa & Prescott Ry. Co.*, 1 Chy. Ch. 99; and see *Brant* v. *Willoughby*, 17 Gr. 627.

It has been held that the effect of a receivership order, obtained by an execution creditor, is to vest in the party obtaining the same a right to the property in question, as from the date of the order, which cannot be divested by proceedings in bankruptcy subsequently taken against the debtor: *Levasseur* v. *Mason*, 1891, 2 Q. B. 73; 64 L. T. 761; but, notwithstanding, it has been held that he is not a "secured creditor" within *The Bankruptcy Act*; *Re Potts*, 1893, 1 Q. B. 648; 68 L. T. 229; and see *Croshaw* v. *Lyndhurst Ship Co.*, 1897, 2 Ch. 154; 76 L. T. 553, where it was held by Stirling, J., that a receiving order, under which the receiver is required to pay the moneys received into Court subject to further order, gave the execution creditor no charge on the property. See also *McLean* v. *Allen*, 18 P. R. at p. 259.

Property in the hands of a receiver is *in custodiâ legis* in so far that none of the parties to the action can recover damages for its detention while in his custody: *The Peruvian Guano Co.* v. *Dreyfus*, 1892, A. C. 166; but not in the same way as it would be if in possession of a sequestrator, or sheriff: *Re Hoare*, *Hoare* v. *Owen*, 1892, 3 Ch. 94; 67 L. T. 45.

Receiver to obtain leave to sue, or defend, or distrain.

Where it is necessary for the receiver to bring, or defend, an action, or take other legal proceedings, to recover, or maintain, his right to property committed to him, he should first obtain the sanction of the Court: *Thomas* v. *Torrance*, 1 Chy. Ch. 9. He cannot sue in his own name, but he must get the leave of the Court to bring the action in the name of the party in whom the legal cause of action is vested: *McGuin* v. *Fretts*, 13 Ont. 699; *Stuart* v. *Grough*, 14 Ont. 255.

The Court may refuse to authorize the receiver to sue, where the party having the legal title is ready and willing to do so: *McLean* v. *Allen*, 14 P. R. 291.

Where a receiver is appointed by way of equitable execution, he may be authorized to sue in the name of the debtor for the purpose of recovering assets to satisfy the execution, on first giving the debtor a proper indemnity against costs: *Morris* v. *McCollum*, 17 P. R. 398.

The receiver should not himself initiate proceedings, but he should apply to the party having the conduct of the cause to take any proceedings that may be necessary: *Third National Bank* v. *Queen City Refining Co.*, 20 C. L. J. 151. After attornment by a tenant to the receiver, the receiver may distrain in his own name; before attornment, leave must be obtained to distrain in the name of the person having the legal estate: Kerr, 142, 143. The application for leave to sue, defend, or distrain, may be made in Chambers: *Thomas* v. *Torrance*, 1 Chy. Ch. 9; notice to the tenants is not necessary: *Farton* v. *Dryden*, 6 P. R. 127.

A receiver cannot be empowered by the Court to do things which the parties to the action could not themselves legally do, *e.g.*, in a partnership action he cannot be empowered to agree to a compromise

against the w... of one of the partners: *Niemonn* v. *Niemann*, 43 Ch. D. 198; 62 L. T. 339. Rule 458.

Proceedings instituted against a receiver for acts done by him in the execution of his office, will, on application to the Court on behalf of the receiver, be restrained: *Simpson* v. *Hutchinson*, 7 Gr. 308; and see *Searle* v. *Choat*, 25 Ch. D. 732; 50 L. T. 470; *Re West Lancashire Ry. Co.*, 63 L. T. 56. Proceedings against, restrained.

After his discharge, a receiver will not be restrained from soliciting customers, unless he was appointed on the terms that he would not do so after he ceased to be receiver: *Re Irish*, *Irish* v. *Irish*, 40 Ch. D. 49; 60 L. T. 224.

If any person is aggrieved by the action of the receiver, he should not bring an action, but should make application to the Court in the action in which the receiver was appointed: see *Re Maidstone Police*, *Blair* v. *Maidstone Palace*, 1909, 2 Ch. 283; 101 L. T. 458. *In re Diehl* v. *Carritt*, 15 O. L. R. 232, leave was given to sue receivers of a company and others, to restrain them from carrying out a bond issue by the company. Remedy of third persons against receiver.

Leave was given to abate an obstruction to a right of way existing on land in the possession of a receiver: *Lone* v. *Copsey*, 1891, 3 Ch. 411; 65 L. T. 375.

Status of Receiver.—A receiver is an officer of the Court, and when appointed at the instance of debenture holders of a company he was held to be neither an agent of the company, nor of the debenture holders, but an officer of the Court appointed to discharge certain duties: see *Parsons* v. *Sovereign Bank*, 1913, A. C. 160; 105 L. T. 572.

Prima facie, any contracts made by him, unless otherwise expressly provided, would be made by him personally in reliance on his right to indemnity out of the assets: *Ib.*, and see *Moss S.S. Co.* v. *Whinney*, 1912, A. C. 254; 105 L. T. 305.

Liability of Receiver.—A receiver or manager entering into contracts will make himself personally liable, unless the contract expressly provides otherwise: *Burt* v. *Bull*, 1895, 1 Q. B. 276; 71 L. T. 810; or the credit is clearly given to the firm, or business, of which the receiver is manager: *Isaacs* v. *Chinery*, 74 L. T. 320; and see *Plumpton* v. *Burkinshaw*, 1908, 2 K. B. 572; 99 L. T. 415; and *Re Boynton*, *Hoffmon* v. *Boynton*, *infra*, p. 1025; and where a receiver is appointed by trustees for debenture holders in pursuance of a power in the trust deed, the trustees are not liable on the contracts of the receiver as undisclosed principals: *Goskell* v. *Gosling*, 1896, 1 Q. B. 669; 77 L. T. 314; 1897, A. C. 575, in which case the deed provided that the receiver when appointed should be the agent of the company, who alone should be liable for his acts or defaults. Liability of receiver.

A receiver is bound to conform to the orders of the Court, and is responsible for any loss resulting from his not doing so: thus, where a receiver was ordered to pay money to the plaintiffs, and he paid it to their solicitor who misappropriated it, the receiver was held liable to make good the loss: *Ind*, *Coope & Co.* v. *Kidd*, 71 L. T. 203.

A receiver is liable to attachment for disobeying the order of the Court as to the payment of moneys which come to his hands as receiver; but *semble*, a specific order for payment should be first obtained, and served on him: *Fawkes* v. *Griffin*, 18 P. R. 48.

Rule 459.

Master to appoint time for receivers, and committees to pass accounts.

459. The Master shall appoint a time when the person appointed is to pass his accounts and pay his balances into Court; and in default of compliance with such direction, the person appointed may, on the passing of his accounts, be disallowed any salary or compensation for his services, and may be charged with interest upon his balances. C.R. 766.

Accounts of.

Accounts of Receiver.—

A receiver appointed without salary, is entitled to be allowed in his accounts for premiums paid for the purpose of furnishing security: *Harris* v. *Sleep*, 1897, 2 Ch. 80; 76 L. T. 458.

Where a receiver, who was appointed without a salary, performed divers extraordinary services in connaction with his office which were not contemplated when he was appointed, he was allowed a reasonable compensation for such extraordinary services: *Harris* v. *Sleep*, 76 L. T. 670.

Notwithstanding a receiver has omitted to pass his accounts as required, he may be allowed remuneration for his services if the Court see fit: *Re Breen, Breen* v. *Toronto General Trusts Corpn.*, 18 O. L. R. 447.

As to payments which a receiver of a going concern may properly make: see *Gooderham* v. *Toronto & Nipissing Ry. Co.*, 8 Ont. App. 685.

Where a receiver has notice of a preferred claim and subsequently pays unpreferred claims, he is liable in tort to the preferred creditor in respect of moneys so paid away: *Woods* v. *Winskill*, 1913, 2 Ch. 303.

A receiver, committee, or guardian should obtain the leave of the Court before borrowing money, or making any extraordinary expenditure; but where such money has been borrowed or expenditure made without leave, it may be allowed, provided it is shown that it would have been authorized by the Court if an application had been made: *Re Breen, Breen* v. *Toronto General Trusts Corporation*, 18 O. L. R. 447; *Re British Power Traction Co., Halifax Bank* v. *British Power Traction Co.*, 1906, 1 Ch. 497; 94 L. T. 479. Though a receiver is entitled to indemnity out of the assets which come to his hands for all proper expenditures made by him for the purposes of his receivership: *Re Gladsir Copper Mines, English E. M. Co.* v. *Gladsir Copper Mines*, 1906, 1 Ch. 365; 94 L. T. 8; he has no right of action against the litigants personally therefor: *Boehm* v. *Goodall*, 1911, 1 Ch. 155; 103 L. T. 717; *sed vide, Matthews* v. *Ruggles-Brice*, 1911, 1 Ch. 194; 103 L. T. 491; and *Deyes* v. *Wood*, 1911, 1 K. B. 806; 104 L. T. 404.

Where a receiver is also manager, he is bound to exercise such reasonable care as an ordinary man would give to his own business, and is personally liable for any loss occasioned by his not doing so: *Plisson* v. *Duncan*, 36 S. C. R. 647.

Where a receiver is authorized to borrow money to carry on a business, and the loan is made a first charge on the property in the hands of the receiver, such a charge does not, unless expressly so provided, take priority over the lien of the receiver for his remuneration, nor

does the receiver incur any personal liability for such loan: *Re Boyn-* Rule 468.
ton, Hoffman v. *Boynton*, 1910, 1 Ch. 579; 102 L. T. 273.

Money paid by mistake to a receiver, or other officer of the Court may, so long as the fund remains under the control of the Court, be ordered to be refunded: *Ex p. James*, L. R. 9 Ch. 609; 30 L. T. 773; *Ex p. Simmonds*, 16 Q. B. D. 308; 54 L. T. 439; *Re Tyler* (1907), 1 K. B. 865; 97 L. T. 30; *Re Temple F. & A. Assuree. Co.*, 129 L. T. Jour. 115.

The sureties of a receiver or committee are not liable for his receipts, after the right to act as receiver, or committee, has come to an end: *Re Walker*, 1907, 2 Ch. 120; 96 L. T. 864.

When a receiver has passed his final accounts, and paid his balances as directed by the Court, an application may be made to discharge the bond; all parties interested are entitled to notice of the application: *Brown* v. *Perry*, 1 Chy. Ch. 253. As to the liability of the sureties, eee *Re Graham*, 1895, 1 Ch. 66; 71 L. T. 623; *In re British Power Tracti.n Co.*, *supra*, p. 1024. Discharge of bond.

CHAPTER XVI.

MORTGAGE ACTIONS.

When demand of payment, or notice of intention to exercise power of sale given, other proceedings not to be taken without order.

By *The Mortgages Act* (R. S. O. c. 112), s. 29, it is provided that where, pursuant to any condition or proviso in a mortgage, a demand or notice has been given requiring payment or declaring an intention to proceed to exercise the power of sale contained in the mortgage, no further proceeding shall be taken, and no action shall be brought to enforce the mortgage until after the lapse of the time at or after which, according to the demand or notice, payment is to be made, or the power of sale is to be exercised or proceeded under, except by leave of a Judge of the High Court or a Judge of a County Court.

Where, after an action to enforce payment under the covenant in a mortgage had been commenced, the plaintiff served notice of intention to exercise the power of sale, unless payment of the mortgage moneys was made within 30 days, this notice, though subsequently abandoned by notice to that effect, was held to have the effect of giving the defendant 30 days during which no further proceedings in the action could be taken without leave: *Lyon* v. *Ryerson*, 17 P. R. 516.

The publication of an advertisement for sale is a "proceeding" within the above Act: *Smith* v. *Brown*, 20 Ont. 165. See also *Neil* v. *Almond*, 29 Ont. 63; *In re Woodall*, 8 O. L. R. 288, and *The Statute of Limitations* (R. S. O. c. 75), s. 24 (2).

The Act does not apply where the power of sale is exercisable without any notice: *Canada Permanent* v. *Teeter*, 19 Ont. 156.

A mortgagee who has given the mortgagor notice to pay off the principal money and interest, is not at liberty to withdraw it without the consent of the mortgagor: *Sontley* v. *Wilde*, 47 W. R. 297.

Where a mortgagee, on default of payment of an instalment of interest, brings a foreclosure action and claims payment of the amount secured by the mortgage, any party to the action, by the original writ, or added in the Master's office, or by subsequent order, is entitled to hold the plaintiff to his election and to pay his claim; but this right must be taken advantage of in the foreclosure action, and does not enure to the benefit of a person, not a party to the action, who ignores the foreclosure proceedings, and brings a redemption action, after making an independent tender to the mortgagee: *Gibson* v. *Nelson*, 2 O. L. R. 500.

After a foreclosure action has been commenced, it is improper for the plaintiff to bring a second action for a subsequently accruing instalment of principal or interest, so long as the first action is pending: see *Poulett* v. *Hill*, 68 L. T. 476; 1893, 1 Ch. 277. But where a mortgagee having a principal mortgage, and five supplemental mortgages, commenced an action and indorsed his writ in respect of only five of the mortgages, he was held entitled to bring another action in respect of the sixth mortgage: *Bake* v. *French*, 1907, 1 Ch. 423; 96 L. T. 496; 97 L. T. 131.

460. A mortgagee may in an action claim foreclosure of the equity of redemption or a sale of the mortgaged premises, and payment of the mortgage debt by any party personally liable therefor and possession of the mortgaged premises. The writ shall be indorsed in accordance with the Form applicable thereto. C.R. 378 and 141.

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Mortgagee may have sale or foreclosure and also personal remedy.

Indorsement of writ.

For forms of indorsement in mortgage actions for sale, payment and possession: see No. 4 (*a*), and for foreclosure, payment and possession: see No. 4 (*b*), and for redemption: see No. 4 (*c*), in the H. & L. Forms, Nos. 57-59.

The indorsement should also state concisely the lands in question: *Canada Landed Credit Co.* v. *Colloghan*, Boyd, C., 26th October, 1881; and see Forms, *supra*.

This *Rule* having reference to the indorsement of a writ only, does not apply to a counter-claim on a mortgage, and orders for immediate payment, and possession, may be granted, though not asked for specifically by the counter-claim: *Klein* v. *Union Fire Insurance Co.*, 3 Ont. 250.

A separate action for possession should not be brought when other remedies against the mortgagor are claimed: *Hoy* v. *McArthur*, 8 P. R. 321.

A writ indorsed with all the claims mentioned in this *Rule* is specially indorsed under *Rule* 33 (*h*), but *semble*, not so as to entitle the plaintiff to move under *Rule* 56 for summary judgment for recovery of land: *Foresters* v. *Pegg*, 19 P. R. 80. *Rules* 460-490, appear to be the *Rules* especially governing such actions.

In an action for foreclosure, in which also possession is claimed, where the mortgage sought to be foreclosed was held void for illegal, or immoral, consideration, the plaintiff was held not entitled to recover possession: *Clork* v. *Hogor*, 22 S. C. R. 511.

Where a mortgagor is dead the mortgagee is entitled to an order for payment against the personal representative of the deceased, and in case of a deficiency, to administration of the deceased's estate: *Re Eustace, Lee* v. *McMillan*, 1912, 1 Ch. 561; 106 L. T. 789; but *semble* that relief cannot be granted by *præcipe* judgment.

Where a mortgage is being enforced by foreclosure against executors of the mortgagor, and an order for payment is asked against them, and they do not plead *plene administraverunt*, the additional costs of the latter claim only should be taxed against the executors personally: *Miles* v. *Brown*, 15 P. R. 375.

Mortgagee should seek all remedies in one action.

A mortgagee should seek all the remedies he is entitled to, in one action, and if after commencing an action for foreclosure, and while it is pending, he brings another action on the covenant, the proceedings in such second action will be stayed: *Williams* v. *Hunt*, 1905, 1 K. B. 512; 92 L. T. 193.

Order for payment of deficiency when granted.

A mortgagee is only entitled to an order for the payment of the mortgage debt, or for payment of any deficiency after a sale, where there is an express or implied contract by the defendant with the plaintiff, by covenant, or otherwise, to pay the mortgage debt. If

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there be no such contract, the mortgagee is entitled to no personal remedy against the defendant: see *Christie* v. *Dowker*, 10 U. C. L. J. 161; *Turnbull* v. *Symmonds*, 6 Gr. 615; *Forbes* v. *Adamson*, 1 Chy. Ch. 117; *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 28 Gr. 334; 7 Ont. App. 237; *Pierce* v. *Cannavan Ib.* 356; *Mathers* v. *Helliwell*, 10 Gr. 175; *Aldous* v. *Hicks*, 21 Ont. 95; *Frontenac L. & I. Soc.* v. *Hysop*, *Ib.* 577; *Re Errington*, 1894, 1 Q. B. 11; *Re Jones*, 1893, 2 Ch. 461; where, however, the mortgage deed contains no express covenant to pay, the law will imply a contract by the mortgagor to pay: see *Sutton* v. *Sutton*, 22 Ch. D. 511; 48 L. T. 95; *Barnes* v. *Glenton*, 79 L. T. 94; provided there be evidence that the mortgage was made to secure a debt or loan: *Holl* v. *Morley*, 8 U. C. Q. B. 584; *Penrmon* v. *Hyland*, 22 U. C. Q. B. 202; *Jackson* v. *Ycomons*, 19 C. P. 394; 28 U. C. Q. B. 307; 39 U. C. Q. B. 280. The mere acknowledgment of the receipt of the mortgage money, is not sufficient to raise any presumption of a loan, or an implied promise of repayment: *London Loan Co.* v. *Smyth*, 32 C. P. 530.

Not if there be no personal liability to pay.

Liability, when implied.

A covenant for payment is implied by persons who convey, and are expressed to convey, as beneficial owners in a conveysnce by way of mortgage: *The Mortgages Act* (R. S. O. c. 112), s. 7.

A mortgagor may by his covenant restrict his liability as to amount, or as to the terms on which it may be enforced: *Wilson* v. *Fleming*, 24 Ont. 388.

Order for immediate payment, when made.

Where there is a covenant for the payment of the mortgage debt, judgment may now be obtained, if claimed by the writ, for the full amount due with costs, for which execution may issue at once, without waiting for a sale of the mortgaged property.

Where a reference to the Master to inquire as to incumbrances is necessary, and relief is also sought on the covenant, the judgment usually refers it to the Master to take the account, and directs payment of the amount which he finds due, forthwith after the making of his report: see H. & L. Forms, No. 905, and *North of Scotland* v. *Beard*, 19 C. L. J. 252, though Form 101 in the *Rules* contemplates a computation by the officer entering the judgment, of the amount for which the plaintiff is entitled to a personal order. A judgment in the latter form will only provide for the immediate payment of the costs up to the date of the judgment, and will not entitle the plaintiff to a personal order for payment of the costs of the reference; these will be simply added to the mortgage debt and be payable as part of the price of redemption, although no execution can issue therefor.

Although the claim of a mortgagee against his mortgagor personally, may be barred by the Statute of Limitations, the mortgagee may, nevertheless, be entitled to proceed for the foreclosure of the equity of redemptio, c for the sale of the mortgaged property: *Barnes* v. *Glenton*, 1899, 1 Q. B. 885; 80 L. T. 606 (a mortgage of land), *London & Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161; 81 L. T. 263 (a mortgage of chattels).

Covenant of mortgagor not enforceable against his assigns.

The burden of a covenant to pay mortgage money does not run with the mortgaged lands. Though the purchaser of an equity of redemption covenants with the mortgagor to pay the mortgage money, there is no privity of contract between him and the mortgagee, or any implied obligation thereby created which will enable

the mortgagee to sue the purchaser: *Re Frontenac Loan & Investment Society* v. *Hysop*, 21 Ont. 577; *Canada Landed and Nat. Investment Co.* v. *Shaver*, 22 Ont. App. 377; the mortgagee cannot, by way of equitable execution against the mortgagor, obtain an order for a receiver to enforce payment by the purchaser, upon his covenant with the mortgagor: *Palmer* v. *McKnight*, 31 Ont. 306; and where a deceased mortgagor's estate is insolvent, the mortgagee cannot compel his personal representative to seek indemnity from a purchaser of the equity of redemption: *Higgins* v. *Trusts Corporation*, 30 Ont. 684; 27 Ont. App. 432; neither has the mortgagee any direct remedy against such purchaser on his contract with the mortgagor, in the absence of an assignment of the contract: *Palmer* v. *McKnight*, *supra*; but the legal or equitable obligation of the purchaser to pay off the mortgage may be assigned by the vendor to the mortgagee, who may then sue the purchaser for the mortgage moneys: *Campbell* v. *Morrison*, 24 Ont. App. 224. Rule 460.

The relations which exist among mortgagee, mortgagor, and assignee, who has agreed to pay the mortgage moneys, are not those which exist among creditor, surety, and principal debtor: *Forster* v. *Ivey*, 32 Ont., 175.

A mortgagor who has assigned his equity of redemption, on the terms that the assignee is to pay off the mortgage, cannot, as between himself and the mortgagee, claim to stand in the position of a surety: *Aldous* v. *Hicks*, 21 Ont. 95; but he is entitled under a contract for indemnity to bring in the assignee as a third party: *McMurtry* v. *Leushner*, 3 O. W. N. 1176.

So long as the covenant to pay endures, the mortgagor, notwithstanding he has assigned his equity of redemption, is liable to pay when sued by the mortgagee; his equitable right is upon payment to get the land back, and to have, unimpaired, his remedies against his assignee; and if those rights can be exercised by him at the time he is sued, it is immaterial, that at some previous time, there was such dealing between his assignee and the mortgagee as would then have interfered with such rights: *Forster* v. *Ivey*, 32 Ont. 175. The mortgagor is, therefore, liable on his covenant notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if, when the liability is enforced, the right of the mortgagor to redeem is not affected: *Ib.*, 2 O. L. R. 480; but a mortgagee, who has notice that the mortgagor is entitled to indemnity from his assignee, cannot deal with the latter to the prejudice of the mortgagor, without discharging him from liability: *Mothere* v. *Helliwell*, 10 Gr. 172; *Muttleberry* v. *Taylor*, 22 Ont. 312. Mortgagor's liability on covenant.

Where the action is against the personal representative of a deceased mortgagor, and the plaintiff claims relief on the covenant for payment made by the deceased mortgagor, on default of defence, the defendant should only be ordered to pay personally the additional costs occasioned by that claim: *Miles* v. *Brown*, 15 P. R. 375. Deceased mortgagor.

Where there is a surety for the payment of the mortgage debt, in default of payment thereof by the mortgagor, it is always desirable to join the surety as a defendant in any action by the mortgagee to enforce the mortgage security, because, as soon as judgment is recovered against the principal, the right of action on the covenant is merged in the judgment, and subsequent accruing interest may not be otherwise recoverable against the surety: *Fober* v. *Lathom*, 77 L. T. 168. Surety, rights of.

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A surety against whom a judgment has been recovered, which, by agreement, is to stand as security for the payment of the deficiency, is entitled to have the security realized, before he can be called on to pay anything: *Teeter* v. *St. John*, 10 Gr. 85. An assignee of the equity of redemption who covenants with the mortgagee to pay off the mortgage debt, becomes a principal debtor, and if time be given him by the mortgagee, the mortgagor may be discharged: *Mathers* v. *Helliwell*, 10 Gr. 172.

Where a mortgagee on assigning a mortgage had covenanted that the mortgagor would pay the mortgage moneys, a release of part of the mortgaged lands, on payment of part of the debt, without the consent of the covenantor, was held to have discharged him, whether the amount paid was the full value of the lands released or not: *Farmers' Loan & S. Co.* v. *Patchett*, 6 O. L. R. 255.

Personal relief should not be directed if not claimed.

Where the writ, or statement of claim, does not claim any personal remedy against the defendant, the judgment is erroneous, if it contain any personal order for payment of the mortgage debt, and such a defect was amended after the lapse of four years: *Cockerone* v. *Bullock*, 12 Gr. 136.

Mortgagee entitled to sale or foreclosure.

A mortgagee is now usually entitled to a sale, or foreclosure, at his option: *Meyers* v. *Harrison*, 1 Gr. 449. But a subsequeot mortgagee cannot, as plaintiff, have a sale against a prior mortgagee without the latter's consent: *McDougall* v. *Campbell*, 6 S. C. R. 502; although he may, as a defendant, under *Rule* 462. Where infants are concerned, and the mortgagee claims foreclosure, the judgment usually directs a sale, or foreclosure, as the Master may find most beneficial for the infants.

Mortgagee of chattels may foreclose.

Pledgee can only sell.

A mortgagee of chattels: *Cook* v. *Flood*, 5 Gr. 463; a municipal corporation: *Oxford* v. *Bailey*, 12 Gr. 276; and a chartered bank: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; are each entitled to foreclosure. But a mere pledgee of chattels is said to be only entitled to a sale: *Carter* v. *Wake*, 4 Ch. D. 605.

Mortgagee by deposit when not entitled to a sale.

The law as to equitable mortgage by deposit of title deeds, save as affected by *The Registry Act*, is the same in Ontario as in England: *Zimmerman* v. *Sproat*, 26 O. L. R. 446. A mortgagee of lands by deposit is said not to be entitled to a sale, but only to a foreclosure: *Pryce* v. *Bury*, L. R. 16 Eq. 153 *n*; *James* v. *James*, *Ib.* 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444; but where the deposit is accompanied by an agreement to execute a legal mortgage, the mortgagee is entitled to either sale, or foreclosure: *York Union Banking Co.* v. *Artley*, 11 Ch. D. 205; although an equitable mortgagee by deposit cannot insist on a sale, yet if a subsequent incumbrancer, or the mortgagor himself, desires a sale, it may be granted as in any other case: *Kerr* v. *Beebe*, 12 Gr. 204.

Crown can not be foreclosed.

The Crown cannot be foreclosed; the only judgment that can be awarded where the equity of redemption is in the Crown, is one authorizing the mortgagee in default of payment to take possession until the Crown shall think proper to redeem: *Reeve* v. *Attorney-General*, 2 Atk. 223; *Dunn* v. *Attorney-General*, 10 Gr. 462; or until the debt shall be satisfied: *Hodge* v. *Attorney-General*, 3 Y. & C. 342; or, if the Crown consent, or do not object, a sale may be ordered: Seton, 4th ed., 1044; *Prescott* v. *Tylee*, 1 Jur. 470; 2 Jur. 870; *Rogers* v. *Maule*, 1 Y. & C. C. C. 4; *Hancock* v. *Attorney-General*, 12 W. R. 569; *Bartlett* v. *Rees*, L. R. 12 Eq. 395.

Form of judgment against the Crown.

Rule 460.

Mortgagee of railway entitled to sale, or foreclosure.

A mortgagee of a railway, subject to Dominion control, is entitled to enforce payment of his mortgage by either sale, or foreclosure, of the railway as a going concern: *Toronto General Trusts Corp.* v. *Central Ont. Ry.*, 6 O. L. R. 1; 8 O. L. R. 342. Affirmed by P. C. 1905, A. C. 576; 93 L. T. 317: and see *The Railway Act* (R. S. C. c. 37), s. 299: but in England the property of a railway, or other company, in which the public have rights, is held to be unsaleable at the instance of creditors: see *Gardner* v. *London C. & D. Ry.*, L. R. 2 Ch. 201, but a company organized to carry on a piece of amusement is not such a company: *Re Crystal Palace*, 104 L. T. 898. A mortgagee of a railway under Dominion control is also entitled to have a receiver, or manager, of the undertaking appointed: *Galt* v. *Erie and Niagara Ry. Co.*, 14 Gr. 499; *Peto* v. *Welland Ry. Co.*, 9 Gr. 455; *Furness* v. *Caterham Ry. Co.*, 25 Beav. 614. A vendor of a right of way to a railway company is entitled to enforce a lien for unpaid purchase money, by sale, or rescission of the contract: *Walker* v. *Ware H. & B. Ry. Co.*, L. R. 1 Eq. 195; *Martin* v. *London, Chatham & Dover Ry. Co.*, 12 Jur. N. S. 775; but see the *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, L. R. 5 Eq. 17; *Pell* v. *Northampton & B. J. Ry. Co.*, L. R. 2 Chy. 100, where the lien was enforced by the appointment of a receiver. And see notes to Jud. Act, s. 17, p. 83, *supra*.

Vendor to Ry. Co., rights of.

Mortgages of any railway within Provincial control may in like manner be enforced by sale, or foreclosure: see *The Ontario Railway Act* (R. S. O. c. 185), s. 53.

As to foreclosure in a debenture holder's action: see *Re Continental Oxygen Co.*, 1897, 1 Ch. 511; *Re Wolverhampton, etc., Brewery Co.*, 1899, W. N. 229; and *Wallace* v. *Evershed*, 1899, 1 Ch. 891.

Right to sale, or foreclosure, when lost by sale of part of property.

The right of a mortgagee to either a sale, or foreclosure, may be lost by his having sold, or parted with, part of the mortgaged property, without the concurrence of a person to whom the equity of redemption in the remainder has been conveyed. But this rule does not apply where the sale has been made under a power contained in the mortgage, or where the mortgage is of chattels which the mortgagee has a right to sell without any express power. But it applies to a sale under a decree in an action to which the owner of the unsold portion was no party: *Gouland* v. *Gorbutt*, 13 Gr. 578, and see *Crawford* v. *Armour*, *Ib.* 576; *Munsen* v. *Hauss*, 22 Gr. 279.

Where the mortgaged lands are out of the jurisdiction, although the Court may grant judgment for foreclosure: *Poget* v. *Edc*, L. R. 18 Eq. 118; it will not grant a judgment for sale: *Stronge* v. *Radford*, 15 Ont. 145; nor for redemption, even in a case where the right to redeem exists according to our law; nor other decree, even though in *personam*, respecting foreign lands, which can have no specific operation without the intervention of a foreign Court: *Henderson* v. *Bank of Hamilton*, 23 Ont. 327; 20 Ont. App. 646; 23 S. C. R. 716; *Gunn* v. *Harper*, 2 O. L. R. 611; but see *MacKay* v. *The Colonial Investment & L. Co.*, 38 C. L. J. 723; 4 O. L. R. 571.

In *Grey* v. *Manitoba & N. W. Ry.*, 31 C. L. J. 324, a judgment for sale of a mortgaged railway, part of which extended beyond the limits of Manitoba, was granted by the Manitoba Court.

Rule 461.

Where judgment for foreclosure, f. s. for sale may be granted.

Where the judgment directs foreclosure, on default in payment a final order may be made in Chambers, directing a sale in lieu of foreclosure, without appealing from the judgment: *Laslett* v. *Cliffe*, 2 Sm. & G. 278; *Fish* v. *Carnegie*, D. B. 4, fo. 151; D. B. 5 fo. 211; *Thompson* v. *Bodgley*, O. B. 25; but usually the sale will not be ordered until after the mortgagor has had the usual time to redeem: *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Ch. 41; where the application is made by a defendant he will be required to deposit $80 to meet the expense of the sale, and this deposit will not be dispensed with, although the security be ample: *Thompson* v. *Macaulay*, 3 Chy. Ch. 111. But if the plaintiff prefer it, the defendant may be required to conduct the sale in lieu of making the deposit. Formerly the Court would not, after a decree for sale, direct a foreclosure without rehearing the cause: *McClelan* v. *Jacob*, 9 Gr. 50; except where the sale had been attempted, and proved abortive: *Goodall* v. *Burrows*, 7 Gr. 449; *Odell* v. *Doty*, 1 Chy. Ch. 207; *Girdlestone* v. *Gunn*, *Ib.* 212. In such a case, an order for foreclosure is granted in Chambers on motion. The mortgagor was usually allowed three months further time to redeem: *Ib.*; but the time has been held to be subject to the discretion of the Court in view of all the circumstances of the case: *Scarlett* v. *Birney*, 15 P. R. 283. In *Goodall* v. *Burrows*, *supra*; and *Heney* v. *Kerr*, 10 C. L. T. 69, only one month was allowed, and perhaps that will now always be the time fixed, by analogy to *Rule* 489.

But if judgment is for sale f. o. f., not granted unless after abortive sale.

But a plaintiff who has been declared a trustee, with a lien for advances, is not entitled to foreclosure, even after an abortive sale, but may be allowed by the Court to become the purchaser of the land: *Hutton* v. *Justin*, 2 O. L. R. 713.

Or security inadequate.

After a judgment for sale, immediate foreclosure was granted, on proof that the lands were not worth the debt, apparently, without giving any further time for redemption: *Lloyd's Bank* v. *Colston*, 106 L. T. 420.

Subsequent incumbrancer may obtain order.

After a judgment of foreclosure, an order for sale may be obtained by a subsequent incumbrancer, under *Rule* 462.

A derivative or sub-mortgagee may foreclose his derivative mortgage without making the original mortgagor, or his assigns, parties: *Silverthorn* v. *Glazbrook*, 30 Ont. 408. (N.B.—The head note of this case is incorrect.) A derivative mortgagee takes subject to the equities subsisting between the original mortgagor and mortgagee at the time of the creation of the derivative mortgage: *DeLisle* v. *Union Bank of Scotland*, 1914, 1 Ch. 22; 109 L. T. 727.

Defendant desiring sale without defending.

461. Where a defendant by writ in an action for foreclosure desires a sale, but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file and serve a memorandum, entitled in the action, to the following effect: "I desire a sale of the mortgaged premises instead of foreclosure," and shall pay into Court the sum of $80 to meet the expenses of the sale, and thereupon the judgment shall be entered for sale. C.R. 381.

462. A person made a party in the Master's office and desiring a sale shall make a similar deposit before the Master's report is settled, and obtain an order which may be issued on *præcipe* directing sale instead of foreclosure, and thereupon all subsequent proceedings shall be had and taken as if the judgment had been in the first instance for sale. C.R. 382.

Rule 462.

Incumbrancer made a party to a foreclosure action in the M. O., may apply for a sale.

The officer out of whose office the writ was issued is the proper officer to issue the *præcipe* order: *Rule* 762. For form of order: see H. & L. Forms No. 912.

Tha *præcipe* should show on whose behalf the application is made, and should also state that the applicant is an incumbrancer, made a party in the Master's office, who has proved a claim; and that the Master's report has not been settled; and should be accompanied by ths certificate of the Accountant of the payment into Court of the requisite deposit of $80.

Præcipe for sale, form of.

If the plaintiff deems the deposit inadequate he may require an adult defendant obtaining the order for sale to conduct the sale: see *Rule* 464.

Chy. O. 429, from which this *Rule* is adapted, required the deposit of "a reasonable sum." The usual amount required was $80, hut, on special application before the sale, it was sometimes increased: *London & C. L. & A. Co.* v. *Morrison*, 7 P. R. 450; 15 C. L. J. 57. But an application after the sale had taken place to increase the deposit would not he entertained, even though the sale had failed to realize the smount of the plaintiff's claim: *London & C. L. & A. Co.* v. *Pulford*, 7 P. R. 432; 15 C. L. J. 55; and probably, even before sale, such an application would not now he entertained: see *Cruso* v. *Close*, *infra*.

By the form of indorsement on the writ in mortgage actions, the amount of the deposit to he made hy a defendant served with the writ, in order to secure a sale, is $80: see Form 4 (*b*); H. & L. Forms, No. 58. When tha sale is applied for hy an original defendant to the action, an application to increase the amount of the deposit cannot be entertained, even though the costs of the sale will exceed $80: *Cruso* v. *Close*, 8 P. R. 33.

Deposit to secure sale in mortgage cases.

The deposit will not he dispensed with, even though the security be ample: *Thompson* v. *Macaulay*, 3 Chy. Ch. 111; or the applicant be a trustee: *Machell* v. *Campbell*, 5 U. C. L. J. 117; and a defendant cannot claim a sala against the consent of tha mortgagee without making the deposit: *Taylor* v. *Walker*, 8 Gr. 506; except in the case of infant defendants, who are entitled to a sale, without the usual deposit: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; *Lawroson* v. *Fitzgerold*, 9 Gr. 371; hut see *Western Canada Loan & S. Co.* v. *Dunn*, 9 P. R. 587.

Cannot he dispensed with.

Except in case of infant defendant.

Where the sale realizes sufficient to pay the plaintiff's claim, hut not the claims of subsequent incumbrancers, the deposit will be ordered to ha applied on account of the claims of the intter, according to their priorities: *Gzowski* v. *Beaty*, 8 P. R. 146. And where the sale proved abortive, except as to one parcel, which did not realize sufficient to pay tha plaintiff's claim, the deposit was applied on account of plaintiff's costs of sale: *Corsellis* v. *Patman*, L. R. 4 Eq. 155. Whera the

Deposit, how applied.

Rules 463-465.

sale realizes sufficient to pay tha claims prior to tha incumbrancer who paid in the deposit to secure a sale. the lattar is entitled to obtain an order to refund it.

Although a mortgagee hy deposit is not entitled to a sale: see *Rule* 460, note; yet a suhsequent legal mortgagee made a party to the suit by the equitahle mortgagee, is entitled to apply for a sale under this *Rule*: *Kerr* v. *Beebe*, 12 Gr. 204.

463. Where there are infant defendants the official guardian may require the judgment to be for sale without making any deposit. *New.*

Plaintiff may require defendant asking sale to conduct it.

464.—(1) If the plaintiff prefers that the sale be conducted by any adult defendant desiring the sale, he may so elect; and he shall thereupon notify the defendant of such election and the defendant making the deposit shall be entitled to a return thereof. C.R. 383 and 384.

On filing notice, deposit to be returned to defendant.

(2) In other cases the Master shall deal with the deposit in making his report. *New.*

Plaintiff may have reserved bid fixed.

Where the defendant claims a sale contrary to the wish of the plaintiff, the latter may protect himself against the mortgaged property being sold for less than his claim by getting a reserved bid fixed, and in tha event of the sale proving abortive, he may obtain a final order for foreclosure: see note to *Rule* 460.

Before the money can be obtained proof will have to be given to the Accountant of tha dua filing of the notice of election. The production of an offica copy, with a certificata of its heing filed, would seem to be the proper proof

As to the application of the deposit: see notes to *Rule* 462.

Rules 462, 463 only apply to cases in which it is competent for the Court to pronounca a judgment for aale, they consequently do not apply where, on the record, such relief cannot be granted, *e.g.*, they do not apply even where infanta nre concerned, to an action by a mortgagea for possession merely: *Western Con., etc.*, v. *Dunn*, 19 C. L. J. 211.

Sale may be ordered instead of foreclosure.

465. The Court may on special application either before or after judgment direct a sale instead of a foreclosure; and without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem. C.R. 379.

Ordinary time for redemption, when shortened.

Some special ground must be shewn in order to deprive the mortgagor of the ordinary six months' time to redeem: *Rigney* v. *Fuller*, 4 Gr. 198; *Swift* v. *Minter*, 27 Gr. 217; *Newman* v. *Selfe*, 33 Beav. 522; and even where nn application for sale was mada in a foreclosure suit, by subsequent incumbrancers, after the time allowed them for redemption had expired, it was held that tha mortgagor was entitled to an opportunity to redeem, before a final order for aale could be made: *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Ch. 41.

Rule 466.

Where the writ claims foreclosure, the defendant is entitled to have the judgment drawn up for sale, on paying into Court $80; see Form No. 4 (*b*); and where a judgment has been entered for foreclosure, a subsequent incumbrancer may also, on being made a party, at any time before the report is settled, on making a like payment, obtain on *præcipe* an order for sale in lieu of foreclosure: see *Rule* 462. The $80 is intended as security for the costs of the sale: see notes to *Rule* 462.

Defendants, when entitled to a sale in foreclosure action.

On the Court being satisfied by evidence that the value of the mortgaged property was not sufficient to pay the amount due to the plaintiff, and that it was for the benefit of infant defendants, an account was dispensed with, and a judgment for immediate foreclosure was granted on the consent of the infant's solicitor: *Wolverhampton & Staffordshire Banking Co.* v. *George*, 24 Ch. D. 707; and see *Lloyds Bank* v. *Colston*, 106 L. T. 420.

A judgment for an immediate sale, without appointing any day for redemption, can only be granted on motion for judgment; it cannot be awarded on *præcipe*. The motion may be made in Chambers, where infants are concerned: see *Rule* 466; *Cayley* v. *Colbert*, 2 Chy. Ch. 431; but in other cases the motion must be to the Court. An immediate sale has been granted on the consent of the mortgagor, and without the consent of the subsequent incumbrancers: *Township of Hamilton* v. *Stephenson*, 25 Gr. 198; but Blake, V.C., repeatedly refused to make such a decree without the consent of the subsequent incumbrancers, on the ground that the equity of redemption might be worthless, and the mortgagor might have really no interest in the mortgaged property.

Judgment for immediate sale, how awarded.

Where a decree for sale was pronounced in Court, the Referee in Chambers refused to entertain a motion for a final order for sale, before the time for redemption had expired: *Buell* v. *Fisher*, 6 P. R. 51.

Where a judgment for sale, or foreclosure, has been pronounced, it is not competent for the mortgagee to abandon the judgment, and proceed to sell under a power of sale in his mortgage: *Stevens* v. *Theatres*, 1903, 1 Ch. 857; 88 L. T. 458.

Plaintiff cannot abandon judgment, and exercise power.

466. In a mortgage action where the defendants, or some of the defendants, are infants and default is made by the adult defendants and the official guardian does not desire to set up any defence, the plaintiff, upon filing affidavits showing such facts and circumstances as entitle him to judgment, may move for judgment in Chambers, upon notice to the official guardian. C.R. 595. *Amended.*

Judgment for redemption, foreclosure or sale, where infants are defendants may be made in Chambers.

This *Rule* enables judgment to be pronounced in Chambers, as against infants, and adult defendants, who are *sui juris*, but where any of the adult defendants is a lunatic, or person of unsound mind not so found. It is necessary that the motion for judgment should be made in Court: *Warnock* v. *Prieur*, 12 P. R. 264.

When anything beyond the ordinary relief is required, as for example an injunction, it would seem that the motion for judgment should be made in Court: see *King* v. *Freeman*, 1 Chy. Ch. 350.

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Day to shew cause.

In judgments for foreclosure against infants, a day to shew cause must still be inserted: *Mellor* v. *Porter*, 25 Ch. D. 158; *Gray* v. *Bell*, 46 L. T. 521; *London & C. L. & A. Co.* v. *Evcritt*, 8 P. R. 489; *Mair* v. *Kerr*, 2 Gr. 223; and the final ordar must also reserve a day to suew cause. The formal worda usually inserted in Ontario are "and this judgment [or order] is to be binding upon [*name of infonts*] unless being served with a copy thereof on attaining the age of twenty-ona years. they do, within six months after such service. shew unto this Court good causs to the contrary": sec Seton, 5th ed., 827.

When unnecessary.

No day to shew cause is reserved in judgments for sale; nor in judgmeuts against infant trustees of real estate: *Foster* v. *Parker*, 8 Ch. D. 223, and see *Wolverhampton, etc.* v. *George*, 24 Ch. D. 707. Thus, in a redemption suit against an infant for redemption of innd conveyed to the infant's ancestor by deed absoiuta in form, it was held that no day to shew cause ahould he reserved in the decree directing a reconveyance: *Lake* v. *McIntosh*, 7 Gr. 532.

Where a decree for foreclosure was mads against the ancestor, who died before a final order was obtained, it was unnecessary to reserve a dsy to shew cause in favour of infant heirs of the mortgagor, as to whom the proceadings were revived: *Sutherland* v. *Dickson*, 2 Chy. Ch. 25; *Younge* v. *Cocker*, 76 L. T. Jour. 247; and infant parties, in such circumstances, could not set up a defsnce, which their ancestor had not set up, unless he had been prevented, by fraud, or mistake, from pleading it: *Burke* v. *Pyne*, 2 Chy. Ch. 193; hut now, in such circumstances, the estate of the mortgagor descends to his psrsonal representative: *The Devolution of Estates Act* (R. S. O. c. 119) s. 3.

As to defences opsn to an infant shewing cause: see Seton, 5th ed., 828, 830.

Inquiry whether sale or foreclosure more beneficial for infant, directed as of cou. .

Formarly where infants wera dafendants in an action for foreclosure befora judgment, the Court would direct a reference to the Master, as of course, to inquire whether a sale, or foreclosure, would be the more beneficial for the infants, and direct a sale, or foreclosure, accordingly, or it would determine the question, on ths motion for judgment, if affidavits were produced, or th Guardian *ad litem* consented to dispense with tha reference on that point: *Dudley* v. *Berczy*, 13 Gr. 141; hut see *Graham* v. *Davis*, 2 Chy. Ch. 24; and if a sale was directed on the application of infant defendants, no deposit was required from the infants: *Bank of Upper Canada* v. *Scott*, 6 Gr. 451; *Lawrason* v. *Fitzgerald*, 9 Gr. 371, this practice is now embodied in *Rule* 463. Whether a personal representative of a deceased mortgagor would be entitled to a sale without a deposit, where infants are beneficially interested in the equity of redemption, has not been thus far determined.

Where the judgment directs an inquiry whether a sale or foreclosure would be more beneficial for infant defendants, if the Master omits to report on thnt point, no final order can be granted: *Edwards* v. *Burling*, 2 Chy. Ch. 48.

When judgment may be signed in mortgage action.

467.—(1) Where the writ has been duly indorsed, and the defendant fails to appear, or by his statement of defence admits the execution of the mortgage and other

facts entitling the plaintiff to a judgment, or where the defendant disclaims any interest in the mortgaged premises, or where no statement of defence is delivered, or where the defendant disputes the amount of the plaintiff's claim only, the plaintiff may sign judgment. Rule 447.

(2) Where the defendant has disputed the amount of the plaintiff's claim, he shall be entitled to four days' notice of the taking of the account. Where no reference as to incumbrances is desired, such account may be taken by the officer signing judgment; whose finding shall be subject to appeal to a Judge in Chambers in the manner prescribed for appeals from the Master in Chambers. Procedure, when dispute filed.

(3) Where the writ has not been personally served, the claim of the plaintiff shall be duly verified by an affidavit which shall be filed with the officer taking the account. C.R. 596. *Amended.* Plaintiff's claim to be verified when writ not personally served.

Where a reference as to incumbrances is desired the reference must be to the Master in Ordinary, or Local Master of the County in which the action is pending.

Where the indorsement on the writ claims foreclosure, and the defendant files a notice requiring a sale and a certificate of the deposit of the sum of $80 as required by *Rule* 461, the judgment must be for sale, together with such other relief, if any, as the plaintiff is entitled to, upon the indorsement.

Where in the defendant's appearance, or otherwise, a notice disputing the amount of the plaintiff's claim only is filed, the defendant filing the same is entitled to four days' notice of the taking of the account. Where no reference as to incumbrances is desired, the account is taken by the officer signing judgment; and where a reference as to incumbrances is desired, then by the Master to whom the action is referred. The finding of the officer taking the account as to the amount due on signing judgment is subject to appeal to a Judge in Chambers in the manner prescribed by *Rule* 502. If a stay of proceedings until the time for appealing has expired is desired, an application to a Judge would appear to be necessary: see *Rule* 208 (16). Notice of taking account.

Where a reference as to incumbrances is directed, in a case where a dispute note has been filed, the judgment should direct that the defendant filing such notice shall have four days' notice of the taking of the account.

The *Rule* applies only to ordinary cases: where any special relief is desired a motion for judgment will be necessary.

A motion for judgment was held to be necessary, where costs of proceeding under the power of sale, and moneys expended for repairs, were claimed: *Hannaford* v. *Neeley*, 9 C. L. T. 38; or immediate foreclosure: *Gibson* v. *McCrimmon*, 9 C. L. T. 40; but since *Hannaford* v. *Neeley* the form of special indorsement has been changed so as to include such claims as were there in question. Motion for judgment, when necessary.

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Cases covered by Rule 467.

It will be seen that this *Rule* covers five classes of cases.

(*a*) Where defendant does not appear.

(*b*) Where the defendant by his defence admits the mortgage and other facts entitling the plaintiff to judgment:

(*c*) Where the defendant disclaims any interest in the mortgaged premises:

(*d*) Where no defence is filed:

(*e*) Or where only a notice disputing the amount claimed is filed.

It is not necessary that all the defendants should be in the same position, in order to entitle the plaintiff to judgment under this *Rule*, it is sufficient if they all come within one or other of the five classes of cases above mentioned; and the judgment should be against all of the defendants and not against some only: see *McLaughlin* v. *Stewart*, 1 O. L. R. 295.

Where the writ is issued from a local office, the judgment should be entered in that local office: *Chamberlain* v. *Armstrong*, 9 P. R. 212; and see *Rule* 762.

Where any of the defendants are infants, or lunatics, or persons of unsound mind not so found, judgment cannot be obtained under this *Rule*, but in the case of infants it may be obtained on motion in Chambers: see *Rule* 466, and in the case of lunatics, etc., a motion in Court is necessary: *Wornock* v. *Prieur*, 12 P. R. 264.

For forms of judgment, see Forms Nos. 101, 102. These forms require modification according to the nature of the relief claimed in the writ. See H. & L. Forms, Nos. 904, 905, 906, 908 and 909.

Indorsement on writ.

Where the writ has not been sufficiently indorsed with a statement of the relief claimed, according to the form prescribed by *Rule* 460, it would seem that the officer may properly refuse to enter judgment as of course: *Pherill* v. *Forbes*, 8 P. R. 408.

In a foreclosure action, where the mortgagee applies for judgment in default of appearance, or defence, not only for foreclosure, but also for a personal order for payment, the indorsement on the writ, or the statement of claim, ought to contain an express statement of the covenant upon which the order is claimed: *Law* v. *Philby*, 56 L. T. 230; 35 W. R. 401; and see Form No. 4 (*a*); H. & L. Forms, Nos. 57, 58.

As to the form of judgment, when immediate payment under the covenant for payment is desired, as well as the usual judgment for foreclosure: see notes to *Rule* 460, *supra*, p. 1027.

Praecipe judgment, form of.

Under Chy. O. 435, on which this *Rule* is mainly founded, it was held that the Registrar was bound to issue on *praecipe* the decree which the Court would itself make upon a hearing of the cause *pro confesso*; *Kirkpatrick* v. *Howell*, 22 Gr. 94; *Buell* v. *Towns*, *Ib.*, 95; but extraordinary relief could not be granted by judgment on *praecipe*, nor can such a judgment be properly granted under this *Rule*: thus, an immediate sale, or foreclosure, without appointing a day for redemption, cannot be granted, even though the relief be claimed by the writ or statement of claim: *Potey* v. *Flint*, 48 L. J. Chy. 696. To obtain such relief, a motion for judgment in Court under *Rule* 356 is necessary. On such a motion, however, special grounds for immediate foreclosure or other special relief, must be shewn though the defendant

Extraordinary relief not granted.

has not appeared, otherwise only the usual judgment will be given: *Meredith* v. *McCabe*, 19th January, 1881, Boyd, C., see also *North of Scotland, etc.*, v. *Beard*, 9 P. R. 546. Rule 487.

Where no appearance has been entered, the plaintiff can not, unless he serves the statement of claim on the defendant personally, enlarge by it the scope of the claim indorsed on the writ, *Rule* 109 (2); and on motion for judgment according to the terms of relief claimed in the statement of claim, in default of appearance, the usual foreclosure judgment only should be given, when that is the only relief claimed by the writ, notwithstanding that by the statement of claim additional relief is claimed, if it has not been personally served on the defendant: see *Law* v. *Philby*, 56 L. T. 522; 35 W. R. 450; *Gee* v. *Bell*, 35 Ch. D. 160.

Where the defendant is a married woman, and the writ is indorsed with a claim for execution against her separate estate, where the action is founded on a contract made before 13th April, 1897, the indorsement should allege that she had, when she made the contract sued on, and still has, separate estate, and when the writ is properly indorsed judgment may be signed under this *Rule*: *Nesbitt* v. *Armstrong*, 14 P. R. 366; *The Married Women's Property Act* (R. S. O. c. 149), ss. 4, 5. This allegation is not necessary in the case of contracts made by a married woman since 13th April, 1897: see *Ib.* s. 5. Married woman defendant.

For form of judgment for payment against a married woman: see Form No. 110; H. & L. Forms, Nos. 923, 924.

Where the plaintiff had obtained an interlocutory injunction, it was held that it could not be continued by a *præcipe* decree: *King* v. *Freeman*, 1 Chy. Ch. 350, the power to issue decrees on *præcipe* being confined to simple cases, where the ordinary decree for foreclosure, or sale, with order for payment and delivery of possession, was all that was required. Thus, where the defendant answered admitting the mortgage, but denying an alleged agreement to pay an increased rate of interest, and set up a tender, and claimed costs, it was held that a decree could not be granted on *præcipe*. Nor could a decree issued on *præcipe* in such a case be amended in Chambers, by inserting a direction to the Master to inquire as to the alleged tender: *Ross* v. *Vader*, 3 Chy. Ch. 236. Interlocutory injunction cannot be continued by.

Reference as to Incumbrances.—The plaintiff must determine for himself whether he takes a judgment with a reference to the Master as to incumbrancers. If he takes a reference unnecessarily, he will not be entitled to the costs of it: *Hamilton* v. *Howard*, 4 Cr. 581; *Purdy* v. *Parks*, 9 P. R. 424. If he omits to take a reference where one is necessary, his proceedings will be defective: see *Wilgress* v. *Crawford*, 12 P. R. 658. Reference as to incumbrances.

Varying Præcipe Judgment.—A decree pronounced *pro confesso* or on *præcipe*, might be varied, or set aside, on motion in Chambers, without rehearing the cause: see *Kline* v. *Kline*, 3 Chy. Ch. 79; *Nelles* v. *Vandyke*, 17 Gr. 14; and the same rule applies to judgments on *præcipe* under this *Rule*: *Trust & Loan Co.* v. *McCarthy*, 19 C. L. J. 188; 3 C. L. T. 266. Varying judgment.

Where a plaintiff had taken judgment without a reference, and after the mortgagor was foreclosed, discovered there was an incumbrancer, on an interlocutory application the judgment was amended by directing the usual reference as to incumbrancers: *Wilgress* v. *Crawford*, 12 P. R. 658; and see *Lally* v. *Longhurst*, *infra*, p. 1040.

Statute of Limitations.—It has been decided that a defendant filing a disputing note in a mortgage action may, on the taking of the Statute of Limitations.

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accounts, shew that the Statute of Limitations applies so as to prevent the recovery of more than six years' arrears of interest: *Wright* v. *Morgan*, 1 Ont. App. 613, overruling the decision reported, 24 Gr. 457. But the statute must be pleaded if the defendant wishes to set it up as a bar to the action; *Cattanach* v. *Urquhart*, 6 P. R. 28, explained, 1 Ont. App. 616; see also notes to *Rule* 143.

Discovery.

Discovery.—It was held also under the former Chancery practice that a disputing note was not an answer, and therefore Gen. Order 134 (see *Rule* 348) allowing a defendant after answer to obtain on *praecipe* an order for production, did not apply: *Richardson* v. *Beaupré*, 2 Chy. Ch. 54. It would seem that under the present *Rules* the filing of a mere dispute note would not disentitle a defendant to examine for discovery: see *Rule* 336 and notes; and it would seem that he might, under *Rule* 348, give notice to produce documents.

Master to inquire as to incumbrances.

468. Upon a reference under a judgment for foreclosure or sale or redemption of mortgaged property, the Master shall inquire and state whether any person, and who, other than the plaintiff, has any lien, charge, or incumbrance upon the land and premises embraced in the mortgage security of the plaintiff, subsequent thereto. C.R. 744.

This *Rule* in its terms applies only to the case of mortgages of lands, but a similar procedure is followed upon a judgment for the sale, or foreclosure of chattels.

Master to inquire as to incumbrancers subsequent to plaintiff.

The inquiry is confined to subsequent incumbrancers; persons against whom relief is sought, who are entitled to the ultimate equity of redemption, or whose claims, if any, are *primâ facie* prior to the plaintiff's must be made parties to the writ: *Glass* v. *Freckleton*, 10 Gr. 470; *Lally* v. *Longhurst*, 12 P. R. 510; and see *White* v. *Beasley*, 2 Gr. 662; and as to the wife of the mortgagor: see *Blong* v. *Fitzgerald*, 15 P. R. 467; and see 30 C. L. J. 113. Where, however, the plaintiff has sought to attack, in the Master's office, the priority of an incumbrancer who is *primâ facie* entitled to priority over him, he has been allowed to vacate his judgment and to add the incumbrancer as an original defendant to the writ, and proceed *de novo* as against him: *Lally* v. *Longhurst*, *supra*. Where the mortgagor was the only defendant, and a decree, by consent, for immediate foreclosure was taken against him, a reference as to incumbrances was refused: *Taylor* v. *Ward*, 13 Gr. 590; but it seems doubtful whether the rule laid down in that case would be followed under the present practice. Where there are no incumbrancers, the plaintiff should not take a judgment with a reference as to incumbrances: see *Rule* 519, and notes.

The incumbrancers are ascertained by the production of the certificates mentioned in the following *Rule*.

Plaintiff to bring into M. O. Sheriff's and Registrar's certificates.

469. The plaintiff shall bring into the Master's Office certificates of the Registrar and Sheriff of the County wherein the property lies, setting forth all the incumbrances which affect the property and such other evidence as may be necessary. C.R. 745.

The certificates should be brought down to, at least, the day subsequent to the issue of the writ in the action. Rule 466.

It is not necessary to add as parties, those who acquire title *pendente lite*: *Robson* v. *Argue*, 25 Gr. 407; *Waldridge* v. *Martin*, 2 Cby. Ch. 275; *Bellamy* v. *Sabine*, 1 D. & J. 566, 578, 580, 584; 3 Jur. N. S. 943; *Tyler* v. *Thomas*, 25 Beav. 47; an order adding parties who had acquired interests *pendente lite* was set aside: *Abell* v. *Parr*, 9 P. R. 564; but see *Lindsay* v. *Bank of Montreal*, 13 Gr. 86. A party acquiring an interest in the subject matter of an action *pendente lite*, may be added as a defendant on his own application: *Gibson* v. *Nelson*, 2 O. L. R. 500; 35 S. C. R. 181, but he is bound by the proceedings as they stand, and is not entitled, as of right, to any extension of time to redeem, and must pay the costs of the application: *Re Parbola*, *Blackburn* v. *Parbola*, 1909, 2 Ch. 437; 101 L. T. 382. See further notes to *Rule* 300, *supra*, p. 758. Parties acquiring title pendente lite need not be added.

Sheriff's Certificate.—Where the mortgage is of freehold lands, the certificate of the Sheriff must relate to executions against lands, but where the property mortgaged is leasehold, or chattels, it should relate to executions against goods: *Sparrow* v. *Champagne*, 5 C. P. 394. The certificates are usually confined to executions against the mortgagor, or other owner of the equity of redemption. But when the practice of registration of judgments was in force, it was held to be necessary to make the judgment creditors of the mortgagee parties also: *Sanderson* v. *Ince*, 7 Gr. 383; but in a later case it was held that a creditor of the mortgagee who had obtained an order attaching the mortgage debt, but not an order to pay over, was not an incumbrancer, and ought not to be made a party: *Crosbie* v. *Fenn*, 26 Gr. 283. The Sheriff's certificate should be so worded as to include writs which have been withdrawn for renewal, this may be done by making the certificate cover any writs which have been in the Sheriff's hands within thirty days preceding its date: see form of such a certificate. H. & L. Forms, No. 1479. Sheriff's certificate, form of.

The withdrawal of a writ for renewal is not an abandonment of its priority, but on being returned to the Sheriff renewed, it retains the same position it held prior to its withdrawal for renewal: *Rowe* v. *Jarvis*, 13 C. P. 495; *Muir* v. *Munroe*, 28 U. C. Q. B. 139. The day of the teste of a *fi. fa.* is inclusive, so that a writ issued on the 15th day of a month expires on the 14th day of the same month in the last year of its currency: *Bank of Montreal* v. *Taylor*, 15 C. P. 107. A writ withdrawn for renewal, and not returned for fifteen days thereafter, when a year from the teste had expired, was held, nevertheless, to be redelivered in sufficient time: *Menelily* v. *McKenzie*, 3 E. & A. 209; but a writ not returned to the Sheriff until six months after its renewal—owing to mistake—was held to have lost its priority: *Re Hime & Ledley*, 13 P. R. 1; as to the currency and renewal of writs of *fi. fa.*, see *Rule* 571. A direction by the execution creditor to the Sheriff to stay proceedings, is tantamount to a withdrawal of the writ, and any subsequent execution then in the Sheriff's hands, or thereafter, and during the stay, coming to his hands, will take priority: *Trust & Loan Co.* v. *Cuthbert*, 12 Gr. 412. Under *The Creditors' Relief Act*, (R. S. O. c. 81), the question of priority between execution creditors is to a large extent done away with: see s. 4. Withdrawal of writ for renewal is not an abandonment. But a direction to the sheriff to stay is

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Registrar's certificate.

Registrar's Certificate.—The Registrar's certificate is usually confined to registrations on the particular parcel of land included in the plaintiff's mortgage. But it is well to bear in mind, that judgments for alimony registered against a defendant, bind all his lands situate within the county, or counties, in which the registration is made, without any local description: see Jud. Act, s. 73, *supra*, p. 33.

C. C. Clerk's certificate, when necessary.

Where the mortgaged property consists of chattels, the certificate of the Clerk of the proper County Court should be produced, as to subsequent mortgages.

It is to the interest of the plaintiff to take care that all persons, having any claim as subsequent incumbrancers, are made parties; as the omission to make them parties at the proper time, may lead to difficulty in carrying out any subsequent sale which may be had in the action and possibly render another action necessary: see *Lally* v. *Longhurst*, in note to *Rule* 468, p. 1040.

Master is to add parties.

470. The Master shall direct all such persons as appear to have any lien, charge or incumbrance upon the property in question, subsequent to the mortgage in question, to be made parties to the action, and to be served with a notice (Form No. 43). C.R. 746.

For Form No. 43: see H. & L. Forms, No. 1022.

Rights of parties whose claims appear doubtful not to be decided in their absence.

Where it is doubtful whether persons, appearing to have claims, have any valid right, the question should not be determined against them in their absence, but they should be added as parties, and an opportunity given them to maintain their claims: *Canada Landed Credit Co.* v. *McAllister*, 21 Gr. 593. Persons whose claims, if any, would be prior to the plaintiff's should be made parties to the writ, if any relief is claimed against them, and not added in the Master's office: *Gloss* v. *Freckleton*, 10 Gr. 470; *Lolly* v. *Longhurst*, 12 P. R. 510; and see *Rule* 488. Persons having mechanics' liens subsequent to the plaintiff should be added under this *Rule*, and not made parties by the writ: *Jackson* v. *Hommond*, 8 P. R. 157. Under the former *Mechanics' Lien Act* an execution creditor whose writ was placed in the Sheriff's hands subsequent to the registration of a mechanic's lien, but prior to the institution of an action to enforce it, was a subsequent incumbrancer, and might be made a party to the action to enforce the lien, in the Master's office notwithstanding the 90 days limited by R. S. O. 1887, c. 126, s. 23, had expired: *Cole* v. *Hall*, 12 P. R. 584, affirmed by C. A., 18 P. R. 100; but under the present *Mechanics' Lien Act* (R. S. O. c. 140), it would seem that such an execution creditor should be made an original party. A creditor of a mortgagee who has obtained an attaching order against the mortgage debt, but who has not obtained an order to pay over, is not an incumbrancer within the meaning of the *Rule: Crosbie* v. *Fenn*, 26 Gr. 283; neither is a simple contract creditor of the mortgagor, nor has he any right of redemption: *Nichol* v. *Allenby*, 17 Ont. 275; and where a tenant in common mortgages his share, his co-tenants have no equity to redeem that share: *Ib.*

Mechanics' liens.

Attaching creditor of mortgagee.

Deceased mortgagee, representatives to be added.

Where a subsequent mortgagee is dead his real representatives should not be made parties, it is only necessary to add his personal representatives: *Whitla* v. *Holliday*, 4 D. & W. 267; *Taylor* v. *Stead* 1 Chy. Ch. 74; *Grimshowe* v. *Parks*, 6 U. C. L. J. 142; *Lawrence* v.

Humphries, 11 Gr. 209; *The Mortgages Act* (R. S. O. c. 112), s. 10; *Dilk* v. *Douglas*, 26 Gr. 99; *Robinson* v. *Byers*, 9 Or. 572; and see *The Devolution of Estates Act* (R. S. O. c. 119), ss. 3, 4. And where a mortgage is taken in the name of one partner to secure a partnership debt, it is not necessary to add the real, or personal, representatives of a deceased partner in an action by the surviving partner to enforce the security: *Stephens* v. *Simpson*, 12 Gr. 493. Rule 471.

To an action for sale, or foreclosure, by a mortgagee of a limited company, whose mortgage covers specific property, debenture holders, secured by a subsequent mortgage constituting a floating security on all the property and undertaking of the company, are proper parties and even though their debentures are not due, they should be added under *Rule* 470; *Wallace* v. *Evershed*, 1899, 1 Ch. 891; 80 L. T. 523.

Subsequent incumbrancers should not be made defendants by writ, even in an action to enforce an annuity: *Nelson* v. *Cochrane*, 13 P. R. 76.

Where a person is entitled to rights in two different capacities, if he be made a party to an action distinctly as regards his right in one capacity, he may not be bound as to his rights in the other capacity; e.g., a person made a defendant as a judgment creditor, was held not to be bound in his character of mortgagee: *Crooks* v. *Watkins*, 8 Gr. 340. Person filling two capacities should be added in both or may not be bound.

Where an execution creditor is made a party in the Master's office as a subsequent incumbrancer, service of the notice (Form 43) upon his solicitor in the action in which the execution was recovered is sufficient: see *Rule* 202. Where it is brought to the notice of the Master that there are parties having subsequent unregistered claims against the lands, they should be made parties in his office: *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442.

A mortgagor's tenant for years is entitled to redeem, if the mortgagee refuse to concur in the lease: *Tarn* v. *Turner*, 39 Ch. D. 456; 58 L. T. 558; and should be added as a party; and see *Anderson* v. *Stevenson*, 15 Ont. 563; but the tenant is not a subsequent incumbrancer, and cannot be added in the Master's office as such: *McLaughlin* v. *Stewart*, 1 O. L. R. 295; but see *Rule* 490.

Persons added as parties under this *Rule* become parties from the date of the notice (Form No. 43), not merely from the date of its service: *Sterling* v. *Compbell*, 1 Chy. Ch. 147.

471. Any party served with such notice may apply at any time within 10 days from the date of the service, to discharge, add to, vary, or set aside the judgment, or the order making him a party. C.R. 747. Parties added may move against order.

Where a party added by the Master, claims to be prior to the plaintiff, he should move to discharge the Master's order: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; 20 C. L. J. 133.

In *Montgomery* v. *Shortis*, 3 Chy. Ch. 69, the motion to discharge an order adding a party, appears to have been entertained in Chambers; and in *McDonald* v. *Rodger*, 9 Gr. 75, the question was raised on an appeal from the Master's report; and in *Kline* v. *Kline*, 3 Chy. Ch. 161, an application was made to the Master himself, to discharge Motion to discharge order adding parties in M. O., how made.

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his order adding a party under *Rule* 404, on grounds disclosed subsequent to the making of the order.

Motion to vary judgment must be made to the Court.

Where the party added, desires to move to vary, or set aside the judgment, the motion must be made to the Court at its weekly sittings, and the motion must be returnable within fourteen days from service of the notice on the party moving: *Miller* v. *Brown*, before Proudfoot, V.C., 23rd November, 1880; *Wright* v. *Wright*, before Blake V.C., 29th March, 1881; and see *McIlroy* v. *Howke*, 3 Chy. Ch. 66; *Harris* v. *Meyers*, 16 Gr. 117; *Jackson* v. *Gardiner*, 2 Chy. Ch. 385.

Leave to move when necessary.

Where the fourteen days is suffered to elapse, before the motion is made returnable to discharge the order, or to vary, or set aside, the judgment, the party added must first obtain leave to move, before he can move to very, or set aside, the judgment, or set aside the order adding him as a party: *Roe* v. *Stanton*, 15 Gr. 137; *McIlroy* v. *Hawke*, 3 Chy. Ch. 66. This leave, in a proper case, may be obtained on motion in Chambers, but where the applicant failed to show a *primâ facie* case, leave was refused: *Box* v. *Bridgman*, 6 P. R. 234.

A subsequent incumbrancer is not entitled to have the judgment varied so as to require the plaintiff to bring before the Court parties for the purposes of effectuating relief to which the incumbrancer is entitled; his remedy is to redeem, and then to proceed on his own account to obtain such relief: *Rutherford* v. *Rutherford*, 17 P. R. 22[illegible].

Incumbrancers to be served with appointment.

472. The Master before he proceeds to hear and determine shall require an appointment (Form No. 44) to be served upon all persons made parties before the judgment appearing to have any lien, charge or incumbrance upon the lands in question, subject to the plaintiff's mortgage, and shall in the notice to the defendant by writ, required by Rule 403, state the names and nature of the claims of those so notified, and of those added under the provisions of Rule 470 as appearing to have a lien, charge or incumbrance upon the said lands, and such notice may be in the Form 45. C.R. 748 and 1306.

For Form No. 44: see H. & L. Forms, No. 1023.

Defendant who has not appeared entitled to notice of proceedings in M.O.

Under the former practice in Chancery, it was held that notwithstanding a bill might have been taken *pro confesso* against a defendant he was, nevertheless, entitled under certain circumstances, to notice of proceedings in the Master's office: *Robinson* v. *Whitcomb*, 20 Gr. 415; *McCormick* v. *McCormick*, 6 P. R. 208; *Buchanon* v. *Tiffany*, 1 Gr. 98; *Walsh* v. *Bourke*, *Ib.* 105; *Hawkins* v. *Jarvis*, Ib. 257; 1 E. & A. 246; *Strachon* v. *Murney*, 6 Gr. 284; *but see Perrin* v. *Davies*, 3 Gr. 161. In mortgage cases it was customary to notify not only subsequent incumbrancers who were parties to the bill, as required by this *Rule*, but also the mortgagor, whenever the plaintiff proved any other claim in addition to that alleged in his bill, or where subsequent incumbrancers were added, even though the bill had been taken *pro confesso*: see *McCormick* v. *McCormick*, *supra*; but see *Baby* v.

Woodbridge, 5 U. C. L. J. 67. But a defendant cannnt, in tha Master's nffice, rely nn any dofence which, if sustained, would have tha effect of determining that iha Cnurt had made a nugatory order or judgment: *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247; *Wilby* v. *Ledyard*, *Ib.* 182. Rule 473.

Under the present practice thore is nnw an equivalent proceeding to the formar proceedings *pro confesso*; see *Rules* 35, 121, 354, 356; *Rule* 35 expressly provides that defendants who do not appear "except where otherwise provided or ntherwise ordered, shall not be entitled to notice of any subsequent proceedings in tha action." This *Rule* contains such a provisinn for notice to such defendants. Under *Rule* 200 non-appearing defendants may be served by postin[illegible] the document required to be served "in the office where the proceedings are being conducted," unless the Court sees fit to order otherwise.

Parties not attending, may be foreclosed.

473. When a person who has been duly served with a notice under Rule 470 or with an appointment under Rule 472 neglects to attend at the time appointed, the Master shall treat such non-attendance as a disclaimer by the person so making the default; and any claim of such person shall be thereby foreclosed, unless otherwise ordered upon application duly made for that purpose. C.R. 749.

Application to incumbrancer to be let in to prove after foreclosure.

Notwithstanding that a subsequent incumbrancer has been foreclosed under this *Rule*, he may in some cases nhtain leave to prove his claim. Applications for leave to be let in after tho time has expired must be obtained from tho Master, if no report has been made, and where the report has issued, then upon motion in Chambers. After a Master has made his* general report, he is thon *functus officio*, and there would therefore he no jurisdiction in the Master in Ordinary to entertain such an application undor *Rule* 433; hut a Local Master having a general juriediction in Chambers under *Rule* 209 would appear to he entitled to entertain such an application. In *Becher* v. *Webb*, 7 P. R. 445, relief was given on tha terms of postponing the applicant tn e subsequont incumbrancer, who had duly proved his claim: and see *Catell* v. *Simons*, 8 Beav. 243; *Hull* v. *Falconer*, 11 Jur. N. S. 151; *Cameron* v. *Wolfe Island Ry. Co.*, 6 P. R. 91; hut in *Ross* v. *Stevenson*, 7 P. R. 126; *Sterling* v. *Compbell*, 1 Chy. Ch. 147, relief was granted, without postponing the applicant.

Terms on which motion granted.

Where an incumbrancer had proved his claim on one mortgage, he was afterwards let in after report, on payment of coets, to prove a claim on another mortgage with e view to coneolidating them: *Ross* v. *Stevenson*, supro.

Where a person added as a eubsequent incumbrancer, appeara and disclaime, he ie nnt entitled to costs: *Hott* v. *Park*, 6 Gr. 553; *Lewin* v. *Jones*, 51 L. T. 59.

Incumbrancer disclaiming, costs.

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*In *The Queen City Refining Co.*, before the Master in Ordinary, 7th May, 1885, the learned master wae of opinion thst he was not *functus* until hie report was filed.

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Master to take accounts of plaintiff and incumbrancers.

474. When all parties have been duly served, the Master shall take an account of what is due the plaintiff, and to the other incumbrancers (if any), for principal money and interest, and tax their costs, and settle their priorities, and appoint a time and place, or times and places, for payment according to the practice of the Court. C.R. 750.

Proof of service of notice.

Proof of Service.—It is the duty of the Master, before proceeding to take the accounts, to require due proof to be adduced of service of the necessary proceedings on all parties not attending before him who are entitled to notice. All subsequent incumbrancers are entitled to attend the taking of the account, and it would seem also necessary that the defendants named in the writ should also be notified, even though they have not appeared: see note to *Rule* 472.

Taking accounts, prima facie proof, what is.

Taking Account.—The production of the mortgage and affidavit of the incumbrancer proving his claim is *primâ facie* sufficient proof of the claim, and under *Rule* 475 the affidavit of an assignee is *primâ facie* sufficient: *Court* v. *Holland*, 8 P. R. 213; *Elliott* v. *Hunter*, 24 Gr. 430; *Pollock* v. *Perry*, 5 Gr. 591; *Hancock* v. *Maulson*, 10 Gr. 483; *Warren* v. *Taylor*, 9 Gr. 59; he need not go into evidence to prove that the amount is unpaid: *Markle* v. *Ross*, 13 P. R. 135; where the bill was pro *confesso*, the mortgagee was bound to state the amount actually advanced: *Sterling* v. *Riley*, 9 Gr. 343; and in every case it is competent for the parties, if the mortgage has not been made for the purpose apparent on the face of it, to shew in the Master's office, the real purpose for which it was executed: *Ib.*; *Penn* v. *Lockwood*, 1 Gr. 547; *Brownlee* v. *Cunningham*, 13 Gr. 586; *Morrison* v. *Robinson*, 19 Gr. 480; or for which it is held as security: *Inglis* v. *Gilchrist*, 10 Gr. 301; *McIntyre* v. *Thompson*, 6 Ont. 710; 19 C. L. J. 393. But to reduce the amount below the amount apparently secured, the evidence must be clear: *Fraser* v. *Locie*, 10 Gr. 207. If the opposite party desires to cross-examine the plaintiff on his affidavit he must do so before the Master before whom the reference is pending, and it would be irregular, without first obtaining the Master's direction to do so, to take out an appointment before a special examiner to take such cross-examination: *Plenderleith* v. *Parsons*, 10 O. L. R. 436.

Affidavit of claimant.

Where the claim is brought in, in the name of the Accountant of the Court, his certificate of the amount appearing due by his books, and that he has not been in possession, is sufficient *primâ facie* evidence of his claim: *Holmested* v. *Vanderbogart*, 19 C. L. J. 97; this was a decision of the Chancellor and Proudfoot, J., on the matter being submitted to them.

Where only part of mortgage money advanced.

Where a mortgagor had received only a part of the mortgage money, but gave a receipt for the full amount, and the mortgagee thereupon, and before any payment had fallen due under the mortgage assigned it to a third person who took it *bonâ fide* without notice that the full amount had not been advanced, it was held that the mortgagor could not, as against the assignee, dispute that the mortgage was security for the amount it purported to secure, and for which he had given the receipt: *Bickerton* v. *Walker*, 31 Ch. D. 151; 53 L. T. 731. But the usual rule is that an assignee of a mortgage

takes it subject to the actual state of account between the mortgagee and mortgagor, and cannot, even when the mortgage contains a formal receipt for the whole amount purported to be secured thereby, recover more than has been actually advanced: *Manley* v. *London Loan Co.*, 23 Ont. App. 139; 26 S. C. R. 443. But a receipt for the mortgage money does not estop the mortgagor as against an assignee, who has notice that the mortgagee is the solicitor of the mortgagor, and takes his assignment without inquiry as to the state of accounts between them: *Powell* v. *Browne*, 97 L. T. 854. Rule 474.

An assignee, moreover, is not entitled to enforce a covenant which his assignor could not have enforced, thus, where a trustee by mistake executed a mortgage containing a covenant for payment personally of the mortgage debt, there being no consideration therefor, it was held that the assignee, though a purchaser for value without notice, could not enforce it: *Patterson* v. *McLean*, 21 Ont. 221. Right of assignee not greater than that of assignor.

Collateral advantages stipulated for by a mortgagee over and above his principal and interest, *e.g.*, a bonus, cannot be recovered: *James* v. *Kerr*, 40 Ch. D. 449; 60 L. T. 212; *Bradley* v. *Carritt*, 1903, A. C. 253; 88 L. T. 633; overruling *Santley* v. *Wilde*, 1899, 2 Ch. 474; 80 L. T. 154; 81 L. T. 393; see *Rice* v. *Noakes*, 1900, 1 Ch. 213; 2 Ch. 445; 1902, A. C. 24; 81 L. T. 482; 86 L. T. 62; nor costs not connected with the loan transaction: *Field* v. *Hopkins*, 62 L. T. 102; but in *Potter* v. *Edwards*, 26 L. J. Ch. 468, (where the security was unsatisfactory, and the mortgage was for £1,000, of which only £700 was actually advanced); the mortgagee was held entitled to hold the security for £1,000, it being proved that the £300 was agreed to be paid for the risk and hazard, and this case was approved by Lord Parker in the *Kreglinger Case*, *infra*: such stipulations are regarded as a clog on redemption: see *Morgan* v. *Jeffries*, 1910, 1 Ch. 620; *British S. A. Co.* v. *DeBeers*, 1910, 1 Ch. 354; 2 Ch. 502; 102 L. T. 95; 103 L. T. 4. This case was ultimately reversed in the House of Lords, 1912, A. C. 52; 105 L. T. 683, on the ground that the agreement in question was a separate transaction, and the mortgage was in fact subject to it. A mortgage of a lease which is framed so as to purport to make it redeemable only when the lease is about to expire, may, in certain circumstances be regarded as imposing a clog on redemption, which would make the proviso void: *Fairclough* v. *Swan Brewery Co.*, 1912, A. C. 565; 106 L. T. 931. Collateral advantages stipulated for by mortgagee

Where a mortgagee stipulates for a life insurance as collateral security for the loan, and for the premiums being paid by, or charged against, the mortgagor, the representatives of the mortgagor are entitled to have the insurance applied to the payment of the debt, and are entitled to any surplus, notwithstanding any stipulation in the mortgage to the contrary: *Salt* v. *Northampton*, 1892, A. C. 1; 76 L. T. 765. A stipulation that the mortgagor should buy goods from the mortgagee exclusively was upheld: *Biggs* v. *Hoddinott*, 1898, 2 Ch. 307; 79 L. T. 201; but such a stipulation is only enforceable during the currency of the mortgage: see *Rice* v. *Noakes*, *supra*; but a stipulation that the mortgagor would sell his goods to the mortgagees exclusively at the market price for a period of five years, was held to be enforceable after redemption, as being a collateral agreement independent of the mortgage: *Kreglinger* v. *New Patagonia Meat & C. S. Co.*, 1914, A. C. 25; 109 L. T. 802; and it was laid down in that case that collateral agreements between mortgagor and mortgagee may be valid provided (1) that they are not unfair or unreasonable, or (2) in the

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nature of a penalty clogging redemption, or (3) inconsistent with, or repugnant to, the contractual and equitable right to redeem.

An option to the mortgagee to purchase the mortgaged property given at the time the mortgage was made, was held to be a clog on the equity of redemption which could not be enforced: *Jarrah Timber Co.* v. *Samuel*, 1902, 2 Ch. 479; 87 L. T. 44; 88 L. T. 196.

But a subsequent agreement giving the mortgagee a collateral advantage may be valid: *Lisle* v. *Reeve*, 1902, 1 Ch. 53; 1902, A. C. 461 85 L. T. 464; 87 L. T. 308.

Account by mortgagee.

Where the secretary of a building society had given the society a mortgage to secure a loan payable by instalments "and other moneys becoming due from the mortgagor to the society," it was held that the mortgagees could not hold the mortgage as security for moneys embezzled from them by the mortgagor after he had assigned the equity of redemption, as against the assignee: *Bailes* v. *Sunderland Eq. Industrial Society*, 55 L. T. 808.

A mortgagee in possession by an agent may be compelled to give a detailed account of the receipts by the agent; an account merely of the lump sums received from the agent is insufficient: *Noyes* v. *Pollock*, 30 Ch. D. 336; 53 L. T. 430.

A derivative mortgagee is bound to account to his mortgagor for all profits made by him: thus, where a derivative mortgagee, by representing himself to be the mortgagee, obtained an assignment of the equity of redemption, which he subsequently resold at a profit, he was held bound to account for the profit so made: *Wilkins* v. *McLean*, 10 Ont. 58; 13 Ont. App. 467; 14 S. C. R. 22.

Where a mortgagee had sold under his power of sale, but, owing to a defect in the advertisement, had been compelled to allow the purchaser compensation, it was held that he was chargeable, as against the mortgagor, with any loss occasioned by the misdescription: *Tomlin* v. *Luce*, 41 Ch. D. 573, in appeal, 43 Ch. D. 191.

Where the mortgage provided that the total amount to be recovered by the mortgagee "under these presents" should not exceed £900 payments made by the mortgagee for rent, and insurance, while in possession, were held to be recoverable, though the aggregate amount of the claim exceeded £900: *White* v. *City of London Brewery Co.*, 42 Ch. D. 237; but where an incumbrancer proved a claim on a bond in a penal sum of £1,000, conditioned for the payment of £500, it was held that he could not, as against a subsequent incumbrancer, recover any large sum against the land than the amount of the penalty, and the decree made in 1853 was amended in 1891 by limiting the principal and interest recoverable thereunder to the amount of the penalty: *Hatton* v. *Harris*, 1892, A. C. 547; 67 L. T. 722.

Stated account may be relied on in M. O., when.

The plaintiff, or defendant, may rely, in the Master's office, on a stated account set up in the pleadings, although no evidence was given of it at the trial: *Edinburgh Life Assurance Co.* v. *Allen*, 23 Gr. 238; and see *Inglis* v. *Gilchrist*, 10 Gr. 301; *Neil* v. *Neil*, 15 Gr. 110; *Holgate* v. *Shutt*, 28 Ch. D. 111.

The Master, in taking the account under the usual judgment in a mortgage action for sale or foreclosure, cannot go into any question affecting the validity of the plaintiff's security: *McDougall* v. *Lindsay*

Paper Mills Co., 10 Pr. R. 247; 20 C. L. J. 133, 253; *Wiley* v. *Ledyard*, 10 P. R. 182; *Bickford* v. *Grand Junction Ry. Co.*, 1 S. C. R. 696, and see *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112; but a subsequent incumbrancer is not bound by an agreement made after the date of such incumbrancer's charge, between the plaintiff and the mortgagor, as to the amount due to plaintiff, and may dispute it without moving against the judgment: *Rutherford* v. *Rutherford*, 17 P. R. 228. Rule 474.

As to the proper method of taking the account, where the mortgagor has sold the equity of redemption in part of the mortgaged lands, and has agreed to indemnify the grantee against the mortgage: see *Perkins* v. *Vanderlip*, 11 Gr. 488. Taking account when equity of redemption divided.

Costs.—As to costs taxable to a mortgagee on a reference: see *Plenderleith* v. *Parsons*, 15 O. L. R. 397.

Consolidation of Mortgages.—Subject, *inter alia*, to the exceptions hereafter mentioned, a mortgagee has a right, in actions for redemption, or foreclosure, to consolidate all mortgages held by him, and made by the same mortgagor, so as to prevent the mortgagor, or subsequent incumbrancers, from redeeming one or more without redeeming all: *Watts* v. *Symes*, 1 D. M. & G. 240; *Selby* v. *Pomfret*, 1 J. & H. 336; 3 De G. F. & J. 595; *Johnston* v. *Reid*, 29 Gr. 296; even though they were originally made by the same mortgagor in favour of different mortgagees: *Pledge* v. *Carr*, 1895, 1 Ch. 51; S. C., *Sub nom. Pledge* v. *White*, 1896, A. C. 187; 74 L. T. 323, and though the securities are of different natures, or the mortgagee is a legal mortgagee in one security, and a derivative mortgagee in another: *Silverthorn* v. *Glazebrook*, 30 Ont. 408; but where the mortgages were made by different mortgagors, the subsequent acquisition of the equity of redemption by one person, does not entitle the mortgagee to consolidate the mortgages: *Sharp* v. *Rickards*, 1909, 1 Ch. 109; 99 L. T. 916. Consolidation of mortgages.

A subsequent incumbrancer added in the Master's office has the same right: *Merritt* v. *Stephenson*, 7 Gr. 22: *Ross* v. *Stevenson*, 7 P. R. 126. But the right to consolidate cannot be enforced against a subsequent registered purchaser, or incumbrancer, without actual notice: *Brower* v. *Canada Permanent Building Society*, 24 Gr. 509; *Johnston* v. *Reid*, 29 Gr. 296; *Smith* v. *Smith*, 18 Ont. 205; *Miller* v. *Brown*, 3 Ont. 210. Nor can it be enforced, where, prior to the creation of the second mortgage, the mortgagor had assigned, or mortgaged, his equity of redemption in the first mortgage, as against such assignee, or mortgagee: *Jennings* v. *Jordan*, 6 App. Cas. 698; 45 L. T. 593; *Harter* v. *Coleman*, 19 Ch. D. 630; 46 L. T. 154; and see *Baker* v. *Gray*, 1 Ch. D. 491; nor where, though the second mortgage was created before the assignment of the equity of redemption, it does not become united in the same hand with the first until after the assignment of the equity of redemption in the first mortgage: *Minter* v. *Carr*, 1894, 2 Ch. 321; 71 L. T. 526; nor where one of the mortgaged estates has ceased to exist, *e.g.*, where it was a leasehold, or life estate: *Re Raggett, ex parte Williams*, 44 L. T. 4; 50 L. J. Chy. 187; nor can a mortgage of realty be consolidated with a mortgage of chattels, so as to throw the debt secured by the realty on the chattels: *Chesworth* v. *Hunt*, 5 C. P. D. 266; 42 L. T. 774; 49 L. J. C. P. 507; nor can it be allowed in favour of the plaintiff in an action for foreclosure, where one of the mortgages is not in default: *Cummins* v. *Fletcher*, 42 L. T. 859; 49 L. J. Chy. 117, 563; *The Scottish-American I. Co.* v. *Tennant*,

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19 Ont. 263. Nor can a mortgago heid hy n sole mortgagee be consolidated with one held hy him jointly with a third person: *Riley* v. *Holl*, 79 L. T. 244. The right to consolidate, except by express agreement, is now abolished in England hy the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) s. 17.

Even where there is an express agreement for consolidation it is held not to apply to mortgages taken after the mortgagor had assigned his equity of redemption in the property covered by the principal mortgage: *Hughes* v. *Britannia Permanent, B. B. Society*, 1906, 2 Ch. 607; 95 L. T. 327.

Consolidation is only allowed as a condition of granting the owner of the equity of redemption equitable relief, on the principle that "he who seeks equity must do equity," but it cannot be imposed as a condition of granting him relief in respect of a legal claim on his part: *Re Union Assce. Co.*, 23 Ont. 627, *per* Ferguson, J.

As to whether a mortgagee is entitled to consolidate mortgages as against a surety: see *Nicholas* v. *Ridley*, 1904, 1 Ch. 192.

Where the right to consolidate mortgages on different properties has once arisen, it cannot he defeated hy any subsequent transfer of the equity of redemption in the different properties to other parties and the right to consolidate arises, notwithstanding that the mortgages which it is sought to consolidate, were not united in title with the mortgage sought to be redeemed, until after the assignment of the equity of redemption in the intter mortgage to the person seeking to redeem: *Pledge* v. *Carr*, 1895, 1 Ch. 51; 71 L. T. 598; *S. C.*, sub *nom.*, *Pledge* v. *White*, 1896, A. C. 187; 74 L. T. 323.

Mortgagee may be estopped from consolidating

Where an intending purchaser of the equity of redemption inquires of the mortgagee the amount due on a prior mortgage, and also states the purpose for which the inquiry is made, and the mortgagee neglects to notify him of the claim to consolidate the security with another, the mortgagee is deprived of the right of consolidation as against such person: *Dominion Savings & Investment Company* v. *Kittridge*, 23 Gr. 631. So also, the assignee of two mortgages cannot consolidate them, if his assignor was precluded from so doing: *Bird* v. *Wenn*, 33 Ch. D. 215.

See further as to the consolidation of mortgages, 101 L. T. 200.

Tacking — what claims may be tacked to mortgage debt

Tacking.—Tacking a subsequent to a prior incumbrance, so as to cut out an intervening registered incumbrance, can no longer be done so as to defeat the provisions of *The Registry Act*: (R. S. O. c. 124), ss. 72, 73; and to this extent tacking is abolished, but there are still some instances in which claims, not secured by the mortgage, may be tacked thereto as a condition of redemption.

The mortgagee cannot tack to his mortgage debt a simple contract debt due from the mortgagor: *Ferguson* v. *Frontenac*, 21 Gr. 188; *Canadian Bank of Commerce* v. *Forbes*, 10 P. R. 442; but he may as against his representatives, in case of his death; and he may tack all prior charges or incumbrances paid off by him: *Trust & Loan Co.* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 85; *Wells* v. *The Trust & Loan Co.*, 9 Ont. 270; 20 C. L. J. 407; and he is entitled to claim as against subsequent incumbrancers, or the mortgagor, the full amount due thereon, no matter how advantageous the terms on

which he may have acquired them: *Watkins* v. *McKellar*, 7 Gr. 586; *Dobson* v. *Land*, 8 Hn. 216. Rule 474.

The mortgagee is also entitled to tack to his mortgage debt any costs occasioned by part of the mortgaged estate being expropriated under any statute: *Rees* v. *The Metropoliton Board of Works*, 14 Ch. D. 372; 42 L. T. 685; 49 L. J. Ch. 620; and also any costs incurred in protecting, or endeavouring to realize, his security: *Wilkes* v. *Saunion*, 7 Ch. D. 188; and see *Rule* 410, note pp. 951 *et seq.*; and the costs of an abortive sale: *Forrer* v. *Lacey*, 31 Ch. D. 42; 50 L. T. 121; but not the costs of unsuccesaful proceedinga undertaken without the concurrence of the mortgagor: *Wells* v. *The Trust & Loan Co.*, *supra*, p. 1050; nor costs of proceedings for sale which he has taken, but abandoned: *Middleton* v. *Scott*, 3 O. L. R. 26. Tacking costs.

Merger.—Where an incumbrancer obtains a release of the equity of redemption, a question whether his incumbrance is merged arises. This is a question of intention, and where it is obviously not for his benefit, the Court will not presume any such intention: *Hart* v. *McQueston*, 22 Gr. 133; *North of Scotland Mortgage Company* v. *German*, 31 C. P. 349; *Elliot* v. *Jayne*, 11 Gr. 412; *Weaver* v. *Vandusen*, 27 Gr. 477; *Macdonald* v. *Bullivant*, 10 Ont. App. 582; and see *Adams* v. *Angell*, 5 Ch. 634; *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618; 49 L. T. 555; *Re Pride, Schockell* v. *Colnett*, 1891, 2 Ch. 135; 64 L. T. 768; *Thorne* v. *Cann*, 1895, A. C. 11; *Liquidation Estates Co.* v. *Willoughby*, 1896, 1 Ch. 726; 74 L. T. 228; 1898, A. C. 321; 78 L. T. 329; *Whiteley* v. *Delaney*, 1914, A. C. 132; 110 L. T. 434. Merger, a question of intention.

Where a third person advanced money to pay off an equitable mortgage, on the understanding that he was to get a legal mortgage from the mortgagor to secure the advance, which, after payment, the mortgagor refused to execute, it was held that the lender was entitled to be subrogated to the rights of the mortgagee who had been paid off: *Butler* v. *Rice*, 1910, 2 Ch. 277; 103 L. T. 94; *Whiteley* v. *Delaney*, *supra*.

Improvements.—Where a sale of the mortgaged property under execution is set aside the vendee is entitled to improvements: *Shaw* v. *Tims*, 19 Gr. 496; and also when a sale is made by the mortgagee who claims to be the absolute owner, as purchaser at a sale under the power which proves invalid: *McLaren* v. *Fraser*, 17 Gr. 567; *Carroll* v. *Robertson*, 15 Gr. 173. The expense of erecting a carding mill was disallowed: *Kerby* v. *Kerby*, 5 Gr. 587. Expenses of planting, and tending fruit, and ornamental trees, suitable for carrying out improvements commenced by the mortgagor were allowed, but not their value at the time of redemption; *Paul* v. *Johnson*, 12 Gr. 474. Where the mortgagee is charged with rents arising from improvements made by him, he should be allowed the expenses of such improvements to a corresponding amount: *Constable* v. *Guest*, 6 Gr. 510; and see further as to allowances to mortgagees in possession, notes to *Rule* 410, *supra*, pp. 949 *et seq.* Improvements—What allowed mortgagee in possession.

Interest.—Interest on moneys secured by mortgages made after 1st July, 1880, is subject to the provisions of R. S. C. c. 120, ss. 6-11. Interest, arrears of, how far recoverable against mortgaged land.

Interest begins to run only from the time the money is actually advanced: *Edmonds* v. *Hamilton P. & L. Soc.*, 19 Ont. 677; 18 Ont. App. 347.

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The general rule is that a mortgagee suing for sale, or foreclosure cannot recover arrears of interest for more than six years prior to the commencement of the action: see *The Statute of Limitations* (R. S. O. c. 75), s. 18; and the same rule applies in an action by a subsequent mortgagee for redemption: *McMicking* v. *Gibbons*, 24 Ont. App. 586, overruling on that point *Delaney* v. *Can. Pac. Ry.*, 21 Ont. R. See also *Colquhoun* v. *Murray*, 26 Ont. App. 204.

Where the action is either for foreclosure or redemption, and is between the mortgagee and the mortgagor, or the representative of a deceased mortgagor, who has covenanted for payment, and no subsequent incumbrancer intervenes, the mortgagee may tack all the interest recoverable on the covenant: *Carroll* v. *Robertson*, 15 Gr. 173; *Howeren* v. *Bradburn*, 22 Gr. 96; *Macdonald* v. *Macdonald*, 11 Ont. 157; see however *McMicking* v. *Gibbons*, *supra*; but where there is no covenant, even in such a case, no more than six years' arrears can be recovered: *Taylor* v. *Hargrave*, 19 Gr. 271; and see *Airey* v. *Mitchell*, 21 Gr. 510; *Howeren* v. *Bradburn*, 22 Gr. 96; *Weaver* v. *Vandusen*, 27 Gr. at p. 481; *Barnes* v. *Glenton*, 1898, 2 Q. B. 223; 1899, 1 Q. B. 885; 80 L. T. 606 (under the English Act, the language is different, not being, like *The Statute of Limitations* (R. S. O. c. 75), s. 24, confined to actions to recover "out of any land"); see also *Dingle* v. *Coppin*, 1898, 79 L. T. 693; 1899, 1 Ch. 726; but the limitation of six years arrears of interest has no application where the mortgaged property is personal estate: *Mellersh* v. *Brown*, 45 Ch. D. 225; 63 L. T. 189; unless it is included in the same mortgage with realty, so as to form one security: *Charter* v. *Watson*, 1899, 1 Ch. 175; 79 L. T. 440. See also *London & Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161; nor does it apply as against a subsequent mortgagee, as regards interest accruing due to him while a prior mortgagee is in possession: see *The Statute of Limitations*, s. 19.

When a mortgagee sells under a power of sale he may retain out of the proceeds, the arrears of interest though they exceed six years: *Edmunds* v. *Waugh*, L. R. 1 Eq. 418; *Ford* v. *Allen*, 15 Gr. 565; *In re Marshfield*, *Marshfield* v. *Hutchings*, 34 Ch. D. 721; 56 L. T. 694. See also *Dingle* v. *Coppin*, *supra*.

Interest is not ordinarily allowed on the costs of the action, but it may be allowed on costs which have been expressly ordered to be added to the plaintiff's security, from the date of taxation: *Eardley* v. *Knight*, 41 Ch. D. 537.

Where a mortgagee in possession is charged with rents and profits he should also be allowed interest on his mortgage debt: *Patterson* v. *Dart*, 24 O. L. R. 609.

Rate of interest recoverable

Rate of Interest.—Since the repeal of the usury laws, the Court will not refuse to enforce any contract, which parties competent to contract, may make for the payment of interest, provided it is understood: *Teeter* v. *St. John*, 10 Gr. 85; R. S. C. c. 120, s. 2.

But this is subject to the provisions of *The Ontario Money Lenders Act* (R. S. O. c. 175), which entitles the Court to refuse to enforce "harsh and unconscionable" transactions: see s. 4.

Stipulation for increased rate on default may be enforced.

Where a mortgage stipulated that up to a certain day the interest to be charged should be eight per cent., and if the principal were not then paid twelve per cent., it was held that the mortgagee was entitled to recover the twelve per cent. on default: *Waldell* v. *McColl*

14 Gr. 211; but as to mortgages made subsequent to 20th April, 1907; see *The Mortgage Act* (R. S. O. c. 112), s. 16. Rule 474.

Where a mortgage is made payable without interest, or no interest is reserved, interest may nevertheless be recovered at the legal rate from the time of default: *McDonell* v. *West*, 14 Gr. 492; *Reid* v. *Wilson*, 9 P. R. 165; 18 C. L. J. 58. Compound interest may now, subject to the provisions of R. S. C. c. 120, ss. 6-8, and *The Ontario Money Lenders Act* (R. S. O. c. 175), be stipulated for, and recovered: *Clarkson* v. *Henderson*, 14 Ch. D. 348; 43 L. T. 29; *Henderson* v. *Dickson*, 9 Gr. 379; or an increased rate in case of default: *Downey* v. *Parnell*, 2 Ont. 62; 16 C. L. J. 241; but a mortgagee is *prima facie* only entitled to simple interest, and where an account charging compound interest was assented to by the mortgagor in ignorance of his rights it was re-opened: *Daniell* v. *Sinclair*, L. R. 6. H. L. 181; 44 L. T. 257; and a bargain for an exorbitant rate of interest will not be enforced if it is shewn not to have been understood by the mortgagor: *Teeter* v. *St. John*, 10 Gr. 65. Mortgage payable without interest. Compound interest. Exorbitant interest.

Agreements to pay compound interest are construed very strictly: see *Imperial Trusts Co.* v. *New York Sec. Co.*, 10 O. L. R. 269.

Where the incumbrancer has redeemed a prior incumbrance, he is entitled to recover interest on the aggregate amount of principal, interest, and costs, so paid; on the principal, at the rate reserved in his own mortgage, and on the interest and costs, at the legal rate: *McMaster* v. *Hector*, 6 C. L. J. 264; and he has a lien on the land therefor as against subsequent incumbrancers: *Trust & Loan Company* v. *Cuthbert*, 14 Gr. 410; *Teeter* v. *St. John*, 10 Gr. 65. But where a solicitor purchases securities at his client's request, simple interest on the amount paid, is all that is chargeable, and not the rate reserved by the securities purchased, unless otherwise agreed: *Macleod* v. *Jones*, 50 L. T. 356. Interest on prior incumbrances paid off by mortgagee.

The rate of interest reserved by the mortgage, is not necessarily payable after default, unless the mortgage expressly so provides: *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Dalby* v. *Humphrey*, 37 U. C. Q. B. 514; *Jackson* v. *Horris*, 76 L. T. Jour. 130; and a covenant to pay interest on instalments in default does not necessarily mean that interest is to be paid on interest in default: *Goldstrom* v. *Tattermon*, 17 Q. B. D. 80; 16 Q. B. D. 1; 55 L. T. 866. But such rate was allowed after default, by way of damages, where it was not expressly shewn by evidence to be excessive: *Simonton* v. *Graham*, 6 P. R. 495; and see *Mellersh* v. *Brown*, 45 Ch. D. 225; 63 L. T. 169; but in another case, where no evidence was given by the mortgagees as to the rate of interest after default, only the legal rate was allowed: *Archbold* v. *Building & Loan Assoc.*, 15 Ont. 237; but see *S. C.*, 16 Ont. App. 1. A covenant to pay interest at a higher rate than the legal rate "until mortgage money paid" does not entitle the covenantor to such higher rate after the time fixed for payment has expired: *Powell* v. *Peck*, 12 Ont. 492; 23 C. L. J. 93; 15 Ont. App. 136; *Peoples Loan & D. Co.* v. *Grant*, 18 S. C. R. 262, but a covenant to pay a specified rate of interest as well before, as after, maturity, until the principal is fully paid, entitles the covenantee to recover the specified rate after maturity until the principal is fully paid: *Middleton* v. *Scott*, 4 O. L. R. 459; *Imperial Trusts Co.* v. *New York Sec. Co.*, 10 O. L. R. 289. Rate of interest payable after time for payment.

A covenant to pay interest on all instalments in arrear, does not cover principal becoming due under an acceleration clause: *Biggs* v.

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Freehold, 26 Ont. App. 232; 31 S. C. R. 163. Nor does it apply to interest accruing due after maturity: *Imperial Trusts Co.* v. *New York Sec. Co.*, *supra*, p. 1053.

Effect of acceleration clause.

In computing the amount to be paid for redemption, in the case of a mortgage, the payment of which had been accelerated by default in the payment of an instalment, the Court allowed the mortgage rate for the six months allowed for redemption though it exceeded the legal rate: *Muttlebury* v. *Stephens*, 6 C. L. T. 588; 23 C. L. J. 12; and see *Mellersh* v. *Brown*, *supra*, p. 1053.

Interest after judgment.

Where an instrument provided for payment of interest at a given rate, until the principal money should be paid, it was held that the rate contracted for could not be recovered after judgment had been obtained on the instrument; but only interest at the legal rate on the amount of the judgment: *St. John* v. *Rykert*, 4 Ont. App. 213; *Grant* v. *People's Loan & D. Co.*, 17 Ont. App. 85; 18 S. C. R. 262; *Arbuthnot* v. *Bunstall*, 62 L. T. 234; *Freehold Loan Co.* v. *McLean*, 8 Man. R. 116; *Manitoba & N. W. L. Co.* v. *Barker*, *Ib.* 296; *Ex p. Fewings*, 25 Ch. D. 338; 50 L. T. 109; but see contra, *Popple* v. *Sylvester*, 22 Ch. D. 98; 47 L. T. 329; and see 19 C. L. J. 21; *Re Atkinson*, before Boyd, C., 4th May, 1883; and it would seem to be settled that the mortgagee cannot be redeemed by a subsequent incumbrancer except on payment of the interest secured by the mortgage, notwithstanding that the mortgagor may have recovered a judgment on the covenant for interest in arrear *Economic Life Assce. Co.* v. *Usborne*, 1902, A. C. 147; 85 L. T. 589.

Payment of higher rate than could be legally required

Where a mortgagor in ignornnce of his rights, has paid interest at a higher rate than he could have been legally required to pay, he cannot recover the over-payments from the mortgagee, nor have them set off against moneys subsequently accruing due on the mortgage *Stewart* v. *Ferguson*, 31 Ont. 112; but money paid by a mortgagor under a mistake of facts is recoverable: *McDermott* v. *Hickling*, 38 C. L. J. 85.

Interest in advance.

Where the interest is payable in advance, the mortgagee is nevertheless not entitled to have interest allowed for a period subsequent to that appointed for redemption: *Trust & Loan Co.* v. *Kirk*, 8 P. R. 203.

Tender prima facie stops interest.

Tender.—Where a tender is relied on, it should be set up by statement of defence, and the amount tendered should be paid into Court: *Rule* 309. Where such a defence is pleaded, it is sometimes specially referred to the Master to inquire as to the tender, or whether the amount tendered was sufficient: *Knapp* v. *Bower*, 17 Gr. 695. *Prima facie* a tender stops interest; but if the mortgagee shews that the money was subsequently used by the mortgagor, and a profit made, subsequent interest is, nevertheless, chargeable: *Ib.*; and see *Pearce* v. *Morris*, L. R. 5 Chy. at p. 231.

A tender is not equivalent to payment, and if refused, the mortgagor's remedy is an action for redemption; detinue for his title deeds will not lie: *Bank of N. S. W.* v. *O'Connor*, 14 App. Cas. 273.

A tender under protest is good, and a mortgagor is entitled to no inquiry whether the amount tendered was sufficient: *Peers* v. *Allen*, 19 Gr. 98; *Greenwood* v. *Sutcliffe*, 1892, 1 Ch. 1; 65 L. T. 797; and although a mortgagee is usually entitled to the costs of a redemption action, yet where it has been occasioned by his refusal to accept the

amount due, he may be ordered to pay the costs of the action up to judgment: *Squire* v. *Pardoe*, 66 L. T. 243. Tender by a cheque to a solicitor of a mortgagee is not a legal tender, though not objected to on that ground: *Blumberg* v. *Life Interest R. I. Corp.*, 1897, 1 Ch. 171; 1898, 1 Ch. 27; and see *Middleton* v. *Scott*, 4 O. L. R. 459. Rule 474.

The mortgagor, when making a tender at the appointed time for payment, is entitled to require a reconveyance, and the delivery up of the title deeds in the mortgagee's possession, and if the mortgagee, having had reasonable notice of the intention to pay the debt, is unprepared to reconvey or deliver up the title deeds he is in default: *Rourke* v. *Robinson*, 1911, 1 Ch. 480; 103 L. T. 895. Where the mortgagor has demanded payment the mortgagee may redeem without notice, or the payment of interest in lieu of notice. A tender does not stop the running of interest unless the mortgagor is able to show that he has kept the money idle and made no profit out of it: *Edmondson* v. *Copland*, 1911, 2 Ch. 301; 105 L. T. 8.

Where a tender is made subject to the execution and delivery of a conveyance, and previous reasonable notice of the intention to make the tender has not been given, a reasonable time should be allowed to procure the execution of the reconveyance before interest will stop: *Webb* v. *Crosse*, 1912, 1 Ch. 323; 105 L. T. 867.

Parol Agreements Affecting Mortgage.—A written agreement for value by a mortgagor to pay additional interest, is enforceable against the mortgagor, though not under seal: *Brown* v. *Deacon*, 12 Gr. 198; and see *Alliance Bank* v. *Brown*, 10 Jur. N. S. 1121. But a verbal agreement to that effect will not bind the lands, as against a subsequent purchaser of the equity of redemption: *Totten* v. *Watson*, 17 Gr. 233; or even as against a devisee, or heir-at-law, of the mortgagor: *Re Houston*, *Houston* v. *Houston*, 2 Ont. 84. Parol agreements affecting mortgage debt.

An agreement for extra interest between a derivative mortgagee and the mortgagor enures to the benefit of the original mortgagee: *Grahame* v. *Anderson*, 15 Gr. 189.

Where, after the mortgage debt was partly paid off, the mortgagor re-borrowed the money and returned the receipts given for his previous payments, it was held that he was estopped from disputing that the amount so re-advanced was still secured by the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301. Estoppel

Statute of Limitations.—Under a dispute note, the Statute may be set up as a bar to the recovery of more than six years' arrears of interest; but where it is relied on as a defence to the whole claim, a statement of defence must be filed: *Wright* v. *Morgan*, 1 Ont. App. 513; *Cattenach* v. *Urquhart*, 6 P. R. 28. Statute of Limitations.

Although ten years is now a bar to the recovery of money charged on land, as against the land: *The Statute of Limitations* (R. S. O. c. 75), s. 5; yet it was held that the right of action on the covenant was not barred until the lapse of twenty years under *Ib.* s. 49; *Allan* v. *McTavish*, 2 Ont. App. 278; *Macdonald* v. *McDonald*, 11 Ont. 187; *McDonald* v. *Elliott*, 12 Ont. 98; but see *contra*, *Sutton* v. *Sutton*, 22 Ch. D. 511; 48 L. T. 95; *Fearnside* v. *Flint*, 22 Ch. D. 579; 48 L. T. 154; *Shaw* v. *Crompton*, 1910, 2 K. B. 370; 103 L. T. 501. As to mortgages made on or after 1st July, 1894, the ten years' limitation applies to actions on the covenant: see *The Statute of Limitations*, s. How far a bar to recovery of interest.

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49 (*b*), (*k*). As to the application of *The Statute of Limitations* as regards interest: see *supra*, p. 938.

Where there is an acceleration clause in case of default in payment of an instalment, the statute begins to run as to the principal and interest from the date of default: *McFadden* v. *Brondon*, 6 O. L. R. 247.

No bar to account for rents.

The Statute is no bar to an account for more than six years' rents as against a mortgagee in possession: *Coldwell* v. *Hall*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93.

Subsequent incumbrancer, how affected by statute.

Where a prior mortgagee, or other incumbrancer, has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage, or other incumbrance on the same land, the person entitled to the subsequent mortgage, or incumbrance, may recover in such action the arrears of interest which have become due during the whole time that such prior mortgagee, or incumbrancer, was in possession, or receipt, as aforesaid, although such time may have exceeded the term of six years: see *The Statute of Limitations* (R. S. O. c. 75), s. 19.

Action for foreclosure, effect of.

Although the remedy against the person of the debtor for the debt may be barred, an action for the foreclosure of the mortgaged property may lie: see *London & Midland Bank* v. *Mitchell*, 1899, 2 Ch. 161; 81 L. T. 263; *Bornes* v. *Glenton*, 1899, 1 Q. B. 885; 80 L. T. 606.

An action for foreclosure, or sale, is an action to recover land, and the commencement of an action for foreclosure, or sale, by a mortgagee out of possession, stops the running of the statute: *Harlock* v. *Ashberry*, 19 Ch. D. 539; 46 L. T. 356; *Pugh* v. *Heath*, 7 App. Cas. 235; 46 L. T. 321; *Fletcher* v. *Rodden*, 1 Ont. 155; but see *Barwick* v. *Barwick*, 21 Gr. 39; and an action for redemption is also an action to recover land: *per* Strong, J., *Foulds* v. *Harper*, 11 S. C. R. 639.

Tenant in common entitled to redeem whole estate.

Where some of several tenants in common are barred by *The Statute of Limitations*, and others of them are not; the latter are entitled to redeem the whole mortgaged estate, and not merely an aliquot part: *Foulds* v. *Harper*, 2 Ont. 405; 9 Ont. App. 537; 11 S. C. R. 639; see also *Martin* v. *Miles*, 5 Ont. 404.

Effect of payments.

Payments to take a case out of *The Statute of Limitations* must be made by the mortgagor, or his duly authorized agent; (payments made on his behalf without his authority will not prevent the Statute from running: *Newbould* v. *Smith*, 29 Ch. D. 882; 53 L. T. 137); or else by some person to whom the right of redemption is expressly reserved by the mortgage, even though he is no party to it: see *Lewin* v. *Wilson*, 11 App. Cas. 639; or by some person liable to pay the mortgage debt, and payment by such person will prevent the Statute from running in favour of his grantee, who is in possession, and no party to the payment: *Trust & Loan Co.* v. *Stevenson*, 20 Ont. App. 66; and see *Dibb* v. *Walker*, 1893, 2 Ch. 429; 68 L. T. 614. Payment by one of several executors, against the will of the others, was held not to bind the land: *Astbury* v. *Astbury*, 1898, 2 Ch. 111; but see *The Devolution of Estates Act* (R. S. O. c. 119), s. 4.

Payment by a receiver appointed by a mortgagee, will be as effectual as a payment by the mortgagor, to prevent the running of *The Statute of Limitations*: *Re Hale, Litley* v. *Faad*, 1899, 2 Ch. 107; 79 L. T. 468.

Payments.—Payment to one of several executors, is a good payment on account of a mortgage held by two of them as executors: *Ewart* v. *Dryden*, 13 Gr. 50; but payment to one of several trustees, who held a mortgage, is not good as to the other trustees: *Ewart* v. *Snyder*, 13 Gr. 55. Rule 474. Payments

Where a mortgagor requested his mortgagee to release a part of the mortgaged property on payment of £100, and he released it on payment of £50 only, he was held liable for the difference: *Boll* v. *Jarvis*, 10 Gr. 568. But where a mortgagee refused to accept £100 offered as the price of part of the mortgaged property, which was expropriated, and upon an arbitration only £30 was awarded, the mortgagee was held not to be liable for the difference: *Gunn* v. *McDonald*, 11 Gr. 140. When mortgagee liable for moneys not received.

Payments of interest made by a mortgagee's agent out of his own pocket to the mortgagee do not enure to the benefit of the mortgagor, or any subsequent incumbrancer: *Gloscott* v. *Comeron*, 10 O. L. R. 399.

As to the date at which payments by cheque count: see *Marreco* v. *Richardson*, *supra*, p. 940.

Appropriation of Payments:— Appropriation of payments

Payments made on account are to be appropriated (1) as the debtor directs at the time of payment, or (2) Where there is no direction by the debtor, as the creditor directs, or (3) Where neither makes any direction, the law will apply it to the older debt, or as may be just: *Wilson* v. *Rykert*, 14 Ont. 188; and see *Lowther* v. *Heaver*, 41 Ch. D. 248.

A payment unappropriated by a debtor may be appropriated by the creditor at any time before judgment; and an appropriation by the creditor in the witness box at the trial was held to be valid: *Seymour* v. *Pickett*, 1905, 1 K. B. 715; 92 L. T. 519.

A mortgagee in possession, and in receipt of rents and profits, may sell under the power of sale, if the mortgage be in default, even though the rents are sufficient to keep down the interest; as, in the absence of any agreement, there is no appropriation of payments until the taking of the account: *Cockburn* v. *Edwards*, 18 Ch. D. 449; 45 L. T. 500; 51 L. J. Ch. 46; and see *Horlock* v. *Ashberry*, 19 Ch. D. 539.

Where a mortgagee sells under a power of sale, he is bound to apply the proceeds, first, in payment of interest and costs, and then either to pay the balance to the mortgagor, or apply it in reduction of principal: *Thompson* v. *Hudson*, L. R. 10 Eq. 497; but see *Ainsworth* v. *Wilding*, 1905, 1 Ch. 435; *Wrigley* v. *Gill*, Ib. 241. He may sell on time, but he must give credit for the amount secured by the mortgage of the purchaser as cash: *Mendels* v. *Gibson*, 9 O. L. R. 94; and, even if he gets the consent of the mortgagor to a sale on credit, he is not at liberty to convert the mortgage taken to secure that part of the purchase money for which credit is given into cash, and charge the mortgagor with the discount and expenses, without a distinct bargain to that effect: *Beatty* v. *O'Connor*, 5 Ont. 731; any surplus in his hands should be either paid over to the party entitled, or if there be no hand to receive it, it should be either paid into Court under *The Trustee Act*, or set apart, so as to be fruitful for the benefit of the party entitled. If the mortgagee neglects to do either of these things, he will be chargeable with interest on the money so long as it remains Appropriation of purchase money, on sale by mortgagee.

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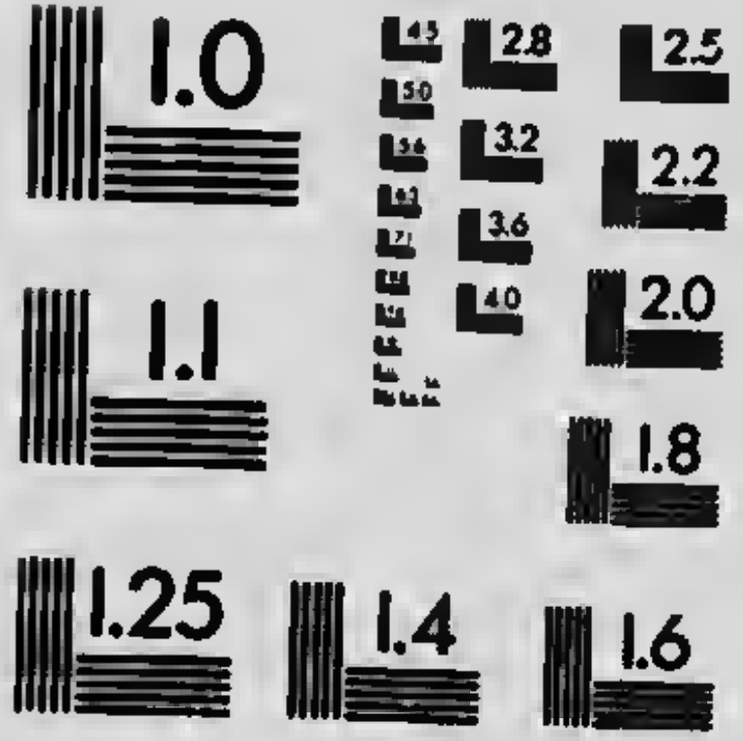

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in his hands: *Charles* v. *Jones*, 35 Ch. D. 544; 58 L. T. 848; *Read* v. *Eley*, 1900, W. N. 57; 88 L. T. 369. A mortgagee who concurs in a sale by his mortgagor is responsible for the due application of the purchase money: *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954; 53 L. T. 442.

Payments how to be appropriated.

If money is not expressly appropriated by the party paying it, the party receiving it may appropriate it, even upon a claim which he cannot enforce by suit; but an appropriation cannot be made by the creditor after action brought, on bringing in his account: *Fraser* v. *Locie*, 10 Gr. 207; *Hagerman* v. *Smith*, Tay. 123; *Armour* v. *Carruthers*, 4 U. C. L. J. 210; *Fuller* v. *Parnall*, 8 C. L. J. 86; and where a mortgagee held as security for a partnership debt the mortgage of one partner, and the note of the other, it was held that he could not, as against an assignee of the equity of redemption, appropriate to the note all payments received by him, but that he was bound to apply one-half of the sums paid out of the partnership assets, on account of the mortgage: *Moore* v. *Riddell*, 11 Gr. 89.

Where two securities held for same debt.

Where no appropriation by payer, payments how to be applied.

In taking the account, payments on account, should (if not otherwise appropriated by the debtor, or creditor, at the time of payment) be applied first, in payment of overdue interest and costs, and then of overdue principal, and where there are several items, the appropriation should be made in discharge of those earliest in date: *McGregor* v. *Gaulin*, 4 U. C. Q. B. 378; *Cummings* v. *Usher*, 1 P. R. 15; *Ross* v. *Perrault*, 13 Gr. 206; *Clayton's Case*, *Devaynes* v. *Noble*, 1 Mer. 530. 604; *Wilson* v. *Rykert*, 14 Ont. 188; *Patterson* v. *Dart*, 24 O. L. R. 609; *Deeley* v. *Lloyd's Bank*, 1910, 1 Ch. 648; 1912, A. C. 756; 102 L. T. 556; 107 L. T. 465; but this rule is not an invariable rule of law. It cannot be applied to two transactions of the same date merely because one precedes the other on the paper on which they are recorded: *Corey* v. *S. S. Mecca*, 1897, A. C. 286; and where an accounting party (a solicitor) had, in his accounts, appropriated payments to principal, instead of the overdue interest, he was held bound by the appropriation: *Taylor* v. *Magrath*, 10 Ont. 669. Where the creditor claims to have appropriated a payment, the onus lies on him of showing affirmatively that no appropriation was made by the debtor: *Lowther* v. *Heaver*, 41 Ch. D. 248. Where, for convenience, two separate accounts are kept by the creditor with his debtor in respect of one of which there is a credit, and the other a debit for which the creditor holds securities; the amount at the credit of the one account is properly applicable to the reduction of the balance to the debit of the other account: *Mutton* v. *Peat*, 1900, 2 Ch. 79.

Appropriation of payments, where mortgage given to secure a floating balance.

A mortgage given to secure a floating balance, however, is not discharged by payments made on account, so long as the dealings between the parties continue, and any balance remains due in respect thereof, even though the payments exceed in amount the debt due when the mortgage was given, or the amount of the debt mentioned in the mortgage: *Cameron* v. *Kerr*, 3 Ont. App. 30; *Russell* v. *Davey*, 7 Gr. 13; *The City Discount Company* v. *McLean*, L. R. 9 C. P. 692; *Fenton* v. *Blackwood*, L. R. 5 P. C. 167; *Griffith* v. *Crocker*, 18 Ont. App. 370; but see *Re Brown*, 2 Gr. 111, 590; *Buchanan* v. *Kerby*, 5 Gr. 332; and this was so held as against a transferree of the equity of redemption: *Thomson* v. *Stikeman*, 29 O. L. R. 146; but as against a subsequent incumbrancer the rule in Clayton's Case is applicable: see *Deeley* v. *Lloyd's Bank*, *supra*.

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An appropriation by the creditor cannot prevent the debtor from pleading the Statute of Limitations, but where the debtor pays a sum in respect of an account which includes a statute-barred item, that will amount to an acknowledgment. After a creditor has once made an appropriation, he cannot, after action brought, make another appropriation of the same payment: *Re Friend*, 1897, 2 Ch. 421; 77 L. T. 50.

Where a mortgagee in possession has, by an agreement with his mortgagor, applied the rents and profits on a collateral indebtedness for goods sold by him to the mortgagor, a subsequent incumbrancer whose rights accrue after the arrangement is executed, is not entitled to have such rents applied on the mortgage debt: *Mitchell* v. *Saylor*, 1 O. L. R. 458.

Insurance money, how applicable.

Insurance Money.—Where the mortgage contains no provision for the application of insurance money, payable under a policy effected by the mortgagor, or by the mortgagee under some covenant or provision in the mortgage in that behalf, the mortgagee is not bound to apply it in reduction of his debt before the time appointed for payment, or on the interest to accrue thereon, until it is actually due. In such a case, where the mortgagee declines to apply the money on his debt, or interest, the mortgagor is entitled to have the moneys laid out in rebuilding and restoring the premises to the *status quo*; but if the mortgagee retains the money he must apply it on account: *Austin* v. *Story*, 10 Gr. 306. Under *The Mortgages Act* (R. S. O. c. 112), s. 6 (2), the mortgagee cannot, without the mortgagor's consent, apply the insurance money in payment of moneys not yet due: *Corham* v. *Kingston*, 17 Ont. 432; *Edmonds* v. *Hamilton P. & L. Socy.*, 19 Ont 677; 18 Ont. App. 347; and he is not bound to apply it in payment of arrears, but may hold it in reserve as collateral security while any portion of the mortgage money is unpaid; and, though he applies part of the insurance money in payment of overdue principal, he is not bound to apply the balance in discharge of overdue interest: *Edmonds* v. *Hamilton*, *supra*; but if he elects to hold the insurance money in reserve he is accountable for all profit made out of the money while so held, and he should not let it lie idle, but ought, if possible, to concur with the mortgagor on some profitable way of laying it out: see *per* Maclennan, J.A., 18 Ont. App. 367.

Mortgagee may have money applied in rebuilding.

In mortgagee executed after 11th March, 1879, after default, there is a statutory power to insure, and the mortgagee may recover premiums paid, with interest at the rate reserved by the mortgage: *The Mortgages Act* (R. S. O. c. 112), s. 19. Where the mortgagor insures, though there be no covenant, in the event of a loss the mortgagee may have the insurance money laid out in re-building: see *The Mortgages Act* (R. S. O. c. 112), s. 6.

Mortgagee insuring whether he can recover both insurance and debt, quaere?

A mortgagee insuring out of his own funds, is not bound to give the mortgagor credit for the moneys received in the event of a loss: *Russell* v. *Robertson*, 1 Chy. Ch. 72. Nor is he entitled to charge him with the premiums, unless the insurance is effected under *The Mortgages Act*, s. 19, *supra*; *McIntosh* v. *Ontario Bank*, 20 Gr. 24. But whether a mortgagee can recover both the insurance money, and also the mortgage debt seems doubtful: see *Castellain* v. *Preston*, 8 Q. B. D. 613; 46 L. T. 568; 19 C. L. J. 143; *Keefer* v. *Phœnix*, 26 Ont. App. 277; as to the right of a second mortgagee to recover on an insurance

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effected by him, when there is also insurance on the same property effected by a prior mortgagee, see *Westminister* v. *Glasgow*, 12 App. Cas. 699; 59 L. T. 641.

Insurance by mortgagor.

Where a mortgagee holds several mortgages on different properties made by the same mortgagor, and receives insurance money in respect of one of such properties sufficient to satisfy the mortgage thereon, and the mortgagor has assigned his equity of redemption on that parcel to a third party, the third party is entitled to recover the surplus of the insurance moneys, and his right thereto cannot be defeated by consolidation of the mortgages: *Re Union Assurance Co.*, 23 Ont. 627.

Mortgagees to whom a policy of insurance effected by the mortgagors is made payable, as their interest may appear, may sue thereon in their own names and enforce payment to the extent of their interest, but if there is no mortgage or subrogation clause in the policy, the mortgagee stands in no better position than the mortgagor, and any defence against him will be a defence against the mortgagee: *Agricultural L. & S. Co.* v. *Liverpool L. & G. Ins. Co.*, 3 O. L. R. 127. A renewal of a policy is a new contract, and though the original policy may have been voidable for non-disclosure of a prior insurance, yet, if, when the renewal is affected, there is no such prior insurance, the insurers cannot avoid the renewal on the ground of the existence of the prior insurance when the policy was originally issued: *Ib.*

A boiler and other machinery were held as between mortgagor and mortgagees to be included under the word "building," as they were treated by the parties as part of the freehold, and passed as such, and the mortgagor was held entitled to the benefit of the insurance thereon as on part of the building: *Carr* v. *The Fire Assurance Association*, 14 Ont. 487.

Assignment of mortgage to Insurance Co., effect of.

Where the mortgagor had insured in pursuance of a covenant, loss, if any, being payable to the mortgagee, and the buildings were burnt by the mortgagor, and the insurance money paid to the mortgagee, who assigned the mortgage to the insurance company; it was held, that inasmuch as the mortgagor could not have recovered on the policy, the insurance company were not bound to give credit on the mortgage debt for the amount of the insurance money, as against a *puisne* incumbrancer: *Westmacott* v. *Hanley*, 22 Gr. 382; *Livingstone* v. *The Western Assurance Company*, 14 Gr. 461; S. C., 16 Gr. 9; and see *Klein* v. *Union Fire Insurance Company*, 3 Ont. 234; *Reddick* v. *The Saugeen Mutual Insurance Company*, 14 Ont. 506; 15 Ont. App. 363; *Secus*, if the mortgagor had not been debarred from recovering: *Bull* v. *North British & Commercial Insurance Company*, 14 Ont. 322, 15 Ont. App. 421, 18 S. C. R. 697; *Howes* v. *Dominion Insurance Company*, 2 Ont. 89 (this case was reversed on appeal: see 19 C. L. J. 348, but not on the point for which it is here cited); *Austin* v. *Story*, 10 Gr. 306; and see *Provincial Insurance Company* v. *Reesor*, 21 Gr. 296; *Burton* v. *Gore District M. F. I. Co.*, 12 Gr. 156; affirmed in appeal, January 21st, 1875; see R. & J. Dig. 1819, and *per* Proudfoot, V.C., 22 Gr. 384; *Green* v. *Hewer*, 21 C. P. 531; and even though the mortgagor could not himself have recovered on the policy by reason of breach of its conditions, yet, if it is unconditional in favour of the mortgagee, the insurance company is bound to give the mortgagor credit for the insurance moneys on the mortgage, if on payment of the loss it takes

an assignment thereof from the mortgagee: *Bull* v. *N. B. & Coml. Ins. Co., supra*; *McKay* v. *Norwich Union Ins. Co.*, 27 Gnt. 251. Rule 474.

Rents.—A mortgagee in possession may be charged with rents actually received, or which, but for wilful neglect and default, he might have received; or he may be charged with an occupation rent when he has been in actual occupation, using and enjoying the mortgaged property in the place of a tenant; in the latter case, he is charged with a fair rental, such as a tenant might be expected to give, unless it is shown that he actually made a larger profit: *Trulock* v. *Robey*, 15 Sim. 265; S. C., 2 Phil. 395; *Coldwell* v. *Hall*, 9 Gr. 110. Rents chargeable against mortgagee.

A mortgagee is accountable not merely for his actual receipts whilst in possession, but also for whatever is received by those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor: *National Bank of Australasia* v. *United Hand in Hand Band of Hope*, 4 App. Cas. 391.

A mortgagee in possession, but not in actual occupation, will not be held liable for any greater rent than he actually received, unless it is clearly established, in evidence, that he knew a greater rent might, and could, have been obtained, and that he refused, or neglected, to obtain the same: *Merriam* v. *Cronk*, 21 Gr. 60; *Waddell* v. *McColl*, 14 Gr. 211; *Penn* v. *Lockwood*, 1 Gr. 547.

A mortgagee receiving rents, or going into occupation, by consent of the mortgagor, must account as a mortgagee in possession to a subsequent incumbrancer, or purchaser of the equity of redemption, although the mortgagor has directed the rents to be applied in payment of another debt due by him to the mortgagee: *Gilmour* v. *Roe*, 21 Gr. 284; *Court* v. *Holland*, 29 Gr. 19; unless such arrangement was made and executed before the right of the subsequent incumbrancer accrued: *Mitchell* v. *Saylor*, 1 O. L. R. 458; and where a mortgagee, pursuant to a power, enters into possession and manages the mortgaged estate without default, at a loss, he is entitled to be recouped the loss as against a *puisne* incumbrancer, not only out of the rents, but also out of any surplus proceeds arising from the sale of the property: *Bompas* v. *King*, 33 Ch. D. 279; 55 L. T. 190. But when a mortgagee suffers the mortgagor to resume possession he ceases to be liable to account for rents: *Rice* v. *George*, 19 Gr. 174. Where the mortgage provides for payment of five per cent. interest, reducible if punctually paid, to four-and-a-half per cent., a mortgagee, on going into possession, after default, is not bound to accept the lower rate: *Union Bank* v. *Ingram*, 16 Ch. D. 53 (overruling *Stains* v. *Banks*, 9 Jur. N. S. 1049); *Bright* v. *Campbell*, 41 Ch. D. 388. A mortgagee in possession is entitled to be allowed a commission reasonably paid for collecting the rents: *Union Bank* v. *Ingram*, *supra*; but see *Eyre* v. *Hughes*, 2 Ch. D. 148. Mortgagee in possession by arrangement with mortgagor, how far liable to subsequent incumbrancer.

A mortgagee, in possession, should not be charged with rests on rents received by him, until he has been paid in full, when his money was in arrear when he entered: *Coldwell* v. *Holl*, 9 Gr. 110; affirmed in appeal, 7 U. C. L. J. 42; 8 U. C. L. J. 93; but by setting up a title adverse to the mortgagor's right of redemption, he may lose the immunity of an ordinary mortgagee: *National Bank of Australasia* v. *United Hand in Hand Band of Hope*, 4 App. Cas. 391: and see notes to *Rule* 410, *supra*, p. 936 *et seq.* Rests, where chargeable.

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Mortgagee in possession, account by.

Notwithstanding the Statute of Limitations, a mortgagee in possession may be compelled to account to the mortgagor for more than six years' rent: *Coldwell* v. *Hall*, *supra*, p. 961; although, if the mortgagee has been overpaid, the Statute would doubtless be a bar to the mortgagor's recovering payment of more than six years' arrears.

Where the mortgagee is in occupation, he should be charged with an occupation rent up to the day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch. 251; and he is entitled to interest on his debt: *Patterson* v. *Dart*, 24 O. L. R. 609.

Attornment clause, effect of.

The mere existence of an attornment clause in a mortgage, does not make the mortgagee liable to account to a subsequent incumbrancer, as a mortgagee in possession: *Stanley* v. *Grundy*, 48 L. T. 106; but see *Re Stockton Iron Company*, 10 Ch. D. 335; 40 L. T. 19; *Ex parte Jackson*, 14 Ch. D. 725; 43 L. T. 272; *Ex parte Punnett*, 16 Ch. D. 226; 44 L. T. 226; *Ex parte Harrison*, 18 Ch. D. 127; 45 L. T. 290; nor yet the fact that he has given notice to the tenant of the mortgagor to attorn, unless the tenant has, in fact, attorned, his mere continuance in possession after the notice is not sufficient: *Towerson* v. *Jackson*, 1891, 2 Q. B. 484; 65 L. T. 332.

See further as to rents: notes to *Rule* 410, *supra*, p. 944.

Estoppel arising from representation to persons dealing with equity of redemption.

Estoppel.—A mortgagee may be estopped as against a person inquiring of him the amount due on his mortgage, with a view to purchasing the equity of redemption, from claiming more than the amount then claimed: *Dominion Savings & Investment Co.* v. *Kittridge*, 23 Gr. 631. But if such representations are made to a person not known to be intending to purchase, or deal in respect of, the equity of redemption, they are not binding on the mortgagee, although actually acted upon: *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374.

The mortgagor may, by his conduct be also estopped from setting up payments on account of the mortgage: *Inglis* v. *Gilchrist*, 10 Gr. 301.

Vendor's lien enforceable, where mortgage taken for purchase money invalid.

Vendor's Lien.—Void Mortgage for Purchase Money.—Where a mortgage was given by an infant for purchase money, and the infant on coming of age adopted the purchase, but repudiated the mortgage; an assignee of the mortgage was held nevertheless entitled to a lien for the purchase money: *Grace* v. *Whitehead*, 7 Gr. 591.

Where land is conveyed in consideration of maintenance, the vendor has a lien for the consideration: *Paine* v. *Chapman*, 6 Gr. 338; 7 Gr. 179.

Mortgage payable in foreign currency.

Mortgage payable in Foreign Currency.—Where the mortgage debt is payable in lawful money of the United States, the mortgagee is entitled, at his option, to claim the amount in the current money of that country, or its equivalent in Canadian currency, at the time of default made in payment: *Morrell* v. *Ward*, 10 Gr. 231; *Crawford* v. *Beard*, 14 C. P. 87; and see *Manners* v. *Pearson*, 1898, 1 Ch. 581; 78 L. T. 432.

Priorities, as to executions.

Priorities.—Formerly the priorities were determined in the case of executions by the date of the delivery of the writs to the sheriff for execution, and for this purpose a fraction of a day was regarded: *Beckman* v. *Jarvis*, 3 U. C. Q. B. 280; *Converse* v. *Michie*, 16 C. P. 167. But now under *The Creditors' Relief Act* (R. S. O. c. 81), all

execution creditors whose writs are in the sheriff's hands to be executed are entitled to rank *pari passu*: *Harvey* v. *McNeil*, 12 P. R. 362; 24 C. L. J. 122. But an execution creditor directing the sheriff to stay execution, may now, as formerly thereby lose his priority, as against any subsequent execution then in, or thereafter coming into, the sheriff's hands, before the stay is removed: *Ross* v. *Hamilton*, E. T. 3 Vict.; *Foster* v. *Smith*, 13 U. C. Q. B. 243; *Re Ross*, 3 P. R. 394; *Bank of Montreal* v. *Munro*, 23 U. C. Q. B. 414; *Kerr* v. *Kinsey*, 15 C. P. 531; *Trust & Loan Co.* v. *Cuthbert*, 13 Gr. 412. But the sheriff, after being stayed, may make a second seizure during the currency of the writ: *Gates* v. *Smith*, 13 C. P. 572. Rule 474. Stay of execution, effect of.

Mortgagees for value are usually entitled to priority, according to the date of registration of their mortgages; and the omission of the Registrar to index a registered instrument will not deprive it of its priority: *Lowrie* v. *Rathbun*, 38 U. C. Q. B. 255; *Green* v. *Ponton*, 8 Ont. 471. Priority of mortgages.

Voluntary mortgagees, and mortgagees with actual notice of a prior unregistered instrument, however, are not within the protection of *The Registry Act* (R. S. O. c. 124); and see *Greaves* v. *Tofield*, 43 L. T. 100; *Kettlewell* v. *Watson*, 46 L. T. 83; 51 L. J. Chy. 281; *Clarke* v. *Palmer*, 48 L. T. 857; and a person making voluntary payments on a registered mortgage cannot thereby acquire the position of a prior incumbrancer in respect of such payments as against persons having charges or incumbrancers on the mortgaged property at the time of such payments, subsequent to the mortgage, even though the person making the payment subsequently obtains an assignment of the mortgage: *McMillan* v. *McMillan*, 23 Ont. 351; and where an assignee of a term subject to a mortgage, in pursuance of an option in that behalf contained in the lease, purchases the fee, the mortgage becomes a charge on the fee, and the purchaser of the fee has no prior lien, even for his purchase money, as against the mortgagee: *Building & L. Ass'n.* v. *McKenzie*, 24 Ont. App. 599. Voluntary mortgages.

A mortgagee who has assigned the mortgage, and covenanted for its payment, is entitled to a lien as against the mortgagor for all payments so made: *Fleming* v. *Palmer*, 12 Gr. 226. Payments by guarantor, lien for.

An execution creditor cannot get priority over a prior unregistered deed: *Russell* v. *Russell*, 28 Gr. 419; nor over a prior unregistered equity: *Hamilton P. L. Socy.* v. *Gilbert*, 6 Ont. 434; *Brown* v. *McLean*, 18 Ont. 533; *Re Trusts Corporation* v. *Bæhmer*, 26 Ont. 191; *Parke* v. *Riley*, 3 E. & A. 215; *Re Lewis & Thorne*, 14 Ont. 133; but it would seem that a purchaser at a sheriff's sale may: *Van Wagner* v. *Findlay*, 14 Gr. 53. Execution creditors purchasers at sheriff's sale.

Where the goods of a debtor are liable to a lien in favour of a third person on his giving notice to the debtor, and the goods are seized in execution before any notice is given, the execution creditor is entitled to priority: *Byford* v. *Russell*, 1907, 2 K. B. 522; 97 L. T. 104.

A mortgagor who becomes also an execution creditor cannot acquire priority as such over his own mortgage, and where the mortgaged property is sold the proceeds are applicable to the mortgage, and only the surplus, if any, which remains will be applicable to his execution: see *Dixon* v. *Steel*, 1901, 2 Ch. 602.

Where it is necessary, for the purpose of settling the priority of incumbrancers, to inquire whether a person who has been sued, was, Absconding debtor, inquiry as to.

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or was not, an absconding debtor within the meaning of the Act (R. S. O. c. 82), the Master may do so, although the party sued may have taken no proceedings to set aside the attachment: *Montreal Bank* v. *Baker*, 9 Gr. 97, 298; but see *Martin* v. *Boulanger*, 8 App. Cas. 296; 49 L. T. 62. An attachment only binds lands from the date of the seizure under it, and an execution delivered to the sheriff, before seizure made under the attachment, is entitled to priority over it: *Robinson* v. *Bergin*, 10 P. R. 127.

Creditor, when postponed, by conduct to prejudice of other creditors.

Where a creditor who had obtained security by an assignment from his debtor of his chattels, and other assets, by way of mortgage, was notified by a subsequent execution creditor of his claim, and informed that he would be held answerable for his dealing with the assets assigned, but negligently allowed the debtor to use, and deal with them, so that they were lost; it was held that the first creditor was thereby postponed to the second as regards other property liable for the payment of their debts: *Huntingdon* v. *Van Brocklin*, 8 Gr. 421.

Two deeds on same day, priority, how settled.

For the purpose of determining priorities between two deeds executed on the same day, the Master may inquire which was in fact first executed, and may have regard to the internal evidence of the deeds themselves, for the purpose of ascertaining the intention of the parties upon the question of priority: *Gartside* v. *Silkstone, D. C. & I. Co.*, 21 Ch. D. 762; 47 L. T. 76.

Where a judgment has been pronounced on the construction of an instrument declaring, A. to be entitled in priority to B., such judgment is a bar to any subsequent action by B. for the rectification of the instrument so as to give him priority; the proper course in such a case is for B. to procure a stay in the first action until his action for rectification can be determined: *Caird* v. *Moss*, 33 Ch. D. 22; 55 L. T. 453.

Disputes between incumbrancers, how determined.

Disputes between Incumbrancers.—Where there is a dispute between two persons, as to which of them is entitled to an incumbrance, the Master may determine the question himself, or, where to do so, would be likely unduly to delay the plaintiff and other parties not interested in the question, he may report the incumbrance, and its priority as regards other incumbrances, and the dispute between the claimants, so that the Court may give proper directions for determining the question: *McDonald* v. *Wright*, 12 Gr. 552.

Place of payment.

Place of Payment.—The Master, in appointing the place, and manner of payment, must proceed under *Rule* 430.

Day of payment not to be a dies non.

Persons to Redeem, and Day for Redemption.—The Master is to appoint a day for redemption. He should be careful to see that the day appointed is not a Sunday, or a bank holiday, otherwise a new day will have to be appointed, before a final order can be obtained: *Holcumb* v. *Leach*, 3 Gr. 449. The omission of the Master to appoint a day for redemption may be remedied by order in Chambers: *King* v. *Connor*, 10 Gr. 364.

Omission to appoint a day.

Foreclosure—redemption, how directed.

Where the judgment is for sale, one day is appointed six calendar months from the making of the report, for the mortgagor to redeem the plaintiff, and all subsequent incumbrancers who have proved claims; in default of payment, a final order for sale is made; see *Rules* 478, 486, but see *Jones* v. *Harris*, 55 L. T. 884, where only three months were allowed for redemption. Where the judgment is for

foreclosure, the subsequent incumbrancers are ordinarily entitled to successive rights of redemption in the order in which they acquired their charges; six calendar months being given to the first in priority, and one calendar month (*Rule* 489) to each of the others in succession: *Seton*, 5th ed., 1645; *Webster* v. *Patterson*, N. N. 1884, 20. But the Court may specially direct that one day only be given to all the defendants to redeem the plaintiff, without prejudice to their priorities *inter se*: *Bartlett* v. *Rees*, L. R. 12 Eq. 395; *The General Credit & D. Co.* v. *Glegg*, 22 Ch. D. 549; 48 L. T. 182; *Smith* v. *Olding*, 25 Ch. D. 462; 50 L. T. 357; *Lewis* v. *Aberdare & P. Co.*, 50 L. T. 451; *Western Canada L. & S. Co.* v. *Helmrod*, 28 C. L. J. 185. In *Mutual Life Assurance Co.* v. *Longley*, 26 Ch. D. 686; 51 L. T. 284, Pearson, J., said that, as a general rule, where there are several defendants, but one day should be given: and see *Platt* v. *Mendel*, 27 Ch. D. 246; 51 L. T. 424; where the practice of giving successive days for redemption, where there are subsequent incumbrancers, was declared to be anomalous: and see *Davis* v. *Manley*, 78 L. T. Jour. 318; *Doble* v. *Manley*, 28 Ch. D. 664; *Tufnell* v. *Nicholls*, 56 L. T. 152. A *puisne* incumbrancer, and all persons claiming under him are entitled to but one day for redemption: *Loveday* v. *Chapmon*, 32 L. T. 689; *Beevor* v. *Luck*, L. R. 4 Eq. 537; and so are execution creditors, where there are no intermediate incumbrances: *Bates* v. *Hillcoat*, 16 Beav. 139; *Stead* v. *Banks*, 5 D. & S. 560; *Ardagh* v. *Wilson*, 1 Chy. Ch. 389; Seton, 5th ed., 1645; but see *Carroll* v. *Hopkins*, 4 Gr. 431. Rule 474.

As to the mode in which the direction for redemption is given where one of the subsequent incumbrancers is an annuitant: see *Smithett* v. *Hesketh*, 44 Ch. D. 161; 62 L. T. 802.

After a judgment, or report, appointing a day for redemption, a plaintiff cannot be required to accept payment of the redemption money before the day named for payment with interest only to that date: *Hill* v. *Rowlands*, 1897, 2 Ch. 361; 77 L. T. 34; but see *The Mortgages Act* (R. S. O. c. 112), s. 15; and R. S. C. c. 120, s. 10.

A party making default in redemption at the time appointed, may be foreclosed: *Rule* 486, and new accounts may, from time to time, be taken without further order: *Rule* 477. When all the subsequent incumbrancers have been foreclosed, one calendar month (*Rule* 489) is given to the mortgagor to redeem, and, on default, he may be foreclosed. An incumbrancer redeeming, may proceed to foreclose the subsequent incumbrancers and the mortgagor, as if he were the original plaintiff in the action. A subsequent incumbrancer redeeming out of his order of priority may add the amount paid to his own claim as against all incumbrancers subsequent to himself, but not as against any that are prior; as against the latter, he may claim to be redeemed in respect of any claim he has paid which had priority over the latter's claim. But, inasmuch as a prior incumbrancer on redeeming a subsequent incumbrancer, in respect of a prior claim paid off by the latter, would be entitled, to add the amount so paid to his own debt, and to be redeemed by the latter, it will generally be found inexpedient to claim the right to be redeemed, and the incumbrancer next in priority to the plaintiff should be appointed to be redeemed as to his claim, without first requiring him to redeem a subsequent incumbrancer in respect of any prior claim paid by the latter. Where the mortgagor redeems after *puisne* incumbrancers have been foreclosed, he thereby opens the foreclosure as to them: see *Box* v. *Bridgman*, 6 P. R. 234; *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 De G. M. & G. 638; *Read* v. *Smith*, Subsequent incumbrancer redeeming out of his order.

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14 Gr. 250; 16 Gr. 52; *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618; 49 L. T. 555; and see *Ledbrook* v. *Passman*, 59 L. T. 306; and *Whiteley* v. *Delaney*, *infra*.

Redemption, how directed where equity of redemption divided.

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day should be given to all the persons interested in the equity of redemption to redeem: *Hill* v. *Forsyth*, 7 Gr. 461; so also where there is any dispute between co-defendants as to their priorities, one day may be given to all to redeem without prejudice to their rights *inter se*: *General Credit & D. Co.* v. *Glegg*, 22 Ch. D. 549; 48 L. T. 182; *Smith* v. *Gilding*, 25 Ch. D. 462; 50 L. T. 357; *Lewis* v. *Aberdare & P. Co.*, 50 L. T. 451; but where there is a stipulation in the mortgage that in case of sales by the mortgagor, the mortgagee shall, on payment of a certain portion of the purchase money, release the part sold, each purchaser is entitled to redeem his own part on payment of the stipulated portion of the money, and the Master should, in such a case, appoint one day for each of the several persons so entitled, to redeem his respective portion accordingly: *Davis* v. *White*, 16 Gr. 312.

Right of purchasers of different parts of mortgaged estate.

As to the rights of purchasers of different portions of the mortgaged estate *inter se*, see *Barker* v. *Eccles*, 17 Gr. 277; *Jones* v. *Beck*, 15 Gr. 671; *Pierce* v. *Canavan*, 28 Gr. 356; 7 Ont. App. 187; *Buckler* v. *Bowman*, 12 Gr. 457; *Norris* v. *Meadows*, 28 Gr. 334, affirmed 7 Ont. App. 237; *Clork* v. *Bogart*, 27 Gr. 450; *Fraser* v. *Nagle*, 16 Ont. 241.

Where a mortgage comprised both real and personal estate, on the death of the mortgagor it was held that his personal representative was entitled to redeem both properties, but that the reconveyance to him should reserve the right or equity of redemption of any other person or persons: *Hall* v. *Heword*, 32 Ch. D. 430; 54 L. T. 810; but see now *The Devolution of Estates Act* (R. S. O. c. 119), ss. 4, 8, 10.

A tenant for life of a mortgaged estate cannot purchase the estate at a sale under a power of sale in the mortgage, so as to cut out the remainderman under the same settlement: *Griffith* v. *Owen*, 1907, 1 Ch. 195; 96 L. T. 5; and probably the same rule would apply where the sale takes place under a judgment.

A mortgagee who realizes a part of his security for his debt, does not thereby prejudice his rights in respect of the rest of his security: see *Monks* v. *Whiteley*, 1911, 2 Ch. 448; 105 L. T. 504, at p. 509; and see *S.C.* sub nom. *Whiteley* v. *Delaney*, 1914, A. C. 132; 110 L. T. 734.

Where several persons are interested in the equity of redemption, any one of them seeking to redeem is entitled to, and as a rule must, redeem the whole mortgaged property, and not merely a proportionate part, but the conveyance to one of several persons entitled to the equity of redemption should be made subject to the right of redemption of such other persons: *Pearce* v. *Morris*, L. R. 5 Chy. 227; 22 L. T. 190; *Foulds* v. *Harper*, 11 S. C. R. 639; *Kennedy* v. *Foxwell*, 11 O. L. R. 389. But under special circumstances one of several joint mortgagors was permitted to redeem his proportionate part of the mortgaged estate on payment of a proportionate part of the mortgage debt: *Readdy* v. *Pendergast*, 56 L. T. 790; and see *Smith* v. *Hunt*, 2 O. L. R. 134; 4 O. L. R. 653, where third parties having acquired, under a power of sale, a legal title to an undivided three-fourths of the mortgaged property, the mortgagor was held only entitled to redeem the remaining undivided one-fourth, and to get compensation for the three-fourths from the mortgagee.

Where the day appointed for redemption is uncertain, a new day must be appointed: *Scott* v. *McKeown*, 1 Chy. Ch. 166. Rule 474.

Pending the time allowed for redemption it is not competant for the mortgagee to sell the mortgaged property under a power of sale: *Stevens* v. *Theatres, Ltd.*, 1903, 1 Ch. 857; 88 L. T. 458. (In this case leave to appeal was given: 117 L. T. J. 199, but the case is not further reported.)

But the exercise of the power of sale before an action to redeem has been commenced puts an end to the right of redemption; even though the purchaser is in default: *Soltmon* v. *McColl*, 12 W. L. R. 146.

Master's Report.—The Master's report should bear date the day it is signed, and not before: *Woddell* v. *McColl*, 14 Gr. 211. It must be confirmed before the day appointed for redemption, or a final order will be refused: *Mountain* v. *Porter*, 1 Chy. Ch. 207; *Mills* v. *Dixon*, 2 Chy. Ch. 53. In the latter case a month's further time to redeem was allowed; and see *Rule* 489, and *Imp. Trusts Co.* v. *N. Y. Security*, 5 O. W. R. 641. Master's report, date of. Should be confirmed.

As to confirming report: see *Rules* 692, 769, and notes. The omission to appoint a day for redemption may be remedied by application in Chambers: *King* v. *Connor*, 10 Gr. 364.

Where the Master had omitted to allow the plaintiff two items of interest, an order was made to correct the mistake, after a final order for sale, without appointing any new day for payment: *Bessey* v. *Graham*, 9 U. C. L. J. 82; and see *Morley* v. *Matthews*, 12 Gr. 453; but the Master cannot, of his own motion, in a subsequent report, correct a mistake in a prior report: *Crooks* v. *Street*, 1 Chy. Ch. 76; and see further RR. 502-4, note p. 915. Correcting mistake in.

Extending Time for Payment.—Application to extend the time for payment should be made in Chambers: *Anon.*, 4 Gr. 61; where the defendant showed that he had sold for £300, and the mortgage debt was only £250, and that he expected to receive payment in full in two or three months, the time was extended: *Ford* v. *Steeples*, 1 O. S. 282. So also where the mortgage was for purchase money, and the vendor had neglected to pay off a prior mortgage, pursuant to his covenant, and it appeared that the existence of the first mortgage prevented the defendant from raising money to pay off the second, the time was extended: *G.* v. *V.*, 2 Chy. Ch. 33. So also six months' further time was given, where the defendant was prevented from raising the money by reason of an improper advertisement published by the plaintiff's solicitors: *Gilmour* v. *Meyers*, 2 Chy. Ch. 179. So also where it was shown that the value of the property would be enhanced in the meantime, by the construction of a railway: *Cameron* v. *Cameron*, 2 Chy. Ch. 375; and where a reasonable prospect of payment at the extended time was shown, the time was extended: *Cohane* v. *Durie*, 2 Chy. Ch. 394; *Street* v. *O'Reilly*, 2 Chy. Ch. 370; but an affidavit of the solicitor, that he believed his clients had exerted themselves, and were endeavouring to raise the money, and that the property was worth much more than the debt, was held insufficient: *Anon.*, 4 Gr. 61. Extension of time for payment, when granted.

Where pending an appeal it is desired to extend the time fixed by a judgment, or report, for redemption until after the appeal shall have been disposed of, the application under *Rule* 176 may be made to the

Rules 475, 476.

Court of first instance: *Manks* v. *Whiteley*, 1913, 1 Ch. 581, 108 L. T. 450.

Application after day appointed has elapsed.

Where the application is made after the day fixed for redemption the applicant is usually required to pay interest for the extended time, on the whole amount found due for principal, and interest: *Street* v. *O'Reilly*; *Cahuac* v. *Durie*; *Cameron* v. *Cameron*, *supra*, p. 1067; and the payment of the whole costs, or at all events the costs of the application, is also usually made a condition precedent: *Ib.*; and see *Hilford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268, *Canada Permanent L. & S. Co.* v. *Donaldson*, 30 C. L. J. 68; and where the mortgagee swore that he had been compelled, in consequence of the mortgagor's default, to contract a loan to meet his liabilities, at a higher rate of interest than that reserved by the mortgage; on extending the time, the mortgagor was required to pay such a sum as would cover the excess of interest payable by the mortgagee: *Howard* v. *Macara*, 1 Chy. Ch. 27. It is probable however, that where the application is made before a final order has been obtained, the application will be more readily granted, and on less stringent terms, than where it is made after the final order has issued: *Patch* v. *Ward*, L. R. 3 Chy. 212.

Terms imposed.

Time may be extended on the same grounds in a redemption action, where the application is not made until after a final order dismissing the action, that order must be first vacated: see *Collinson* v. *Jeffery*, 1896, 1 Ch. 644; 76 L. T. 78.

See further as to applications to open foreclosure, and extend the time for payment, *Rule* 486, note.

In proceedings for foreclosure, etc., state of mortgage account may be proved prima facie, by statement on oath of assignee of mortgage.

475. On any proceeding for foreclosure by, or for redemption against an assignee of a mortgagee, the statement of the mortgage account, under the oath of such assignee, shall be sufficient *prima facie* evidence of the state of such account, and an affidavit or oath shall not be required from the mortgagee or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account. C.R. 751.

See *Court* v. *Holland*, 8 P. R. 213.

Master's report, contents of.

476. The Master's report shall state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided for, and the names of such as have made default, and shall set forth the amount of the claims, and priorities of such as have attended, and these latter shall be certified as the only incumbrancers upon the property. C.R. 752.

For forms of reports in mortgage cases: see H. & L. Forms, Nos. 1070-1072, 1075, 1077, 1078-1080.

477. Subsequent accounts shall, from time to time, be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the judgment. C.R. 753. [*As amended* by Rule 1, December, 1913.]

Subsequent accounts to be taken by Master.

If the mortgagor, or owner of the equity of redemption, or any incumbrancer, redeems any prior charge which was his own debt, or which, by contract, express or implied, he was bound to discharge, he cannot keep such charge alive as against a *mesne* incumbrancer, whose incumbrance he is also expressly, or impliedly, bound to discharge: *Blake* v. *Beaty*, 5 Gr. 359; *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. G. M. & G. 638.

Mortgagor paying off incumbrance, effect of.

In taking the subsequent account the Master may allow a sum paid for insurance since the last account, under a provision in the mortgage: *Bethune* v. *Calcutt*, 3 Gr. 648.

Insurance.

In England, it is the practice on taking the subsequent account, to allow interest on the gross amount of principal, interest and costs, found due by the last report: *Ellon* v. *Curtois*, 19 Ch D. 49; 45 L. T. 435; and see *Jocob* v. *Earl of Suffolk*, Mos. 27; but in Ontario, it has not been customary to allow interest upon interest in respect of an incumbrancer's own proper debt, unless the mortgage expressly provides therefor. But where a subsequent incumbrancer pays off a prior incumbrance, he is entitled to interest on the aggregate amount paid by him for principal, interest and costs; the interest on the principal being computed at the rate reserved in his own security, but on the interest and costs, at the legal rate only: *McMaster* v. *Hector*, 8 C. L. J. 284.

It ereat on subsequant amount.

Although ordinarily a mortgagee's own costs do not bear interest, yet if they have been expressly ordered to be added to his debt, they bear interest at the same rate as the principal money from the date of taxation: *Eardley* v. *Knight*, 41 Ch. D. 537.

Where an execution creditor redeems a plaintiff mortgagee, he is entitled to consolidate his claim as execution creditor with that of the plaintiff which he has paid off, and an assignee for creditors of the mortgagor cannot redeem the execution creditor without paying the whole amount due to him: *Federal Life Assce. Co.* v. *Stinson*, 13 O. L. R. 127. *S. C. sub nom. Scott* v. *Swonson*, 39 S. C. R. 230.

Where a subsequent incumbrancer redeems the plaintiff, and desires to proceed under this *Rule*, it has not been usual for him to take out an order to continue the proceedings in his own name. The judgment is treated as giving him the right, on redeeming the plaintiff, to assume the carriage of the judgment under this *Rule* without the necessity of any order under *Rule* 300: see Mad. Cby. Pr., 495.

Sale—proceedings on.

478. If the judgment directs a sale on default in payment, then on default being made, and an order for sale obtained, the property shall be sold, with the approbation of the Master, and the purchaser shall pay his pur-

Rule 479.

chase money into Court, to the credit of the action. C.R. 754.

C. R. 754 provided for the settlement of conveyances by the Master, but that is now provided for in case of all sales by the Court, by *Rule* 416.

Master may sell by tender, private contract, etc.

By *Rule* 438, where a sale is ordered, the Master may cause the property, or a competent part thereof, to be sold, either by public auction, private contract, or tender; or part by one mode, and part by another, as he may think best for the interests of all parties; and he may fix an upset price, or reserved bidding, but such price, or bidding, must be so fixed at the meeting held by him for the purpose of settling the advertisement, and making the other arrangements preparatory to the sale, and must be notified in the conditions of sale.

Settle all conveyances.

The Master is to settle all necessary conveyances for the purpose of carrying out the sale, in case the parties differ; or in case there shall be any persons under any disability interested in such sale: see *Rules* 416, 457.

Before a sale can take place, a final order must be obtained: see *Rule* 486, and note.

Whole should not be sold where part sufficient.

It is the Master's duty not to sell the whole, where it is clear that a sale of part would suffice for the payment of the incumbrances. Where the mortgagor thinks more land is offered for sale than is necessary, he should object at the settlement of the advertisement. It is too late to take the objection after the sale: *Beaty* v. *Radenhurst*, 3 Chy. Ch. 344.

Purchase money, application of.

479. The purchase money, when so paid, shall be applied and paid out of Court in payment of what has been found due to the plaintiff and the other incumbrancers (if any), according to their priorities, together with subsequent interest, and subsequent costs. C.R. 755.

Even after a sale a dowress was allowed to come in and prove her claim: *Hyde* v. *Barton*, 8 P. R. 205.

Residue of purchase money, how disposed of.

This *Rule* makes no provision for the disposition of the residue, after payment of the claims of the plaintiff, and other incumbrances. A motion may be made by the mortgagor, before a Judge in Chambers, for payment of the residue. Since 11th March, 1879, a wife having dower in a mortgage, does so only for the purpose of the mortgage, and is consequently dowable out of any surplus after satisfying the mortgage debt. It will therefore be necessary wherever this right exists, that the wife should be notified, and provision made for her protection, in any order directing payment out of the surplus: *The Dower Act* (R. S. O. c. 70), s. 10; *Mortindale* v. *Clarkson*, 6 Oct. App. 1; but it would seem that the wife of a mortgagor who has joined in the mortgage should now be made a party by writ: *Biong* v. *Fitzgerald*, 15 P. R. 467; *sed quære*, whether, even now, a woman having a mere inchoate right to dower in mortgaged lands has any present right of redemption.

Execution creditors.

The Creditors' Relief Act (R. S. O. c. 81), applies to executions against lands which have been sold in a mortgage action; and the surplus after payment of specific incumbrancers is distributable, rateably among the execution creditors: *Harvey* v. *McNeil*, 12 P. R. 362; 24 C. L. J. 122.

Rules 480, 481.

The surplus proceeds of mortgaged land sold in the lifetime of the mortgagor are personalty, and, in case of intestacy, devolve as such, even though there be a power of sale which provides that the surplus is to go to the mortgagor "his heirs or assigns": *In re Grange, Chadwick* v. *Grange*, 1907, 2 Ch. 20.

Master to take account in redemption suits.

480. Upon a reference under a judgment for redemption, the Master shall, without any special direction, take an account of what is due to the defendant for principal money and interest, and his costs shall be taxed, and a time and place for payment appointed. C.R. 756.

Six months is usually allowed for redemption by the plaintiff in a redemption action, as in the case of a defendant in a foreclosure action: see *Rules* 474, 489, and notes. But it would seem that if the mortgagee were to insist on exercising his power of sale *instanter*, a mortgagor could not, by commencing a redemption action, where the right to redeem is not in dispute, procure an extension of time for redemption, nor even stay the sale pending the action, except on the terms of bringing the money sworn to be due by the mortgagee for principal, interest, and costs, into Court, to abide the taking of the account. But where the right of redemption is in dispute, a sale may be restrained until the trial or hearing of the cause without bringing the amount claimed into Court: *Rhodes* v. *Buckland*, 16 Beav. 212, 219; and the general rule requiring the payment of the money into Court may be modified, having regard to the special circumstances of the case: see *Hickson* v. *Darlow*, 23 Ch. D. 690; *Macleod* v. *Jones*, 24 Ch. D. 289.

In the event of a plaintiff in a redemption action failing to redeem at the time appointed he may be foreclosed: *Rule* 487.

Procedure where judgment is for redemption, etc.

481. Where the judgment is for redemption or foreclosure, or redemption or sale, such proceedings are in such case to be therenpon had, and with the same effect as in an action for foreclosure or sale, and in such case the last incumbrancer shall be treated as the owner of the equity of redemption. C.R. 757.

In an action for redemption the plaintiff is not entitled to a sale in default of redemption, and it is only where the mortgagee expressly consents, that a judgment in a redemption action can be so framed.

Usually the only alternative of redemption is foreclosure, or dismissal of the action, which is equivalent to a foreclosure. The plaintiff may be foreclosed: see *Rule* 487; and under this *Rule* the mortgagee may bring in any subsequent incumbrancers and foreclose them. But when the mortgagee brings in the subsequent incumbrancers it would seem that they would have the ordinary right of defendants in a foreclosure action, and be entitled to claim a sale on the usual terms, because the action then ceases to be a redemption action, and becomes one for foreclosure: see *Rule* 462.

A mortgagor, or any person liable to pay, is entitled to redeem any mortgage made after the 1st July, 1880, after it has run five years, even though the time limited by the mortgage itself for redemption

Rule 482.

has not expired: *The Interest Act* (R. S. C. c. 120), s. 10; *Re Parker*, 30 C. L. J. 140; but this provision does not extend to mortgages or debentures secured on real estate given by any joint stock company or corporation: *Ib.*: and after the time for redemption has been fixed by any judgment, order, or report, the right of a mortgagor to stop interest by redeeming at an earlier period than that named would seem to be doubtful: see *Hill* v. *Rowlands*, 1897, 2 Ch. 361; 77 L. T. 34.

Where a mortgagee takes proceedings to enforce his security, he cannot refuse to accept payment of the whole amount of principal and interest, even though part of it has not matured; but when his proceedings are confined to protecting his security, he cannot, so far as the Statute above mentioned applies, be compelled to accept payment of moneys not yet accrued due; the right to accelerate payment for default being his, and not that of the mortgagor; see *Ex p. Ellis*, 1898, 2 Q. B. 79; 78 L. T. 733; *Ex p. Wickens*, 1898, 1 Q. B. 542; *Wickens* v. *Shuckburgh*, 78 L. T. 213.

A reversioner, or remainderman, is not entitled to redeem a mortgage of the particular estate, without the mortgagee's consent, before the reversion, or remainder, has come into possession: *Prout* v. *Cock*, 1896, 2 Ch. 808.

Assignment of property, and delivery of documents.

482. Subject to the provisions of *The Mortgages Act*, upon payment of the amount found due, the mortgagee shall, unless the judgment otherwise directs, assign and convey the mortgaged property to the party making the payment, or to whom he may appoint, free and clear of all incumbrances done by him, and shall deliver up all deeds and writings in his custody or power relating thereto. C.R. 758.

The Act referred to in this *Rule* is R. S. O. c. 112, under which a person entitled to redeem, instead of taking a discharge, or reconveyance, may require the mortgage debt, and mortgaged property to be transferred by the mortgagee to any third person: see s. 3, unless the mortgagee is, or has been, in possession: see *Ib.*, sub-s. 3.

Judgment creditor.

A judgment creditor is bound to assign his judgment to the party redeeming him: *Bank of British North America* v. *Moore*, 8 Gr. 461.

Who entitled to conveyance.

Where both the mortgagor, and a subsequent incumbrancer, pay the money due to the plaintiff into the bank, the subsequent incumbrancer has the right to a conveyance in preference to a mortgagor, and as between two incumbrancers, the one who is prior is entitled to the conveyance: see *Teevan* v. *Smith*, 20 Ch. D. 724.

Redemption by one of several interested in equity of redemption.

Where there are other persons interested in the equity of redemption, besides the person redeeming, the mortgagee should convey to the party redeeming, subject to the equities of such other persons: *Pearce* v. *Morris*, L. R. 5 Chy. 227; and see *Boyd* v. *Petrie*, L. R. 10 Eq. 482; L. R. 7 Chy. 392; and see further as to form of conveyance: *Hartley* v. *Burton*, L. R. 3 Chy. 365.

Reconveyance.

Where a mortgagor who has assigned his equity of redemption, taking a covenant of indemnity from his assignee, is compelled to pay the mortgage debt, he is entitled to a reconveyance subject to the equities of persons other than himself in the property: *Kinnaird* v.

Trollope, 39 Ch. D. 636; 59 L. T. 433; *Queen's Coll.* v. *Claxton*, 25 Ont. 282; *Stark* v. *Reid*, 26 Ont. 257; and he is entitled to a charge on the land for the amount so paid as against his assignee: *Hamilton Providt. L. & I. Co.* v. *Smith*, 17 Ont. 1. As to the terms of a conveyance to a tenant for life who redeems: see *Alderson* v. *Elgey*, 26 Ch. D. 567. Where a mortgage is paid off, the mortgagee is bound to reconvey the mortgaged property so that it will revest in the mortgagors; if he reconvey to one of several mortgagors, he will be liable at the suit of the other mortgagors for any loss they may sustain by his so doing: *Magnus* v. *Queensland National Bank*, 36 Ch. D. 25; 57 L. T. 136; affirmed by C. A.: 37 Ch. D. 466; 58 L. T. 248. Rule 482.

A subsequent incumbrancer redeeming a prior mortgage is bound to take over all collateral securities of which he has notice, in the hands of the mortgagee, or is liable to subsequent incumbrancers for the value thereof: *Glover* v. *Southern L. & S. Co.*, 1 O. L. R. 59. If a mortgagee has put it out of his power to reconvey the whole of the mortgage security, he may be compelled to make compensation for the part he is unable to reconvey: *Smith* v. *Hunt*, 2 O. L. R. 134; 4 O. L. R. 633.

A mortgagor redeeming is entitled to a reconveyance, or vesting order, and is not obliged to accept a certificate of discharge of the mortgage: *Ellis* v. *Ellis*, 1 Chy. Ch. 257; *McLennan* v. *McLean*, 27 Gr. 54.

Where, owing to the disappearance of a mortgagee trustee, a reconveyance or discharge cannot be obtained from him, and it becomes necessary to obtain a vesting order under *The Trustee Act*, the mortgagor is liable to pay the costs of obtaining such order: *Webb* v. *Crosse*, 1912, 1 Ch. 323.

Where the mortgagee has realized part of his securities, the party redeeming is not entitled to any reconveyance thereof: see *Manks* v. *Whiteley*, 1911, 2 Ch. 448; 105 L. T. 504; see p. 509.

The costs of the reconveyance are chargeable to the mortgagor as part of the price of redemption: see *Webb* v. *Crosse*, *supra*.

C. R. 758 provided that the delivery of deeds was to be on oath, which meant that an affidavit might be required from the mortgagee proving that the deeds delivered were all that he had received, but this provision has been dropped from the present *Rule*.

Lost mortgage, indemnity required.

Where the mortgagee has lost the mortgage deed, he is bound, at his own expense, to furnish the mortgagor, or any incumbrancer redeeming him, with proof of the loss, and with an indemnity against any demand of third persons: *McDonald* v. *Hime*, 15 Gr. 72; and see *Caldwell* v. *Matthews*, 62 L. T. 799.

Redemption money, how paid out of bank.

In order to get the money out of the bank, it is necessary to produce to the officer required to sign the cheque, the consent of the party paying it in, duly verified, or that of his solicitor, if any. If this consent cannot be procured, an order must be obtained in Chambers, on notice to such party, and the costs of such motion will not be ordered to be paid by the latter: *Bernard* v. *Alley*, 2 Chy. Ch. 91; *Weeks* v. *Stourton*, 11 Jur. N. S. 278. There should also be produced to him a certificate from the bank that the money has been paid in, and the judgment and report, if any, under which it was paid in.

Payment of redemption money.

Rules 483, 484.

The party paying in the money, is entitled to receive his conveyance and deeds, and to be let into possession, before the money is paid out.

Order for payment of deficiency may be obtained, when.

483. If the purchase money is not sufficient to pay what has been found due to the mortgagee (where the mortgagor or person liable to pay the debt is a defendant), he shall be entitled on an *ex parte* application, to an order for the payment of the deficiency. C.R. 386.

Judgment on covenant, on praecipe.

Where a personal order for payment is claimed by indorsement on the writ, that relief may now be awarded by the judgment in the first instance, without waiting for the ascertainment of the deficiency: see Forms 101, 102, 154; H. & L. Forms, Nos. 904, 905.

Enforcing judgment on covenant after foreclosure.

Where the judgment is for foreclosure, accompanied by a personal remedy for payment of the mortgage debt, if the mortgagee, after obtaining a final order of foreclosure, enforces the judgment for payment, by issuing execution, or otherwise, he thereby opens the foreclosure. If he has in such a case, parted with the mortgaged property after obtaining the final order (otherwise than under a power of sale), any further proceedings to enforce the payment of the debt will be restrained on motion: see *Rule* 486, note p. 1082.

Order for payment of deficiency, only granted when there is a personal liability.

The order for payment of deficiency can only be granted where there is a personal liability to pay. See cases cited in note to *Rule* 460.

Where there is a covenant express, or implied, for payment of the mortgage debt, a mortgagee, who has exercised his power of sale, is entitled to sue for any deficiency which may remain due after deducting the proceeds of the sale, and the fact that the mortgagee has again acquired the land is no objection to his right to recover: *Pegg* v. *Hobson*, 14 Ont. 272.

Where a mortgagor, who has parted with his equity of redemption, is sued on his covenant to pay the mortgage debt, he is entitled, as against the assignee of the equity of redemption, to a lien on the mortgaged land, if still in the hands of the mortgagee, subject to redemption, for any sum so paid, if the assignee of the equity of redemption has agreed to assume the mortgage: *Hamilton Provident L. & I. Co.* v. *Smith*, 17 Ont. 1.

Where account changed after being ascertained, new account may be taken.

484.—(1) Where the state of the account ascertained by a judgment order or report is changed before the final order is obtained, the mortgagee may either before or after the day appointed for payment apply *ex parte* to fix, by reference to a Master or otherwise, the amount to be paid in lieu of the amount previously ascertained, or where the day appointed for payment has not arrived, may give notice to the party by whom the money is payable that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice.

Or notice of credit given.

Rule 485.

New day.

(2) Where the application is made after the day appointed for payment, and in other cases if so directed, a new day for payment shall be appointed.

Final order may be granted if notice of credit given, or party may have new account taken.

(3) Where notice of credit has been given, if the sums named therein appear proper to be allowed and paid, the final order may be granted without further notice; but the party to whom the notice of credit is given may apply to fix, by reference to a Master or otherwise, the amounts proper to be allowed and paid instead of the amounts mentioned in the notice. C.R. 387.

Notice of credit must be served before day of payment.

A notice of credit must be given before the day for payment arrives: see also *Knottinger* v. *Barber*, 1 Chy. Ch. 258. Notice of credit of payments, or rents, which have been received after the day fixed for redemption, need not be given: see *Rule* 486, note. Such payments do not affect the plaintiff's right to a final order, unless indeed they amount to a total extinguishment of the debt: *National Perm. Mutl. B. B. Socy.* v. *Raper*, 65 L. T. 668.

A new day was appointed where accounts had been altered by a new arrangement between the plaintiff and defendant as to payments: *McCollum* v. *Caston*, 1 O. L. R. 240.

The procedure prescribed by this *Rule* must be followed, and it is not enough to entitle a plaintiff to a final order, after the account has been changed, to state on affidavit that the outgoings have exceeded the receipts since the date of the report: *Foresters* v. *Pegg*, 13 P. R. 254.

When notice has been given under this *Rule*, or the payment on account has been made after the day fixed for redemption, the final order may be obtained, notwithstanding the alteration in the state of the account, without appointing any new day: *Ib.*

Action may be dismissed before judgment on payment of arrears and costs.

485.—(1) In an action for foreclosure or sale, or for recovery of possession of any mortgaged property for default in the payment of interest, or of an instalment of the principal, the defendant may, before judgment or after judgment, but before sale or final foreclosure or recovery of possession of the mortgaged property, move to stay the action upon payment of the amount then due for principal, interest and costs. C.R. 388.

(2) Any action so stayed may upon subsequent default in the payment of a further instalment of the principal, or of the interest, be proceeded with by leave of the court. C.R. 389 and 390.

Rule 485 applies to actions for redemption.

The *Rule*, in terms, is confined to actions for foreclosure, or sale, and for recovery of possession of mortgaged property for default in payment of principal or interest; but it has been held that a mortgagor bringing an action for redemption is within the equity of this

Rule 485.

Rule: *Moore* v. *Merritt*, 6 Gr. 550; *Dornyn* v. *Fralick*, 21 Gr. 194; see *contra*, *Tylee* v. *Hinton*, 3 Ont. App. 53; but a plaintiff in an action for redemption claiming the benefit of this *Rule* is not entitled to six months for payment of the instalment in default: *Dornyn* v. *Fralick*, *supra*. The *Rule* is held not to apply where the mortgagee is seeking to enforce a power of sale: *Robertson* v. *Hetherington*, 8 C. L. T. 141; nor where he is suing solely on the covenant for payment, even though the principal has become due by virtue of an acceleration clause in the mortgage: *Wilson* v. *Campbell*, 15 P. R. 254.

Mortgagee bringing action cannot claim six months' notice, or six months' interest.

Formerly when the principal money due under a mortgage was not paid off at the date at which it was covenanted to be paid, the mortgagee was entitled to six months' notice of payment, or six months' interest: *Lotshow* v. *Davis*, Blake, V.C., 7th June, 1877; and see *Re Houston*, 2 Ont. 84; *Trust & Loan Co.* v. *Kirk*, 8 P. R. 203; *Archbold* v. *Building & Loan Association*, 15 Ont. 237; *Smith* v. *Smith*, 1891, 3 Ch. 550; 65 L. T. 234; notice was not necessary where the six months' interest was paid: *Johnson* v. *Evans*, 61 L. T. 18; but a mortgagee bringing an action for sale, or foreclosure, or taking steps to enforce payment, could not insist on getting six months' notice of payment, or in default thereof, six months' interest: *Letts* v. *Hutchins*, L. R. 13 Eq. 176; *Re Alcock*, *Prescott* v. *Phipps*, 23 Ch. D. 372; 49 L. T. 240; *Bovill* v. *Endle*, 1896, 1 Ch. 648; nor could a mortgagee who entered into possession: *Bovill* v. *Endle*, *supra*; or who proved his claim in a partition action: *Re Houston*, 2 Ont. 84; and see *In re Moss*, 31 Ch. D. 90; 54 L. T. 49; nor an equitable mortgagee by deposit of title deeds: *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385; 66 L. T. 178. This right to six months' notice, or six months' interest, does not exist in the case of a mortgage made after 1st July, 1888, unless there is an express stipulation therein to that effect: see *The Mortgages Act* (R. S. O.), c. 112, s. 15; see R. S. C. c. 120, ss. 10, 11.

Although, after action for foreclosure brought, a mortgagor may, at any time before judgment, tender the amount due with interest to the date of tender, and the plaintiff is bound to accept it, yet after judgment, it has been held, in England, that a defendant cannot waive the six months allowed for redemption without the consent of the plaintiff: *Hill* v. *Rowlands*, 1897, 2 Ch. 361, but *quære*, how far the statutes above referred to would enable a defendant to do so in Ontario.

In default of payment of instalment, whole amount secured becomes due.

Upon default in payment of any instalment of principal, or interest, the mortgagee has a right, without any express stipulation to that effect, to call in the whole amount secured by the mortgage: *Cameron* v. *McRae*, 3 Gr. 311; but this right may be qualified by the express stipulation of the parties, as, for instance, where there was an express proviso that in default of payment of any instalment of interest for six months, the whole principal money should become payable, it was held that a suit for foreclosure would not lie until the lapse of the six months: *Porker* v. *The Vine Growers' Association*, 23 Gr. 179; and see *Hooper* v. *Herts*, 1906, 1 Ch. 549; 94 L. T. 324; *Williams* v. *Morgan*, 1906, 1 Ch. 804; 94 L. T. 473.

The acceptance of instalments after default has been made entitling the mortgagee to call in the principal, though not necessarily a waiver of the right to enforce payment, is a circumstance to be considered where a waiver is claimed: *Seal* v. *Gibson*, 110 L. T. 583.

Rule 485.

Proviso accelerating payment, how construed.

Where there was a proviso accelerating payment of principal and interest in the event of the mortgagor mortgaging, or otherwise incumbering the property, or suffering it to become liable to sale for taxes, it was held that a voluntary assignment in insolvency was not within the proviso: *McKay* v. *McFarlane*, 19 Gr. 345. Under a clause accelerating payment of mortgage money in the event of default, a mortgagee, who neglects to call in the mortgage money pursuant to the proviso, cannot in a redemption action treat the sums, of which the payment is accelerated, as overdue, and claim interest thereon: *McLaren* v. *Miller*, 20 Gr. 637.

How far Court can relieve from express proviso for accelerating payment in event of default, quaere?

It was held by Spragge, C., that even though there be an express stipulation in the mortgage, that in default of payment of any instalment the whole mortgage money shall become payable, the mortgagor may, nevertheless, after default, claim the benefit of this *Rule*: *Gemmell* v. *Burn*, 7 P. R. 381; and see *Knapp* v. *Cameron*, 6 Gr. 559; but in *Tylee* v. *Hinton*, 3 Ont. App. 53, Moss, C.J.A., expressed a doubt whether the Court had any power to relieve against such a stipulation, either under this *Rule*, or under its inherent jurisdiction to relieve against penalties, and forfeitures; and see *General Credit & Discount Co.* v. *Glegg*, 48 L. T. 182. It cannot, therefore, be said to be clear that the *Rule* applies to cases where there is an express proviso accelerating the payment of the mortgage debt in the event of default.

Interest to be paid up to last gale day.

Where a defendant moves to stay proceedings under this *Rule*, he may obtain the stay, on payment of the interest calculated up to the last gale day, and is not obliged to pay it, up to the time of making the application: *Strachan* v. *Murney*, 6 Gr. 378; but, if the defendant desires to pay off the whole amount of the mortgage debt, the mortgagee cannot refuse to accept it: *Cruso* v. *Bond*, 9 P. R. 111; 1 Ont. 884 (overruling *Green* v. *Adams*, 2 Chy. Ch. 184); *Ex p. Wickens*, 1898, 1 Q. B. 543; 78 L. T. 213; *Re Ellis*, 1898, 2 Q. B. 79; 78 L. T. 733; although in a redemption action he might not be bound to accept more than the instalments in arrear: see *Gibson* v. *Nelson*, 2 O. L. R. 500.

Mortgagee plaintiff cannot refuse to accept payment of whole debt.

The making of a motion to stay proceedings on payment of principal and interest is not equivalent to a tender: *Kinnaird* v. *Trollope*, 42 Ch. D. 610.

This *Rule* does not apply where, after judgment, the parties agree to an extension of the time for payment by instalments. In the event of the mortgagor making default he has no right, on payment of instalments in arrear under the agreement, to have the proceedings stayed: see *Keen* v. *Biscoe*, 8 Ch. D. 201; *McCollum* v. *Caston*, 1 O. L. R. 240.

Stay of proceedings under Rule 485, effect of.

After payment has been made, under this *Rule*, of the instalments in arrear, it is irregular for the plaintiff to take any further proceedings in the action, until another instalment falls due: *Carroll* v. *Hopkins*, 4 Gr. 431; and not even then, without the leave of the Court: see *Rule* 485.

Where subsequent default made after stay, form or order.

Where, after a judgment of foreclosure, the proceedings are stayed under this *Rule*, on a subsequent default being made, on the plaintiff's application to enforce the judgment, and the defendant asking for a further stay on payment of the arrears, an order may be made directing payment of the whole sum in six months, and in default

Rule 485. foreclosure, with liberty to the defendant to pay the arrears forthwith, and in that event staying the proceedings: *Strachan* v. *Devlin*, 1 Chy. Ch. 8.

In default of redemption final order may be granted in Chambers.

486. In default of payment according to the report in a foreclosure action, a final order of foreclosure may be granted against the party making default, on an *ex parte* application. C.R. 385.

Judgments in mortgage actions in the usual form, are to be read as if this *Rule* was incorporated therein: see *Rule* 519. Where the judgment is for sale in default of redemption, in like manner a final order for sale should be obtained: see *Rule* 478.

A final order is, generally speaking, necessary in all cases where a judgment directs anything to be done, upon the default of a party in doing a given act by a future day; the final order being the judicial determination that the default has in fact taken place.

Application for, how made.

Application for Final Order.—The application may be made to the Master in Chambers, or to any local officer having like jurisdiction.

Affidavit of non-payment to be produced.

In order to obtain a final order for default of redemption in a mortgage action, it is necessary to produce an office copy of the judgment, an office copy of the report, if any, the affidavit of the party to be redeemed of non-payment, and non-receipt of rents, and negativing his being in possession: *Scott* v. *McDonnell*, 1 Chy. Ch. 193; *Burford* v. *Lymburner*, *Ib.* 275; *Prees* v. *Coke*, L. R. 6 Chy. 645, or, in case any sum has been paid since the account was taken, and before the day appointed for redemption, showing that notice has been given pursuant to *Rule* 484, or, in case the party is in possession, showing no receipts, beyond those for which credit has been given in the account. For forms of affidavits: see H. & L. Forms, Nos. 598-600.

There must also be produced a certificate of the cashier, or other like officer: *Campbell* v. *Garrett*, 1 Chy. Ch. 255, of the bank, where the money is appointed to be paid, of non-payment of the money, on the date of the judgment, or since, duly verified by affidavit: see H. & L. Forms, Nos. 596, 597.

Affidavit of non-payment, by whom to be made.

Affidavit of Non-payment. — Where there are several parties entitled to the money directed to be paid, the affidavit of non-payment should be made by all: *Annis* v. *Wilson*, 1 Chy. Ch. 217; *Kinnaird* v. *Yorke*, 60 L. T. 380; but where one of the parties is out of the jurisdiction, his affidavit may be dispensed with: *Lyman* v. *Kirkpatrick*, 2 Gr. 625; *Counter* v. *Wylde*, 1 Gr. 538; and see *Frith* v. *Cooke*, 52 L. T. 798, where the affidavit of the plaintiff's solicitor was accepted: *Kinnaird* v. *Yorke*, *supra*; where a sole plaintiff resides out of the jurisdiction, the affidavit of his agent will be accepted, and in such case the affidavit should show where the custody of the mortgage has been: *Rae* v. *Shaw*, 1 Chy. Ch. 209; and where, in such a case, the affidavit is made by the solicitor of the plaintiff, it should show that the plaintiff has no other agent within the jurisdiction authorized to receive the money: *Taylor* v. *Cuthbert*, 1 Chy. Ch. 240; but see *Moody* v. *Tyrrell*, 6 P. R. 313; *Gillen* v. *Roman Catholic Episcopal Corporation*, 7 Ont. 146; *McMullen* v. *Polly*, 12 Ont. 702;

13 Ont. 299. An agent should state that he is authorized to receive the money: *Powers* v. *Merriman*, 1 Chy. Ch. 225; but it is not, however, necessary to produce the agent's authority: *Radclyffe* v. *Duffy*, 1 Chy. Ch. 302; and where the party to receive the money is a corporation aggregate, the affidavit of an officer of the company must show that he is the proper officer to receive the mortgage money: *Western Assurance Co.* v. *Coprcol*, 1 Chy. Ch. 227. Rule 488.

The affidavit of non-payment must he made after the day appointed for redemption: *Blong* v. *Kennedy*, 2 Chy. Ch. 453. When to be made.

When Notice Necessary.—The motion for a final order is usually *ex parte*: *Henderson* v. *Cowan*, 1 Chy. Ch. 297; *Rule* 486. But where two years had elapsed since the default, before the motion was made, notice was required to he served: *Kirkhoffer* v. *Stafford*, 2 Chy. Ch. 52; *Ardagh* v. *Orchord*, 2 C. L. J. 303; and where it appeared hy the report, that the defendant had not received notice of the proceedings in the Maeter's office, in a caee in which he was entitled to notice, notice of the motion was required to he eerved: *McCormick* v. *McCormick*, 6 P. R. 208; and where the account has heen changed even *after* the day appointed for redemption, notice ehould he eerved: *Portman* v. *Smith*, 2 C. L. J. 167; *Forcsters* v. *Peg*', 19 P. R. 254. Notice of motion when necessary.

On What Grounds Final Order Refused.—The order may be refused where the account ie changed hy the receipt of money before the day fixed for redemption: *Prees* v. *Coke*, L. R. 6 Chy. 645; *Garlick* v. *Jackson*, 4 Beav. 154. Final order, when refused, where account changed.

Where the mortgagee ie in occupation, or receipt of rents, he should be charged with rents up to the day fixed for redemption, or a new account muet be taken, and a new day appointed for payment: *Pipe* v. *Shafer*, 1 Chy. Ch. 251; and it was heid that this must he done even where the plaintiff ewore he wae in occupation merely as a caretaker: *Cummer* v. *Tomlinson*, 1 Chy. Ch. 235; or where a receiver had been appointed: *Jenner-Fust* v. *Needham*, 31 Ch. D. 500; 54 L. T. 420, affirmed hy C. A. 32 Ch. D. 582; *Piat* v. *Nicholson*, 80 L. T. Jour. 374; hut see *Rule* 474, notc; *Hoare* v. *Stephens*, 32 Ch. D. 194; 54 L. T. 230; *Holt* v. *Beagle*, 55 L. T. 592; *Ingham* v. *Sutherland*, 63 L. T. 614.

But the plaintiff'e going into poeeeesion and receiving rents, *after* the day appointed for payment, does not affect his right to a final order: *Portmon* v. *Smith*, 2 C. L. J. 167; *Greenshields* v. *Blackwood*, 1 Chy. Ch. 60; *Constable* v. *Howick*, 5 Jur. N. S. 331; *National Perm. B. S.* v. *Raper*, 65 L. T. 668.

Where before the day appointed for payment, the office of the bank, at which the money is made payable, ie cloeed, a new day must be appointed: *King* v. *Connor*, 1 Chy. Ch. 274. So where a Sunday was appointed for payment, the final order was refueed: *Holcumb* v. *Leach*, 3 Gr. 449. Refused where bank closed.

Where it appeared that the decree was erroneous, a final order was refused: *Commercial Bank* v. *Graham*, 4 Gr. 419; and see *Mitchell* v. *Strathy*, 28 Gr. 80. Or judgment erroneous.

Where a sole mortgagee, or one of eeveral joint mortgagees, diee before the day appointed for payment, unless the judgment provides in the latter caee for payment to the eurvivore, a new account must Death of mortgagee, effect of.

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be taken, and a new day appointed: *Blackburn* v. *Caine*, 22 Beav. 614; *Kingsford* v. *Polle*, 8 W. R. 110.

Crown cannot be foreclosed.

Where the Crown is entitled to the equity of redemption, a final order of foreclosure cannot be obtained, but merely an order authorizing the mortgagee to take possession until the Crown may see fit to redeem: *Dunn* v. *Attorney-General*, 10 Gr. 482, or the security be satisfied: *Hodge* v. *Attorney-General*, 3 Y. & C. 342; Seton (4th ed.), 1044. A sale may be ordered where the Crown is interested: *Bartlett* v. *Rees*, L. R. 12 Eq. 396.

The final order may be refused where an extension of time for redemption is asked, and reasonable grounds therefor are shown, and the same relief may be granted in a redemption action, where the judgment provides for the dismissal of the action in default of payment, so long as the final order of dismissal has not been granted: *Collinson* v. *Jeffery*, 1896, 1 Ch. 644; 74 L. T. 78.

Effect of final order.

A bar to redemption.

Effect of Final Order.—The final order for foreclosure, so long as it remains in force, is an absolute bar to the parties foreclosed from claiming the right to redeem. But it is no bar to the mortgagee, as long as he is in a position to restore the mortgaged property, from seeking to enforce payment of the mortgage debt: *Lockhart* v. *Hardy*, 9 Beav. 349; *Munsen* v. *Hawes*, 22 Gr. 279; and see *Worthington* v. *Abbott*, 1910, 1 Ch. 585; 101 L. T. 895. But if, after a final order for foreclosure, he takes proceedings to enforce payment of the debt, that *ipso facto* operates as an opening of the foreclosure, and entitles the mortgagor to a reconveyance on payment of the money: *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341. If, however, the mortgagee, by his own act, unauthorized by the mortgagor, has made it impossible to restore the mortgaged property, proceedings to enforce payment of the debt will be stayed on the application of the mortgagor: *Ib.*; *The British and Canadian Loan & Investment Co.* v. *Williams*, 15 Ont. 366; and see *Re Thuresson*, 3 O. L. R. 271; *Beatty* v. *Bailey*, 26 O. L. R. 143.

Unless mortgagee enforces payment of mortgage debt.

A final order of foreclosure obtained against an assignee of the equity of redemption for the benefit of creditors, is no estoppel to a subsequent action by him on behalf of the creditors of the mortgagor, under *The Assignments and Preferences Act* (R. S. O. c. 134), s. 12 (2), to set aside the mortgage for fraud where no such issue was raised in the action for foreclosure: *Glass* v. *Grant*, 16 Ont. 233.

Where a final order was granted, after a defendant had died, and without obtaining an order to continue proceedings against his representatives (see *Rules* 300-302), it was held to be void: *Kennedy* v. *Forwell*, 11 O. L. R. 389.

The fact that a subsequent incumbrancer consents to a judgment or foreclosure in favour of a prior mortgagee does not preclude him from suing on a covenant for payment contained in his mortgage: *Worthington* v. *Abott*, *supra*.

Opening foreclosure at the instance of the mortgagor.

Opening of Foreclosure at the Instance of the Mortgagor.—Even after a final order has been obtained, the mortgagor may apply to set aside the order, and to be let in to redeem: and this relief was granted even as against a purchaser from the mortgagee after the final order of foreclosure: *Campbell* v. *Holyland*, 7 Ch. D. 166; 26 W. R. 160; *Johnston* v. *Johnston*, 9 P. R. 259; *Foresters* v. *Pegg*, 19 P. R. 254; and see *Re Parbola*, *Blackburn* v. *Parbola*, 1909, 2 Ch. 437; 101 L. T. 382.

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But usually, where a mortgagee has entered into a binding contract to sell either under a power of sale, or after a final order of foreclosure, the mortgagor cannot be let in to redeem: *Standard Realty Co.* v. *Nicholson*, 24 O. L. R. 40; *Kenney* v. *Barnard*, 17 O. W. R. 889. A purchaser who has purchased pending foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order in favour of the mortgagee, stands in a different position from one who comes in for the first time after the final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure. But it has been said that this relief can only be granted where the final order has been obtained by actual positive fraud, or under circumstances of oppression: *Potch* v. *Wa* L. R. 3 Chy. 203, 212; and in *Trinity College* v. *Hill*, 2 Ont. 848; 18 C. L. J. 387, the relief was refused as against a purchaser from the mortgagee after the final order, there being no such circumstances; but this case was subsequently reversed in appeal on the ground of irregularity in the proceedings; the sale having taken place under a decree nisi, which had not been made absolute before the final order was obtained: *S. C.*, 10 Ont. App. 99. When the rights of third parties do not intervene, and the plaintiff can be replaced in the same position he occupied before the default, and recompensed for any damages he may have suffered, and there is a reasonable prospect of payment shown, the foreclosure may be opened, and the time for payment extended: *Waddell* v. *McColl*, 2 Chy. Ch. 62; but some reasonable excuse must be shown for not redeeming at the time appointed, and the fact that the property is of much greater value than the amount due should be established: *Johnson* v. *Ashbridge*, 2 Chy. Ch. 251. The fact that the property has increased in value, is not alone a sufficient ground for opening the foreclosure: *Miles* v. *Cameron*, 9 P. R. 502; 19 C. L. J. 235; 3 C. L. T. 361. In *Platt* v. *Ashbridge*, 12 Gr. 106, the foreclosure was opened after a lapse of eighteen months, the mortgagor being illiterate, and having no solicitor, and not understanding the proceedings, and the property appearing to be worth three times the amount of the incumbrance.

Not opened as against purchaser from mortgagee except where fraud shewn.

When rights of third party do not intervene, it may be opened.

Evidence required.

The Court refused to open a foreclosure merely because a receiver, by mistake, neglected to account for all the rents he had received before the final order was granted: *Ingham* v. *Sutherland*, 83 L. T. 614.

Where, after a final order of foreclosure against subsequent incumbrancers, the mortgagor redeems; that has the effect of opening the foreclosure as against the subsequent incumbrancers: *Reed* v. *Smith*, 14 Gr. 250; *S. C.*, 16 Gr. 52; *Box* v. *Bridgman*, 6 P. R. 234; *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638; and see *Ledbrook* v. *Passman*, 59 L. T. 306; *Re Howard*, 29 L. R. Ir. 266. In *Hilliard* v. *Campbell*, 7 Gr. 96, a final order of foreclosure was set aside at the instance of a purchaser of the equity of redemption *pendente lite*, but without notice of it, but in *Robson* v. *Argue*, 25 Gr. 407, such relief was refused.

Mortgagor redeeming after mesne incumbrancers have been foreclosed.

Purchaser of equity of redemption.

Terms on which Foreclosure Opened at the Instance of the Mortgagor.—The terms on which a foreclosure is opened are in the discretion of the Court. Where the security is not ample, the mortgagor may be required to pay the interest and costs by an early day, and six months may be allowed for the payment of the principal: Fisher on Mortgages, 5th ed., 926; Robbins on Mortgages, 1047. But where the security is ample, the costs of the action, and

Terms on which foreclosure opened.

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of the application, may be ordered to be paid forthwith, and the time extended for payment of the principal and interest, the defendant being charged with interest on the gross amount of the principal and interest, for the per' t of the extension: see *Trinity College* v. *Hill*, 9 Ont. 286; 20 C. L. . 359, 385; *Holford* v. *Yate*, 1 K. & J. 677; *Whitfield* v. *Roberts*, 7 Jur. N. S. 1268; *Thornhill* v. *Manning*, 1 Sim. N. S. 451; and see *Howard* v. *Macara*, 1 Chy. Cb. 27, and other cases cited in note to *Rule* 474.

Opening Foreclosure at the Instance of a Subsequent Incumbrancer.—See *Scottish American Investment Co.* v. *Brewer*, 2 O. L. R. 369, where the circumstances were such that the mortgagor might have successfully applied, and the incumbrancers, his creditors, even though they had not proved their claim, were held entitled to the same relief as the mortgagor.

Opening foreclosure by mortgagee.

Opening of the Foreclosure by the Mortgagee.—So long as the mortgagee is in a position to restore the mortgaged property, he may at any time open the foreclosure by enforcing payment of the debt. But if, after he has obtained a final order, he has parted with the mortgaged estate, or any part of it (otherwise than under power of sale: see *Pegg* v. *Hobson*, *infra*), so that he is not in a position to re-convey, he will be restrained from recovering the debt: *Lockhart* v. *Hordy*, 9 Beav. 349; *Gowland* v. *Garbutt*, 13 Gr. 583; *Burnham* v. *Galt* 16 Gr. 417; *Chatfield* v. *Cunningham*, 23 Ont. 153; but see *Bald* v. *Thompson*, 16 Gr. 177; but the making of a mortgage by the mortgagee on the mortgaged estate, will not prevent him from opening the foreclosure by suing for the mortgage debt, if at the time of his bringing the action, he has paid off the mortgage, and is in a position to re-convey: *Munsen* v. *Hauss*, 22 Gr. 279.

Cannot be opened by mortgagee if not in a position to re-convey.

But this rule does not necessarily apply in the case of a second mortgagee whose estate has been extinguished by the first mortgagee, nor will the inability to re-convey the mortgaged estate bar a mortgagee's right to sue on the covenant where such inability arises from the default of the mortgagor: *Beatty* v. *Bolley*, 26 O. L. R. 145.

Where the mortgagee has incapacitated himself from restoring the mortgaged property intact, he will be disabled from enforcing payment: *Re Thuresson*, 2 O. L. R. 271; but this principle does not apply where the property is not intact merely owing to the removal or destruction of a building on it, unless, *semble*, the building is of such a character that compensation in money (which the mortgagor is, in such an event, entitled to) would not be an adequate indemnity: *Mendels* v. *Gibson*, 9 O. L. R. 94; and where the property was not intact by reason of the mortgagee having granted a right of way across part of it, he was given an opportunity to remove this difficulty: *Re Thuresson*, *supra*.

A mortgagee who has exercised his power of sale, where there is a personal liability to pay the mortgage debt, is entitled to sue for the deficiency: the fact that the mortgagee has acquired the land since the sale, is no objection to his right to recover: *Pegg* v. *Hobson*, 14 Ont. 272. In the absence of any objection to the sale under the power, the acquisition of the estate by the mortgagee would not give the mortgagor any new right of redemption.

Order on default.

487. In a redemption action, on default of payment being made according to the report, the defendant shall

be entitled, on an *ex parte* application, to a final order of foreclosure against the plaintiff, or to an order dismissing the action with costs to be paid by the plaintiff. C.R. 391. Rules 486, 488.

See *Rules* 486, 488, and notes.

As to the evidence of non-payment: see *Docksey* v. *Else*, 64 L. T. 256.

The Court may in a proper case extend the time for redemption, at any time before a final order of dismissal, or foreclosure: *Collinson* v. *Jeffery*, 1896, 1 Ch. 644; 74 L. T. 78.

488. In a redemption action where the plaintiff is declared foreclosed, directions may be given either by the final order foreclosing the plaintiff, or by subsequent orders, that all necessary inquiries be made, accounts taken and proceedings had for redemption or foreclosure, or redemption or sale, as against any subsequent incumbrancers, or for the adjustment of the relative rights and liabilities of the original defendants as among themselves. C.R. 392. Directions where plaintiff in redemption action is foreclosed.

The dismissal of an action for redemption by a mortgagor usually operates as a foreclosure; and where a bill did not pray redemption, but a decree for redemption was granted, it would seem a subsequent dismissal operated as a foreclosure: *Cornwell* v. *Henriod*, 12 Gr. 338; but this is not the case where the mortgage is by deposit of title deeds, because in such a case a judgment of foreclosure would provide for the execution of a legal mortgage, but the mere dismissal of an action to redeem cannot have that effect, though it may preclude the mortgagor from bringing another action to redeem: *Marshall* v. *Shrewsbury*, L. R. 10 Chy. 250; it would seem, however, that the defendant, on obtaining the dismissal, may also obtain an order for the absolute conveyance of the property: see note *infra*, p. 1087. Dismissal of action for redemption operates as a foreclosure.

Where an action for redemption is brought by a second mortgagee and he is foreclosed, the mortgagor, as well as the first mortgagee, has a right to have a day appointed for the redemption of the first mortgage by the mortgagor: *McKinnon* v. *Anderson*, 18 Gr. 684. The defendant who is sought to be redeemed, need not, unless he pleases, proceed under this *Rule*, and he cannot be deprived of costs of any subsequent action for foreclosure, or redemption, for not having done so: *Ib.* Subsequent proceedings.

Where a second mortgagee brings an action to redeem a prior mortgagee, and to foreclose the mortgagor; in default of redemption, the action may be dismissed as against both the prior mortgagee, and the mortgagor, with costs: *Hallett* v. *Furze*, 31 Ch. D. 312; 55 L. T. 12.

489. In mortgage actions the period allowed for redemption in the first place shall be six months and when it becomes necessary to fix a date for redemption after Redemption after six months.

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the lapse of the first period the further time allowed shall be one month. C.R. 393.

Before this *Rule* the practice was to allow each person, or set of persons, successively entitled to redeem, three months from the taking of the subsequent accounts respectively. Incumbrancers having a specific lien by mortgage were successively allowed each a separate day in order of their priorities, but since *The Creditors' Relief Act* (R. S. O. c. 81), s. 4, execution creditors have been together given one day for redemption, their order of priority conjointly being that of the first execution creditor: see note to *Rule* 474.

The terms of this *Rule* are probably wide enough to be applicable to the time to be given to a mortgagor, where foreclosure is ordered after an abortive sale: see note to *Rule* 460.

Parties interested in equity of redemption may be allowed to be added in M. O.

490.—(1) Where one or more of the persons interested in the equity of redemption are already defendants, and it is made to appear that by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of the other persons interested in the equity of redemption, the Court may give directions accordingly, and may order such other persons to be made parties in the Master's office after judgment.

(2) Where after judgment it appears that persons are interested in the equity of redemption besides those who are already parties, such persons may be made parties in the Master's office upon such terms as may seem just. C.R. 190.

This *Rule* and *Rules* 77-84, 404 and 470, constitute an exception to the general rule of practice, that after judgment parties cannot be added: see *Durham* v. *Robertson*, 1898, 1 Q. B. 765, *per* Chitty, L.J., at p. 774; and see *Johnston* v. *Consumers' Gas Co.*, 17 P. R. 297.

Parties to whom Rule applies.

The words "persons interested in the equity of redemption" in this *Rule* are intended to apply to persons interested in the ultimate equity of redemption, *i.e.*, the mortgagor or any one standing in his place. As a general rule, all parties interested in the ultimate equity of redemption in mortgaged property, ought to be made original defendants in an action to enforce the mortgage, by sale, or foreclosure: *Paterson* v. *Holland*, 8 Gr. 238; *Buckley* v. *Wilson*, 8 Gr. 566; but not *mesne* incumbrancers, or execution creditors, who are always added in the Master's office: see *Rule* 470.

Where a co-mortgagor (even though only a surety) is not made a party to an action to foreclose the mortgage, the foreclosure of his principal is not binding upon him: *Gee* v. *Liddell*, 1913, 2 Ch. 62; 108 L. T. 913.

This *Rule* makes an exception to the general rule, and enables the Court or a Judge to direct that parties interested in the ultimate equity of redemption, may be made parties in the Master's office.

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Under the former Con. Rule 306 it was not clear whether before judgment the other persons could, by order, be directed to be added in the Master's office. It was in Chancery done either upon motion for judgment: *Jones* v. *Bank of U. C.*, 12 Gr. 429; *Faulds* v. *Harper*, 2 Ont. 405; or upon motion in Chambers afterwards: see cases *infra*. This *Rule* contemplates either an interlocutory order, or an order embodied in the judgment. Such a direction, however, cannot be inserted in a judgment obtained on *præcipe*, because this is a matter of judicial discretion.

When order to add parties interested in the equity of redemption in the M. O. may be obtained.

Upon any such motion to add parties in the Master's office the parties already before the Court are entitled to notice, but not those intended to be added: *Penner* v. *Canniff*, 1 Chy. Ch. 351; *Harrison* v. *Greer*, 2 Chy. Ch. 440; *Rumble* v. *Moore*, 1 Chy. Ch. 59; but see *Cummins* v. *Harrison*, 1 Chy. Ch. 369, where the order was granted *ex parte*. But after a final order of foreclosure, or sale, the application is, in general, too late: see *Orford* v. *Bayley*, 1 Chy. Ch. 272; *Street* v. *Dolan*, 3 Chy. Ch. 227. And where the plaintiff had not acted with reasonable diligence in framing his suit, the order was refused: *Portman* v. *Paul*, 10 Gr. 458.

Setting aside orders.

Where an order of this kind has been obtained in Chambers after judgment, the defendant so added should be served with a copy of the order adding him, and also with an office copy of the judgment which, by analogy to the procedure laid down in *Rule* 87, should be indorsed with a notice according to Form No. 41; H. & L. Forms, No. 967. Any motion to set aside or vary the order, or judgment, should be made to the Court: *Tice* v. *Myers*, 3 C. L. J. 102.

Wherever the party added claims by title paramount to the plaintiff's, he may move to discharge the order adding him as a party: *Montgomery* v. *Shortis*, 3 Chy. Ch. 69; but see note to *Rule* 471.

Conflict between co-defendants as to equity of redemption, how determined.

Occasionally it happens that the plaintiff is unable to determine which of the defendants is entitled to the equity of redemption, or there may be a conflict between defendants on this point *inter se*. The Court will not, however, determine such questions *ex parte*, even against defendants who have not appeared, but will pronounce the usual judgment directing all the defendants to redeem, leaving them to settle their rights *inter se* by a separate proceeding: *Robinson* v. *Dobson*, 11 Gr. 357, and see *Bumsey* v. *Thompson*, 8 Gr. 372; or may direct the Master to inquire as to the point: *Cayley* v. *Hodgson*, 13 Gr. 433. But latterly any such reference if ordered has been directed as a separate reference from the general reference in the cause, and so as the plaintiff may not be put to expense, or delay, thereby: see decree in *Johnson* v. *Neezer*, D. B. 27, fo. 150.

Wife of Mortgagor.—Whether the wife of the mortgagor who joined in the mortgage to bar her dower should be a party to an action for foreclosure or sale has been several times considered. Prior to R. S. O. 1887, c. 133, ss. 5-8 (see now *The Dower Act* (R. S. O. c. 70), ss. 10, 11, it was held that she was neither a proper, nor a necessary party: see *Moffatt* v. *Thomson*, 3 Gr. 111; *Davidson* v. *Boyes*, 6 P. R. 27. After that Act she was held to be a proper party: *Building & Loan* v. *Carswell*, 9 P. R. 73; *Ayerst* v. *McClean*, 14 P. R. 15. In *Casner* v. *Haight*, 6 Ont. 451, she was held, by Proudfoot, J., to be not a necessary party, but the contrary view was taken by Rose, J., in *Blong* v. *Fitzgerald*, 15 P. R. 467, where, on her application, she was added as a defendant, the opinion being intimated that she was a

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necessary party in order to bind her by the proceedings. The weight of authority appears to be rather in favour of the view that she is a proper, but not a necessary party. The safer practice is to add her as a party, though strictly speaking a married woman having a mere inchoate right of dower in the equity of redemption has no present right to redeem: see *per* Riddell, J., *Standard Realty Co.* v. *Nicholson*, 24 O. L. R. at p. 51. Where the wife of a mortgagor has covenanted to pay the mortgage debt of her husband, she is entitled as his surety to redeem apart from her right as dowress: *Ib.*

Husband of Mortgagor.—In view of what is said by Osler, J.A., in *Moore* v. *Jackson*, 19 Ont. App. at p. 396, and see *Wallace* v. *Lee*, 28 S. C. R. 595; it would seem safer to add the husband of a married woman mortgagor as a defendant in an action for foreclosure, or sale, notwithstanding the estate mortgaged may have been her separate estate.

Infant Heirs of Intestate Mortgagor.—Though the record may be complete as a matter of title, since *The Devolution of Estates Act*, by making the administrator of the mortgagor sole defendant (see *Plenderleith* v. *Smith*, 5 O. W. R. 753), yet as a matter of procedure the infant heirs are proper parties, and as such should be made defendants to the writ, unless some good reason exists for omitting them: *Keen* v. *Codd*, 14 P. R. 182. See notes to *Rule* 74 (2).

Devisees of a mortgagor were ordered to be added: *Watts* v. *Lane*, 84 L. T. 144.

Where the mortgaged estate proves insufficient to satisfy the mortgage the mortgagee is entitled to administration of the deceased mortgagor's estate and to follow assets thereof into the hands of legatees who have received any part thereof: *Re Eustace, Lee* v. *McMillan*, 1912, 1 Ch. 561; 106 L. T. 789.

Railway Co.—A railway company which has expropriated part of the mortgaged property and obtained an award fixing the compensation is a proper party to a foreclosure action when the award has not been taken up, and the compensation has not been paid: *Scottish Investment Co.* v. *Prittie*, 20 Ont. App. 398.

Prior Mortgagees.—Con. Rule 305 of 1888 has not been inserted in the present Consolidation, as the practice which it stated is now too well established to require stating in a Rule. That Rule was as follows:

Where relief is sought subject to prior mortgage, prior mortgagee an unnecessary party.

"305. Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the statement of claim. Chy. O. 440."

That *Rule* was, and the practice which it stated will still be, confined to cases where the plaintiff claims relief subject to the prior mortgage; where he seeks to redeem, or in any way to bring in question the right of the prior mortgagee, the latter must, of course, be made a defendant by writ.

Formerly Chy. O. 439 provided that where a bill was filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause; but that Order was in 1888 omitted from the *Rules* as being

no longer necessary. The practice it prescribed, however, is still in force. Rule 480.

Subsequent incumbrancer, action for redemption by.

An action for redemption by a subsequent, against a prior mortgagee, will not lie, unless the prior mortgage, and that of the plaintiff, are both overdue: *Parsons* v. *Bank of Montreal*, 15 Gr. 411; *Long* v. *Long*, 16 Gr. 239. The owner of the equity of redemption is a necessary party to such an action: *Ib.*

A bill, by a subsequent incumbrancer, against a prior mortgagee, claiming the right of redemption, but not offering to redeem him, was not demurrable: *Pearson* v. *Campbell*, 2 Chy. Ch. 12 (but see *Rogers* v. *Lewis*, 11 Gr. 257); and it would probably now be held that a statement of claim, omitting an offer to redeem, would not be open to objection under the present practice: see *National Bank of Australasia* v. *United Hand in Hand Band of Hope*, 4 App. Cas., at p. 400.

Not entitled to a sale

A subsequent incumbrancer, bringing an action against a prior mortgagee, is not entitled to a sale: *McDougall* v. *Campbell*, 6 S. C. R. 502; unless the prior incumbrancer consents, or does not object, to a sale: *Grange* v. *Barber*, 2 Chy. Ch. 189; he is only entitled to judgment for redemption, and in default of redemption he is foreclosed: see *Rule* 487, or the action is dismissed, as against both mortgagee and mortgagor with costs: *Hallet* v. *Furze*, 54 L. T. 12, which is equivalent to a foreclosure of the plaintiff: *Cornwall* v. *Henriod*, 12 Gr. 338; *Inmon* v. *Wearing*, 3 De G. & Sm. 734; except in the case of an equitable mortgage by deposit: *Marshall* v. *Shrewsbury*, L. R. 10 Chy. 250, unless in the latter case the defendant on obtaining the dismissal obtains also an order for the absolute conveyance of the property, as he probably might do under the present system of procedure: see Jud. Act, s. 16 (*h*).

In an action by a subsequent incumbrancer, to redeem, he may also impeach transactions by the prior mortgagee in reference to the mortgaged estate: *McLaren* v. *Fraser*, 15 Gr. 239.

Prior mortgagee, when he may be made a defendant.

Although a prior mortgagee can, ordinarily, only be made a party to an action by a subsequent incumbrancer, for the purpose of redeeming him, yet where the prior security is created by a deed absolute in form, a subsequent incumbrancer is at liberty to bring him before the Court for the purpose of showing his interest to be redeemable, without offering to redeem him: *Moore* v. *Hobson*, 14 Gr. 703; and see *Rogers* v. *Lewis*, 12 Gr. 257. To such an action the execution creditors of the alleged mortgagee are necessary parties: *Glass* v. *Freckleton*, 10 Gr. 470; and see *Darling* v. *Wilson*, 16 Gr. 255, 257.

Subsequent incumbrancer obtaining sale has no priority for costs.

Where a prior incumbrancer is made a party to an action by a subsequent incumbrancer, and a judgment for sale is obtained by consent, or without objection on the part of the prior incumbrancer, the proceeds of the sale must be distributed in payment of the claims of the incumbrancers according to their priorities, and in such a case the plaintiff is not entitled to any priority in respect of his costs, even though the fund prove insufficient: *Grange* v. *Barber*, 2 Chy. Ch. 189.

Assignee of equity of redemption, when entitled to attack prior mortgage for fraud.

Where the equity of redemption was valueless, and an assignment thereof was made merely for the purpose of enabling the assignee to impeach a prior mortgage, on the ground of fraud, for the benefit of the assignor, the assignment was held to savour of champerty, and no relief was granted to the assignee, even though he asked in the alternative for redemption: *Mucholl* v. *Banks*, 10 Gr. 25; and see

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Little v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, *Ib.*, 512; Bell v. *Walker*, 20 Gr. 558; *Hilton* v. *Woods*, L. R. 4 Eq. 432. But where the assignee takes beneficially, and the assignment is not made merely to enable him to sue in respect of the alleged fraud, it would seem that he may maintain the action: *Scear* v. *Lawson*, 15 Ch. D. 426; *Dickinson* v. *Burrell*, L. R. 1 Eq. 337.

Liability of purchaser of equity of redemption.

The purchaser of an equity of redemption is, in the absence of an agreement to the contrary, under an implied obligation to indemnify the mortgagor against any further claim under the mortgage: *Waring* v. *Ward*, 5 Ves. Jr. 690; 7 Ves. Jr. 332; but where is an express agreement as to indemnity, that precludes any implied agreement: *Mills* v. *United Counties Bank*, 1911, 1 Ch. 669; 104 L. T. 632; 1912, 1 Ch. 231; 105 L. T. 742.

Relief against other incumbrancers.

A subsequent incumbrancer may, in the same action, obtain relief against the mortgagor, and incumbrancers subsequent to himself—consequent on his redeeming the prior mortgagee: *Rogers* v. *Lewis*, 12 Gr. 257; *McLaren* v. *Fraser*, 15 Gr. 239; and see *Rule* 477.

Prior mortgagee owning eq. of red., account for rents by.

A prior mortgagee in possession, who is also the owner of the equity of redemption, is only bound to account to a subsequent incumbrancer for rents and profits, on the footing of a mortgagee in possession, until his mortgage is paid off; any subsequent receipts he is entitled to retain without account as owner: *Steinhoff* v. *Brown*, 11 Gr. 114.

CHAPTER XVII.

APPEALS AND NEW TRIALS.

(i) *Appeals to Divisional Courts.*

Rules 491 and 492 are repealed and the following substituted therefor:—

492.—(1) An appeal from a judgment pronounced at a trial or a motion for a new trial shall be by notice of motion returnable before a Divisional Court seven days after service, and shall be set down to be heard within fifteen days from the date of the judgment.

(2) All other appeals shall be by a notice of motion returnable before a Divisional Court two clear days after service and shall be set down to be heard within seven days from the date of the judgment or order.

(3) Cases shall be entered on the list for hearing as soon as the papers are completed.

(4) If the evidence is not deposited within seven days after notice from the office of the Registrar of the High Court Division that it has been received from the stenographer, the appeal shall be deemed to be abandoned and costs may be taxed as provided by Rule 660.

(5) The notice of motion may be according to the following form:—

(STYLE OF CAUSE.)

Take notice that the appeals to a Divisional Court from the judgment (*or* order) pronounced by on the day of 191 , on the following grounds (*stating them briefly*).

Dated the day of , 191 .

Solicitor for

To , Esq.,

Solicitor for

(*Rule passed, 19th June, 1914*).

Rule 492.

This *Rule* was published after some part of this work was in print, and modifies what is said on previous pages as to the sittings of the Divisional Court of the Appellate Division (*e.g.*, pp. 133, 139).

Sittings of Appellate Division.

The Sittings of the Appellate Division.—For the sittings of the Appellate Division: see Jud. Act, s. 42.

The following *Rule* regulating the sittings of the Appellate Division was passed on December 13th, 1912, and approved on 2nd January, 1913, the confirmation on the latter day being necessary because *The Law Reform Act* (1909), Part I. did not come into force until 1st January, 1913, and until then there was no jurisdiction to pass the *Rule*.

"It was recommended that excepting long vacation, the Sittings of the Divisional Court be held weekly, commencing Monday of each week, except that in the month of January, the first Sittings be held on the first Monday after the 6th of the month and that in the month of September the first Sittings be held on the first Monday after the 14th of the month."

This *Rule* has not been officially published.

The effect of *Rule* 492, *supra*, appears to be to require appeals and motions to be set down for the Appellate Division as if the sittings were continuous. Formerly the sittings of Divisional Courts of the High Court of Justice were monthly. And it was assumed that the same rule applied to the sittings of the Appellate Division: see Jud. Act, 1913, ss. 42 (1), 75. The *Rule* of 2nd January, 1913, seems to have made the sittings of the Divisional Courts of the Appellate Division weekly, and now this *Rule* in effect makes them continuous, except during the periods mentioned in the *Rule* of the 2nd January, 1913. The second clause of the *Rule* would appear not to apply to County Court, District Court, Surrogate Court or Division Court appeals, as to which there are special statutory provisions: see *supra*, pp. 131, 136.

See Jud. Act, ss. 24-31, and notes, *supra*.

The Court may, on a special application, allow the appeal to be set down on short notice, and stay proceedings pending the appeal: *Todd* v. *Rusnell*, 17 P. R. 127.

As to how far a motion to a Divisional Court operates to stay execution and other proceedings under the judgment: see *Rules* 496-498.

The "date of the judgment" means the day of pronouncing the judgment or order: see *Rule* 512, and *Hickey* v. *Stover*, 11 P. R. 88; but where judgment is not given in open Court: see *Wallace* v. *Bath*, 7 O. L. R. 522. Vacations are not to be reckoned in the 15 days, or 7 days: *Rule* 179.

A motion to extend the time for moving under this *Rule* should be made before the Divisional Court itself: *Imperial Loan Co.* v. *Baby*, 13 P. R. 59. For circumstances under which the time may be extended: see *Hickey* v. *Stover*, 11 P. R. 88.

A motion for a new trial was allowed after the time for moving had elapsed under peculiar circumstances, in *Wilkins* v. *Wilkins*, 12

T. L. R. 212, where it had been decided at the trial that a man was dead, but he was subsequently found to be alive. Rule 492.

The seven days' notice of motion, under clause (1), are not expressed to be clear days; as to the mode of their computation: see *Rule* 173. Formerly notice was required to be given for the first day of the sittings, and would not be sufficient if given for any subsequent day, although given in time to permit the motion to be set down two clear days before the commencement of the sittings: *Sierichs* v. *Woodcock*, 13 P. R. 260.

The two days' notice of motion under clause 2 are expressed to be "clear days"; for mode of their computation: see *Rule* 173 (2).

Where a solicitor had instructed his clerk to set down a case, but the clerk, by a mistake in supposing that the days limited for that purpose were not clear days, allowed the last day to pass, this was held not a sufficient ground for granting leave to set the case down: *Rumohr* v. *Marx*, 18 C. L. J. 444; 19 C. L. J. 10; 3 C. L. T. 31.

Where judgment for defendants was delivered on 22nd November, and the plaintiff's solicitor immediately applied for a copy, but did not receive it until 29th November, which was the last day for setting down a motion to reverse the judgment, and there was therefore, no time to consult either the plaintiff, or counsel, the Court held that the delay was sufficiently excused, and granted leave to set down, upon payment of costs: *Foley* v. *Canada Permanent, etc.*, 18 C. L. J. 444; 3 C. L. T. 32.

Abandonment of appeal.

Where a cause has been set down, and notice of abandonment subsequently served, it will not be restored to the list on the appellant's application, unless he make out a case in which it would be proper to grant leave to appeal: *Union Bank of Canada* v. *Rideau Lumber Co.*, 19 P. R. 106; *semble*, he should show that the judgment, or order, to be appealed from is *primâ facie* wrong, and that there is good ground for allowing the appeal to prevent a substantial wrong or injustice: *Ib.*

Striking out.

Where a case is improperly set down, a substantive motion to the Divisional Court should be made to strike it out: *Wansley* v. *Smallwood*, 10 P. R. 233. Where the objection has not been taken until the case has been called on for argument, costs have sometimes been refused, although the objection has been sustained.

Notice must be formal notice.

The notice of appeal must be a formal notice; the mere communication, verbal, or otherwise, by an unsuccessful party to his opponent of his intention to appeal is not sufficient notice of appeal: *In re Blyth & Young*, 13 Ch. D. 416; *Re New Callao Co.*, 22 Ch. D. 484; see *Kettlewell* v. *Watson*, W. N. 1883, 102.

Service of notice.

The retainer of a solicitor continues after judgment, so as to make service of notice of appeal on him good service on the client, until the client takes proper steps to inform his opponent that he has withdrawn his authority: *De la Pole* v. *Dick*, 29 Ch. D. 351.

Service of the notice must be made upon all parties affected by the appeal. It would, therefore, seem to be necessary for a defendant appealing to serve any co-defendant, or third party, against whom he claims relief over, and probably all against whom the plaintiff, in case the appeal is successful, can claim any relief different from that which the judgment already gives him: see formerly *Freed* v. *Orr*, 6 Ont. App. 690, not followed in *Johnston* v. *Petrolia*, 17 P. R. 332; *Re Solmon*, 42 Ch. D. 351.

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Where a notice of appeal has been given contrary to an undertaking not to appeal, the notice may be set aside on a motion to the High Court Division: *Donovon* v. *Holdane*, 14 P. R. 106.

Notice of appeal not necessary to give Court jurisdiction.

The service of notice as required by *Rule* 491 is not a condition precedent to the jurisdiction of the Court to hear the appeal, and may be waived by the respondent: see *Park Gate Iron Co.* v. *Coates*, L. R. 5 C. P. 634.

Third parties.

A third party who has obtained liberty to contest the plaintiff's claim is not entitled to be heard on an appeal by plaintiff from a judgment dismissing the action: see *Ewing* v. *Toronto*, 18 P. R. 137.

Where a plaintiff appeals, third parties are held to be not "directly affected by the appeal": *Re Salmon*, 42 Ch. D. 351, but *quære* whether they are not affected by the appeal, and entitled to notice under this *Rule*: see *Re New Callao, etc.*, 22 Ch. D. 484; *Eckensweiller* v. *Coyle*, 18 P. R. 423; but see *O'Sullivan* v. *Lake*, 12 P. R. 550.

Trustees served with notice of appeal, and holding merely a neutral position, without any intention of taking any part in the argument, ought not to appear by separate counsel on the appeal: *Carroll* v. *Graham*, 1905, 1 Ch. 478.

Court may order parties not served to be notified.

Where it appears that a party who has not been served ought to be notified, the Court may direct service to be made, and may postpone the hearing of the appeal for that purpose, upon such terms as may seem just.

In *Re Salmon, Priest* v. *Uppleby*, 61 L. T. 146; W. N. 1889, 106, on an appeal by plaintiff the Court directed third parties to be served, who, if the judgment were reversed, would have to indemnify defendant, the defendant so desiring, though the Court considered that the third parties were only indirectly affected. The defendant was ordered to pay the costs of the adjournment.

As a rule a respondent will not be heard by counsel in support of the appellant's case, but the rule may be relaxed: see *Re Marquis of Ailesbury's Settled Estates*, 1892, 1 Ch. 506.

Default of parties at hearing—effect of.

If either party fails to appear the Court may hear the other party, and give judgment, or may postpone the hearing upon such terms as may seem just.

Extending Time for Appeal.—Formerly an unexplained oversight on the part of a solicitor, was held to be an insufficient ground for extending the time for giving notice of appeal; though it might be otherwise if an important question of law were involved, as to which there was a conflict between the Courts: *Gordon* v. *Great Western Ry.*, 6 P. R. 300.

Under the present practice relief will be granted against a slip in practice, such as a failure to give notice of appeal, wherever the justice of the case requires it, and no injury has resulted to the opposite party which cannot be compensated for by costs; and, in considering what justice requires, regard is to be had to the *bona fides* of the applicant, and whether or not his proposed appeal appears to be groundless or frivolous: *Ross* v. *Robertson*, 7 O. L. R. 464; *Ray* v. *Port Arthur*, 7 O. L. R. 737; and the fact that the party desiring to appeal has taken some step within the month is deemed important: *Cain* v. *Pearce*, 4 O. W. N. 70; *McClemont* v. *Kilgour Mfg. Co.*, 3 O. W. N. 1351.

Rules 493, 494.

Before applying for an extension of time, the solicitor requiring the time should apply for it to the opposite solicitor, who should in every proper case grant it: *Bodine* v. *Howe*, 1 O. L. R. 208. Where the opposite party unreasonably refused to consent to extend the time, an order extending the time was made without costs: *Bodine* v. *Howe*, 1 O. L. R. 208; *McLaughlin* v. *Mayhew*, 5 O. L. R. 114; and see *McGuire* v. *Corry*, 1 O. L. R. 590, where the costs of the application were made costs in the appeal.

Notice, when allowed to be served after time has elapsed.

Where the notice was served on the last day after office hours, the notice was allowed, but the Court doubted whether the section requiring notice applied in that particular case: *Rose* v. *Hickey*, 7 P. R. 390; and where notice had been served in due time on the respondent, but, through the negligence of a clerk of the appellant's solicitor, notice had not been served on the Registrar of the Court appealed from (which was then necessary), notice was allowed to be served on payment of costs: *Re Laws*, 9 P. R. 72; and see *Re Crosby*, *Munns* v. *Burn*, 34 Ch. D. 664; and where notice had been given, but the appeal was not set down in time, but security had been given for a large part of the debt and costs, leave to prosecute the appeal was given on terms: *D'Ivry* v. *The World*, 17 P. R. 543; see also *Thuresson* v. *Thuresson*, 18 P. R. 414; but where nothing was done within the time, and no sufficient special circumstances were shown, leave was refused: *Miller* v. *Brown*, 9 P. R. 542. In England a delay of three days beyond the prescribed time in delivering notice to the officer has been held fatal to the right of appeal: *Ex parte Lamb*, 45 L. T. 639, and see *Ex parte Lyon*, *Ib.* 768; *Re Blyth & Young*, 18 Ch. D. 416; and *Wright* v. *Leys*, 10 P. R. 354.

See also the cases relating to applications for leave to appeal in notes to *Rule* 176, and on pp. 115, 165, *supra*.

Grounds of appeal to be set out in notice.

493. Every notice of motion by way of appeal shall set out the grounds of the motion or appeal. C.R. 789.

C. R. 789 only applied to appeals to a Divisional Court. Under the present *Rule* it will be necessary to set out the grounds in every notice of motion by way of appeal, as notwithstanding the collocation of this *Rule* it is probably intended to apply not only to appeals to the Appellate Division, but also to appeals to the Weekly Court, or to a Judge in Chambers: see *Rule* 4.

A notice of motion for a new trial on the ground of misdirection, or non-direction, should state how and in what manner the Judge misdirected, or failed to direct, the jury: *Pfeiffer* v. *Midland Ry. Co.*, 18 Q. B. D. 243; *Mutt* v. *Smith*, 12 P. D. 116; *Scott* v. *Crerar*, 11 Ont. 541; *Furlong* v. *Reid*, 12 P. R. 201; see 12 Ont. 607; and *Hughes* v. *Dublin United Tramways Co.*, 1911, 2 Ir. R. 112. Amendment may be allowed in a proper case, but was refused in *Furlong* v. *Reid*.

Copy of judgment or order as settled to be furnished to Court.

494.—(1) The appellant shall when setting the appeal down deliver to the Registrar of the Appellate Division all papers necessary for the proper hearing of the appeal, including [five copies] of the judgment or order in question (or the settled minutes thereof [and of the reasons

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therefor unless reported]) and, where evidence is to be used, five copies of the evidence, certified as correct by the official stenographer. *As amended by Rule passed December 1, 1913.*)

Five copies of shorthand notes to be delivered on motions for new trial, etc.

(2) If the copies of evidence have not then been prepared, it shall be sufficient if such copies have been duly bespoken and are deposited so soon as received from the stenographer. C.R. 791, 792.

The words in [ ] in clause (1) indicate the amendments.

Under this *Rule* it is necessary that the judgment or order appealed from be settled, though not necessarily entered, or issued, before the appeal comes on for argument. The staying of the entry of the judgment will not prevent its settlement for the purposes of this *Rule*. Where a judgment is entered before the appeal therefrom is heard, a stay of execution, where necessary, can be applied for under *Rule* 496.

As to whether an appeal will be quashed if this *Rule* has not been complied with: see *Henderson* v. *Rogers*, 15 P. R. 241.

Sometimes the order, or judgment, appealed from, is not delivered to the Registrar in order to delay the placing of the cass on the peremptory list, but this was held to be improper: *Sherwell* v. *Combined Incandescent Mantles Syndicate*, 124 L. T. Jour. 35; 1907, W. N. 211.

Fees for notes of evidence.

The fees payable to stenographers for copies of evidence on appeals to Divisional Courts and County Courts are regulated by the following Orders in Council.

Orders in Council dated 18th March, A.D. 1896.

Court Reporters.

The Committee of Council advise that the portion of the charges for copies of shorthand notes of evidence at trials at present payable to the "Shorthand Reporters' Fund" be abolished, and that the fees payable and applicable to the personal use of the reporters, be hereafter as follows:—

1. For single copies—five cents per folio.

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

3. For any additional copies made for the parties—one and one-half cents per folio for each copy.

4. The charges aforesaid shall be paid to the reporter when and as the moneys payable in respect of such copies are collected, and no charge is to be made for copies required by the Attorney-General of Ontario, or by the Judges for their private use and not taxable to any party, or for copies which it is the duty of the reporter to supply without charge.

5. The extra reporters shall be allowed for their own use, the same fees as the regular reporters, with twenty-five per cent. added thereto, to be paid out of the "Shorthand Reporters' Fund."

6. The above charges are to apply only to cases entered for trial after 1st January, 1896. Rule 494.

[Local Masters, Referees, Special Examiners and others, entitled to take examinations or cross-examinations in the High Court and County Court shall, for copies of such examinations or cross-examinations, be entitled to the same fees for copies of notes of evidence at trials, as are payable to the Official Shorthand Reporters, vide 58 Vict. c. 13, s. 40.] (a).

Order in Council dated 26th May, A.D. 1896.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that the Order in Council of 18th March, 1896, fixing the fees for copies of shorthand notes of evidence, payable to the Official Court Reporters, be amended by striking out the last paragraph thereof having reference to the fees for copies of evidence payable to Local Masters, Referees, Special Examiners, etc. (b). County Court Reporters.

The Committee further advise that the same fees as are under the said Order payable to the Official Court Reporters be paid to the Reporters in the County Courts (c).

Order in Council dated 12th August, 1897.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that the same fees as are payable to the Official Court Reportere, for copies of shorthand notes of evidence under Order in Council of 18th March, 1896, be paid to the Official Reporter or other stenographer of the Master in Ordinary, for copies of notes of evidence taken on any reference before the Master in Ordinary. Master's office.

Order in Council dated the 29th day of January, A.D. 1913.

Having regard to the re-arrangement of the Courts under "The Law Reform Act, 1909," and upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that the Order in Council of 18th March, 1896, fixing the fees for copies of evidence to be taken for their own use by the Official Court Reporters, be revoked, and that the following be substituted therefor: Fees of shorthand writers in S. C. O.

1. For copies required for the Judges under Rules made or to be made in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon

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(a) This clause was abrogated by order of 26th May, 1896, which follows.

Whether this order, though repealed, still governs the fees payable to stenographers in the office of the Master in Ordinary: *Quære*, see order in Council of 12th August, 1897.

(b) The fees payable to Local Masters, Referees, and Special Examiners, are fixed by Tariff B.

(c) See now Order in Council of 28th March, 1913, *infra*, p. 1096.

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seven and one-half cents per folio of one copy for all the copies required of any one transcription of shorthand notes not exceeding six altogether.

2. For any additional copies made for the parties two and one-half cents per folio for each copy.

3. The charges aforesaid shall be paid to the Reporters when and as the moneys payable in respect of such copies are collected. No charge shall be made for copies required by the Judges for their private use and not taxable to any party.

4. For copies of evidence and other proceedings in the case of a retrial in criminal cases furnished to the Attorney-General or the Crown prosecutor, two and one-half cents per folio.

Order in Council of the 28th day of March, A.D. 1913:—

Fees of shorthand writers in Local Courts.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that, pursuant to the provisions of sub-section 2 of section 17, cap. 29, 9 Edward VII., the remuneration by salary of the Shorthand Writers of the Local Courts and the fees for copies of evidence to be taken by them for their own use, be fixed as follows:—

1. For services during the time actually employed, six dollars ($6) per diem.

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

3. For any additional copies made for the parties, two cents per folio for each copy.

4. For single copies ordered, six and two-third cents per folio.

5. For copies ordered by the Judge for his own use, six and two-third cents per folio, to be paid by the County Treasurer upon the order or certificate of the Judge.

6. For reading evidence to the Judge from notes taken where no copies are ordered, at the rate of one dollar per hour, to be paid by the County Treasurer upon the order or certificate of the Judge.

The Committee further advise that the Orders in Council of 31st December, 1878, and 30th June, 1896, with reference to the above be revoked.

Copies of evidence.

The copies of evidence required for the appeal may be procured from the stenographer. In Supreme Court cases the order is given through the office of the Registrar of the H. C. D.

If the notes of the evidence taken have been lost, the Appellate Division may allow the evidence to be taken over again: *Ex parte Firth, Re Cowburn*, 19 Ch. D. 419; 51 L. J. Chy. 473.

Documents not proved or produced at the trial cannot be relied on or made part of the case in appeal: *Lionais* v. *Molson*, 10 S. C. R. 527. Rule 494.

Where no written judgment has been given by the Court or Judge appealed from, a statement of the grounds assigned for the judgment should be obtained from the reporter, or from the notes of counsel, and should be inserted in the appeal book: *Blockley* v. *Kenny*, 16 Ont. App. 522.

The formal judgment as drawn up, or the minutes thereof as settled, must be included in the papers to be used on the appeal. That is the subject of the appeal, and not the reasons upon which it is founded: *Thompson* v. *Robinson*, 16 Ont. App. at p. 184.

Printing Appeal Books.—No provision is made requiring the printing of appeal books. In some cases however the parties may desire to have them printed, and where that is the case it may be well to abide by the regulations formerly in existence in reference to the printing of appeal books, which were as follows:—

1. The book shall be printed upon both sides of the paper, which shall be of good quality, not less than 60 pounds to the ream.

2. The sheet when folded and trimmed shall be 11 inches long and 8½ inches wide.

3. The type in the text shall be pica, but long primer shall be used in printing accounts, tabular matter and notes.

4. The number of lines on each page shall be 47, as nearly as may be, exclusive of headlines, each line to be 5¾ inches in length, exclusive of marginal notes, and every tenth line on each page shall be numbered in the margin, and the other margin shall be one and one-half inches wide.

5. The books shall be bound in paper, not less than 60 pounds to the ream, and the backs shall be reinforced with cloth.

6. In cases in which an appeal lies to His Majesty in Council, and in any other case in which the parties so agree or a Judge upon the application of either party so directs, marginal notes, such as are required upon an Appeal to His Majesty in Council, shall be printed.

7. In other cases there shall be a headline on each page of evidence, giving the name of the witness and stating whether the evidence is on examination-in-chief, cross-examination, or as the case may be, and answers shall follow the questions immediately and not commence a separate line.

8. All exhibits shall be grouped, and be printed in chronological order.

9. At the beginning of the book there shall be an index setting out in detail the contents of the book in four parts, as follows:

Part 1. A statement of the case and each pleading, order or other document in chronological order, with its date.

Part 2. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be.

Part 3. Each exhibit, with its description, date and number in the order of filing.

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Part 4. All judgments in the Courts below, with the reasons for judgment (*a*), and the name of the Judge delivering the same, and the reasons for and against appeal.

10. The name of the Court, Judge, or Official, appealed from shall be stated on the cover and title page.

11. The book shall contain the date of the first proceeding and of the delivery of the several pleadings, but the style of the cause shall not be repeated.

Quashing Appeals.—Where an appeal does not lie, the Court may quash it, and order the appellant to pay the costs. A motion to quash should be made without delay; *Federal Life Assce. Co.* v. *Siddall*, 22 O. L. R. 96; and notice of motion may be served for any day the Court sits, two day's notice is sufficient: *Rule* 215. Such a motion need not be set down. On the return of the notice the Court may either hear the motion, or adjourn it to come on with the appeal. Where a party appeals contrary to an undertaking the proceedings may be quashed: *Donovan* v. *Haldane*, 14 P. R. 106.

Appellants may discontinue.

Discontinuance of Appeal.—An appellant may discontinue his appeal by failing to set it down, or by giving to the respondent a notice signed by the appellant or his solicitor, stating that he discontinues, and thereupon, in either case, respondent is entitled to the costs of the appeal: see *Rule* 660.

Where an appellant has given notice of his intention to withdraw his appeal, and has obtained the respondent's consent, he cannot afterwards revoke it, and proceed with the appeal: *Watson* v. *Cave*, 29 W. R. 768; 44 L. T. 40; 50 L. J. Chy. 561; 17 C. L. J. 366.

After notice of abandonment of an appeal has been given, any application for leave to restore it must be supported by evidence showing the existence of a *primâ facie* ground of appeal: *Union Bank* v. *Rideau Lumber Co.*, 19 P. R. 106.

Where the Court had no jurisdiction, an appeal was quashed, with costs, the Court on the merits seeing no reason to differ from the decision of the Court below: *Teskey* v. *Neil*, 15 P. R. 244.

Costs on discontinuance or abandonment.

The costs of an abandoned appeal may be taxed without an order upon the production of the notice of discontinuance served, or of the notice of appeal, with an affidavit that the appeal has not been set down; and if the costs are not paid within 4 days from taxation the respondent may issue execution therefor: see *Rule* 660 (3).

Reasons for and against appeal.

Reasons for and against Appeal.—Although the reasons for the appeal are to be stated in the notice of motion under this *Rule*, there is no provision requiring formal reasons against the appeal to be delivered by a respondent.

If the appeal is from a part only of the judgment, the notice should specify the part.

Raising new points on appeal.

A new point may not be allowed to be raised in the Appellate Division, where, if raised, it might have been met by evidence:

(*a*) Where the judgment has been reported this is now not necessary: see *Rule* 494.

Ex parte Firth, Re Cowburn, 10 Ch. D. 419; 46 L. T. 120; *Randwick* v. *Australian C. I. Corp.*, 1893, A. C. 322; *Brown* v. *Dunn*, 6 R. 67; *Martin* v. *Great Northern Ry.*, 16 C. B. 179; see also *Millar* v. *McTaggart*, 20 Ont. 617; *Connecticut F. Ins. Co.* v. *Kavanagh*, 1892, A. C. 473; 67 L. T. 508; and the Court will not decide such point in favour of the party taking it, unless it is satisfied that it has all the facts before it, and that no satisfactory answer to it could have been given: *Tasmania* v. *City of Corinth*, 15 App. Cas. 223, approved L. R. P. C., *Karunaratne* v. *Ferdinandus*, 1902, A. C. 405; 86 L. T. 329; *Archambault* v. *Archambault*, 1902, A. C. 575; 87 L. T. 404. Rule 494.

Where certain issues were not raised on the pleadings, but at the trial had been treated as if raised, the objection that they were not pleaded was not allowed to be taken in the Appellate Court, because if taken at the trial an amendment would have been allowed: *Kennan* v. *Murphy*, 8 L. R. Ir. 285.

A point of law not taken at the trial may be raised for the first time on appeal: see *McKelvey* v. *Le Roi Mining Co.*, 32 S. C. R. 664; provided that the appellate Court is satisfied that it has before it all the facts bearing on the new contention as completely as if it had been raised at the trial: *Karunaratne* v. *Ferdinandus*, 1902, A. C. 405; 86 L. T. 329; *Archambault* v. *Archambault*, 1902, A. C. 575; 87 L. T. 404; and see *The Queen* v. *Poirier*, 30 S. C. R. 36.

Where an appellant succeeds upon a point not adjudicated upon in the Court below he may not be allowed his costs: *Goddard* v. *Jeffreys*, 46 L. T. 904; *Page* v. *Austin*, 7 Ont. App. 1; *Van Velser* v. *Hughson*, 9 Ont. App. 390; *Cooper* v. *Cooper*, 59 L. T. 1. See also p. 1118.

In the Privy Council an appellant is not allowed to take a point not taken in the Court below: *Corporation of Adelaide* v. *White*, 55 L. T. 3; *Randwick* v. *Australian C. I. Corp.*, *supra*; *Connecticut F. Ins. Co.* v. *Kavanagh*, 1892, A. C. 473; or to raise questions not raised in the Court below either on the pleadings or evidence: *Grey* v. *Manitoba & N. W. Ry.*, 1897, A. C. 254; but see *McKelvey* v. *Le Roi Mining Co.*, *Karunaratne* v. *Ferinandus*, and *Archambault* v. *Archambault*, *supra*.

Cross Appeal.—A cross appeal is an appeal by a respondent in respect to some matter in which the appellant is also concerned.

Under C. R. 813, which has not been continued, it was provided that a cross appeal should not be necessary, but that a respondent might in his reasons against the appeal set up any grounds which he desired to urge by way of cross appeal: see also Eng. (1883), R. 870. In the interpretation of that Rule the Ontario and English Courts have differed. In England it is held that where such a notice is given by a respondent the appellant cannot, by abandoning his appeal, prevent the respondent from having his point argued: see per Jessel, M.R., *Re Cavander*, 16 Ch. D. 270; but that the respondent, in such circumstances, is entitled to elect whether to continue, or withdraw his cross appeal. If he elects to continue, the original appellant and the respondent in effect change places, and the latter is, on the hearing of the respondents' appeal, entitled to rely on his original appeal by way of cross appeal: *The Beeswing*, 1884, 10 P. D. 18; 51 L. T. 883. In Ontario, however, the cross notice was held to be merely subsidiary to the appeal, and if the latter were abandoned, or dismissed for want of prosecution, the cross notice also fell: *Pickering* v. *Toronto Ry.*, 16 P. R. 144, that case, however, turned on the difference in the practice

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as to the constitution of appeals in England, and Ontario, which appears no longer to exist. Under C. R. 813, a respondent might serve notice on a co-respondent claiming a variation in his favour of the judgment appealed from: *Ex p. Payne*, 11 Ch. D. 539; *Harrison v. Cornwall M. Ry. Co.*, 18 Ch. D. 334; but, apparently, not in respect to a question in which the appellant was not interested; an independent appeal in such case would seem to be necessary: *Johnston v. Petrolia*, 17 P. R. 332, not following *Freed v. Orr*, 6 Ont. App. 690; but see *Ralph v. Carrick*, 11 Ch. D. 873; 40 L. T. 505.

A respondent could not give notice of cross appeal to parties, or persons, who were in no way affected by the original appeal: *Begg v. Ellison*, 14 P. R. 267; *Johnston v. Petrolia*, 17 P. R. 332; *Re Cavander*, 16 Ch. D. 270.

A respondent questioning the judgment under C. R. 813 was so far in the same position as an appellant, that anything which would be an answer to an independent appeal by him would be an answer to his cross appeal: *Re Charles Stark Co.*, 15 P. R. 451.

Where a claim, and counter-claim, were both dismissed, and the defendant appealed from the judgment on the counter-claim, if the plaintiff desired also to appeal from the judgment on his claim, he must bring a separate appeal, and could not raise the question by a notice under the Eng. Rule above referred to: *National Society, etc., v. Gibb*, 1900, 2 Ch. 280.

Where a party adopts, or acts under, or enforces, a judgment or order, he usually waives his right to appeal therefrom: see *infra*, p. 1101.

Where a respondent sought to vary the order appealed from, leave to enforce the order pending the appeal, without prejudice to his cross appeal, was refused: *Re Stark*, 15 P. R. 451.

In the present *Rules*, no provision appears to be made for a cross-appeal by a respondent, except as an original appellant. This perhaps may prove inconvenient in practice, as it may necessitate each party obtaining copies of the evidence and all necessary papers for the purpose of complying with this *Rule;* unless by leave of the Court, and arrangement between the parties, the same papers be authorized to be received and used for the purposes of all appeals (if more than one) from the same order, or judgment.

A cross appeal of which notice could be given under C. R. 813, was limited to matters in which the original appellant was concerned; an appeal in which other parties are interested is not a "cross appeal:" *Re Covender, supra; Begg v. Ellison*, 14 P. R. 267; *Johnston v. Petrolia*, 17 P. R. 332.

Costs, where Cross Appeal Lodged.—Where respondents gave notice of intention to move to have the judgment varied, and both appeals were dismissed, the appellants were ordered to pay the costs, except such as were occasioned by the notice of the respondents: *The Louretta*, 4 P. D. 25.

Where there were two respondents, one of whom gave a cross notice affecting the other respondent, the appellant, whose appeal was dismissed, was ordered to pay half the costs of both the respondents, and the unsuccessful respondent in the cross appeal was ordered to pay half the costs of the other respondent: *Horrison v. Cornwall Minerol Ry. Co.*, 18 Ch. D. 334. Where, however, the costs could not

have been materially increased by the notice, no apportionment was made, but a fixed sum was allowed for costs incidental to the notice: *Robinson* v. *Drakes*, 23 Ch. D. 98. Rule 494.

As to the costs of a respondent who has given no notice of objection, and as to whom the judgment appealed from is reversed: see *Challoner* v. *Lobo*, *infra*.

How far Relief may be Given to non-appealing Party.—Usually where a party seeks to vary a judgment or order, he must himself appeal therefrom; but in some cases, however, a variation of the judgment in favour of a party who has not appealed has been made: see *Toronto Junction* v. *Christie*, 25 S. C. R. 551, which was an appeal in an expropriation proceeding, in which the arbitrators had fixed the damage at $100, which, on appeal, Mr. Justice Rose increased to $1,000, and on a further appeal by the expropriators, the Supreme Court of Canada increased the damages to over $1,800: and see *Hunter* v. *Hunter*, 24 W. R. 527; but see *Stephens* v. *Chaussé*, 15 S. C. R. 379, where it was held that in the absence of a cross appeal, damages could not be increased in favour of the plaintiff. Sometimes the result of a successful appeal necessitates a variation of the judgment in favour of a party who has not appealed; thus where judgment was recovered against a township corporation, and a contractor, restraining them from constructing a drain, and ordering them to pay the costs of the action, but directing the township to indemnify the contractor as to such costs, and the township alone appealed, making the contractor a respondent, which appeal was allowed; it was held that as no case for relief was made against the contractor, except through the township, and the case failing against the township, the action should be dismissed as against both defendants, and that the contractor was entitled to his costs of action, but not of the appeal: *Challoner* v. *Lobo*, 1 O. L. R. 156, 292; 32 S. C. R. 505.

In *Atty-Gen.* v. *Simpson*, 1901, 2 Ch. 671, a judgment was varied in favour of a respondent, where the appeal was being allowed on other points, although there was no cross-appeal.

See also Jud. Act, s. 12, and notes p. 107, *supra*.

Settlement of Judgments and Orders of the Appellate Division.—By the regulations of the Judges of 2nd January, 1913, the duty of settling the judgments, and orders, of the Divisional Court of the Appellate Division, was assigned to the Senior Registrar of the High Court Division: when settled, they are signed and issued by the Registrar of the Appellate Division.

Orders made by a Judge of the Appellate Division are to be settled by the Registrar of that Division: *Rule* 531 (5).

Order on or certificate of appeal—settlement of.

Where the Registrar considers a notice of settling the order, or certificate, of the Appellate Division to be proper, he appoints a time for the purpose, and one day's notice is sufficient.

Moving to vary minutes of certificate.

Any party dissatisfied with the minutes of the order of the Appellate Division as settled, may move to vary them: *General Share and Trust Co.* v. *Wetley*, 20 Ch. D. 130; and see notes to *Rules* 527, 528.

After the order, or certificate, of the Appellate Division has issued, the cause is no longer in the Appellate Division, except as regards any application in reference to the order, or certificate, but all subsequent proceedings are to be taken in the High Court Division, and

Rules 485, 486.

any application to stay proceedings pending any further appeal must be made to the High Court Division: see *Hargrove* v. *Royal Templars*, 2 O. L. R. 126.

The Registrar in drawing up the order or certificate of the Appellate Court may introduce any proper and usual provision though not expressly ordered in the judgment delivered on the appeal, and this authority extends to the insertion of directions for the restitution of money paid in obedience to a reversed judgment: *McKindsey* v. *Armstrong*, 11 P. R. 200.

Where the order, or certificate, drawn up and issued, does not conform to the judgment of the Court, a motion may be made to amend it, so as to make it conform thereto: *St. John* v. *Rykert*, 3 C. L. T. 119; *McKindsey* v. *Armstrong*, 1 P. R. 200; and see notes preceding *Rule* 521, *infra*, p. 1139.

Where an injunction order had been varied by the Court of Appeal by suspending its operation for a time, it was held that a further extension might be granted by the Court below: *Shelfer* v. *London Electric, etc.*, 1895, 2 Ch. 388.

(ii) *Stay of Execution Pending Appeal.*

Stay of execution.

495. The Judge at the trial may stay the entry of judgment or the issue of execution for a period not exceeding thirty days. *New.*

As a judgment cannot be enforced, or prosecuted, until it has been entered, a stay of entry is in effect a stay of all proceedings on the judgment, but not a stay of other proceedings, as for example, the settlement of the judgment, or the prosecution of the proceedings in appeal.

Stay of execution.

496. Unless otherwise ordered by a Judge of a Divisional Court the execution of the judgment appealed from shall, upon an appeal being set down to be heard, be stayed, pending the appeal, but if the judgment appealed from awards a mandamus or an injunction, execution shall not be stayed unless so ordered by the Judge of a Divisional Court. C.R. 827.

"**Execution of the Judgment.**"—As to these words: see *Monro* v. *Toronto Ry. Co.*, 5 O. L. R. 15; *Uylaki* v. *Dawson*, 10 O. L. R. 683.

After an appeal has been set down, from the judgment of a Judge, he has no jurisdiction to make an order that execution shall not be stayed: *Mullin* v. *Provincial Construction Co.*, 16 O. L. R. 241; under this *Rule* such an order can only be made by a Judge of a Divisional Court.

Staying execution pending appeal

Staying Execution under Judgment appealed from:—

The setting down of an appeal, effects a stay of proceedings, and entitles the appellant to a certificate that any execution in the sheriff's hands has been stayed (*a*): see *Rule* 497; but if an injunction, or man-

(*a*) The *Rule* says "superseded."

damus, has been grnnted, the entry of an nppeal does not effect a stay, unless expressly ordered; upon an applicatlon to stay, the Court may impose such terms as may aeem fit: *Copeland-Chatterson Co.* v. *Business Systems*. 14 O. L. R. 337; *Fox* v. *Toronto & Nipissing Ry. Co.*, 26 Gr. 352; *Gossage* v. *Canadian L. & E. Co.*, 24 U. C. Q. B. 452; *Barker* v. *Lavery*, 14 Q. B. D. 169; *Rombough* v. *Balch*, 19 P. R. 123. Rule 496.

An applicatlon under thls *Rule* to stay a mandamus, or lnjunctlon, pending an appeal, muat be made to the Judge appealed from, or to a Judge of the Appellate Dlvlslon: see *Grand Trunk Ry. Co.* v. *Ont. & Que. Ry. Co.*, 9 P. R. 420; *Wilson* v. *Church*, 11 Ch. D. 576; *Otto* v. *Lindford*, 18 Ch. D. 394; *Cropper* v. *Smith*, 24 Ch. D. 315.

Where it is desired to carry n judgment or order lnto executlon, pending an appeal, a specla! applicatlon must he made for the purpose to a Judge of a Divislonnl Court: see *Rule* 496 and *Confederation Life Assocn.* v. *Labatt*, 35 C. L. J. 443; *Rice* v. *Rice*, 35 C. L. J. 535; *Uylaki* v. *Dawson*, 10 O. L. R. 683.

Any order made hy a Judge of the Appellate Dlvlslon ln such matters is subject to appeal: Jud. Act, s. 31, *supra*. As to appeals from such orders made hy a Judge of the High Court Dlvlsion: see Jud. Act, ss. 24, 25, *supra*.

An order made under thls *Rule* is not merely discretlonary so as to preclude the rlght of appeal therefrom: *Centaur Cycle Co.* v. *Hill*. 4 O. L. R. 92.

An applicatlon to stay execution, or to allow exscutlon to issue should not he made *ex parte*: *Grand Trunk Ry.* v. *Ont. & Q. Ry.*, 9 P. R. 420. But the Court may on such an applicatlon consider whether the appeal is frivolous: *Norval* v. *Canada Southern Ry. Co.*, 7 P. R. 462; or whether the respondent may suffer any injustice hy the stay: see *Wintemute* v. *Brotherhood of Railway Trainmen*, 19 P. R. 6.

It would seem that an applicatlon under thls *Rule* for leave to proceed with an execution for money, or to compel the appellant to givs security therefor, will not be granted merely on the ground that the appellant is impecunious: *Confederation Life Assen.* v. *Labatt*, 35 C. L. J. 443; *Wintemute* v. *Brotherhood of Railway Trainmen*. 19 P. R. 6.

An order that execution should not be atayed was refused where an appeal appeared to he prosecuted ln good faith, and upon substantlal grounds, and the effect of the removal of the atay would he practically to close the husiness of the appellant: *Centaur Cycle Co.* v. *Hill*, 4 O. L. R. 92.

After an appeal has been entered and execution stayed hy virtue of thls *Rule*, a Judge of the High Court Dlvlsion has no power to order that execution shall not be stayed: see *Mullin* v. *Provincial Construction Co.*, *supro*, p. 1102.

The costs of an applicatlon to stay execution ln England, where there is no enactment similar to this *Rule*, are, as a general rule, ordered to he paid hy the applicant: see *Merry* v. *Nickalls*, L. R. 8 Chy. 205; *Cooper* v. *Cooper*, 2 Ch. D. 492; *Morgan* v. *Elford*, 4 Ch. 358. In *Burdick* v. *Garrick*, L. R. 5 Chy. 453, and *Adair* v. *Young*, 11 Ch. D. 136, however, they were made costs in the appeal. Costs of motion.

In Ontario, the costs of applications to stay execntlon, or proceedings, are ln the discretlon of the Court: Jud. Act, s. 74, and the general

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rule is to make the costs, costs in the appeal. Sometimes formerly they were ordered to be paid by the applicant: see *Norval* v. *Canada Southern Ry. Co.*, 15 C. L. J. 86; 7 P. R. 462; *Fox* v. *Toronto & Nipissing Ry. Co.*, *supra*, p. 1103; but there is no rule that the costs of an unsuccessful application to remove the stay of execution under this *Rule* are to be costs in the appeal; they have been ordered to be paid by the applicant: *Wintemute* v. *Brotherhood of Railway Trainmen*, 19 P. R. 6.

Where execution is stayed under this *Rule*, the execution is not only stayed, but is superseded, so that it ceases to bind, if it has been issued and placed in the Sheriff's hands; *Rule* 497, and see *O'Donohoe* v. *Robinson*, 10 Ont. App. 622; *Vigeon* v. *Northcote*, 15 P. R. 171.

When money made under execution, will be ordered to be refunded, or possession of land be ordered to be restored.

Where the money had been made by the Sheriff, and transmitted to the respondent's solicitor, before an order staying execution was served the Court refused to order such money to be refunded, even though the order staying the execution was granted before the money actually reached the solicitor's hands: *McDonell* v. *McKoy*, 2 Chy. Ch. 354; and see *Rule* 497. But where a suit was brought to restrain an action of ejectment, and the plaintiff failed, and thereupon a writ of *hab. foc. poss.* had been executed before the proceedings thereon could be stayed, possession was ordered to be restored to the appellant pending the appeal, on his giving security as required by former C. R. 827: *Campbell* v. *Royal Canadian Bank*, 19 Gr. 477.

Where a judgment has been stayed pending an appeal, proceedings cannot be taken to enforce the judgment, or order, appealed from, pending the appeal, even against a third person: see *Vigeon* v. *Northcote*, 15 P. R. 171; and where the judgment or order appealed from directs a reference to the Master, the reference is stayed: see *Monro* v. *Toronto Ry.*, 5 O. L. R. 15.

Stay of proceedings under judgment or order appealed from.

After the execution of the judgment or order has been stayed, only the issue of the judgment, or order, and the taxation of costs thereunder, can be proceeded with, unless otherwise ordered: *Rule* 498; but the stay does not extend to the proceedings on the appeal.

Injunction, when suspended.

Proceedings to commit a defendant for a breach of an injunction, will not be stayed pending an appeal from the judgment, or order, granting the injunction: *Gamble* v. *Howland*, 3 Gr. 281, 303; and see *McLaren* v. *Caldwell*, 29 Gr. 438; unless the operation of the injunction has been suspended under this *Rule*. If it has, proceedings for alleged contempt of the injunction will be also stayed: *Copeland-Chatterson Co.* v. *Business Systems*, 14 O. L. R. 337; and see *McGarvey* v. *Strathroy*, 6 Ont. 138; 19 C. L. J. 393, where Proudfoot, J., refused a sequestration to enforce an injunction restraining the defendants from permitting water to flow on to plaintiff's land, pending an appeal, after security had been given under R. S. O. 1877, c. 38, s. 26; and see also *Toronto* v. *Toronto Street Ry. Co.*, 12 P. R. 361; this *Rule* now authorizes the Court to stay an injunction, or mandamus, in any case.

Appointment of Receiver, when stayed.

Terms on which Execution of Judgment Stayed.—Where a sum of money was ordered to be paid, or in default a receiver was directed to be appointed, the appointment of a receiver could formerly only be stayed pending an appeal, on security being given for the amount ordered to be paid, as required by the former C. R. 804: *Fox* v. *Toronto & Nipissing Ry. Co.*, 26 Gr. 352; and see *Polini* v. *Gray*, 12 Ch. D. 438; such terms are not necessarily to be imposed under the present *Rule*.

Even before this *Rule*, in mortgage cases, simply for foreclosure, or ssle, proceedings were stayed pending an appeal without security being required: *Bank of U. C.* v. *Potiroff*, 8 U. C. L. J. 328. And it would seem that the Court appealed from, may, in its discretion, irrespective of this *Rule*, suepend the operation of its judgment in any esse pending an appeal: *Cotton* v. *Corby*, 5 U. C. L. J. 67. Rule 496. Mortgage actions, when stayed

As to the form of bond for security, and affidavits of justification, and execution, where the giving of security is imposed as a term of staying execution: eee H. & L. Forms, Nos. 1206, 1207, 1233.

Where an appellant proceeds to enforce an order, or judgment, sppealed from, pending the appeal, and hy his appeal he claims relief inconsistent with that given by the order, or judgment, appealed from, he will be held to have ahandoned hie appeal: *International Wrecking Co.* v. *Lobb*, 12 P. R. 207; *Videon* v. *Westover*, 29 Ont. 6; hut under some circumstances the compliance with certain terms of a judgment will be no waiver of the right to appeal therefrom: see *Devlin* v. *Radkey*, 22 O. L. R. 399; compliance with an order for security for costs, by giving security under protest, and proceeding with the action, was held not to he acceptance of, and acquiescence in, the order, which wsived the right of appeal: *Duffy* v. *Donovan*, 14 P. R. 159.

In *Re Chorles Stark Co.*, 15 P. R. 451, a Judge in Chambers refused to enforce an order without prejudice to an appeal.

Money Paid into Court Pending Appeal.—Where money has been paid into Court for a specific purpose, and that purpose has been answered in fnvour of the party paying it in, it will he paid out to thst party; therefore, where security for coste of an appeal to the Appellate Division has been given, hy paying money into Court, the sppelisnt is entitled, in the event of the appeal proving successful, to have the money paid out to him, notwithetanding the respondent may desire to appeal to the Supreme Court of Canada: *McLoren* v. *Caldwell*, 9 P. R. 118: *Wilson* v. *Beatty, Re Donovan*, 10 P. R. 71; *Atherton* v. *British Not. A. Co.*, L. R. 5 Chy. 720; *Lindsey Petroleum Co.* v. *Hurd*, 3 Chy. Ch. 16; *Billington* v. *Provincial Ins. Co.*, 9 P. R. 67; *Crossman* v. *Shears*, 15 C. L. J. 110; *Centour Cycle Co.* v. *Hill*, 7 O. L. R. 411; 617; and the respondent in such a case, if he desires to stop the payment out, must give security for damages consequent on its detention in Court: *McDonald* v. *Worthington*, 8 P. R. 554, and see *Polini* v. *Gray*, *supra*, p. 1104. Money paid into Court pending appeal—disposition of.

Similarly a hond given as security for the costs of an appeal to the Appellate Division may be ordered to be delivered up, where the appellsnt is successful in the appeal, all liahility upon it heing at an end, notwithstanding that an appeal to the Supreme Court may be pending: *Burgess* v. *Conway*, 11 P. R. 514; so also a bond given for security for costs in the action, where the plaintiff has succeeded in the Appellate Division: *Morsh* v. *Webb*, 15 P. R. 64.

This principle does not, however, apply to enahle a party who has paid money into Court ae security for costs in the High Court Division, snd has succeeded, to obtain payment of the money out to him pending sn appeal to the Appellate Division, as the appeal is a step in the original action, and the purpoee for which the money is paid in is not answered, unless the appeal is unsuccessful: *Notional Ins. Co.* v. *Egle*

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son, 9 P. R. 202; see also *Badische Anilin, etc.* v. *Johnson*, 1897, 2 Ch. 322; *Seaton* v. *Burnand*, 15 T. L. R. 342.

But where the opposite party was otherwise secured, payment out was directed: *Napier* v. *Hughes*, 9 P. R. 164. Similarly while an appeal to the Appellate Division is pending, a bond given for security for costs in the action, will not be ordered to be delivered up to a successful plaintiff for cancellation: *Hateley* v. *Merchants' Despatch*, 12 Ont. App. 640; 11 P. R. 9; nor delivered out for suit to a successful defendant: *Coffey* v. *Scane*, 16 P. R. 307; but where the plaintiff succeeds in the Appellate Division: see *Marsh* v. *Webb*, *supra*, p. 1105.

Money paid in by one of two appellants, but in the name of both, as security for the costs of an appeal, will not be paid out to the party who paid it in, on his abandoning the appeal, if his co-appellant wishes to proceed with the appeal: *Centaur Cycle Co.* v. *Hill*, 4 O. L. R. 493.

But where money was paid into Court as security for the costs of an appeal, and for the purpose of staying execution, and the appeal was dismissed, upon the appellant giving the further security required for an appeal to the Supreme Court, it was held that an order for payment out of the costs of the appeal, and of the action, on an undertaking of the solicitors to refund, should not be made: *Agricultural Ins. Co.* v. *Sargent*, 16 P. R. 397; and see *Rombough* v. *Balch*, 19 P. R. 123.

It has been held in England that the recovery of costs, payable under an order, will not be stayed by the Court of Appeal, pending an appeal to the House of Lords, if the solicitors to whom they are payable, give their personal undertaking to refund, in case of the order being reversed: *Grant* v. *The Banque Franco-Egyptienne*, 3 C. P. D. 202; *Morgan* v. *Elford*, 4 Ch. D. 352; *The Khedive*, 5 P. D. 1, but see *supra* and *Atty.-Gen.* v. *Emerson*, 88 L. T. Jour. 97.

Money paid in by an appellant as security for costs of appeal, where it becomes liable to be applied to pay the costs of the respondent, will generally be paid out to the solicitor for the respondent, on his undertaking to refund it if the appeal is allowed, by the Supreme Court: *Kelly* v. *Imperial, etc.*, 10 P. R. 499; *Steele* v. *York*, 7 C. L. T. 170; but see *Agricultural, etc.* v. *Sargent*, 16 P. R. 401; *Rombough* v. *Balch*, *supra*.

The solicitor's undertaking may be enforced in a summary manner: *Swyny* v. *Harland*, 1894, 1 Q. B. 707; but where no such undertaking is given the solicitors are not liable to be called on to refund, even though their client is worthless, and is ordered to repay the money: *Hood-Barrs* v. *Heriot*, 1896, 1 Q. B. 610; 74 L. T. 372; *Hood-Barrs* v. *Crossman*, 76 L. T. 297; 1897, A. C. 172.

And where a sum of money has been paid into Court, not to answer any specific purpose, but generally to abide further order, then the Court has a discretion as to ordering the money to be paid out pending an appeal, and in such a case, may require security to be given to refund if required: *King* v. *Duncan*, 9 P. R. 61; *Canadian Land, &c., Co.* v. *Dysart*, 11 P. R. 51, *e.g.*, where owing to the poverty of the successful party there is danger that it may not be recovered if the decision should be reversed: *Re Airey, Airey* v. *Bower*, 79 L. T. Jour. 95.

Where money was retained in Court to abide the res[illegible]h Rule 497. proceedings as the plaintiff might be advised to take in reference thereto, and the plaintiffs thereupon brought an action which was dismissed, and the judgment was subsequently affirmed by the Court of Appeal, and the plaintiffs then appealed from the Court of Appeal, a motion for payment out pending such appeal was refused: *Toronto v. Toronto St. Ry.*, 15 P. R. 358.

Where a fund in Court is, by the judgment appealed from, directed to be paid out to the respondent, the Court may stay the payment out, upon the appellant giving security for the difference between legal interest and the interest which will actually accrue in Court: *McDonald* v. *Worthington*, 8 P. R. 554; *Brewer* v. *Yorke*, 31 W. R. 109; *Bradford* v. *Young*, 28 Ch. D. 18; but if payment out is not stayed, the mere pendency of an appeal will not prevent its being paid out: *McMaster* v. *Radford*, 16 P. R. 20.

Where money has been paid in as security for costs of an appeal by a party who is unsuccessful, it will be applied in payment of the costs of the appeal, and the balance will not be treated as that party's own moneys and applied to pay other costs of the action payable by him, if it is shewn to have been borrowed for the specific purpose of securing the costs of the appeal: *McKenzie* v. *Kittridge*, 1 C. L. T. 110; see also *Worthington* v. *Johnson*, 72 L. T. Jour. 373; but *primâ facie* it will be considered to be the money of the party on whose behalf it was paid in, and the title of any other person must be made clearly to appear: *Evans* v. *Huntsville*, 7 O. L. R. 540.

Where money was so paid out to a respondent to satisfy costs of an unsuccessful appeal, but the decision was reversed by the Privy Council, the respondent was compelled, in an action brought for the purpose, to repay the moneys so paid out for principal and interest, with interest on that gross amount at six per cent., and all sums otherwise paid for costs without interest: *Citizens Ins. Co.* v. *Parsons*, 32 C. P. 492; *semble*, that an action was only necessary in that case because the money had been paid out to persons not parties to the original suit as trustees for the creditors of the original plaintiff: *Ib.*: see *McKindsey* v. *Armstrong*, 11 P. R. 200.

Proceedings in an action upon an appeal bond were stayed, where a further appeal was pending and security had in it been given for the costs secured by the bond: *McLaren* v. *Stephens*, 10 P. R. 88.

When given a certificate to stay execution may be granted.

497. Where an execution has been issued and is thereafter stayed upon an appeal, the appellant shall be entitled to obtain a certificate from the Registrar of the Appellate Division that the execution has been stayed pending the appeal, and upon the certificate being lodged with the Sheriff the execution shall be superseded, but the execution debtor shall pay the Sheriff's fees; and the sum so paid shall be allowed to him as part of the costs of the appeal. C.R. 828. *Amended.*

See notes to *Rule* 496. This *Rule* has made an important variation in C. R. 828. That *Rule* merely provided that the execution should be "stayed." This provides that it shall be "superseded" and a *supersedeas*

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means that a writ is countermanded, and after it is superseded it is doubtful if it can be again put in force, and a new writ would appear to be necessary for the issue of which the leave of the Court would appear to be necessary.

Stay of further proceedings in actions.

498. Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment, and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by a Judge of the Divisional Courts. C.R. 829.

See *Monro* v. *Toronto Ry. Co.*, 5 O. L. R. 15.

A judgment on a special case by which the opinion of the Court is given, but upon which there can be no execution issued is not within this *Rule*. Where, therefore, the opinion of the Court has been asked on questions of law, "before proceeding to take further evidence," it was held that the taking of evidence was not stayed pending an appeal by virtue of this *Rule*, though it was considered that such stay existed by virtue of the terms of the special case: *Toronto* v. *Toronto Ry. Co.*, 5 O. W. R. 415.

Although an appeal is a step in the action, it seems obvious that the stay of all further proceedings in the action can not be intended to affect the proceedings in appeal; but after a case has been carried to appeal a Judge of the High Court Division has no jurisdiction to grant an injunction, or receiver, in the action pending the appeal: *Embree* v. *McCurdy*, 14 O. L. R. 284; but *semble* a Judge of the Appellate Division may do so: *Ib.*, see Jud. Act, s. 31, but see *Mackenzie* v. *Toronto*, p. 62, *supra*.

(iii) *Default and Disagreement of Jury.*

Setting aside judgment by default.

499. Where a party does not appear at the trial, the judgment may be set aside and a new trial ordered by the Judge presiding at the sittings, or by a Judge. C.R. 778. *Amended.*

Where a judgment was given at the trial for the defendant owing to the absence of the plaintiff, and an application to reinstate was refused by the Judge, it was held that the plaintiff might apply to the Divisional Court to set aside the judgment, and for a new trial: *Wilson* v. *Irwin*, 10 P. R. 598.

Though an appellate Court may have jurisdiction to hear an appeal from a judgment by default, such appeals are not encouraged. A party should apply to have the judgment set aside and the case retried: *Flint* v. *Hudspith*, 29 Ch. D. 322; *Armour* v. *Bate*, 1891. 2 Q. B. 233.

Where a defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that the action had with others been transferred from one Judge of the Chancery Division to another, Fry. J., held that the solicitor had therein been guilty of gross negligence, and that the plaintiff could not be relieved. But it was held, on appeal, that the judgment must be set aside, on payment of the costs of the day, Jessel, M.R., observing: "Solicitors

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cannot any more than other men conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice, and with the course of practice, to restore the action to the paper on the terms of the party in default paying the costs of the day; which include all costs thrown away by reason of the trial becoming abortive": *Burgoine* v. *Taylor*, 9 Ch. D. 4.

Where the Court was satisfied that the absence of the defendant and his counsel was purely accidental, a judgment by default was set aside on payment of plaintiff's costs of hearing, including reasonable disbursements to counsel, and the costs of the application: *Wolfe* v. *Hughes*, 17 C. L. J. 427. On similar terms an action dismissed was restored to the paper, where, in consequence of the illness of the plaintiff's solicitor, the necessary arrangments were not made: *Birch* v. *Williams*, W. N. 1876 168.

Where one counsel had been unavoidably detained by a railway accident, and the other had been prevented by indisposition from conducting the case (see *Cockle* v. *Joyce*, in *Burgoine* v. *Taylor*, 9 Ch. D. 3), and where the defendant had personally been guilty of no negligence, though his solicitor had neglected to attend to the defence, and the defendant made an application within six days of his having heard that the trial had taken place, the Court granted an extension of time, to enable him to make application to set aside the judgment: *Mitchell* v. *Wilson*, 25 W. R. 380. So also where one side had trusted to a reasonable expectation of a settlement of the dispute: *Wright* v. *Clifford*, 26 W. R. 369; 47 L. J. Chy. 544.

As to delay in applying: see *May* v. *Head*, W. N. 1880, 26; *Wilkins* v. *Bedford*, 35 L. T. 622; *Webster* v. *Cool Consumers Co.*, 1 Chari. Ca. (Court) 131; *Atwood* v. *Chichester*, 3 Q. B. D. 722; *King* v. *Sondemann*, 38 L. T. 461, and notes to *Rules* 37 and 520.

Re-trial where jury disagree.

500. Where the jury disagree the action may be re-tried at the same sittings or at any subsequent sittings as may be directed. *New.*

In certain cases where the jury disagrees the action may be dismissed: see Jud. Act, s. 30.

If the Judge, notwithstanding the disagreement of the jury, is of the opinion that there is really no evidence to support a verdict for the plaintiff, he may dismiss the action, although he may have previously ruled that there was some evidence. An Appellate Court has the like power, but it will not be exercised unless the Court is satisfied that further evidence could not be produced on a re-trial: Jud. Act, s. 2 (a): *Skeate* v. *Slaters*, 1914, 2 K. B. 429; 110 L. T. 604.

Where judgment cannot be entered on answers.

501.—(1) Where a jury is directed to answer questions, and answers some but not all, or where the answers are conflicting so that judgment cannot be entered upon such findings, the action shall be re-tried as in the case of a disagreement.

(2) If the answers entitle either party to judgment as to some but not to all the causes of action, the Judge may

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direct judgment to be entered on the causes of action as to which the answers are sufficient, and the issues upon the remaining causes of action shall then be re-tried as upon a disagreement. C.R. 781.

The first part of this *Rule* is intended to set at rest the question which led to a difference of opinion in Divisional Courts in the cases of *Stevens* v. *Grout*, 16 P. R. 210, and *McDermott* v. *Grout*, *Ib.*, 213, and see *Faulknor* v. *Clifford*, 17 P. R. 363; *Brown* v. *Defor*, 21 Ont. App. 466; and, in the case mentioned in the *Rule*, the action may therefore be taken down to trial again by a new notice of trial, as soon as it has been decided upon motion for judgment, at the trial or afterwards, under Jud. Act, s. 30, or *Rule* 501 (2), that judgment cannot be pronounced: see *Moore* v. *Grand Trunk Ry. Co.*, 5 O. W. R. 211.

This *Rule* will not enable the Court to direct judgment to be entered contrary to the findings of a jury on any material question of fact. But, where the jury has found a fact entitling the defendant to a dismissal of the action, a new trial will not be granted merely because, notwithstanding such finding, the jury has also given a verdict for damages against such defendant: *Kerry* v. *England*, 1898, A. C. 742.

Under Jud. Act, s. 30, it would seem to be competent in a proper case for the Court to dismiss the action, otherwise it must be tried again. A dismissal will, no doubt, only be ordered where the Court is satisfied that the plaintiff has made out no case. The Court would, however, not arrive at that conclusion on conflicting evidence: see notes to Jud. Act, s. 26.

(iv) *Appeals from Masters and Referees—Local Judges and Officers in Chambers.*

Report, when absolute.

502. Every report of certificate of a Master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same unless notice of appeal is served within that time. C.R. 769.

The filing is a prerequisite to the report, or certificate, becoming absolute: *Re Supreme Legion of Select Knights of Canada*, 29 Ont. 708.

This *Rule* applies both to appeals, and cross-appeals from reports: *Stewart* v. *Ferguson*, 19 P. R. 21; notice of appeal given by one party, does not prevent the report becoming absolute as against another party: *Ib.*

As to appeals from Masters under the Dominion *Winding up Act* (R. S. C. c. 144), s. 110; *Re Central Bank*, 30 Ont. 320; *Re Farmers' Loan & S. Co.*, 30 Ont. 337; the appeal in such cases is to a Judge in Court as in other cases of appeals from reports.

Reports and Certificates.—As to the reports, and certificates, which are the subjects of appeal: see notes to *Rule* 424, *supra*, p. 424. Orders made under *Rule* 433 are not included under the words "report" or "certificate:" *Rule* 504.

This *Rule* applies to the report, or certificate, of a Referee: see *Freeborn* v. *Vandusen*, 15 P. R. 264; *Colchester* v. *Valad*, 24 S. C. R. 622; and *Rule* 400. It is also considered to apply to all reports, including those of Commissioners to admeasure dower under *The Dower Act* (R. S. O. c. 70), s. 29. Rule 502.

This and the two following *Rules* apply only to appeals from reports and certificates. Where Local Masters are exercising jurisdiction in Chambers, under *Rule* 433, appeals from their decisions are regulated by *Rule* 505.

Where a reference was directed by consent to a Local Registrar with all the powers of a Master, it was held that his report was appealable in the same manner as a Master's report: *Kennedy* v. *Haddon*, 19 Ont. 240.

The certificate of a Taxing Officer of the result of a taxation between solicitor and client is a report, and only appealable in the manner pointed out in *Rule* 503: see *Rule* 508.

As to appeals under the *Mechanics' Lien Act* (R. S. O. c. 140), s. 40; that section, it will be observed, seems only to provide for appeals from the judgment in the action; no express provision is made by the Act for appeals from interlocutory orders, or reports, in such actions, which are apparently intended to be governed by the ordinary procedure of the Court in like cases.

Reports which require Confirmation.—All reports, and certificates, which are the subject of appeal, are, as a general rule, required to be confirmed before they can be acted on: *Scott* v. *Livesey*, 2 Sim. & S. 300; or any application can be made to the Court founded thereon: *Hayes* v. *Hayes*, 8 P. R. 546; *Nichols* v. *McDonald*, 8 Gr. 594; *Croven* v. *Ingham*, 58 L. T. 488. Thus a report on sale, where the sale proved abortive, requires confirmation before it can be acted on: *Robert* v. *Coughell*, 8 O. L. R. 381. There are, however, some reports, and certificates, which may be acted upon without confirmation on their being filed: see *Re Yoggie*, 1 Chy. Ch. 168. Reports which require confirmation, may be confirmed by special order before the expiration of the time limited for appealing therefrom, upon consent of all parties interested. An order confirming a report may be made by the Master in Chambers. Reports requiring confirmation.

Chief Justice Sir William Meredith, on 22nd October, 1906, on being consulted by the Accountant, expressed the opinion that the Accountant ought not now to act on any report whatever, even by consent, until it has been confirmed by lapse of time, or order.

Reports which do not require to be Confirmed.—All reports, or certificates, of mere calculation: *Lewis* v. *Talbot St. Road Co.*, 10 P. R. 15; *Boeck* v. *Boeck*, 16 P. R. 213; and of matters of opinion, which do not require any further order from the Court to give effect to, or to sanction them—except reports on sales—do not require confirmation except where the Accountant is required to act upon them, and in such case they must be first confirmed: see *supra*. Under this head are included certificates of compliance, or non-compliance; with any order of the Master, or of the Court (but not certificates of insufficient compliance; *e.g.*, that accounts filed are insufficient in substance and form: *Foster* v. *Morden*, 9 P. R. 70); certificates of scandal, or impertinence, in pleadings, or affidavits, referred to the Master; reports appointing Reports not requiring confirmation.

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trustees; and appointments of receivers, committees, or guardians, under *Rule* 458; but see *Finkle* v. *Date*, 7 P. R. 413; *Foster* v. *Morden*, *supra*; reports on passing the accounts of receivers, or committees; reports approving of conveyances; and other certificates and reports of a like description: see Smith's Pr. 2nd ed., Vol. II., 357-8.

No appeal after confirmation without leave.

No Appeal after Confirmation without Leave.—After a report requiring confirmation has been confirmed, no appeal from it will be entertained without leave first given, on special application: *Thompson* v. *Luke*, 10 Gr. 281.

After the cause or matter has been heard on further directions, the Court has no power to permit an appeal from the report upon which the order or judgment on further directions is founded: *Re Dingman* v. *Hall*, 13 P. R. 232; 17 Ont. App. 398. The judgment or order on further directions must be first vacated.

Effect of confirmation.

Effect of Confirmation.—After confirmation, the parties are concluded by the report; yet the Court, in its discretion, may refuse to act upon it, and may refer the cause back to the Master, or require additional information to be furnished: *Taylor* v. *Craven*, 10 Gr. 488; *Baldwin* v. *Crawford*, 1 Gr. 202; *Harrison* v. *McSheehan*, 80 L. T. Jour. 79.

Clerical errors may be corrected notwithstanding confirmation.

Notwithstanding confirmation, clerical errors, and accidental slips, in a report may be corrected at any time upon motion in Chambers, without appeal: *Morley* v. *Matthews*, 12 Gr. 453; *King* v. *Connor*, 10 Gr. 364; *Watson* v. *Moore*, 1 Chy. Ch. 266; and where the error was apparent on the face of the report, the application was granted *ex parte*: *White* v. *Courtney*, 1 Chy. Ch. 11. But although the error be apparent, it does not follow that the proper correction is apparent, and the motion therefore is usually required to be on notice or consent: *Simpson* v. *Ottawa*, 2 Chy. Ch. 12. Mistakes in a report, however, cannot be corrected by the Master *mero motu*, on any subsequent reference in the action: *Crooks* v. *Street*, 1 Chy. Ch. 78; but on a reference back upon an appeal, when the Court enunciates a principle, which is applicable to other parties, and other points, than those expressly concerned in the appeal, it is the duty of the Master so to apply that principle in all cases to which it is applicable in making his new report, even though it involve the readjustment of an account not appealed from: *Denison* v. *Denison*, 17 Gr. 306; and see *Gilbert* v. *Jarvis*, 20 Gr. 478.

Report stands confirmed as to matters not appealed.

Even though an appeal be had, the report will stand confirmed as to matters not objected to by the appeal, and which the decision on the appeal does not affect: *Denison* v. *Denison*, 17 Gr. 308; *Ross* v. *Perrault*, 13 Gr. 206. And when the report is referred back, an appeal will not lie from the further report, as to matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, *supra*, or affected thereby: *Denison* v. *Denison*, 17 Gr. 308.

Waiver of objection that appeal too late.

Where notice of appeal is delivered, without leave, after a report is confirmed, the delivery of notice of cross-appeal is a waiver of the objection: *Larkin* v. *Armstrong*, 1 Chy. Ch. 31.

Report not to be dated before costs revised.

The report should not be dated before the costs have been revised, where revision is necessary: *Waddell* v. *McColl*, 14 Gr. 211. A report as to parties who, being entitled to notice, have had no notice, is a nullity: *Fuller* v. *McLean*, 8 P. R. 549.

Confirmation of Report.—A report requiring confirmation now becomes absolute at the expiration of fourteen days from the date of service of notice of filing, unless in the meantime notice of appeal is served: *Rule* 502. An application to extend the time for appealing from a report, even before confirmation, must be made on notice: see *Hamilton* v. *Tweed*, 9 P. R. 448; as also an application for leave to appeal after the time has expired: *Peterborough* v. *Ireton*, before Proudfoot, J., Nov. 11th, 1883. Rule 502. Confirmation of report. Notice.

Where it is desired to confirm a report before the expiration of the 14 days, a special application in Chambers may be made for that purpose, but such applications are granted only where all parties entitled to appeal consent: *Patterson* v. *Gilbert*, 12 P. R. 652, and it is considered undesirable that an officer should make an order confirming his own report: *Ib.* Special order confirming report, when made.

Filing Report.—A report must be filed before it can be acted on, and notice of filing must be given by the party filing it to the opposite party: *Rule* 429; and a report does not become absolute until notice of filing has been given (when necessary), and fourteen days have elapsed: *In re Supreme Legion S. K. of C.*, 29 Ont. 708; but service of such notice on defendants who have not appeared in the action is unnecessary: *Toronto General Trusts Corp.* v. *Craig*, 2 O. L. R. 238. So also a report must be filed before an appeal will lie: *Hayes* v. *Hayes*, 8 P. R. 546. If it appoints a day for payment of money, it should be filed before the day for payment: *Mills* v. *Dixon*, 2 Chy. Ch. 53, and confirmed, if it is a report requiring confirmation: *Mountain* v. *Porter*, 1 Chy. Ch. 207. No proceedings can properly be taken on a report until filed, either by the issue of process, or otherwise: Beames' Ord. 293; *Jellett* v. *Anderson*, 8 P. R. 387; even though the report, or certificate, be one not requiring confirmation: *Ib.*; but such reports can be acted on, immediately on filing; it is not necessary to wait fourteen days: *Re Yaggie*, 7 U. C. L. J. 293; 1 Chy. Ch. 168. Filing report; time for.

All reports are to be filed in the office where the proceedings were commenced: *Rule* 428; and see *Rule* 761.

Appeal, when Necessary.—Ordinarily, where the objection to the report is not manifest on its face, an appeal must be brought, unless the report be a nullity: *Fuller* v. *McLean*, 8 P. R. 549; *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113; where the report goes beyond the judgment, or order of reference, the report as to such matters will "not be respected" by the Court: Beames' Ord., 23, and therefore no appeal as to such matters would seem necessary; an incumbrancer claiming priority to the plaintiff, who is made a party as a subsequent incumbrancer, may either move to set aside the order making him a party (which appears to be the preferable practice), or appeal from the report on the question of priority: *McDonald* v. *Rodger*, 9 Gr. 75, and see *Montgomery* v. *Shortis*, 3 Chy. Ch. 69. Appeal, when necessary.

Mere clerical errors in a report may be corrected, even after confirmation, without appeal, by order in Chambers: see *Rule* 502 note; and where the Master who has made the report has also jurisdiction in Chambers, it would appear to be competent for him to make the order; but he has no jurisdiction to make any material alteration or amendment of the report, not being a clerical error: that can only be properly done on appeal: see *Skead* v. *Holland*, 9 C. L. T. 50.

Rule 502.

For the purpose of appeal, a Master's certificate stands on the same footing as a report: *Re Molphy*, 17 P. R. 247.

For the procedure on appeals from a Master's report: see *Rules* 502-506.

No appeal after confirmation without leave.

Leave to Appeal after Confirmation.—After a report is confirmed, leave to appeal from it may he granted on motion in Chambers. The application must be made on notice, or consent: *Cozens* v. *McDougol*, 1 Chy. Ch. 29; *Cade* v. *Newholl*, 1 Chy. Ch. 200; *Peterborough* v. *Ireton*, before Proudfoot, J., 11th November, 1883; all parties are entitled to notice even though they he in the ssme interest as the party seeking to appeal: *Lorkin* v. *Armstrong*, 1 Cby. Ch. 31. Where leave has been granted *ex parte*, the objection to the order may be taken on the appeal coming on for argument: *Peterborough* v. *Ireton*, *supro*. On such application it is necessary to account for the delay, and to show a *primâ facie* ground of appeal: *Dickson* v. *Avery*, 3 Chy. Ch. 222; *Rowe* v. *Wert*, 13 C. L. J. 326; *Coisse* v. *Burnham*, 6 P. R. 201; *Dudley* v. *Berczy*, 3 Chy. Ch. 81; *Chard* v. *Meyers*, 3 Chy. Ch. 120. It is not absolutely necessary that the grounds of the proposed appeal shonld be stated in the notice of motion for leave to appeal: *Romanes* v. *Herns*, 1 Chy. Ch. 363; hut reasonable, and probable, grounde of appeal, must be shown hy the affidavits: *Ib.*, and a mere statement of the proposed grounds of appeal in tbe notice of motion will not suffice: *De Blaquiere* v. *Armstrong*, 9 C. L. J. 363; but costs unnecessarily incurred in making out a case on tbe merits were disallowed: *Nash* v. *Glover*, 6 P. R. 267.

What necessary to be shown on application.

Master in Chambers may grant leave.

The Master in Chambere has jurisdiction to entertain the application: *Russel* v. *Brucken*, 3 Chy. Ch. 488; *Sievewright* v. *Leys*, 9 P. R. 200.

Leave to appeal was refused with costs, where it appesred that the object of the appeal, was to fix executore with interest upon a sum which they had invested, and upon which a loss hsd been incurred: *Cootes* v. *McGlasham*, 2 Chy. Ch. 218; so also where tbe matter had been heard on further directions, and an order pronounced founded on the report: *Re Dingmon and Holl*, 13 P. R. 232.

But leave wae granted where time was allowed to elapse through the mistake of the solicitor in supposing that hie clients would be entitled to the benefit of the appeal of their co-defendants: *Re Gabourie*, *Casey* v. *Gobourie*, 12 P. R. 252; and see *Sievewright* v. *Leys*, 9 P. R. 200; hut see *Blackstock* v. *McFarlone*, 15 C. L. J. 137.

See also notes to *Rule* 176.

Time for appealing.

Time for Appealing.—An appeal from any report, ruling, or other determination, of any Master, other than the Master in Ordinsry, must now he brought on for argument, before a Judge in Court, within one month from the date of the notice of filing of such report or certificate: *Rules* 502, 503,—or within snch further time as a Judge may think proper; the vacations are excluded from the computation of the month: *Rule* 179. An appeal from a ruling of a Master, must he brought within the same time as is allowed for sppealing from a report: *Mitchell* v. *Mitchell*, 22 Gr. 23; formerly it had to be brought within one month from the date of the ruling, irrespective of the date of the certificate of such rnling: *Maclennan* v. *Gray*, 12 P. R. 431;

but *quære* if that is now the case, though it is obvious that it may be inconvenient in practice if it is not. Rule 502.

In *Markie* v. *Ross*, 13 P. R. 135, it was held under the then Consolidated Rules that there could be no appeal to a Judge in Chambers from a *ruling* of a Master because the provision of Chy. O. 642, had not been included in the Consolidated Rules; and that an appeal only lay from a report, by which was possibly meant a general report. It is, however, to be observed that unless a new meaning is to be given to the words "report" and "certificate" from that which they possessed under the former practice, there is nothing in the present *Rules* which prevent an appeal from a Master's ruling, as in the case of an appeal from a report, because, as we have already seen, a certificate of a Master is a report: see *Rule* 424, note; and a Master's certificate of his ruling is therefore a "separate report," and as such it would seem to be appealable in the same way as any other report: see also *Re Crothers*, 15 P. R. 92; and *Re Molphy*, 17 P. R. 247. Appeal from ruling.

Semble, that where it is not shown that a report has been filed, or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail: *Re McLellan & Chinguacousy*, 18 P. R. 246.

Notice of Appeal, and Setting Down for Argument.—Seven clear days' notice of the appeal: *Rule* 503; stating the grounds of appeal: *Rule* 218; must be given to the opposite party: *Rule* 503; *Hoyes* v. *Hayes*, 8 P. R. 546; and such notice must be returnable within one calendar month from the date of service of notice of filing the report or certificate: *Rule* 503; and the appeal must be set down for argument at latest the day before that on which the notice is returnable: *Rule* 234 (6). Notice of appeal and setting down for argument.

Such appeals from Local Masters are to be heard on Monday, Wednesday or Thursday: see *Rule* 234 (1).

Appeals from a Master's certificate of taxation are an exception to the usual rule, and must be brought before a Judge in Chambers: see *Rules* 508, 509, 234 (1), (3).

Where an appeal was set down for a *dies non*, but was placed by the Clerk in the paper for the next regular sitting of the Court, it was held not to be irregularly set down: *McCaw* v. *Ponton*, 11 P. R. 328.

Before notice of an appeal is given the report must be filed, and notice of filing served on the opposite party: *Rule* 429; and see *Hayes* v. *Hayes*, 8 P. R. 546. Report must be first filed.

The notice of appeal should set out *seriatim* the grounds upon which the appeal is brought, and should include all the grounds of objection intended to be urged: *Rule* 218; objections cannot be raised on an appeal from a further report, made in pursuance of an order to the Master to review his report, which might have been taken, but were not, on the appeal from the original report: *Ross* v. *Perrault*, 13 Gr. 206. Notice of appeal should set out grounds.

Who Entitled to Appeal.—Any person having a substantial interest in the question involved in an appeal, is entitled to appeal; but persons having no interest in the subject of appeal, cannot appeal, even though the report be erroneous: *Thompson* v. *Luke*, 10 Gr. 281; Who entitled to appeal.

Rule 502.

McCargor v. *McKinnon*, 17 Gr. 525; neither will an appeal lie from a Master's ruling, or direction, by a party who has complied with it, even though it be to escape commitment for disobedience: *Mitchell* v. *Mitchell*, 22 Gr. at p. 24; neither will an appeal lie, where the amount involved is of trifling amount, *e.g.*, where not more than $10 was in question, an appeal was dismissed: *McQueen* v. *McQueen*, 2 Chy. Ch. 344.

And from Master's ruling as to evidence; or principle on which accounts to be taken; or on disallowance of a claim.

An appeal may also be brought, before the Master has made his report, from his ruling as to the admissibility of evidence: *McDonald* v. *Wright*, 12 Gr. 552; or upon his finding as to the principle upon which an account should be taken: see *Court* v. *Holland*, 29 Gr. 19, or by a creditor from the Master's ruling, disallowing his claim: *Wood* v. *Brett*, 9 Gr. 452; and he need not wait for a general report, but may at once obtain a certificate of disallowance, and appeal therefrom: *Re Clogett, Fordhom* v. *Clagett*, 20 Ch. D. 637; 46 L. T. 70.

No appeal from an award.

Where a cause had been referred to a Master as an arbitrator, by a consent decree, which provided that "either party should be at liberty to appeal against the award in the same manner and to the same extent that a report may be appealed from," it was held nevertheless, that an appeal from the award could not be entertained: *Burns* v. *Chamberlin*, 25 Gr. 148; and see *Lemay* v. *McRae*, 16 Ont. App. 348; but as to appeals to the Appellate Division in such cases: see *The Arbitration Act* (R. S. O. c. 65), s. 17; *Re Graham*, 25 O. L. R. 5. Where the order directing the reference was made without jurisdiction, the Court refused to entertain any appeal from a report made thereunder: *Queen* v. *Smith*, 7 P. R. 429; *Brown* v. *Dollard*, 6 P. R. 113.

Appeals on questions of fact; credibility; or weight of evidence.

Hearing of Appeal.—Appeals from the Master's ruling as to the regularity of proceedings in his office, in point of form, will not be readily allowed, even though the Court be of opinion that he might have properly taken an opposite view: *Sculthorpe* v. *Burn*, 12 Gr. 427.

On matters of fact decided by the Master who has had the witnesses before him, the Judge will differ from the Master with great hesitation, and only when it is manifest that he has fallen into error: *Coldwell* v. *Hall*, 9 Gr. at p. 115; and the Judge will not, in general, interfere with the decision of the Master as to the weight of evidence, nor as to the relative credibility of witnesses whose evidence has been taken before him, *viva voce*: *Doy* v. *Brown*, 18 Gr. 681; *Waddell* v. *Smyth*, 3 Chy. Ch. 412; but see *McArthur* v. *Prittie*, 29 Gr. 500; *Coghlon* v. *Cumberland*, 1898, 1 Ch. 704. But if it can be shown that there is not only a balance of direct testimony, but also corroborative circumstances pointing strongly against the Master's conclusion, the Judge on appeal may review the evidence, and reverse his finding on a question of fact: *Chard* v. *Meyers*, 19 Gr. 358; *Armstrong* v. *Gage*, 25 Gr. 1; *Morrison* v. *Robinson*, 19 Gr. 480. Where the Master determines the question without seeing the witnesses, the Judge will, in such a case, be less trammelled by the Master's finding, and will dispose of the question upon his own judgment as to the weight of evidence: *Fawcett* v. *Burwell*, 27 Gr. 445.

As to whether a third party, who has obtained liberty to contest the plaintiff's claim, is entitled to be heard on an appeal by the plaintiff from a report: see *Ewing* v. *Toronto*, 18 P. R. 137.

Rule 502.

Order on Appeal.—The order on appeal should always recite or state in substance the grounds of the appeal which have been allowed: (see *Downey* v. *Roaf*, 6 P. R. 89, as modified by the directions of the Court, given to the Registrars 6th October, 1893), and where a reference back is ordered as to any ground of appeal, that ground is to be set forth in the order: *Ib.*

Grounds of appeal to be recited in order.

Where the report is varied, it is not proper to make any actual alteration in the original: *Rule* 187; *Fox* v. *Beorblock*, 45 L. T. 469; 17 Ch. D. 429; 46 L. T. 145; nor where the alteration is simple, need it be referred back to the Master to alter: *Teeter* v. *St. John*, 10 Gr. 85, the order on the appeal specifying the alteration made being sufficient: *Ib.*

Variation of report.

Where the report is referred back, and it is not intended that further evidence should be received, the order must contain a direction to that effect: *Morley* v. *Matthews*, 12 Gr. 453; 3 C. L. J. 21.

Reference Back.—Where a report is referred back, the Master is at liberty, as of course, to receive further evidence, unless the Judge otherwise orders, or the reference back is expressed to be for a purpose on which further evidence could not be material: *Morley* v. *Matthews*, 12 Gr. 453; see also *Imp. Trusts Co.* v. *New York Security Co.*, 5 O. W. R. 641. Where the reference back is to ascertain a particular fact, the Master cannot open other matters in his report not objected to on appeal: *Williams* v. *Houn*, 10 Gr. 553. Nor on a reference back can the Master entertain a claim not previously made before him, unless specially ordered so to do: *Romanes* v. *Herns*, 22 Gr. 469.

Evidence back, further evidence on, when receivable.

When on an appeal from a Master's report a reference back to review the report is ordered, the appellant cannot appeal from the further report as to matters disposed of by the first report, and not objected to on the first appeal: *Ross* v. *Perrault*, 13 Gr. 206.

Matters not objected to on first appeal.

Costs of Appeals from Masters' Reports.—When some grounds of appeal are allowed with costs, and others disallowed with costs, the appellant is entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a proportionate share of those costs common to all the objections, according to the number of really distinct grounds of appeal on which he succeeds; and the same rule applies to the costs of a respondent: *Bank of Montreal* v. *Ryan*, 13 Gr. 204; *Trinity College* v. *Hill*, 8 Ont. 286. Sometimes, instead of giving costs to each party of so much of the appeal as to which he succeeds, the general costs of the appeal are awarded to one of the parties, subject to the deduction of a proportionate part of the gross amount, in respect of the partial success of the other party. Thus, where there were four distinct grounds of appeal embraced in eleven objections, of which objections only two were allowed, the Court gave the general costs of the appeal to the respondent, deducting therefrom one-fourth in respect of the partial success of the appellant: *Ferguson* v. *Frontenac*, 21 Gr. 188.

Costs of appeal from reports, how awarded.

In the disposition of the costs of appeals from Master's reports, the Judges will probably continue to follow the rules of the Court of Chancery. The general rule is, that the costs should follow the event of the appeal: *Downey* v. *Roof*, 6 P. R. 89; *Huntington* v. *Fon Brocklin*, 8 Gr. 421; and the word "event" is to be understood distributively: *Bank of Montreal* v. *Ryon*, 13 Gr. 204. But where the appeal fails on the principal point involved, and succeeds only as to

General rule is that costs follow the event.

But secus when appeal successful only on a trifling point.

Rules 503, 504.

a comparatively insignificant one, the whole costs of the appeal may be given to the respondent: *Brownlee* v. *Cunningham*, 13 Gr. 586. And where the Court is of opinion that the finding of the Master was a fit subject for discussion in the circumstances, even though the appeal be dismissed, costs may be refused: *Secord* v. *Terryberry*, 14 Gr. 172, and costs have also been refused of a successful appeal, where the report was defective, and the solicitors appeared to have been negligent: *Clouster* v. *McLean*, 10 Gr. 576.

Costs when appeal dismissed or allowed on ground not adjudicated upon by Master.

Where an appeal was dismissed on a ground raised for the first time on the appeal, and not adjudicated upon by the Master, the Court refused costs: *Heward* v. *Wolfenden*, 14 Gr. 188; *McDonald* v. *Wright*, *Ib.*, 284, and the same rule applies where the appeal is successful on a ground not taken before the Master: *Goddard* v. *Jeffreys*, 46 L. T. 904; see also cases, p. 1099, *supra*. Where an appeal by an executrix was allowed without costs; on the hearing on further directions, the Court refused to order the costs of the appellant to be paid out of the estate: *Story* v. *Dunlap*, 13 Gr. 375. Where the appeal was unnecessary, and the question raised thereby could have been disposed of on motion in Chambers, no costs were given: *Fouchier* v. *St. Louis*, 13 P. R. 318.

Appeals from reports to be to Court.

503. An appeal from the report or certificate of a Master or Referee shall be to the Court upon seven clear days' notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate. C.R. 770.

C. R. 770 was repealed, and the *Rule* appears to be based on C. R. 771. The Court referred to in this *Rule* is the Weekly Court in Toronto, or as provided by *Rule* 239.

As to the time for appealing: see notes to *Rule* 502, p. 1114.

A month means a calendar month: see *supra*, p. 631.

As to whether appeals now lie from a ruling of a Master: see *Muirkie* v. *Ross*, and note thereon in the notes to *Rule* 502, p. 1115, and see *Rule* 504.

The Appellate Division has no power to hear an appeal from a Master's report, the appeal is to a single Judge: *Clarke* v. *Jamieson*, 9 C. L. T. 97; not even, it would seem, by consent: see *In re Wilson*, 16 P. R. 150.

On an appeal the Court will only recognize the note of the Master, or a certificate from him, as evidence of what took place before him; affidavits are inadmissible: *Sykes* v. *Sykes*, 1897, P. 306.

504. An appeal shall lie under the two preceding rules from every decision of a Master, except an order made under the authority of Rule 433. C.R. 1264.

Interpretation of "report or certificate."

C. R. 1264 enacted *Rule* 768*a*, which is that on which this *Rule* is based.

This *Rule* would seem to apply to orders made by Masters under *Rule* 404, where an appeal therefrom is brought; but a motion by the

party added to set such an order aside, is provided for by *Rule* 405, and is not properly an appeal. Rule 505.

505.—(1) A person affected by an order of the Master in Chambers, a Local Judge or a Local Master, or other officer in Chambers, or of a Master under the authority of Rule 433, may appeal therefrom to a Judge in Chambers. Appeals from officers acting in Chambers.

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

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

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

(5) Appeals in Chambers shall be argued by Counsel. C.R. 767 and 768.

This *Rule* only relates to orders made in Chambers, it does not cover or include Masters' reports, or certificates, as to which: see *Rules* 502-504.

This *Rule* governs appeals from the Master in Ordinary when acting in Chambers, under *Rule* 433; and from the Master in Chambers, and the Local Judges, and Local Masters, when acting under *Rules* 208, 209: *Lowson* v. *Canada Farmers, etc.*, 9. P. R. 188. or *Rules* 608, 610, 615: *Stroud* v. *Sun Oil Co.*, 7 O. L. R. 704; 8 O. L. R. 748. What appeals within the Rule.

As to appeals from a Local Judge when acting under *Rule* 211: see *Rule* 506.

Appeals from a Judge in Chambers to the Appellate Division are governed by *Rule* 507.

Where a Judge or judicial officer decides a matter as a *persona designata*, there appears to be no right of appeal under this *Rule*: *Hoare* v. *Morshead*, 1903, 2 K. B. 359; *Re King*, 18 P. R. 365, save as provided by *The Judges' Orders Enforcement Act* (R. S. O. c. 79), s. 4.

There is no power to vary or discharge an order except in the manner provided by the Act, or *Rules*, *e.g.*, by way of appeal or by motion under *Rule* 217, or 523: see *Atty.-Gen.* v. *Llewellyn*, 58 L. T. 367; and *Re Adam Eyton, Limited*, 36 Ch. D., at p. 301; *Hood-Barrs* v. *Cathcart*, 72 L. T. 184, and notes preceding *Rule* 521; or by an action: see *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673.

Rule 505.

An appeal cannot be had direct to the Appellate Division from a Master, Local Judge, or other officer acting in Chambers. *Ball* v. *Cathcart*, 16 Ont. 525.

Any person affected by an order may appeal, and therefore an appeal lies from an *ex parte* order by a person affected thereby: *Wigle* v. *Harris*, 9 P. R. 276; *Grand Trunk Ry. Co.* v. *Ont. & Que. Ry. Co.*, 9 P. R. 420; but an application to set aside an order, made *ex parte*, and without knowledge of the facts, is not an appeal, and not within this *Rule*: *Hughes* v. *Field*, 1 C. L. T. 702; and see *Re Central Bank*, 24 Ont. App. 470; and *Rule* 217.

A consent order of an officer in Chambers is within sec. 24 of the Jud. Act, and no appeal lies from it without leave: *Re Solicitor*, 18 C. L. T. 224, 261, and it is not clear that an appeal can be had from such an order even with leave: see *supra*, pp. 111, 116.

Discretionary orders.

The Master's discretion is open to review on an appeal under this *Rule*: *Christie* v. *Conway*, 9 P. R. 529; *Abell* v. *Morrison*, 14 P. R. 210; but to be interfered with, it must be shown to be clearly wrong: *Adamson* v. *Adomson*, 12 P. R. 471; *Odell* v. *Mulholland*, 14 P. R. 180.

Time for appealing.

The time for appealing runs from the pronouncing of the order, and not from the day upon which it was issued: *Miller* v. *Stillwell*, 21 C. L. J. 96, following *Dayer* v. *Robertson*, 9 P. R. 76. The contrary was at one time decided in *McNeil* v. *McGregor*, 3 C. L. T. 3[illegible]; see *Heatley* v. *Newton*, 19 Ch. D. 326; *Gibb* v. *Murphy*, 2 Cby. Ch. 132; see also *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 1[illegible].

Where the time expires on a Sunday or holiday, *Rule* 174 applies: see that *Rule* and *Taylor* v. *Jones*, 45 L. J. C. P. 110.

An appeal from a decision of a Master refusing to rescind a former order was held to be tantamount to an appeal from the first order, and dismissed as too late under this *Rule*: *Jamieson* v. *Prince Albert Colonization Co.*, 11 P. R. 115.

The notice of motion by way of appeal must be served within four days, and be made returnable within the ten days: see *Bell* v. *N. Staffordshire Ry. Co.*, 5 Q. B. D. 205.

Extending time for appealing.

Orders extending the time should not be made *ex parte*: *Hamilton* v. *Tweed*, 9 P. R. 448, and cannot be made by the Master in Chambers in the case of an appeal from an officer other than himself: *Re Davies & York*, 10 C. L. T. 186.

It has been held that leave to serve short notice of appeal should not be obtained from the Master in Chambers; he has no power to shorten the time on a motion not returnable before himself: *Donovan* v. *Boultbee*, 3 C. L. T. 501; and see 1 C. L. T. 614, 645.

Where an order was made on Friday, so that two clear days' notice of appeal could not be given for the next Chamber day (Monday), application was made *ex parte* within four days, for leave to bring on the appeal on the following Thursday, but leave was given instead for the following Monday, and no order was taken out extending the time. It was held not an application for an extension of time, and an objection that the appeal could not be heard as eight days from the decision (the time named under the original *Rule*), had expired, was overruled: *Standard Bank* v. *Willis*, 10 P. R. 153.

Owing to the longer time allowed by the present *Rule* (viz., 10 days), the difficulty is not now likely to arise. Rule 505.

The time was extended where there was the intention to appeal, but by misapprehension of the new practice, the time was allowed to pass: *Dayer* v. *Robertson*, 9 P. R. 78; also where it was supposed that Christmas vacation did not count in computing the time: *Sievewright* v. *Leys*, 9 P. R. 200. But in *Snowden* v. *Huntington*, 12 P. R. 1, notice of appeal given Dec. 24 for Jan. 10, the first day after vacation when a Judge sat in Chambers, was held not good notice. The notice should have been given for a day within the eight (now ten) days, and then an extension of the time for bringing on the appeal should have been applied for, on an *ex parte* application as of course: see also *Wallingford* v. *Mutual Soc.*, 5 App. Cas. 685; and *Blaylock* v. *McFarlane*, 15 C. L. J. 137; *Lewis* v. *Talbot Road Co.*, 10 P. R. 15; *Lowson* v. *Canada Formers, etc.*, 9 P. R. 185; *Carter* v. *Stubbs*, 6 Q. B. D. 116; *Gibbons* v. *London Financial Association*, 4 C. P. D. 263. But as to orders made in vacation: see now *Rule* 505, clause (4).

An application to enlarge the time should in general be made within the ten days: *Stirling* v. *DuBorry*, 5 Q. B. D. 65.

Neglect to set down an appeal through forgetfulness of the appellant's solicitors' clerk, has been held not sufficient reason for extending the time for appealing from an order refusing to dismiss an action for want of prosecution: *Dunnard* v. *McLeod*, 8 P. R. 343.

Where, on an application in Chambers, a party omitted to take an objection to the jurisdiction to make the order applied for in Chambers, he was held not entitled to raise the objection afterward on motion to discharge the order: *Horton* v. *Bosson*, 1899, W. N. 23, 33.

A right to appeal may be waived by acting upon the order appealed from: *International Wrecking Co.* v. *Lobb*, 12 P. R. 207; *Videan* v. *Westover*, 18 C. L. T. 83; 29 Ont. 1; *Boulton* v. *Boulton*, 5 O. W. R. 177; or otherwise recognizing it, *e.g.*, by obtaining an extension of time for complying with it: *Pierce* v. *Palmer*, 12 P. R. 308, where a motion by defendant to set aside a judgment for irregularity was refused, but defendant was let in to defend on terms, and he was held to have waived the right to appeal from the refusal to set aside the judgment by obtaining an extension of the time for compliance with the terms. See also *Re Smart*, 12 P. R. at p. 638; *Boyle* v. *Sacker*, 39 Ch. D. 249; and *Phillips* v. *Belleville*, *infra*. Waiver.

But mere payment of money as directed by a judgment: *Phillips* v. *Belleville*, 10 O. L. R. 178; and the mere compliance with the terms of an order by the party to whom an indulgence or relief is granted on terms: *Anthony* v. *Blain*, 5 O. L. R. 48; or the doing something to enable the judgment to be settled so that the appeal may be prosecuted: *Devlin* v. *Radkey*, 22 O. L. R. 399; do not operate as a waiver of the right to appeal from the judgment or order; and see *Duffy* v. *Donovan*, 14 P. R. 159. Formerly an appeal could not be brought without the appellant first obeying the judgment or order appealed from: Gilbert's Chy. 185.

Under the English Judicature Act an appeal is in all cases a rehearing, and fresh facts may be gone into: *Anon*, per Lush, J., 60 L. Fresh evidence on appeals.

Rules 506, 507.

T. Jour. 67; 1 Chart. Ch. Ca. 128. "Every appeal is now a re-hearing, and therefore fresh affidavits may be used on all appeals from a Master to a Judge in Chambers"; *per* Quain, J., *Anon.* W. N. 1875, 230; 1 Chart. Ch. Ca. 129. "This ruling has been held by other Judges and confirmed by the Court" (Coe's Practice in the Judge's Chambers, p 6). This would not seem to be the case in Ontario. Fresh evidence may be given by leave only under *Rule* 232: see *Taylor* v. *Sisters, etc., of Ottowo*, 11 P. R. 496. *In re Neoth Horbour, etc., Works*, 20 Sol. Jour. 26, it was said that each case must in this respect depend upon its own circumstances: fresh evidence was there allowed, also in *Robinson* v. *Bradshow*, 32 W. R. 95.

In *Re Munns* v. *Longden*, 32 W. R. 675; 50 L. T. 356, it was held that the Court will not receive further evidence on a motion to discharge an order made in Chambers, where the motion has been fully argued and disposed of: see also notes to *Rule* 232.

Where it is intended to apply for leave to use fresh affidavits or documentary evidence, notice should be given to the opposite party that such relief will be applied for on the hearing of the appeal: *Hastie* v. *Hastie*, 1 Ch. D. 562; see *Bigsby* v. *Dickinson*, 4 Ch. D. 24; and *Dicks* v. *Brooks*, 13 Ch. D. 654.

Costs of affidavits in answer to fresh affidavits were refused where the fresh affidavits were not allowed to be read: *Mitchell* v. *Condy*, W. N. 1881, 83.

Appeals from Local Judges in Court.

506. Any person affected by a judgment or order of a Local Judge in Court, may appeal therefrom to a Judge in Court, and such appeal shall be brought within the time and upon the like notice and proceedings as in cases of appeals from orders and decisions of Local Judges in Chambers. C.R. 48.

This *Rule* applies only to appeals from Local Judges when sitting in Court. The appeal in such cases is to the Weekly Court.

Appeals from Local Judges when acting in Chambers are provided for by *Rule* 505, and are to a Judge in Chambers.

By this *Rule* the procedure in both cases is assimilated.

(v) *Appeals from a Judge in Chambers.*

Appeal from Judge in Chambers.

507.—(1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of the whole or part of the action or matter may appeal therefrom to a Divisional Court without leave.

(2) Except in cases in which a right of appeal is specially conferred no appeal shall lie from any judgment or order of a Judge in Chambers which does not finally dispose of the whole or part of the action or matter, unless by leave of a Judge other than the Judge by whom the judgment order was pronounced.

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(3) Such lonve shall not be given unless:—

(a) There are eonflicting decisions by Judges upon the mntter involved in the proposed appeal, and it is in the opinion of the Judge desirable that an appeal should be allowed; or

(b) There appenrs to the Judgo to be good reason to doubt the correctness of the judgment or order from which the applicant seeks lenve to appeal, and the appeal wonld involve matters of such importanee that in the opinion of the Judge leave to appeal should be given;

(4) The application for leave shall be upon uotice served within four dnys nnd returnable within seven days from the judgment or order.

(5) If leave be given, the appeal shnll be forthwith set down by the applicant and shall be heard by a Divisional Court without further notice.

(6) No appeal under this Rule shall be a stay of proceedings unless so ordered by a Judge. C.R. 777.

This *Rule* applies only to appeals from n Judge in Chambers, not to appeals from the Master in Ordinary, tbe Master in Chambers, or Local Judges. or Local Masters. Appeals of the latter kind are governed by *Rules* 502-506; and see *Lowson* v. *Canada Farmers, etc.*, 9 P. R. 185.

An order made at the Assizes on a motion referred from Chambers to change the venue, was heló to be in Cbambers. The Judge may treat the Court room as his Chambers if he chooses: *Sarnia Agricultural Implement, etc., Co.* v. *Perdue*, 11 P. R. 224.

A solicitor knowing of a preliminary objection to an appeal which he intenda to raise, ought, as a matter of professional courtesy, to inform his opponent, but tha omissaon to do so ia not sufficient ground for depriving tbe respondent of the costs of the appeal: *Ex p. Shead*, 15 Q. B. D. 338, not following *Re Speight*, 13 Q. B. D. 42; and *Ex p. Blease*, 14 Q. B. D. 123.

Judge as Persona Designata.—A Judge making an order under the *Dominion Railway Act* (R. S. C. c. 37), s. 219, for payment out of compensation moneys acts not for the Court but aa a *persona designata*, and no appeal lies to the Appellate Division from his order: *Re Toronto H. & B. Ry. Co. and Hendrie*, 17 P. R. 199; and see *Hoare* v. *Morshead*, 1903, 2 K. B. 359.

As to appeals from orders of a Judge acting as a *persona designata* under an Ontario Statute: see *The Judges' Orders Enforcement Act* (R. S. O. c. 79), s. 4; *Re King*, 18 P. R. 365.

Appeals from Judge in Chambers without leave.—Orders made by a Judge in Chambers are not appealable without leave unless they

Rule 507. finally dispose of the whole, or some part of the action, or matter—mere interlocutory orders are not appealable except with leave. As to what orders are regarded as final, and what as interlocutory; see notes to Jud. Act, s. 25, and notes *supra*, pp. 117, 118.

An interpleader order, if finally disposing of the matter, is not an exception. An appeal lies by any party affected by such an order *Rondot* v. *Monetary Times*, 19 P. R. 23.

There is no appeal under this *Rule* from the order of a Judge in a *habeas corpus* proceeding recommitting the applicant to prison in a criminal proceeding: *Rex* v. *Graves*, 21 O. L. R. 329.

No express provision is made limiting the time for bringing an appeal under sub-sec. (1), nor is any express provision made for the length of notice, or the time for setting down such an appeal. Notice of such appeals must be served at least two days before the return day; *Rule* 215; and the appeal must be set down at least the day before the day of argument: *Rule* 234 (6).

The appeal is to the Appellate Division.

Where the appellant neglects to set down his motion he is nevertheless liable to pay the respondent's costs of the motion: see *Regina* v. *Armstrong*, 13 P. R. 306; and see *Rule* 660 as to procedure for obtaining costs of an abandoned motion.

The notice should be made returnable for a day named "or so soon thereafter as the Court sits, and the motion can be heard."

Appeals from Judge in Chambers with Leave.—An order, or judgment, made by a Judge in Chambers which is of a merely interlocutory nature is not appealable without leave. As to what orders are regarded as interlocutory: see Jud. Act, s. 25 and notes, *supra*, pp. 117, 116.

Leave can only be granted by some other Judge than the one making the order: see sub-sec. (2) *supra*; and only by him where (a) there are conflicting decisions: as to which, see Jud. Act, s. 32, or (b) where he doubts the correctness of the decision, and matters of importance are involved; sub-sec. (3): as to which see *Robinson* v. *Mills*, 19 O. L. R. 162; *Dick* v. *Stondord*, 4 O. W. N. 111; *Bain* v. *University Estates*, 6 O. W. N. 70. The conflicting decisions spoken of in clause (a) are conflicting decisions of Provincial not of English Courts: *Ryckman* v. *Randolph*, 20 O. L. R. 1, and see *Robinson* v. *Mills*, 19 O. L. R. 162; and for the purposes of this clause, decisions of Judges of the Appellate Division are considered decisions of the High Court Division: *Re Rowland & McCallum*, 22 O. L. R. 418.

The motion for leave must be launched within four days after the making of the judgment or order complained of, sub-sec. (4) *supra*. but judgments if final, of course, come within sub-sec. 1, *supra*, and are appealable without leave.

The motion should be made returnable within seven days, on a day appointed for holding Judges' Chambers: *Rule* 234, "or so soon thereafter as the motion can be heard," and it has been held in England not to be sufficient to give notice of motion within that time: see *Fox* v. *Wallis*, 2 C. P. D. 45; see also *Jackson* v. *Gardner*, 15 Gr. 425; *Horris* v. *Meyers*, 16 Gr. 117; *McIlroy* v. *Howke*, 3 Chy. Ch. 66; *Taylor* v. *Jones*, 45 L. J. C. P. 110; *Hewson* v. *Mocdonold*, 2 C. L. T. 348; *McLaren* v. *Marks*, 10 P. R. 451; *Steadman* v. *Hokim*, 22 Q. B. D. 16.

Setting Down the Appeal.—An appeal *without leave* is brought by notice of motion setting out the grounds: see *supra*, p. 1089, returnable before a Divisional Court two clear days after service. The motion must be set down within seven days from the date of the order appealed from. Where an appeal is brought *by leave*, notice of motion is unnecessary: see sub-sec. 5, *supra*, p. 1123, but the appeal is to be forthwith set down: *Ib.* Rules 508, 509.

As to the time of the sittings of the Divisional Court: see *supra* p. 1090.

An application for an extension of the time limited for applying for leave to appeal under this *Rule* must be made to a Judge of the High Court Division in Chambers: *Rules* 176, 207 (4), not to the Master in Chambers, or other officer having the like jurisdiction: see *Rule* 208 (13) s.-s. 2, *supra*.

And an application to extend the time for setting down the appeal where leave has been granted, should in like manner be made to a Judge in Chambers, and in ordinary course to the Judge who granted the leave.

The Court on appeal will, in general, not interfere on a question which is, by the practice, purely within the discretion of the Judge: *McDonnell* v. *McKay*, 2 Chy. Ch. 243; *Neill* v. *Travellers' Ins. Co.*, 9 Ont. App. 54; and appeals from a Judge in Chambers made on appeal from the Master in Chambers on matters of pleading are not to be encouraged: see *Dodge* v. *Smith*, 1 O. L. R. 46; *Bateman* v. *The Mail*, 2 O. L. R. 416.

Where an order made in Court was issued as if made in Chambers leave to appeal therefrom to the Appellate Division was given; and the notice of appeal given on the assumption that the order was a Court order, was allowed to stand: *Foss* v. *Fairgrieve*, 6 O. W. N. 640.

(vi) *Appeals from Taxation.*

Solicitor and client taxations.

508. An appeal from the report or certificate of an officer to whom the taxation of a solicitor's bill under *The Solicitors Act* has been referred shall lie and may be brought in the same manner as in the case of the report of a Master. C.R. 773.

This *Rule* and *Rule* 3 settle the differences of opinion expressed in previous decisions: see *Re Robinson*, 17 P. R. 137; *Re Mowat*, 17 P. R. 180; *Re Crothers*, 15 P. R. 93; *Exchange Bank* v. *Newell*, 9 P. R. 528; and make it clear that *Rules* 681 and 682 only apply in case of party and party taxations: see *Re Solicitors*, 6 O. W. N. 625.

The procedure on such appeals is to be the same as on an appeal from a Master's report; as to which: see *Rules* 502, 503. The certificate should be filed, and notice of filing given, and seven clear days notice of motion must be given. The appeal is to a Judge in Court.

An appeal may be made from the taxing officer on a taxation between solicitor and client without carrying in objections under *Rule* 681: *Re Solicitors*, 6 O. W. N. 625.

Review of taxation by Judge on party and party taxations.

509. In other cases a party dissatisfied with the decision of a taxing officer upon any question of principle or as to any item respecting which objections have

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been duly filed, may appeal from the certificate of a taxing officer to a Judge in Chambers; the practice upon the appeal shall be the same as upon an appeal from the Master in Chambers. C.R. 774, 775 and 776. *Amended.*

See notes to *Rule* 508.

The Master in Chambers, and officers having like powers, have no jurisdiction to review taxations: *Rule* 208 (2).

This *Rule* applies both to appeals from the Taxing Officers in Toronto, and from the Local Taxing Officers: *Rule* 756.

No appeal lies from the taxation, under *The Mortgages Act* (R. S. O. c. 112), s. 30 (4), of a mortgagee's costs of proceedings under a power of sale: *Re Vanluven & Walker*, 19 P. R. 216.

No appeal lies from a taxation of costs pursuant to an order of Court made under the Cr. Code, s. 689: *Re Constantineau* v. *Jones*, 26 O. L. R. 160.

The procedure on the appeal is to be the same as on an appeal from the Master in Chambers as provided by *Rule* 505.

The objections referred to are those provided for by *Rule* 681.

Notwithstanding the terms of this *Rule*, it is competent for the Court or a Judge in a proper case to set aside a Taxing Master's certificate, in order to enable a party to adduce further evidence, or file written objections: *Robinson* v. *England*, 11 O. L. R. 385; *Re Farber*, 1898, 2 Ch. 533; 79 L. T. 266.

This *Rule* is in affirmance of what was held to be the practice in *Stark* v. *Fisher*, 11 P. R. 235; *Ireland* v. *Pitcher*, *Ib.*, 403.

The time runs from the date of the certificate of taxation, and not from the date of each ruling in the course of the taxation: *Re O'Donohoe*, 12 P. R. 612.

The time may be extended under *Rule* 176: *Clork* v. *Virgo*, 17 P. R. 260; by the Master in Chambers, or officer having like jurisdiction, or by a Judge: *Quay* v. *Quay*, 11 P. R. 258.

Matters in discretion of Taxing Officer.

Discretion of Taxing Officer.—Where questions of taxation are in the Taxing Officer's discretion, his discretion will not be interfered with, unless it be manifest that he has failed to exercise it in a reasonable manner: *The Neera*, 5 P. D. 118; *Hargreaves* v. *Scott*, 4 C. P. D. 21; *Smith* v. *Wills*, 34 W. R. 30; 53 L. T. 386; see also *Boswell* v. *Cooks*, 36 Ch. D. 444; *Re Hillyard and Royal Ins. Co.*, 12 P. R. 285; *Gall* v. *Collins*, 12 P. R. 413. Amongst items formerly placed by the tariff in his discretion, were instructions for motions, letters, attendances: *McGonnon* v. *Clarke*, 9 P. R. 555; see also *Turnbull* v. *Jonson*, 3 C. P. D. 264; see now, Tariff A, items, 6, 9, 11, 12, 13, 16, 17, 20, 21, 23.

The Taxing Officer's decision as to the number of counsel will not be interfered with where it is merely the officer's discretion that is in question, and not the correctness of his judgment in following any supposed rule of decision: *Wheeler* v. *Fradd*, 14 T. L. R. 440; so his decision as to the amount of counsel's fees, will not be interfered with, unless a gross mistake is made: *Brown* v. *Sewell*, 16 Ch. D. 517;

Talbot v. *Poole*, 15 P. R. 274; see also *Fox* v. *Toronto & Nipissing Ry.*, 7 P. R. 157; *Betts* v. *Cleaver*, L. R. 7 Chy. 513; *Re Bethune & Co.*, 4 C. L. T. 251; *Petrie* v. *Guelph, etc.*, 10 P. R. 600; *Re Robinson*, 16 P. R. 423; *Rondot* v. *Monetary Times*, 18 P. R. 141; *Re Solicitors*, 4 O. W. R. 302. The Court will slowly and reluctantly enter into all questions of quantum merely: *Smith* v. *Buller*, L. R. 19 Eq. 478; Morgan and Wurtzburg on Costs, 480; where they are taxable under a tariff: *Re Solicitor*, 12 O. W. R. 1074; *Murphy* v. *Corry*, 7 O. W. R. 363; and generally on appeals from a Taxing Officer the Court will not interfere with his discretion as to *quantum* and *quoties* of fees, and this rule covers any question of distribution, or allotment of charges, among different cases, or branches of a case: *Conmee* v. *N. American Contracting Co.*, 13 P. R. 433; *McDonald* v. *Grand Trunk Ry.*, 2 O. W. N. 748; see also per Burton, J.A., in *Re Robinson*, 17 P. R. 146; and *Oliver* v. *Robins*, 43 W. R. 137: *Re Solicitors*, 3 O. W. N. 194; but an appeal respecting only $5.32 was entertained where a question of principle was involved: *Monk* v. *Benjomin*, 13 P. R. 356; and where the items in question are not governed by a Tariff, and the Taxing Officer has to determine the value of the services, the Court will have less hesitation in reviewing his decision: *Re Solicitors*, 27 O. L. R. 147. Rule 609.

Certificate.—A memorandum at the foot of the bill shewing the result, upon which execution has issued, was held to be a sufficient certificate, when filed in the proper office: *McCallum* v. *McCallum*, 11 P. R. 179; but an informal certificate written at the end of the bill, shewing that it was fixed at so much, initialed by the Taxing Officer, and marked filed in his office, is insufficient: *Gall* v. *Collins*, 12 P. R. 413. It must be filed in the proper office for filing a report: see *Langtry* v. *Dumoulin*, 10 P. R. 444; and *Gall* v. *Collins*, *supra*. Certificate of Taxing Officer.

Practice on Appeals.—An appeal from a taxation of costs in Appeal is to be made to a Judge of the High Court Division: *Petrie* v. *Guelph, etc.*, 10 P. R. 600; *Holmes* v. *Bready*, 18 P. R. 79. Practice on appeals from Taxing Officer.

Two clear days' notice of appeal is sufficient: *McCallum* v. *McCallum*, *supra*.

An appeal will not be allowed as to any items not included in the objections brought in under *Rule* 681: *Platt* v. *Grand Trunk Ry. Co.*, 12 P. R. 273; and where no objections have been brought in under *Rule* 681; the appeal will be dismissed: *Snowden* v. *Huntington*, 12 P. R. 1; *Cameron* v. *Cameron*, 9 C. L. T. 196; see also *Hester* v. *Hester*, 34 Ch. D. 607; *Re Nation*, 57 L. T. 648; *Strousberg* v. *Sanders*, 38 W. R. 117; except where the whole principle or method of taxation is the subject of the appeal: see *Clark* v. *Virgo*, 17 P. R. 260, and notes to *Rule* 681.

In *Quay* v. *Quay*, 11 P. R. 258, it was held to be a convenient practice (which was for some time followed), on an appeal from a Local Officer as to numerous items, or on the ground of general exorbitancy, to refer the whole bill to the Taxing Officer in Toronto; and where this was done no costs of the revision, and appeal, were usually allowed, unless substantially entire success was with one party or the other: *Platt* v. *Grand Trunk Ry. Co.*, 12 P. R. 273; and where a taxing officer reported that the respondent should have had more allowed to him than had been taxed, he was not allowed the increased amount, as he had not appealed, but the appeal was dismissed: *Loomis*

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v. *Pearsall*, 12 C. L. T. 19; but this mode of procedure has been held by a Divisional Court to be not warranted by the *Rules*, and no doubt it will no longer be followed: *Campbell* v. *Baker*, 9 O. L. R. 291. The Judge in Chambers before whom an appeal is brought may take the opinion of an officer for his own information, but must himself determine the questions arising on the appeal: *Ib.*

An appeal lies to Appellate Division from an order of a Judge in Chambers on appeal from a Taxing Officer: *Talbot* v. *Poole*, 15 P. R. 274; and see *Rule* 507.

CHAPTER XVIII.

FORMS OF JUDGMENTS AND ORDERS, ETC.

510. Judgments and orders shall be divided into convenient paragraphs, numbered consecutively. C.R. 620. Orders to be divided into paragraphs.

For Forms: see H. & L. Forms, No. 836 *et seq.*

Judgments against Executors and Administrators. — In an action against a personal representative for a debt of the deceased, if the defendant has not administered the estate, and has no defence, he should not allow judgment to go against him if the estate is not solvent, but should ask by counter-claim for judgment for administration, and for payment of the debt in due course of administration. Judgment in that form is the proper judgment in all actions in the Supreme Court, and in the County Court, where it has jurisdiction to order administration under *The County Courts Act* (R. S. O. c. 59), s. 22, against executors, etc., when there is a recovery of money, and assets are not admitted: see *McKibbon* v. *Feegan*, 21 Ont. App. 95. Judgments against personal representatives.

If he has duly administered he should plead *plene administrovit*, or *plene administrovit præter*, viz.: "That he has fully administered all the estate and effects of A. B., the deceased, which have come to the hands of the defendant as executor (*or* administrator) to be administered [except, etc.], and the defendant had not at the commencement of this action, nor has he since, any estate or effects of A. B. in the hands of the defendant as executor (*or* administrator), [except as aforesaid]." And *semble*, a personal representative may plead *plene administravit*, where he has paid his own debt out of the assets, without notice of any other claims, if that has exhausted the assets: see *Re Fludger*, 1898, 2 Ch. 562; 79 L. T. 298; but see *The Trustee Act* (R. S. O. c. 121), s. 53.

If the executor thus pleads *plene administrovit*, he cannot, if he establishee his defence, be made personally liable; but if he does not so plead, he is taken to admit assets, and may become personally liable for the claim and the costs, if they cannot be levied on property of deceased. Judgment if plaintiff succeeds on plea of plene administravit, or where it is not pleaded.

If the defendant does not so plead, or if he pleads and fails to establish his defence, or disputes the right to recover, or pleads any defence which is false to his knowledge, such as a denial that he is executor, etc., and the plaintiff succeeds, the plaintiff is entitled to judgment for costs de *bonis et terris testatoris, si, etc., et si non* de *propriis*: *Huyck* v. *Proctor*, 10 P. R. 25; *Lince* v. *Foircloth*, 14 P. R. 253; *Miles* v. *Brown*, 15 P. R. 375; but *semble*, not for the debt, *de propriis*: see Wms. Exors., 9th ed., 1859-60.

If the defendant proves his plea of *plene administravit* he will usually be given the general costs of the action, as having succeeded on a plea in bar, although other issues may be found against him: see *McKibbon* v. *Feegan*, 21 Ont. App. at *p.* 94. To prove his plea he must probably shew due notice to creditors and distribution of the If defendant succeeds.

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estate thus far come to his hands pursuant to *The Trustee Act* (R. S. O. c. 121), s. 56, or in administration proceedings in Court.

If the plaintiff takes issue on a plea of *plene administravit*, and proves some assets unadministered, he may obtain judgment to the extent of the assets proved, and of future assets *quando acciderint* for the residue, if any, of his debt: 2 Wms. Exors., 9th ed., 1860, and in such a case the defendant may be ordered personally to pay the costs: 2 Wms. Exors., 9th ed., 1859. Where a judgment has been recovered in this form against a personal representative, it would seem that it would be open to the plaintiff, where the facts justified that course, to apply under *Rule* 523, alleging a *devastavit* by defendant and praying judgment against him personally to the extent thereof, so far as necessary to satisfy the judgment.

Judgment if plaintiff admits plea of plene administravit.

The plaintiff upon the plea of *plene administravit* being pleaded, may apply for judgment (for his debt and costs) of future assets *quando*, etc.: 2 Wms. Exors., 9th ed., 1862; Chitty's Forms, 12th ed., 540. He may do this at once, or after having obtained discovery: see Chitty's Forms, 12th ed., 290, 291.

Such a judgment may, after assets have come to the hands of the executor, and demand has been made upon him for payment, be enforced by applying under *Rule* 566 for leave to issue execution, or by action upon the judgment: 2 Wms. Exors., 9th ed., 1863.

Before *The Judicature Act* if a plaintiff took issue on a plea of *plene administravit* and failed, he was not entitled to judgment of assets *quando*, *etc.*; but this is no longer the case, and such judgment may be awarded, if desired, even though the plea be established: *McKibbon* v. *Feegan*, *supra*.

Judgments against trustees.

Judgment against a Trustee for Trust Moneys.—A judgment in the common law raform that the plaintiff "do recover" against a trustee, trust moneys, was held not to be equivalent to the form of decree formerly used in equity directing a defendant to pay: see *Re Oddy Major* v. *Harness*, 1906, 1 Ch. 93; 94 L. T. 146; and such a judgment was held not to be enforceable by attachment of the person as a judgment in the equity form would have been: *Ib.* This distinction is possibly of no importance in Ontario having regard to *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 13.

Sums to be stated in dollars and cents.

Form of Judgments and Orders.—In all judgments and orders, sums should be stated in dollars and cents.

The Court has no jurisdiction to award payment in anything but Canadian currency: *Manners* v. *Pearson*, 1898, 1 Ch. 581; 78 L. T. 432; and in taking account of money payable under a contract in a foreign currency, conversion into Canadian currency is to be made at the rate of exchange current at the time when the amount is ascertained: *Ib.*

Costs, and money of infants.

Judgments directing payment of costs are to direct them to be paid to the suitor and not his solicitor: *Rule* 514; and judgments and orders directing payment into Court of any money for the benefit of an infant, are also to state the date of the birth of such infant: *Rule* 513.

Liberty to apply, need not be reserved.

511. It shall not be necessary in any judgment or order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised. C.R. 622.

It is said that all orders of the Court carry with them in *gremio* liberty to apply to the Court, per Fry, J., *Fritz* v. *Hobson*, 14 Ch. D. 542; 42 L. T. 225; see also *Re Roper, Taylor* v. *Ward*, 39 W. R. 101, and *How* v. *Winterton*, 91 L. T. 763, 765. But this liberty was held in England not to be implied in orders of a final nature; *Penrice* v. *Williams*, 23 Ch. D. 353; 48 L. T. 868; nor, in favour of defendant, in an order dismissing an action, except for the purpose of enforcing the terms of the order: *Huntley* v. *Link*, 26 Sol. Jour. 59. Rule 512.

Where costs of an interlocutory motion were reserved "until the hearing or other final disposition of the cause," and an order was subsequently made allowing a demurrer to the plaintiff's bill for want of equity, but the costs of the interlocutory motion were not then asked for, it was held that a subsequent application might be made to the Court to amend the order by directing the allowance of the costs reserved: *St. Michael's College* v. *Merrick*, 26 Gr. 216; 18 C. L. J. 130; *Viney* v. *Chaplin*, 3 De G. & J. 281; *Fritz* v. *Hobson*, 14 Ch. D. 542; *Blakey* v. *Hall*, 56 L. T. 400; and see *Gosnell* v. *Bishop*, 38 Ch. D. 385; *How* v. *Winterton*, 91 L. T. 763, 766. Costs reserved to trial may be subsequently disposed of.

Liberty to apply is said only to extend to applications for further relief consequent on the order or judgment pronounced, and not to an application for additional relief which is not consequential on that already given: see *Poisson* v. *Robertson*, 86 L. T. 302.

512. Every judgment or order shall show on its face the day of the week and month on which it was given or made and every judgment shall also show the date upon which it is actually signed, and (except judgments signed by default and *præcipe orders*) shall show the name or names of the Judge or officer who gave or made the same, and shall take effect from its date. C.R. 623 and 629. Date of judgments and orders.

C. R. 629 provided that a judgment or order should take effect from the date it was pronounced.

Although that provision is omitted in the present *Rule*, it is probably not intended to work any change in the practice, as no other day is named on which it is to take effect.

Although a judgment or order takes effect from its date, yet it cannot be actively enforced until it has been entered: see *Rule* 515; but execution may be issued thereon upon its being left with the proper officer before it has been actually entered: *Rossiter* v. *Toronto Ry.*, 15 O. L. R. 297.

Judgments and orders should be dated on the day on which they are finally made, and should not be ante-dated, nor contain recitals of affidavits sworn after the date of the order: *Ashley* v. *Taylor*, 10 Ch. D. 768; nor upon an application by a defendant against the plaintiff, should the order be drawn up stating that a co-defendant appeared who in fact did appear, but who had not been served with the notice: *Evelyn* v. *Evelyn*, 28 W. R. 531.

Where an order is expressed to last until a particular day "or until further order," the words "further order" mean an order made on an earlier day than the day specified: *Bolton* v. *London School Board*, 7 Ch. D. 766.

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Name of Judge.

As to the manner in which the name of the Judge or officer is to be stated in the margin of judgments or orders: see Form No. 107; H. & L. Forms, Nos. 946, 947.

It has been held by a Divisional Court in an unreported case, that where a judgment is handed to the Registrar and not delivered in open Court, it is not to be deemed to be pronounced or delivered until the parties are notified of it; and see *Fowkes* v. *Swayzie*, 31 Ont. 261; *Wallace* v. *Bath*, 7 O. L. R. 542; but the well settled practice of the Court is, in such cases, to date the judgment or order as of the date on which the decision was handed to the Registrar, notice of its delivery being usually placed on the notice board of the Court on the same day; and see *Atty.-Gen.* v. *Dunlop*, 36 C. L. J. 607.

See *Rule* 568, and *Winkley* v. *Winkley*, 44 L. T. 572.

"Signing judgment."

The signing of the judgment referred to in this *Rule* is the marking of it as entered, with the date of entry, and the name of the officer in whose office it is entered, and not merely the signing of it by the officer who settles it, where he is not the officer with whom it is entered.

Delay in signing judgment.

A plaintiff who has obtained an order giving him leave to sign judgment, but who has not actually signed judgment, is not a judgment creditor: *Re Gurney*, 1896, 2 Ch. 864; but where a judgment has been actually pronounced it becomes an effective judgment from that time, so that it may be attached, though the judgment is not formally entered: *Holtby* v. *Hodgson*, 24 Q. B. D. 103; *Dovidson* v. *Taylor*, 14 P. R. 78; and see *Moody* v. *Canadian Bank of Commerce*, *Ib.*, 258. The formal signature is only the record that it has been pronounced: *Kelly* v. *Wade*, 14 P. R. 66.

Where a judgment pronounced in 1880 gave a plaintiff an order for an account if he desired it, the judgment not having been issued, twelve years afterwards, leave to issue it was refused, in view of the altered position of the parties and other circumstances: *Eaton* v. *Dorland*, 15 P. R. 138; and see *Re Leslie*, 23 Ont. 143; and *Finkle* v. *Lutz*, 14 P. R. 446.

Entry of judgments, and orders.

This *Rule* was held not to apply when the judgment itself regulates the entry: *McLaren* v. *Canada Central*, 10 P. R. 328, where the judgment was, "I direct judgment to be entered after the 5th day of Hilary Sittings for $100.000;" but see *Talbot* v. *Canadian Coloured Cotton Co.*, 17 C. L. T. 336. In practice, on such an indorsement, the judgment is dated as required by this *Rule* on the day it is pronounced, but it cannot be entered until after the day named in the indorsement.

Where a judgment is varied by a Divisional Court the judgment should be entered as of the date on which the Divisional Court pronounced judgment: *Beckett* v. *Grand Trunk Ry. Co.*, 12 P. R. 377.

Orders in Chambers should be dated on the day on which they are finally made: *Ashley* v. *Taylor*, 27 W. R. 228; so also the finding of a Master: *Wallace* v. *Bath*, 7 O. L. R. 542.

Death after argument, and before judgment.

Where a party dies after argument and while the cause is standing for judgment, the direction of the court should be obtained to date and enter the judgment when delivered, as of the date of the argument, otherwise it would appear to be defective on its face; see *Rule* 304, and notes.

Rules 513-518.

Where an application is mada and rafused, and on appeal tha order is reversed, and the application granted, tha order mada on the appeal relates back to the date of tha order raversed, so far as any intervening proceadings ara concernad: *In re Donisthorpe & The Manchester S. & L. Ry. Co.*, 1897, 1 Q. B. 671; the litigant is not to be prejudiced by tha delay, or the mistake, of tha Court.

Effect of order on appeal.

In all cases tha judgment pronouncad by the Court may be signed forthwith, unless otharwise ordered.

Immediate judgment.

513. An order for payment of money into Court on bchalf of, or as the property of, an infant shall, unless otherwise directed, state the date of the birth of the infant. C.R. 411.

Dates of birth of infants in judgments and orders.

C. R. 418, provided that if this *Rule* was not obsarved, the order or jndgment was not to be acted on by the Accountant unless otherwisa ordered. No penalty is now prescribed for the non-obsarvance of this *Rule*.

514. All judgmcnts and orders directing payment of costs shall direct payment to the party entitled to receive the same and not to his Solicitor. C.R. 1313.

Costs to be ordered to be paid to suitor.

515.—(1) Every judgment, and every order pronounced in Court, shall be entered at full length.

Entry of judgments and orders.

(2) Judgment in causes and matters commenced in the Central Office, and all orders made in Court in Toronto, shall be entered in the Central Office. Orders made in Chambers in Toronto shall be entered in the office of the Clerk in Chambers.

Where to be entered.

(3) Judgments in causes or matters commenced in a local office and all orders made therein not entered at Toronto shall be entered in the office in which the cause or matter was commenced. C.R. 635.

Tha data of entry, and tha book, and folio, in which the entry is made, must be stated in tha margin of the order, or judgment, issued: *Rule* 517.

Place of entry of judgments and orders.

Place of Entry.—All orders made in Court, or in Chambers, in Toronto, requiring entry, are to be entered in Toronto. Orders made elsewhere, *e.g.*, on circuit, or at the Weekly Courts at London, or Ottawa, or in Chambers, should under this *Rule*, sub-sec. (3), be entered at tha place where tha action or matter was commenced.

Except in the case of judgments in an issue (as to which see *Rule* 125), all judgments no mattar where pronounced, are to be entered in tha office where the proceedings were commenced: see clause (3), *Rule* 762; a.g., where the proceedings have been commenced elsawhere than in Toronto, the judgment must ha enterd in tha office of the Local Registrar, Deputy Registrar, or Deputy Clerk of tha Crown, in

Rule 516.

whose office the proceedings were commenced; and where the judgment is pronounced in a proceeding not commenced by writ, then the office of the Deputy Clerk of the Crown, or Deputy, or Local Registrar, in which the first document is required to be filed, is to be deemed the office in which the cause or matter is commenced; see *Rule* 761.

Entry of orders made in other Provinces under Dominion Winding-up Act.

Execution may be issued under sec. 127 of *The Winding-up Act* (R. S. C. c, 144), upon the order of a Court of another Province, upon the mere production to the proper officer of the High Court Division of a properly certified copy of the order; but entry of the order must be made in the proper judgment or order book of the High Court Division: *Re Dominion Cold Storage Co., Lowrey's Case*, 18 P. R. 68.

Lost order.

Where an order, which had not been entered, was lost, it was directed to be redrawn: *Ex parte Dean of St. Paul's*, 18 W. R. 724. No proceedings can properly be taken upon a judgment or order required to be entered, until it has been entered: see *Ballard* v. *Tomlinson*, 48 L. T. 515. But where an administration judgment had been issued before being entered, and was subsequently entered after proceedings had been taken under it, such proceedings were upheld: *Re Morphy, Morphy* v. *Niven*, 11 P. R. 321; but where a plaintiff in a redemption action obtained judgment, but neglected to issue it for twelve years, he was held to have disentitled himself by the delay, to issue or prosecute it: *Eaton* v. *Dorland*, 15 P. R. 138; and see *Re Leslie*, 23 Ont. 143; but see *Finkle* v. *Lutz*, 14 P. R. 446.

Issuing execution.

Although a judgment, or order, cannot be actively enforced until it is entered, yet execution may be issued thereon upon its being left with the proper officer for entry before it is actually entered: *Rossiter* v. *Toronto Ry.*, 15 O. L. R. 297.

Semble, orders dismissing actions when made in Chambers whether *in invitum*, or upon consent, are in the nature of judgments and should be entered in full, in order that it may be possible to certify them at any future time.

Orders required to be entered in full, and otherwise.

516. Orders issued on *præcipe* and orders made in Chambers, shall not be entered in full, except:

Orders declaring persons Lunatics; or and with respect to Lunatics' Estates;

" for the Sale of Infants' Estates;

" for Payment of Money into or out of Court, or out of an estate or fund;

" for Foreclosure or Sale;

" for the confirmation of the report of a Master or Referee;

" vacating certificates of *lis pendens* or cautions.

Vesting Orders;

and such other orders as may from time to time be directed to be entered. C.R. 636.

This *Rule* is strictly confined to orders, and does not include Judgments. All judgments pronounced in Chambers are covered by *Rule* 515, and must be entered in full. They must be entered not in Chambers, hot in the office for entering judgments. As to orders dismissing actions; see note to *Rule* 515.

The orders enumerated in this *Rule* are, in Toronto, entered by the Entering Clerk in Chambers.

The practice in Toronto beretofore has been to make a brief note of the purport of all orders not requiring entry in full, and this practice seems to be continued by *Rule* 515. It is desirable that a similer practice should be observed in the local offices, but there appears to be no express *Rule* requiring it to be done.

By the words, "orders for foreclosure or sale," final orders, as well as judgments, are intended to be included; see *Rule* 486.

Entering.

517. The Entering Clerk shall note in the margin of the judgment or order book the day of entering, and shall at the foot of the judgment or order note the same date and a reference to the book in which the entry has been made. C.R. 637.

The absence of such a note of entry on the face of the order is irregular: see *Lovell* v. *Taylor*, 5 O. W. R. 525.

Divisional Court orders to be entered.

518. All judgments and orders of a Divisional Court shall he entered in the Central Office at Toronto, and if the action was commenced elsewhere also in the office where the action was commenced. *New.*

Former C. R. 635 (4) as enacted by C. R. 1262, was to a similar effect, but provided that the fees for only one entry should be charged; this is now provided for by Tariff B, item 7.

See also *Rule* 525.

General form of judgment for foreclosure or sale.

519.—(1) Any judgment in a mortgage action may direct in general terms that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, (or for redemption or sale, as the case may he) and that for these purposes the cause is referred to (*naming the Master*).

(2) Any judgment directing a sale may so direct in general terms and refer the action to the Master for that purpose.

For partition or administration.

(3) Any judgment directing partition or administration may be in general terms.

Effect of.

(4) Any jndgment in general terms shall confer npon the Master all the powers given by these rules and all

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other powers necessary to enable him to carry the judgment into full effect. C.R. 619. *Amended.*

A declaration that plaintiff is entitled to a charge is a proper preface to a judgment on mortgage debentures: *Parkinson* v. *Wainright*, 43 W. R. 420, but not after a winding-up order has been made, unless with the consent of the liquidator: *Warwick* v. *Thurlow*, *Ib.*, 493.

Judgments under Judicature Act for foreclosure or sale, effect of.

Judgments for foreclosure, or sale, since *The Judicature Act* have been authorized to be drawn in a similar form to that prescribed by Chy. Ord. 441, from which this *Rule* is taken; see Forms Nos. 101, 102, 103; H. & L. Forms, Nos. 904, 905, 906, 908, 909 and 910. The Rules prior to 1888 did not expressly state that judgments so worded were to have the effect which Chy. O. 441 stated they should have, but in *McDougall* v. *Lindsay Paper Mills Co.*, 10 P. R. 247, it was held that such was the effect of judgments so drawn.

In special cases.

Where the circumstances of the case are special, a judgment in the ordinary form prescribed by this *Rule* would not be appropriate. Thus, where a tender was pleaded, a special inquiry was directed on this point, and further directions and costs were reserved: *Peers* v. *Allen*, 19 Gr. 98. So also where the defendant pleaded payment in full, costs were reserved: *Goodcrham* v. *DeGrassi*, 2 Gr. 135. In such cases, this must still be done, or the judgment must provide for the dismissal of the action in case the Master shall find in the defendant's favour. So also, where the defendants were rival claimants to the equity of redemption, special directions were inserted in the decree: *Ramsey* v. *Thompson*, 8 Gr. 372.

Day to show cause.

When infants are defendants, a judgment of foreclosure must also ordinarily, reserve a day to shew cause: see notes to *Rule* 466.

Reference to take account, when unnecessary.

It is for the plaintiff himself to determine whether or not a reference is required. This will depend upon whether or not there are any subsequent incumbrances; of this he must satisfy himself by getting the proper certificates from the proper officers: see *Rule* 469. Where there are no subsequent incumbrancers, the account should be taken on entering the judgment; if the plaintiff takes a reference to the Master unnecessarily, he cannot recover the extra costs so occasioned: *Hamilton* v. *Howard*, 4 Gr. 581; *Purdy* v. *Parks*, 9 P. R. 424.

Where the plaintiff took a judgment without a reference, and, after obtaining a final order of foreclosure, discovered that there were subsequent incumbrances, the Court refused to make a supplemental judgment directing the usual accounts and inquiries against the incumbrancers, but amended the judgment by inserting the usual reference as to incumbrancers, which had the effect of nullifying the previous proceedings: *Wilgress* v. *Crawford*, 12 P. R. 658; and so also where after a final order, it was discovered that a parcel of land had by mistake been omitted from the indorsement on the writ of summons, an amendment was granted but only on the terms of vacating the judgment and final order: *Clarke* v. *Cooper*, 15 P. R. 54.

The reference, if directed, should be made to a Master in the county where the writ issued: *Macara* v. *Gwynne*, 8 Gr. 310. But the reference may afterwards be changed on motion, for sufficient cause: see notes to *Rule* 245, p. 706.

Reference, where to be directed.

A judgment to enforce an equitable mortgage of shares by deposit, should be in substantially the same form as a judgment to enforce an

equitable mortgage by depositing title deeds: *Harrold* v. *Plenty*, 85 Rule 520. L. T. 45.

Same in effect as the Eng. (1683), R. 308.

520. Any judgment by default may be set aside upon an application in Chambers. C.R. 639. Judgment by default may be set aside on terms.

Notwithstanding this *Rule*, an action to set aside a judgment by default on the ground of fraud, will lie: *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639.

A judgment for default of appearance, or defence, signed after an appearance or defence has been filed, but which has been mislaid by the officer, and not entered in his procedure book, is irregular: *Moore* v. *Simons*, 1 C. L. J. 183; *Bank of Montreal* v. *Harrison*, 4 P. R. 381.

Where a judgment has been obtained irregularly, the party against whom it has been obtained is entitled *ex debito justitiæ* to have it set aside: *Anlaby* v. *Praetorius*, 20 Q. B. D. 764; *Voight* v. *Orth*, 5 O. L. R. 443. The Court has only power to impose terms as a condition of giving him costs: *Ib.* This *Rule* applies, rather to cases where a regular judgment is sought to be set aside as an indulgence.

A judgment obtained by default in compliance with the terms on which leave was, under former C. R. 603, given to defend, was held to be a judgment, by default within this *Rule*: *Badman's case*, *Re Portuguese, etc., Mines*, 62 L. T. 180.

To set aside a regular judgment, an affidavit of merits will be necessary: *Farden* v. *Richter*, 23 Q. B. D. 124; but where merits are shewn, it is only a question of proper terms; see *Wright* v. *Mills*, 60 L. T. 887; *Moore* v. *Kennedy*, 18 C. L. T. 204 (Man.); and though the judgment be set aside, the Court may refuse costs of the application: *Jackson* v. *Gardiner*, 19 P. R. 137. Merits must be shewn.

The Court will not set aside a final judgment regularly signed by default, unless the defendant shews at least some *prima facie* ground of defence, such as would be necessary on a motion for judgment under *Rule* 57. The Court will not on such an application try the defence; but the defendant may be cross-examined on his affidavit, and his alleged defence may be shewn by documents under his own hand, not explained or answered, to be non-existent: *Bourne* v. *O'Donohoe*, 17 P. R. 522. A judgment by default signed for too much damages: *Muir* v. *Jenks*, 1913, 2 K. B. 412; 108 L. T. 747; or too much costs: *Armitage* v. *Parsons*, 1908, 2 K. B. 410; 99 L. T. 329; is amendable, but if the plaintiff neglects to apply to amend, it may be set aside: *Muir* v. *Jenks*, *supra*.

Mere delay is not in itself a reason for refusing to set aside a judgment by default. Some irreparable injury must be shewn to result to the plaintiff: see *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Watt* v. *Barnett*, 3 Q. B. D. 183, 363, and notes to *Rule* 37; but lapse of time, and acquiescence, may be an answer to the motion: *McLean* v. *Smith*, 10 P. R. 145. Laches.

Where the action had been improperly brought against the defendant, and the plaintiff was aware of the impropriety, and had suffered no irreparable mischief, it was held that the lapse of time was no bar

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to the application to set aside judgment by default: *King* v. *Sandeman*, *infra*.

Terms imposed.

Where a judgment obtained on default of appearance at the trial was set aside, the defaulting party was ordered to pay the costs of the day, and of the application to set it aside, and to restore the case to the list: *Cockle* v. *Joyce*, 28 W. R. 59.

A plaintiff not being ready to proceed with the trial of his action when it came on unexpectedly, applied for a postponement, and upon its being refused let judgment go by default: a Divisional Court refused to set aside the judgment; but the Court of Appeal, upon fresh evidence offering a reasonable explanation of the plaintiff's unreadiness, set aside the judgment, and ordered the action to be restored to the list on his paying the costs of the day, including all costs thrown away, and the costs of the applications both to the Divisional Court, and to the Court of Appeal: *King* v. *Sandeman*, 38 L. T. 461; 26 W. R. 569; see also *Williams* v. *Brisco*, 29 W. R. 713 (where a judgment was set aside and leave given to defend upon payment of all costs of the action subsequent to the delivery of the statement of claim); and *Ryan* v. *Fish*, 9 P. R. 458 (where judgment of seisin signed in an action of dower, under a misapprehension of plaintiff's solicitor as to its effect, was vacated).

Where the defence had been struck out for wilful refusal to produce, and judgment by default obtained, the Court refused to set it aside on any terms: *Haigh* v. *Haigh*, 31 Ch. D. 478; and see *Dunn* v. *McLean*, 8 P. R. 156.

Strangers to judgment cannot apply.

A stranger to the proceedings cannot apply to set aside a judgment on the ground of irregularity: *Balfour* v. *Ellison*, 8 U. C. L. J. 330; *Jacques* v. *Harrison*, *infra*; *Tait* v. *Harrison*, 17 Gr. 458; but where it has been obtained by fraud to the prejudice of a stranger, it may be successfully attacked by him: *Ib.*; but *semble*, in such a case an action should be brought.

A judgment by default, in an action against a lessee for recovery of land on a forfeiture, was set aside under this *Rule* on the application of equitable mortgagees, although not parties to the action: *Jacques* v. *Harrison*, 12 Q. B. D. 136; but on appeal it was held that the order was technically wrong, as the applicants ought to have obtained the leave of the defendant to move in his name, or to have applied for leave to defend on terms of indemnifying defendant, and the order made was amended so as to allow the mortgagees to defend in defendant's name: S. C., 12 Q. B. D. 185. The *Rule* is designed to enable judgments by default to be set aside by those who have, or who can acquire a *locus standi*, and does not give a *locus standi* to those who have none: *Ib.*

An appeal does not lie to the Supreme Court from a judgment of the Court of Appeal granting or refusing a motion to set aside a judgment obtained by default: *O'Donohoe* v. *Bourne*, 27 S. C. R. 654.

See also notes to *Rules* 37 and 499.

VARIATION OF JUDGMENTS AND ORDERS.

(1) Before being Drawn up and Entered.—

Reconsideration by the Judge.

A Judge can always reconsider his decision until the judgment or order is drawn up: *Re St. Nazaire Co.*, 12 Ch. D. p. 91; *Miller's Case*, 3

Ch. D. 661; *Atty.-Gen.* v. *Tomline*, 7 Ch. D. 388; *Canada Land, etc., Co.* v. *Dysart*, 9 Ont. 511; *Glasgow* v. *Glasgow*, *Ib.*; *Re Suffield and Watts*, 20 Q. B. D. at p. 697; *Re Adam Eyton*, 36 Ch. D. 299; *Re Crown Bank*, 44 Ch. D. 634; 62 L. T. 823; *Keith* v. *Butcher*, 25 Ch. D. 750; *Hipkiss* v. *Fellows*, 101 L. T. 701; *Re Thomas*, *Bartley* v. *Thomas*, 1911, 2 Ch. 389; 105 L. T. 59. So also can the Appellate Division: see *Cameron* v. *Walker*, 19 Ont. 217; *Hockley* v. *Grand Trunk Ry.*, 10 O. L. R. 363. Rule 520.

After an order made declaring that children took *per stirpes*, it was discovered that this was contrary to authorities, and by arrangement the matter was mentioned to the Court again, and an order altering the order so as to declare that they took *per capita* was made: *Re Blackwell*, *Bridgman* v. *Blackwell*, W. N. 1886, 97; *sed vide Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 144.

Even if a judgment has not been passed or entered, the Court will not always interfere, *e.g.*, where from the nature of the ground on which the application is based, conflicting evidence would have to be gone into: *Ainsworth* v. *Wilding*, *infra*.

As to motions to vary the minutes of judgments and orders, see note to *Rule* 526.

(2) After having been Drawn up and Entered.—

A judgment or order, when passed and entered, can only be amended as provided by the *Rules* of Court: *Blake* v. *Harvey*, 29 Ch. D. 827; *Re Beard*, 69 L. T. 259. The Judge who made it has no authority to alter it, even so as to make his meaning clear: *Fitzgerald* v. *Tilling*, 99 L. T. 718, unless it can be said the judgment as drawn up does not correctly express the judgment of the Court as pronounced; see *infra*. It is irregular for the officer who issued it to take upon himself to vary it, even though it be defective or erroneous: *Re Beard*, *supra*; *Sweetland* v. *Turkish Cigarette Co.*, 47 W. R. 511; 80 L. T. 472. Variation after entry.

After a judgment has been passed and entered, even where taken by consent, and under a mistake, the Court cannot set it aside otherwise than in a fresh action brought for the purpose, unless;

(1) There has been a clerical mistake or error arising from an accidental slip or omission within *Rule* 521, or,

(2) The judgment does not, as drawn up, correctly state what the Court actually decided, or intended to decide, in either of which cases, an application may be made by a motion in the action to correct the error: *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673.

Semble, different considerations apply to interlocutory orders: *Ib.*

A Judge of an inferior Court was held entitled to amend his finding of fact, after delivery of judgment, so as to clear up an ambiguity: *Lowery* v. *Walker*, 1911, A. C. 10; 103 L. T. 674.

Clerical Mistakes.—See notes to *Rule* 521. Clerical errors.

Judgment not Correctly Stating the Decision of the Court.— In *Lawrie* v. *Lees*, 7 App. Cas. at p. 34; 46 L. T. 210, 214, Lord Penzance said: "I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry, or in the office of the Court, in such a way as to carry out its own meaning, and, where language has Varying judgment to carry out intention of the Court.

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been used which is doubtful, to make it plain"; see also *Balfour* v. *Drummond*, 4 Man. 467; *Tucker* v. *New Brunswick Trading Co.*, 44 Ch. D. 249; *Shipwright* v. *Clements*, 38 W. R. 746; 63 L. T. 160; *Rattray* v. *Young*, Cassels Sup. Ct. Dig. 692; *McMaster* v. *Radford*, 16 P. R. 20; *Sherk* v. *Evans*, 22 Ont. App. 242; *Milson* v. *Carter*, 1893, A. C. 638; *sed vide Fitzgerold* v. *Tilling*, *supra*, p. 1139. Thus an alteration may be made so as to make the record truly contain what was adjudged: *Re Swire*, *Mellor* v. *Swire*, 30 Ch. D. 239, but where the defect is known before the order is passed and entered, the proper course is to move to vary the minutes, and if this course is not pursued the applicant may have to pay costs: S. C., 53 L. T. 206.

Where the Court intended to give costs, and the judgment as drawn up merely provided for their payment out of a sum of money, which the Court was informed, was in Court, the judgment was amended so as to direct payment of the costs forthwith after taxation, it appearing that the money was not in Court: *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

Other cases.

Other Cases.—Where a Judge has given an erroneous judgment, he has no jurisdiction to alter or amend the judgment, or order, which correctly embodies the judgment actually given, even although he has been induced to make it under a misrepresentation, or mistake of fact: *Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 144; except at the instance of a party who did not appear when the order or judgment was made: see *Rule* 217; S. C., 71 L. T. 708. Such mistakes can, where the party complaining was represented, only be corrected by appeal. Where a judgment, before being drawn up, had been appealed from by one defendant, and varied, it was held that the Judge had no power to entertain a motion to vary his decision as to the defendant who did not appeal, on the question of costs, even though the judgment or order had not been drawn up *Port Elgin School Board* v. *Eby*, 17 P. R. 58; *McIlhargey* v. *Queen*, 2 O. W. N. 916; *sed vide*, *Re Blackwell*, *Bridgman* v. *Blackwell*, *supra*, p. 1139, and *Re St. Nazoire*, and other cases, *supra*, p. 1138; but a supplemental order may be made: *Scowby* v. *Scowby*, 1897, 1 Ch. 741.

Where, however, an order is made in the absence of a party, the Court has jurisdiction to reconsider its judgment, or order, even after entry, and, if proper, to rescind or vary it: see *Rule* 358; *Cousins* v. *Cronk*, 17 P. R. 348; and where the application to vary a judgment or order is based on the discovery of new matter, see *Rule* 523, and notes.

Amendment of judgment on præcipe.

A judgment entered on *præcipe* cannot be amended on application in Chambers, by inserting therein any special direction which could not properly be included in a judgment issued on *præcipe*: *Ross* v. *Vader*, 3 Chy. Ch. 236.

Liberty to apply.

Liberty to apply is implied in judgments and orders: *Rule* 511; *Fritz* v. *Hobson*, 14 Ch. D. 642, 561, but, *semble*, not where they are final: *Penrice* v. *Williams*, 23 Ch. D. 353; but see *Rule* 511. It is not implied in favour of a defendant against whom the action has been dismissed, except for the purpose of enforcing the terms of the order: *Huntley* v. *Link*, 26 Sol. Jour. 59.

Order made without jurisdiction.

An order made without jurisdiction, if not appealed against, must stand: *West* v. *Downman*, 27 W. R. 697; and a *de facto* judgment, which has not been set aside, cannot be objected to, as having been

rendered *ultra vires*, in an action of trespass for acts done under it: see *Bruce* v. *Canadian Bank of Commerce*, before Osler, J., 26th September, 1882; *Forrester* v. *Thrasher*, 9 P. R. 383; 2 Ont. 38; but it was held that a party could not be committed for disregarding an order made without jurisdiction: *McLeod* v. *Noble*, 28 Ont. 528. Rule 520.

A consent judgment on a contract *ultra vires* of a company, where the question of *ultra vires* is not raised either in the pleadings, or on the facts stated, is of no greater value than the contract on which it is founded: *Great North West Central Ry. Co.* v. *Charlebois*, 1899, A. C. 114.

Judgment Obtained by Fraud. — Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for the purpose, to set aside the judgment: *Cole* v. *Langford*, 1898, 2 Q. B. 36; *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639; but it will not be set aside on the ground alone that it was obtained by perjury: *Baxter* v. *Wadsworth*, 67 L. J. Q. B. 301; *sed vide Johnston* v. *Borkley*, 10 O. L. R. 724. Judgment obtained by fraud.

Variation of Consent Judgments and Orders.—Where an order has been made by consent, the consent given, without mistake, is binding, and cannot be withdrawn, even before the order is drawn up: *Horvey* v. *Croydon*, 26 Ch. D. 249; overruling S. C. W. N. 1883, 222; *Elsos* v. *Williams*, 52 L. T. 39; *Re West Devon, etc., Mines*, 38 Ch. D. 51, 55; *Holt* v. *Jesse*, 3 Ch. D. 177; and *Rogers* v. *Horn*, 26 W. R. 432, in which, as reported, it was held that the consent might be withdrawn before the order was passed and entered; and see *Williams* v. *Meakins*, Crump & Evans, Chy. Pr. 562; *Roberts* v. *Donovan*, 16 P. R. 456; but where counsel, being authorized by his client to agree to terms of an order, by mistake agrees to other terms, the client may withdraw the consent before the order is drawn up: *Lewis* v. *Lewis*, 45 Ch. D. 281; 63 L. T. 84. In *Moore* v. *Peachey*, 66 L. T. 198, a garnishee order made by mutual mistake of the judgment creditor, and garnishee, was set aside, and money paid under it, was ordered to be repaid; see also *Marshall* v. *James*, 1905, 1 Ch. 432; 92 L. T. 681. Variation of consent judgments and orders.

An interlocutory order consented to by mistake may be discharged, though the mistake was on one side only: *Mullins* v. *Howell*, 11 Ch. D. 763; and see *Gilbert* v. *Endean*, 9 Ch. D. 259; but not because one of the parties finds it less beneficial than he expected: *Cousineau* v. *London F. Ins. Co.*, 12 P. R. 512; *Powell* v. *Smith*, L. R. 14 Eq. 85; *Midland* v. *Johnston*, 6 H. L. C. 811.

The omission of a suitor to communicate a material fact to his counsel is no ground for the withdrawal of a consent to an order: *Re Wedge, Wedge* v. *Panter*, 98 L. T. 436.

After a judgment by consent has been passed and entered, it cannot be afterwards amended, except for reasons sufficient to set aside an agreement on the ground of mistake: *Atty.-Gen.* v. *Tomline*, 7 Ch. D. 388; *Davis* v. *Davis*, 13 Ch. D. 861; and it would seem that it can not, even then, be set aside on motion, but that an action must be brought for that purpose: see *The Huddersfield Banking Co.* v. *Lister*, 1895, 2 Ch. 273; 72 L. T. 703; 12 R. 331; *Wilding* v. *Sanderson*, 1897, 2 Ch. p. 538; *Bank of Hamilton* v. *Kramer Irwin*, 3 O. W. N. 603; 20 O. W. R. 999. Thus where parties had consented to a judgment establishing a will, which afterwards turned out to be a forgery, it was held that they were not estopped from shewing the forgery, and setting aside After entry

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the compromise judgment on that ground, in an action brought for that purpose: *Priestman* v. *Thomas*, 9 P. D. 210; 51 L. T. 843. In *Hickman* v. *Berens*, 1895, 2 Ch. 638; 73 L. T. 323; where a consent order had not been drawn up, it was rescinded on motion, on proof that there had been a mistake in giving the consent: and see *Lewis* v. *Lewis*, 13 Ch. D. 281; 63 L. T. 84.

Consent disputed.

Where the Master had proceeded on an alleged consent of counsel, of which he had made no entry in his book, and of which the terms were disputed, the report was referred back, although the Master's recollection agreed with that of one of the parties: *Beaudry* v. *Gallien* 6 O. L. R. 73.

A consent judgment, or order, may be amended by striking out terms not consented to: *Merchants Bank* v. *Grant*, 3 Chy. Ch. 64.

The silence by a party in regard to a material fact which the party knowing it was not under obligation to disclose, is not a ground for a rescission of an agreement, or a compromise of an action: *Turner* v. *Green*, 1895, 2 Ch. 205; 43 W. R. 537; 72 L. T. 763.

Withdrawal of consent not permitted.

A defendant gave an undertaking at the hearing to make certain payments to the plaintiff; the order was drawn up two or three weeks later, and the undertaking was embodied in it; the undertaking was given under a misapprehension of fact; but application to discharge the defendant from the undertaking was refused, on the ground that the facts were ascertainable by the defendant, and that the application was under these circumstances too late: *Attorney-General* v. *Tomline*, 7 Ch. D. 388.

A consent to a perpetual injunction was not allowed to be withdrawn, merely because the defendant afterwards discovered that he had a defence: *Elsas* v. *Williams*, 52 L. T. 39; 54 L. J. Chy. 336.

Where the Judge at the trial ruled adversely to the defendant, but in compliance with the request of his counsel modified his ruling, it was held that the judgment was not by consent, and defendant was not precluded from moving against it: *Sweeney* v. *Sweeney*, 16 Ont. 92.

An order arranged by consent between the parties, and not the result of an adjudication by the Court, should shew on its face that it is by consent: *Michel* v. *Mutch*, 34 W. R. 251; 54 L. T. 45; 55 L. J. Chy. 485.

Disobedience to a consent order, good on its face, cannot be justified by shewing grounds, which, if urged against the making of the order, might have prevented it from being made: *Ribble, etc.* v. *Croston, etc.*, 45 W. R. 348.

No appeal can be had from a consent judgment, or order, except perhaps, by leave, see Jud. Act, s. 24 and notes.

Compromise.

The solicitor on the record, or his agent acting for him, has a general authority to compromise an action on behalf of his client, provided he acts *bonâ fide* and reasonably, and not in defiance of his direct and positive instructions, and, whether the compromise is made by the solicitor or his agent, the client will be bound, although there is no privity between him and the agent: *Re Newen*, 1903, 1 Ch. 812. And a client who induces his solicitor to believe that he has authority to compromise an action upon certain terms, is bound by the compromise, if the solicitor, in making it, reasonably believed that he had authority to make it, even though the client did not in fact intend

to authorize a compromise upon those terms, and did not understand the terms: *Little* v. *Spreadbury*, 1910, 2 K. B. 658; 102 L. T. 829. See also *Hockett* v. *Bible*, 12 P. R. 482. Rule 521. Consent orders.

A solicitor has no implied authority before action to compromise a claim: *Macaulay* v *Polley*, 1897, 2 Q. B. 122; *Duffy* v. *Honson*, 16 L. T. 332; nor has he after judgment: see *Re A Debtor*, *infra*.

Counsel has full authority to compromise an action at the trial: *Matthews* v. *Munster*, 20 Q. B. D. 141; but see *Watt* v. *Clark*, 12 P. R. 359; and see 98 L. T. Jour. 489; but a compromise in intended pursuance of terms consented to by the client, but by misapprehension or intentionally not strictly following them, is not binding on the client: *Lewis* v. *Lewis*, 45 Ch. D. 281; 63 L. T. 84; *Bennor* v. *Edwards*, 19 P. R. 9; *Stokes* v. *Latham*, 4 T. L. R. 305; *Neale* v. *Lennox*, *infra*; and where, acting on general instructions to compromise, counsel consents under a misapprehension, such as, where intending to concede one thing he inadvertently concedes another, or where counsel are not *ad idem*, the compromise is not binding, and the Court will set it aside: *Hickmon* v. *Berens*, 1895, 2 Ch. 638; 73 L. T. 323.

As to the right to repudiate a verbal arrangement of compromise made at the trial, before it is recorded as a verdict, or judgment: see *Brown* v. *Blackwell*, 26 C. P. 43

Upon the question of the authority of counsel to compromise, the Court will take the statement of the counsel from his place at the bar without oath: see *Hickmon* v. *Berens*, *supra*; and *Wilding* v. *Sanderson*, 1897, 2 Ch. 534.

An action by an infant by his next friend cannot validly be compromised by the infant, or his counsel, without the sanction of the Court: *Mattei* v. *Vautro*, 105 L. T. Jour. 202.

As to the enforcement of a compromise by motion for judgment, or otherwise, in the action: see *Pirung* v. *Dowson*, 9 O. L. R. 248, and notes, *supra*, pp. 44-45.

A counsel has not authority to refer an action against the wishes of his client, or upon terms different from those which his client has authorized. Where a limitation has been placed by a client on the authority of his counsel with regard to the reference of the action, though it is not communicated to the other side, if his counsel agrees to a reference in disregard of that limitation, the agreement to refer is not binding on the client, whether it results in an interlocutory, or a final order: *Neale* v. *Lennox*, 1902, A. C. 465; 87 L. T. 341.

A consent order creates an estoppel between the parties: *Re South American Co.*, 71 L. T. 334; unless procured by fraud: *Priestmon* v. *Thomas*, 9 P. D. 210; 51 L. T. 843.

Where a solicitor after judgment had, as the Court held, without authority, consented to an order affecting his client's rights as against third persons, the order was, on the client's application, set aside: *Re A Debtor*, 1914, 2 K. B. 758. Solicitor has no implied authority to compromise after judgment.

521. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected upon an application in Chambers. C.R. 640. Correction of mistakes in judgments and orders.

The same in effect as Eng. (1883), R. 319.

Rule 521.

A judgment by default entered against a married woman, not in the limited form prescribed by form Nn. 110, was held to be void and not amendable under this *Rule*: *Orley* v. *Link*, 1914, 2 K. B. 734; 110 L. T. 248; and see *Re Hamilton* v. *Perry*, 24 O. L. R. 38; where the judgment was entered by consent: and see *Muir* v. *Jenks*, 1913, 2 K. B. 412; 108 L. T. 747.

As to judgments entered by default under *Rule* 37 for a sum exceeding what is authorized by that *Rule*: see notes to that *Rule*.

Lapse of time is not necessarily a bar to the making of amendments under this *Rule*, where the rights of other parties acquired under the judgment or order will not be improperly affected; thus an action was brought to enforce a covenant, in an assignment of lease against carrying on a business, and the decree contained an injunction perpetually restraining the defendant from carrying on the business; after the lapse of 19 years it was amended by restricting the injunction "to the remainder of the term of the lease," which had previously expired: *Shipwright* v. *Clements*, 38 W. R. 746; 63 L. T. 160; and where a decree made in 1853, declared a party entitled to a charge on land for £500 and interest until paid, and it appeared in 1892 that the claim in question arose out of a bond in a penal sum of £1,000, the decree was amended so as to limit the charge for principal and interest to a sum not exceeding the amount of the penalty: *Hatton* v. *Harris*, 1892, A. C. 547; 67 L. T. 722; see also *McMaster* v. *Radford*, 16 P. R. 20; *Milson* v. *Carter*, 1893, A. C. 638; and where a judgment ordered costs to be paid out of moneys in Court, and it turned out that there were no moneys in Court, it was amended by substituting a personal order to pay such costs: *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

What kind of errors corrected.

Under Chy. O. 335, a direction necessarily consequent upon the judgment, but omitted from the decree drawn up, might be supplied, such as a direction (now unnecessary, see *Rule* 416), to settle a conveyance: *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Trevelyan* v. *Charter*, 9 Beav. 140; or a reference as to title, in a decree for specific performance: *Hughes* v. *Jones*, 26 Beav. 24; and an error in an order arising from an error in the chief clerk's certificate which had escaped the notice of all parties: *Eckersley* v. *Eckersley*, W. N. 1884, 133; an error in a taxing officer's certificate by reason of disbursements (fees paid to a referee), by mistake, not having been carried in for taxation: *Chessum* v. *Gordon*, 1901, 1 Q. B. 694; 84 L. T. 137; a foreclosure judgment in the form without a reference as to incumbrancers, it having been discovered that there was an incumbrancer: *Wilgress* v. *Crawford*, 12 P. R. 658; *Clarke* v. *Cooper*, 15 P. R. 54; or other mistake or slip: *Turner* v. *Hodgson*, 9 Beav. 265; *Askew* v. *Peddle*, 14 Sim. 301; and see *Eadie* v *McEwen*, 14 Gr. 404; see also *Ex parte Straight*, 16 W. R. 661; *Andrews* v. *Bohannon*, W. N. 1869, 80; *Jeffreys* v. *Smith*, 11 W. R. 479; *Re Glanville's Trusts*, W. N. 1878, 21; *Warman* v. *Zeal*, W. N. 1871, 241; *Re Tidl*, 11 W. R. 351; but not any term which could only have been introduced by express direction of the Court, which was not given: *Bird* v. *Heath*, 6 Ha. 236; *Whitehead* v. *North*, Cr. & Ph. 78; nor any substantial addition except by consent: *Willis* v. *Parkinson*, 3 Sw. 233; but see *Rule* 522.

The application must, as a general rule, be on notice: *Radenhurst* v. *Reynolds*, 11 Gr. 521.

An error was corrected under this *Rule*, not because it did not correctly carry out the intention of the Court at the time, but because

the parties were mistaken as to the fact upon which the judgment as it stood was founded: *Barker* v. *Purvis*, 31 Sol. Jour. 155; 56 L. T. 131; but see *Re Leonard*, 107 L. T. Jour. 409; so an order awarding costs against a defendant who had not appeared, the Court thinking he was represented, was amended by striking out such award of costs: *Cousins* v. *Cronk*, 17 P. R. 348; a clause giving special directions as to scale of costs was inserted in *Doswell* v. *Norton*, 18 T. L. R. 728. But in *Klinck* v. *Ontario Loan & I. Co.*, before the Divisional Court, Ch. D., 28 June, 1889, it was considered that a Judge had no power to amend his judgment, after it had been formally issued, even on the ground of mistake (except to make it carry out the intention of the Court when it was made), and an order made in such circumstances was vacated, and a new order to the like effect was made by the Divisional Court: *Broom* v. *Pepall*, 23 O. L. R. 630. See also *Glasier* v. *Rolls*, 62 L. T. 305; *Preston Banking Co.* v. *Allsup*, 1895, 1 Ch. 141; *McMaster* v. *Radford*, 16 P. R. 20; *Ainsworth* v. *Wilding*, 1896, 1 Ch. 673; *Port Elgin, etc.*, v. *Eby*, 17 P. R. 58; *McIlhargey* v. *Queen*, 2 O. W. N. 916. See also notes preceding *Rule* 321. Rule 521.

A motion to amend a decree in which the pleadings and evidence, or anything beyond the judgment pronounced, and the decree, is required to be looked at, must be made in Court: *Lapp* v. *Lapp*, 3 Chy. Ch. 234; 4 Chy. Ch. 3.

In *Livingstone* v. *Wood*, 29 Gr. 157, a decree directing an account was amended, by striking out a declaration that the plaintiff was entitled to certain credits, which had not formed a substantive part of the judgment, so as to make the decree conform to the actual judgment, and enable the credits to be further investigated in the Master's office.

On motion under the corresponding English Rule, an order made under the Settled Estates Act was varied, so as to dispense with consents of tenants for life to leasing powers granted: *Re Riley's Trusts*, 30 W. R. 78.

Where an order had been made on the petition of several persons, two of whom had not authorized it, the Court, under this *Rule* amended the order by striking out the names of those two as petitioners, and treating them as not having been served with the petition: *Re Savage*, 15 Ch. D. 557.

Where the costs of a motion for an interim injunction having been reserved till the trial of the action, the plaintiff's counsel omitted to ask for them at the trial, and they were not provided for, it was held that the omission might be supplied under this *Rule*: *Fritz* v. *Hobson*, 14 Ch. D. 542, 561. So, where the Judge inadvertently omitted to make any order as to the costs of the action: *Hardy* v. *Pickard*, 12 P. R. 428; and see *Rule* 522.

But where the decree did not direct the payment of costs "forthwith," and it did not appear that such a direction was intended by the judgment, an application to amend was refused: *Wilson* v. *Robertson*, 3 Chy. Ch. 100.

For amendment of orders so as to provide for costs omitted by mistake: see *Blakey* v. *Hall*, 56 L. J. Chy. 568; 56 L. T. 400; *Viney* v. *Chaplin*, 3 De G. & J. 282; *St. Michael's College* v. *Merrick*, 26 Gr. 216.

Where a judgment, order, report or certificate is varied, it is not the correct practice to make any actual physical alteration in the document: *Rule* 187; see *Fox* v. *Bearblock*, 45 L. T. 469; 46 L. T. 145.

Rules 522, 523.

Amendment as to matters on which there was no adjudication

522. Where a judgment or order requires amendment in any particular on which the Court did not adjudicate, the same may be amended by the Court on motion. C.R. 641.

Where the application was made after the time within which the cause could have been reheard without leave, it was held that the applicant need not apply for leave to move, but must, nevertheless, make out such a case as would be necessary, in order to obtain leave to rehear after the time had elapsed: O'*Donohgue* v. *Hembroff*, 19 Gr. 95. And see *Fritz* v. *Hobson*, and *Hurdy* v. *Pickard*; *Blakey* v. *Hall*, and other cases cited in note to preceding *Rule*, p. 1145.

Application to impeach judgments, etc.

523. A party entitled to maintain an action for the reversal or variation of a judgment or order, upon the ground of matter arising subsequent to the making thereof, or subsequently discovered, or to impeach a judgment or order on the ground of fraud, or to suspend the operation of a judgment or order, or to carry a judgment or order into operation, or to any further or other relief than that originally awarded may move in the action for the relief claimed. C.R. 642, *amended*.

Under C. R. 642 the application was required to be made by petition, under the present *Rule* it may be made by notice of motion which, however, should set out the grounds on which it is based. The *Rule* applies only to cases in which bills in Chancery could formerly be filed for the purposes mentioned in the *Rule*, and has no application to proceedings in a Surrogate Court to vacate an order made by the Surrogate Court Judge on the passing of an executor's accounts: *Re Wilson & Toronto General Trusts Corp.*, 13 O. L. R. 82.

On petition under Chy. Ord. 330, security required.

Formerly a person presenting a petition under Chy. O. 330, from which this *Rule* is taken, in a case where formerly a bill of review or a bill in the nature of a bill of review, should have been filed, was required to give security for costs: *Sadlier* v. *Doyle*, before Proudfoot V.C., 19 and 26 Nov., 1877, and see Beames' Orders, pp. 314, 366, and see Ont. Order in Chy. 12th July, 1844, lxxix; but see Chy. O. 1; but it would seem that no such security is now required to be given, unless expressly ordered.

An order made for the payment out of Court of money in a winding up proceeding, was rescinded and the money ordered to be refunded, on the application of the Receiver General who had received no notice of the motion for the order, though having an inchoate interest in the fund: *Re Central Bank*, 24 Ont. App. 470; 28 S. C. R. 192.

Leave to move under this *Rule* is not necessary in any case: *Duggan* v. *McKay*, 1 Chy. Ch. 380.

For cases in which petitions have been presented under Chy. O. 330 see *Bank of Upper Canada* v. *Wallace*, 16 Gr. 280; *Brouse* v. *Stayner*, 16 Gr. 1; *Dumble* v. *Cobourg & P. Ry. Co.*, 29 Gr. 121; *Mason* v. *Seney*, 12 Gr. 143; *Colonial Trusts* v. *Cameron*, 21 Gr. 70; *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

Rule 523.

As to vacating a judgment on the application of the party in whose favour it is, where a third party might be affected thereby: see *Toronto Dental, etc., Co.* v. *McLaren*, 14 P. R. 89; and as to vacating a judgment or order at the request of the plaintiff in order to enable him to amend his proceedings: see *Clarke* v. *Cooper*, 15 P. R. 54; *Wilgress* v. *Crawford*, 12 P. R. 658.

Semble, the *Rule* is not imperative, and where consequential relief is sought, which could not be granted upon petition in the original action, a new action may be brought: *Leeming* v. *Armitage*, 18 P. R. 486; see also *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106; 80 L. T. 639.

Application to impeach judgments on ground of fraud.

Applications to Impeach a Judgment on the Ground of Fraud.—A bill of this kind was, prior to Chy. O. 330, propar. where a decree had been obtained by fraud. Where the decree, however, had also been affirmed by the House of Lords, it would seem to have been necessary that application should be first made to the House of Lords for directions: *Shedden* v. *Patrick*, 1 Macq. H. L. C. 535, and see *Tommey* v. *White*, 4 H. L. C. 313.

In England, where no such practice as that prescribed by this *Rule* is in force, it is held by analogy to the former practice, that in order to set aside a judgment obtained by fraud, a new action must now be brought: *Flower* v. *Lloyd*, 6 Ch. D. 297; *Priestman* v. *Thomas*, 9 P. D. 210; 51 L. T. 843; *Cole* v. *Langford*, 1898, 2 Q. B. 36; *Wyatt* v. *Palmer*, 1899, 2 Q. B. 106, 80 L. T. 639.

Where it can be shown that a judgment, whether foreign, or domestic, has been obtained by fraud, it cannot be held to be binding on the party on whom the fraud has been practised: *Johnston* v. *Barkley*, 10 O. L. R. 724; *Abouloff* v. *Openheimer*, 1882, 10 Q. B. D. 295.

An order, obtained by the suppression of material facts, may be set aside on motion: *Merchants Bank* v. *Sussex*, 4 O. L. R. 524.

Application to suspend operation of a judgment.

Applications to Suspend the Operation of a Judgment.—Bills of this kind were formerly necessary whenever it was sought to stay the execution of a decree: *e.g.*, where an appeal was pending from the decree. But relief of this kind has, since Chy. O. 330, been granted on motion in Chambers, without even a petition: *Campbell* v. *Edwards*, 6 P. R. 159; *Walker* v. *Niles*, 3 Chy. Ch. 418. In such cases security was generally required to be given: *Ib.* The staying of proceedings pending an appeal is discretionary. In a case where the Court refused to stay proceedings pending an appeal from an order allowing a demurrer, it directed that an answer filed should not prejudice the appeal: *McMurray* v. *Grand Trunk Ry.*, 3 Chy. Ch. 125.

But where a judgment was not appealed from, and restrained the infringement of a *de facto* patent and ordered an account, the Court refused to stay the account, or the carrying out of the judgment, though the patent had been subsequently revoked: *Poulton* v. *Adjustable Covers & Boiler Co.*, 1908, 2 Ch. 433; 99 L. T. 647.

Application to carry judgment into operation.

Applications to Carry a Judgment into Operation.—Bills of this kind were sometimes necessary where the parties neglected to proceed upon the decree, and their rights under it had become embarrassed by subsequent events, and it was necessary to have them settled by the decree, of the Court. See Mitford Pleadings, 3rd ed., 75.

Rule 823.

Motion to review.

Motion to Review.—Prior to Chy. O. 330, where a party sought to impeach a decree, either for error in law appearing in the body of the decree, without further examination of matters of fact, or in respect of some new matters arising after the decree; or on new evidence discovered after decree made, which could not possibly have been used when the decree was pronounced; in such cases, where the decree had been enrolled, a bill of review was filed, and where it had not been enrolled a bill in the nature of a bill of review was the proper proceeding: see *Dumble* v. *Cobourg, etc.*, 29 Gr. 121.

When bill filed on ground of error, error must be apparent on face of decree.

Where the bill was filed on the ground of error, it was necessary to specifically assign the error complained of, and it must have been an error of law, apparent on the face of the decree, and not a mere error of judgment: *Green* v. *Jenkins*, 6 Jur. N. S. 515, *e.g.*; it could not be assigned for error that any matter had been decreed contrary to the pr[illegible]s: *Mellish* v. *Williams*, 1 Vern. 166.

For cases since *The Judicature Act*: see *Synod* v. *De Blaquiere*, 10 P. R. 1; *Bank of B. N. A.* v. *Western Ins. Co.*, 11 P. R. 434; *Boswell* v. *Coaks*, 6 R. 167; and see *Wilkins* v. *Wilkins*, 100 L. T. Jour. 418.

Semble, an application to review will not now be entertained in any case in which the applicant could have appealed from the judgment or order in question: *Bright* v. *Sellar*, 1904, 1 K. B. 6; 89 L. T. 137.

An application under the present *Rule* is a proceeding in the cause, and is properly made in Court to the Judge who pronounced the judgment, or order, sought to be varied, etc.: *Armour* v. *Merchants Bank*, 17 P. R. 108; *Bank of British North America* v. *Western Assurance Co.*, 11 P. R. 434; *Synod* v. *De Blaquiere*, 10 P. R. 11; but where new evidence is discovered within the time limited for moving before a Divisional Court, under *Rules* 491, 492, a motion for a new trial on that ground may be made to the Appellate Division.

A new trial was refused where the fresh evidence was only in corroboration: *Howarth* v. *McGugon*, 23 Ont. 396; *Trumble* v. *Hortin*, 22 Ont. App. 51.

A respondent may file affidavits in answer without the leave of the Court: *Robson* v. *Wride*, 14 Gr. 606; 15 Gr. 565.

On applications to open up proceedings, by way of review, on the ground of newly discovered evidence, the party applying must show (1) that the evidence is such that if it had been brought forward at the proper time, it might probably have changed the result; (2) that at the time he might have so used it, neither he nor his agent had knowledge of it; (3) that it could not, with reasonable diligence, have been discovered in time to have been so used; and (4) the applicant must have used reasonable diligence after the discovery of the new evidence: *Hosking* v. *Terry*, 8 Jur. N. S. 977; *Mason* v. *Seney*, 12 Gr. 143; *Dumble* v. *Cobourg and Peterboro' Ry. Co.*, 29 Gr. 121; *Colonial Trusts* v. *Cameron*, 21 Gr. 70; see also *Carradice* v. *Currie*, 19 Gr. 105; *Waters* v. *Shade*, 2 Gr. 218; *Murray* v. *Canada Central Railway Co.*, 7 Ont. App. 646; *Synod* v. *De Blaquiere*, 10 P. R. 11; *Bank of B. N. A.* v. *Western Ass. Co.*, 11 P. R. 434; *Boswell* v. *Coaks*, 6 R. 167.

Res judicata.—A judgment obtained *bonâ fide* and not reversed is a bar to any further action for the same cause; but where *res judicata* is relied on, and in the former action a judgment by consent was pronounced, and it is impossible to say from the record what was the

question adjudicated, the Court must needs go into evidence *dehors* the record in order to find out what was actually decided by the judgment relied on as constituting a bar: *Re Ontario Sugar Co.*, 22 O. L. R. 621; 24 O. L. R. 332; 44 S. C. R. 659. Rule 524.

Where, in the former action the plaintiff might have recovered the damages sued for in a subsequent action brought by him, the judgment in the former action will constitute a bar: *Furness* v. *Hall*, 126 L. T. Jour. 284; and see *Bador Bee* v. *Noordin*, 1903, A. C. 615; but where a plaintiff was dismissed from his employment in October and then sued for, and recovered his October wages, it was held that the judgment was no bar to a subsequent action for damages for wrongful dismissal: *Hayes* v. *Horshaw*, 30 O. L. R. 157.

Where a defendant in a previous action on a contract omitted to set up the Statute of Frauds as a defence, and judgment was given against him, such judgment will constitute *res judicata* so as to prevent the defence of the Statute of Frauds being set up in any future action on the same contract: *Humphries* v. *Humphries*, 1910, 1 K. B. 796; 102 L. T. 492; 1910, 2 K. B. 531; 103 L. T. 14; *Cooke* v. *Rickman*, 1911, 2 K. B. 1125.

An order, or judgment, pronounced, may be effective as a defence of *res judicata* even before it has been actually passed and entered: see *McNiven* v. *Pigott*, 31 O. L. R. 364.

A judgment which it is shown was obtained by fraud cannot be relied on as constituting *res judicata*: *Johnson* v. *Borkley*, 10 O. L. R. 724, and such fraud may be shown as an answer to the defence of *res judicata*. *Ib.*

Further Directions.—Under the concluding clause of this *Rule* a motion for judgment on further directions would appear to be authorized, where a cause has been referred to a Master for report, and further directions have been reserved, and it would also appear to authorize a motion for judgment as to any matter in which the parties claim to be entitled to some further relief than that provided for or adjudicated by the original judgment, and which is consistent with the relief claimed by the pleadings: see p. 658, *supra*.

Certificate of result of appeal to be entered in judgment book.

524. Upon the production of the order of His Majesty in His Privy Council, made upon an appeal to His Majesty in Council, or of the certificate of the Registrar of the Supreme Court of Canada upon an appeal to that Court, the officer of this Court with whom the judgment or order appealed from was entered shall cause the same to be entered in the judgment book, and all subsequent proceedings may be taken thereupon as if the decision had been given in this Court. C.R. 1255 and 818 *a* and *b*, *amended*.

Under this *Rule* the proper officer of the High Court Division can, without order, enter in the Judgment Book, the Order of His Majesty in His Privy Council, or the certificate of the Registrar of the Supreme Court of Canada, and it may thereupon be acted on as a judgment of the High Court Division: see *Lowson* v. *Canada Farmers Ins. Co.*, 8

Rules 525, 526.

Ont. App. 613. Process may then be issued on the judgment so entered, without further order: *Lowson* v. *Canada Farmers, etc., supra.* The judgment entered in the High Court must not be altered in accordance with the certificate of the Appellate Court, where such certificate varies the judgment appealed from. The inconvenience attending any physical alteration of the records of the Court are pointed out in 19 C. L. J. 302; and it is now forbidden by *Rule* 187, *supra.*

The certificate of the Registrar of the Supreme Court of Canada, or the order of His Majesty in His Privy Council, is entered in the judgment book *verbatim et literatim*, and a note referring thereto is made in the margin of the entry of the original judgment, or order, affected thereby; it should be entered in the same office in which the order or judgment appealed from was entered.

Where the order of His Majesty in His Privy Council directs costs to be paid, it is not competent for the Court below to direct under *Rule* 666; or for the Taxing Officer to allow under *Rule* 665, a set off in respect of such costs: *Metallic Roofing Co.* v. *Jose*, 17 O. L. R. 237.

The Supreme Court cannot go behind the certificate of the Privy Council as to the result of the appeal: see *Booth* v. *Ratte*, 21 S. C. R. 637.

Orders varying judgments, etc., to be entered.

525. Every judgment and order by which a judgment is affirmed, reversed, set aside, varied, or in any way modified, shall, in addition to any other entry thereof, be entered in the office where the original judgment or order is entered. C.R. 1262 and 635 (4), *amended.*

In addition to the entry required by this *Rule*, there is also to be made in the margin of the entry of the judgment or order affirmed, reversed, set aside, varied, or modified thereby, a note referring to the order, whereby the same is affirmed, reversed, or varied: see *Rule* 187.

Settlement of judgments at trials.

526. Judgments and orders pronounced in trials at Toronto shall be settled by the Registrar to whom is assigned the duty of settling judgments. C.R. 624.

By former C. R. 28 the settling of judgments made at any sittings of the Court in the County of York for trial was assigned to the Senior Registrar of the High Court Division. Under *Rule* 527 he may also, if desired, settle judgments pronounced in any other country.

By Registrar.

The Registrar referred to in this *Rule*, therefore, is the Senior Registrar of the High Court Division.

When a judgment is pronounced, or an order made, by the Court, a note is taken by the Registrar or other officer attending the Court for the purpose, and a similar note is indorsed by counsel on their briefs; and from these notes the draft or minute of the judgment, or order is prepared.

Judgments pronounced on circuit, are, when necessary, to be settled by the Deputy Registrar, Deputy Clerk, or Local Registrar, or by the Senior Registrar; see *Rule* 527.

This *Rule* only refers to judgments pronounced after a trial at Toronto; judgments pronounced on motions in the Weekly Court are

settled by the Clerk of that Court, or other officer acting as Clerk thereof: see *Rule* 751. Rule 526.

The party on whose motion a judgment or order is made, if he obtains any relief or benefit thereby, is *prima facie* entitled to the carriage of it.

The party desiring to enter a judgment, or issue an order, the minutes of which require to be first settled, usually in practice prepares a draft, and attends the Registrar, or other officer authorized to settle the minutes of the judgment or order, for an appointment to settle it. The Registrar or other officer will, however, if required, himself prepare the draft of the judgment or order, and when it is ready will issue the appointment to settle it, if he deems one necessary: see *Rule* 528. Appointment to settle.

On the return of the appointment, the parties notified attend and make any objections they may have to the draft, which are disposed of by the Registrar, or the officer settling the minutes, who then marks the draft settled, and adds his initials. The minutes having been settled, the judgment, or order, is then engrossed, and having been compared with the draft and passed, it is then signed by the Registrar, or other officer, who has settled the minutes, and it is then ready for entry.

Where the Registrar or other officer thinks it necessary, he may give an appointment to pass: *e.g.*, when any blanks have been left in the draft; or the terms of the order, or judgment, are complicated, and there is any danger of error in transcribing the draft. The passing of the judgment, or order, is merely the act of comparing the engrossment with the draft and seeing that it agrees with it, and signing and marking it for entry. Appointment to pass.

Where on an appointment to settle or pass a judgment or order the party served attends, but the party serving the appointment does not attend or is not prepared to proceed, the officer settling the judgment or order may proceed *ex parte* to settle the minutes, or pass the judgment or order; or if a party served asks for delay, the officer may grant the delay on such terms as he thinks reasonable. He would not appear to have any jurisdiction to make any order as to costs as he would not be acting as a judicial officer: see Jud. Act, s. 74 (4). Procedure where party makes default.

Where either party does not attend, it would seem that the officer is not justified in proceeding *ex parte* until the lapse of half an hour from the time appointed: *Rule* 225.

The officer in settling any judgment or order, may introduce such alterations as from his experience he believes the Court will sanction; and these alterations are binding on the parties: see *Davenport* v. *Stafford*, 8 Beav. 503; *Hargrave* v. *Hargrave*, 3 Mac. & G. 348; Seton, 5th ed., 164; *McKindsey* v. *Armstrong*, 11 P. R. 200. It is also his duty to bring to the attention of the Judge any defects he may find to exist in the proceedings. Thus, when, after judgment pronounced, it appeared before the Registrar that one of the defendants had not been duly served with process, on his bringing the point to the attention of the Judge the judgment was ordered not to be drawn up: *Re Howard*, 10 Ch. D. 550. Registrar may make alterations.

Where the Registrar finds that the judgment or order has been pronounced without due notice to a non-appearing party, entitled to

Rule 526.

notice, before drawing up the order or judgment he should obtain the direction of the Court: see *Tilling* v. *Blythe*, 106 L. T. Jour. 365; 1899, 1 Q. B. 557.

Where questions of difficulty arise, the Registrar may require the matter to be mentioned to the Court.

Where the judgment to be settled was pronounced at a trial, the Judge's indorsement on the record is the officer's guide and warrant for the terms of the judgment: see *Rule* 264, and in the case of orders, the entry in the Registrar's book.

Varying minutes.

Motion to vary Minutes.—After the draft or minutes have been settled by the Registrar, or other officer, but not before, any party dissatisfied may move to vary the minutes; and the Registrar, or other officer, should be previously informed of the application: *Prince* v. *Howard*, 14 Beav. 208; *Hood* v. *Cooper*, 26 Beav. 373; *Tennant* v. *Trenchard*, L. R. 4 Chy. 537, 545; *British Dynomite Co.* v. *Krebs*, 25 W. R. 846; and such application may be made at any time before the judgment, or order, is passed and entered; 1 Turn. & Ven. 319; Dan. Pr. 875; Seton, 5th ed., 164. The notice of motion should be served on all parties interested, and state the alteration desired.

The Court may refuse to permit any question to be argued on a motion to vary the minutes, except what was the actual order made, and whether the intention of the Court has been correctly expressed: *South Wales Min. Co.* v. *Davies*, 31 Sol. Jour. 110; unless both parties consent to an addition being made, or when it cannot be ascertained what order was pronounced; in which cases the Court may allow the case to be re-argued: see Seton, 5th ed., 165; *Hendrie* v. *Beatty*, 29 Gr. 423. The Court has, however, on a motion to vary minutes, varied the decree: *Johnson* v. *School Trustees*, 26 Gr. 204; and until a judgment has been actually entered a Judge may recall, or alter the judgment: *Glasgow* v. *Glasgow*, 9 Ont. 511, note; *Conodion L. & E. Co.* v. *Dysart*, *Ib.*; *Re Suffield & Wotts*, 20 Q. B. D. at p. 697; *Re Adam Eyton*, 36 Ch. D. 299, and other cases in notes to *Rule* 521; and see *Munroe* v. *Heubach*, 45 C. L. J. 252 (M.).

An appeal is not proper from the decision of the Judge on a motion to vary the minutes of his judgment, or order. The appeal must be from the judgment or order in its entered form: *Jones* v. *Jones*, 67 L. T. 584.

As the Registrar or other officer settling minutes has no jurisdiction to stay the entry of an order or judgment indefinitely, any motion to vary the minutes should be made promptly, after the settlement of the minutes; it should be made returnable at the next sittings of the Court at which the order or judgment was pronounced, if a Divisional Court; or before a Judge of the High Court Division, if the order or judgment was pronounced in the Weekly Court, or at a trial. Such motions are usually heard before the Judge by whom the order or judgment in question was made, and if he be not then sitting, the motion will usually be adjourned to be heard by him.

Costs of motion.

Any variation made on a motion to vary the minutes is embodied in the draft, and except where the costs of the motion are ordered to be paid, no further order need be drawn up by any party.

If there is fair ground for the application, and there has been no improper opposition, the costs are usually made costs in the cause.

and the judgment, or order, may be post-dated so as to include the costs of the day: see Seton, 5th ed., 165. Rule 526.

Where an order has been made in Chambers, it ought not to be drawn up as a Court order, even though the case be one which might have properly been argued in Court, unless both the parties and the Court consent: *Re Henning*, 11 P. R. 272; whether an order was made in Court, or Chambers, is important on the question of appeal therefrom: see *Rules* 502, 507; and see *Joss* v. *Fairgrieve*, 6 O. W. N. 640.

Where the minutes have been settled by a Local Officer they may be varied either on application to the Senior Registrar of the High Court Division, or on motion to "the Judge," presumably the Judge who pronounced the judgment: *Rule* 527.

Where, after judgment was pronounced, a mistake was discovered in the statement of claim, on a subsequent application to amend the statement of claim, the judgment was directed to be post-dated as of a day subsequent to the amendment: *Winkley* v. *Winkley*, 44 L. T. 572.

Under the former practice, if the suit abated after decree pronounced, or between hearing and judgment, the decree might be passed and entered notwithstanding the abatement of the suit: Seton, 5th ed., 165; *Reamish* v. *Pomeroy*, 1 Chy. Ch. 32. Abatement.

A party not producing his briefs when required, was ordered to do so within a limited time, and in default the order was to be drawn up without them: *Yeatman* v. *Read*, 14 W. R. 123. Delay in settling minutes.

A solicitor who has been discharged by his client before the passing and entry of an order, will not be allowed to withhold papers on which he claims to have a lien, so as to prevent the drawing up, or entry of the order: *Simmonds* v. *Great Eastern Ry. Co.*, L. R. 3 Chy. 797; *Clifford* v. *Turrill*, 2 D. & S. 1.

An appointment to settle minutes, served one day and returnable the next, was sufficient under the former practice: *Re Christmas*, 19 Beav. 519. No time is prescribed by the *Rules* within which a judgment or order is to be spoken, and issued; under the former practice a time was limited by Chy. Orders 10, 11: see Holmested's Rules & Orders, 8; and after the lapse of the prescribed time the judgment or order was not to be issued without leave; but this practice was not very strictly followed. After the lapse of four years, notice of the application to issue an order was required to be given to all parties: *Re Forrester, Messnier* v. *Forrester*, 1 Chy. Ch. 29.

Entry of Judgments and Orders.—Before an order requiring entry can be enforced by attachment for disobedience, it must be entered, and such entry should have been made before the expiry of the time limited by the order for doing the act thereby ordered to be done: *Ballard* v. *Tomlinson*, 48 L. T. 515.

Proceedings under a judgment, or order, requiring entry, before it has been entered, are irregular and voidable: *Tolson* v. *Jervis*, 8 Beav. 366; *Drummond* v. *Anderson*, 3 Gr. 150; although in the case of injunctions and restraining orders, parties are bound by notice of the restraining order, however received, from the time when it is pronounced: see Seton, 5th ed., 456.

Rules 527, 528.

If a party having the carriage of a judgment neglects to enter it, the opposite party may apply for the carriage of it in order to have it entered.

Entry nunc pro tunc.

Orders may be made to enter judgments, or orders, *nunc pro tunc*: *Donne* v. *Lewis*, 11 Ves. 601; *Lawrence* v. *Richmond*, 1 J. & W. 241; *Re Jones*, *Bullis* v. *Jones*, 91 L. T. Jour. 127; 39 W. R. 619; and see *Gunn* v. *Harper*, and other cases in note to *Rule* 304. But where a defendant would be prejudiced by such an order it will be refused: *Drummond* v. *Anderson*, 3 Gr. 150.

Varying judgment.

A judgment, though by consent, is a solemn judgment of the Court, and cannot be altered by consent of the parties without the sanction of the Court: *The Bellcairn*, 34 W. R. 65; *Blake* v. *Harvey*, 29 Ch. D. 827; 63 L. T. 541.

After a judgment, or order, has been passed, and entered, it can, as a general rule, only be varied on appeal: see *Pepper* v. *Pepper*, W. N. 1868, 104; *Re Robinson*, W. N. 1873, 28; *Andrews* v. *Bohanna*, W. N. 1869, 80; *Teil* v. *Barlow*, 3 D. J. & S. 426; *Mason* v. *Seney*, 2 Chy. Ch. 30; *Moffatt* v. *Hyde*, 6 U. C. L. J. 94; *Simmers* v. *Erb*, 21 Gr. 289; *Fawkes* v. *Swayzie*, 31 Ont. 256; and where the applicant has neglected to move to vary the minutes in the usual way, an amendment will only be granted on payment by the applicant of all costs: *Re Swire*, *Mellor* v. *Swire*, 30 Ch. D. 239; 53 L. T. 205. In cases of clerical mistakes, or errors, arising from any accidental slip or omission, a judgment or order may be corrected on motion, without appeal: *Rule* 521. So also a judgment may be amended on motion where it has been obtained by default: see *Kline* v. *Kline*, 3 Chy. Ch. 79, or on *præcipe*: *Nelles* v. *Vandyke*, 17 Gr. 14. After the judgment or order has actually issued, such mistakes cannot properly be corrected, as of course, by the officer who has drawn up the judgment, or order; it can only be done on motion: see *Re Beard*, 69 L. T. 259.

Settlement of judgments by local officers, etc.

527.—(1) Judgments in cases tried elsewhere than at Toronto, shall be settled by the Deputy Clerk of the Crown, Deputy or Local Registrar, at the place of trial, unless any party affected applies to the Registrar to whom is assigned the duty of settling judgments to settle the same, or to reconsider the settlement of the same by the local officer.

(2) When settled the minutes may be varied by the Trial Judge on the application of either party. C.R. 625.

As to varying minutes: see notes to *Rule* 526.

In County Court cases there is no appeal to the Supreme Court from an order dismissing a motion to vary the minutes of a judgment or order: *Taggart* v. *Bennett*, 6 O. L. R. 74; and see *James* v. *Jones*, *supra*, p. 1152.

Appointments to settle minutes or pass orders, how to be issued.

528. Notice of settling minutes of a judgment or order other than a simple judgment or order for recovery of a sum certain with or without costs or dismissing an action or motion shall be given unless dispensed with by the

officer by whom the judgment or order is to be settled, and the proposed minutes of the judgment or order shall be served or left in his office for inspection, and any party may take a copy thereof. C.R. 626, *amended*. Rules 529, 530.

Notice is usually given by an appointment to be obtained from the officer is to settle the minutes of the order, or judgment.

The officer may dispense with notice of settling, or passing, if he thinks fit; but, except where the order or judgment is simple, notice is usually required to be given; the minutes must be first prepared, and a copy may be either left with the officer, or served on the opposite party, the latter being the usual course: see *Rule* 527, and an appointment obtained from him: see *Rule* 526, note.

An appointment served one day for the next is sufficient: *Re Christmas*, 19 Beav. 519.

529. Where judgment may be signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced and ascertain that it is regular and sufficient. C.R. 631. Entry of judgment on affidavit, etc.

See Eng. (1883), R. 575.

530. Where a judgment or order is obtained upon a condition, and the condition is not complied with, the judgment or order shall be deemed to have been waived or abandoned as far as the same is beneficial to the person obtaining the same, and any person interested in the matter, on the breach or non-performance of the condition, may either take such proceedings as the judgment or order in such case may warrant, or such proceedings as might have been taken if the judgment or order had not been made. C.R. 638. Orders obtained on condition deemed to be abandoned so far as beneficial to party obtaining unless condition performed.

See Eng. (1883) R. 580.

Conditional Orders.—Under a former Rule, where a new trial was granted to a party on condition of payment of costs, or other condition, an application was prop[illegible]ade, on default in performance of the condition, for an order [illegible] the rights of the opposite party: see *Carroll* v. *Booth*, 11 C. L. [illegible]4. Under the present *Rule* no such order will be necessary.

Even before this *Rule*, where an order was made granting a new trial on payment into Court of $500 within a limited time, and in default dismissing the motion with costs, it was held that no further order was necessary: *Story* v. *McKay*, before Div'l Court, Chy. D., 6 Sept., 1888.

Where a plaintiff gave notice of trial for 2nd October, and on 23rd September the defendant obtained an order postponing the trial on payment of costs, it was held to be a conditional order, not staying plaintiff's proceedings, and one which the defendant was at liberty to abandon without paying any costs except those of the application:

Rule 531.

Allen v. *Mathers*, 9 P. R. 477; *Pugh* v. *Korn*, 5 M. & W. 164; *Brega* v. *Hodgson*, 4 P. R. 47; *Horton* v. *Westminster Commissioners*, 7 Ex. 911.

Where a plaintiff in an action of tort recovered a verdict, and on motion of the defendant a new trial was granted in June, 1889, and the plaintiff died in the Spring of 1890, it was held on an application in December, 1890, by the defendant, to issue the order, that the delay afforded no evidence of an intention to abandon it: *Kelly* v. *Wade*, 14 P. R. 66.

Where a new trial is granted on payment of costs, it is the duty of the party obtaining the indulgence to get the costs taxed and paid, so as to enable the case to be tried at the next opportunity: *Johnson* v. *Sparrow*, 1 U. C. Q. B. 396; *Grantham* v. *Powell*, 1 P. R. 256; but see *Van Every* v. *Droke*, 3 P. R 84; *Stocey* v. *McIntyre*, 5 P. R. 205; *Pocaud* v. *McEwon*, 6 P. R. 20; *Lyman* v. *Snarr*, 3 P. R. 86; but where the solicitor of the party to pay the costs promptly applied to the solicitor of the opposite party begging to know what the costs were that he might pay them, of which communication no notice was taken, a rule subsequently obtained *ex parte* discharging the rule for a new trial, and the judgment entered thereon, were set aside without costs: *Doe* d. *Arnold* v. *Auldjo*, 6 U. C. Q. B. 21. A party to receive costs cannot insist on their being taxed: *Stock* v. *Shewan*, 18 C. P. 185. Where the costs were tendered, but refused because there was not sufficient time to give proper notice of trial for the next Assizes, which, however, the defendant offered to waive, it was held that the plaintiff was not entitled to have the rule for a new trial rescinded: *Rabidon* v. *Harkin*, 2 P. R. 129; and see *Thompson* v. *Sewell*, 4 O. S. 16. The costs must be paid before notice of trial can properly be given: *Stock* v. *Shewon*, 18 C. P. 185.

Where an order for a new trial is not taken out, the original judgment stands, and proceedings to enforce it, before the order for the new trial has been issued, will not be stayed: *Kelly* v. *Wade*, 14 P. R. 13; and see S. C. *Ib.* 66.

Where an order is made on a condition which the party in whose favour it is made elects not to comply with, there is no jurisdiction to compel compliance of the opposite party: *Talbot* v. *Blindell*, 1908. 2 K. B. 114; 98 L. T. 859.

Signing of judgments.

531.—(1) Every judgment shall be signed by the officer in whose office the action was commenced, and if the action was commenced in Toronto the judgment shall be signed by the Judgment Clerk of the Central Office.

Signing of Court orders.

(2) Every order pronounced by the Court shall be settled and signed by the Registrar or officer attending the Court at which the same is pronounced, but the Judge pronouncing such order may himself sign the same.

Signing of Chamber orders, Judge.

(3) Orders made by a Judge of the High Court in Chambers in Toronto shall be settled and signed by the Clerk in Chambers (or in his absence by the Assistant Clerk), but the Judge pronouncing such order may himself sign the same.

(4) Orders made by an officer sitting in Chambers shall be signed by him. C.R. 628 and 634. Rule 532. Judicial officer.

(5) Orders made by a Judge of the Appellate Division shall be settled and signed by the Registrar of that Division or by the Judge. *New.* Appellate Division.

This *Rule* does not very clearly distinguish between the signing of a judgment for the purpose of authenticating it for entry, and the entry of the judgment which is also understood to be "the signing of the judgment."

According to the settled practice of the Court after a judgment or order has been settled by the proper officer, he adds his signature thereto, but this is not the "signing" referred to in clause (1), that is merely the "signing" referred to in clause (2), because the officer who settles the judgment is very often not the officer who enters it. Having the signature of the officer who has settled the judgment, unless he is also the officer to enter it, the judgment must be taken to the entry office, which in Toronto is termed "the Judgment Office," and it is there entered and marked as "signed" as of the day it is delivered for entry though it may not be actually entered in the entry book on that day. This latter "signing" by the officer entering the judgment is that which is referred to in clause (1).

With regard to orders made in Court, or in Chambers, they are signed by the officer as mentioned in clauses (2-5), and no other signing is necessary; but they have to be entered, and the date of entry, etc., is made thereon by the entry clerk: *Rules* 515-517.

The signing of orders in accordance with the requirements of the *Rules* is sometimes most important, and especially where the liberty of the subject is concerned; thus, where the former Rule required all orders to be signed by the Clerk, the signature of a Judge alone to an order for arrest was held insufficient, and the order was held to be a nullity: *St. Croix* v. *McLachlin*, 13 P. R. 438.

An order of a Local Judge sitting in Chambers must be signed by the Local Judge, not by the Local Registrar: see clause (4) and *Lovell* v. *Taylor*, 5 O. W. R. 525; but *semble*, when the Local Judge acts under *Rule* 219, the signature of the Local Registrar attending the Court would be sufficient.

532.—(1) In order to acknowledge satisfaction of a judgment, a satisfaction piece shall be signed by the party acknowledging the same or his personal representative, and his signature shall, unless the Court expressly dispenses therewith, be witnessed by some practising solicitor, expressly named by him, and attending at his request to inform him of the nature and effect of such satisfaction piece before the same is signed. Satisfaction of judgments, entry of.

(2) The solicitor shall declare himself in the attestation thereto to be the solicitor for the person so signing the same, and state that he is witness as such solicitor; Solicitor, how to attest.

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and in cases where the satisfaction piece is signed by the personal representative of a party deceased, his representative character shall be proved by the production of the probate of the will, or of the letters of administration, to the officer in custody of the judgment.

Where to be entered.

(3) The satisfaction piece shall be entered in the office in which the judgment is entered, and a note thereof shall be made in the margin of book where the judgment is entered. C.R. 643 and 644.

See Form No. 13.; H. & L. Forms, No. 939.

The plaintiff's signature may be dispensed with, and his solicitor in the cause may be authorized to acknowledge satisfaction, upon proof that the solicitor is authorized by the plaintiff to arrange the claim, and that the delay in obtaining the plaintiff's signature would be prejudicial: *Rudell* v. *Hurd*, 3 U. C. L. J. 14; *Pawson* v. *Wrightmon*, 2 U. C. L. J. 184; so also where the amount of the judgment is small and the plaintiff resides out of the jurisdiction: *Bank of Montreal* v. *Cronk*, 3 U. C. L. J. 32; or where the plaintiff resides abroad and has given his solicitor written authority to acknowledge satisfaction for him: *Dorling* v. *Wright*, 3 U. C. L. J. 50. When a satisfaction piece is executed before an attorney of another Province, a certificate of his due admission must be produced, and his signature duly verified: *Moss* v. *Dayly*, 3 U. C. L. J. 74; signature before a practising attorney of a foreign country is a sufficient compliance with this *Rule*: *Abernethy* v. *Beddome*, 6 P. R. 162.

An order to enter up satisfaction will not be granted where it is not clear that the judgment has been satisfied: *Levine* v. *Savage*, 3 U. C. L. J. 89.

After the judgment has been satisfied, the plaintiff's solicitor cannot be compelled by defendant to procure a satisfaction piece to be executed by his client; but the solicitor may be ordered to disclose his client's place of residence, so that the defendant may sue out a satisfaction piece for execution, and if the plaintiff refuses to sign it he may be ordered to do so: *Corr* v. *Coulter*, 2 P. R. 226.

Satisfaction by act of plaintiff.

Formerly the arrest of one of several defendants on a *ca. sa.* and his subsequent discharge with the consent of the plaintiff, operated as a satisfaction of the judgment, as to him, even though the plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired: *Hamilton* v. *Holcomb*, 7 U. C. L. J. 40; but it was held not to be a satisfaction as to other parties liable in priority to the party discharged: S. C., 11 C. P. 93; 12 C. P. 53; 2 E. & A. 230, and see now, *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 59. Where a vendor, after recovering judgment for his purchase money, subsequently cancels the contract of sale, that operates as a satisfaction of the judgment: *Cameron* v. *Brodbury*, 9 Gr. 67.

CHAPTER XIX.

ENFORCEMENT OF JUDGMENTS AND ORDERS.

Enforcing judgment for recovery of money.

533. A judgment for the recovery by or payment to any person of money may be enforced by the issue of a writ of execution against the goods and chattels, lands and tenements of the debtor, but if the amount due on the judgment is less than $40.00 no execution shall issue against lands and tenements. C.R. 837, *amended*.

The effect of this *Rule* is to preserve the right to issue any process of execution which might formerly be adopted to enforce payment of money under a judgment or decree: see *London & Canadian L. & A. Co. v. Merritt*, 32 C. P. 380.

The principal of these were:

1. Writs of *fieri facias*, and (in aid thereof) *venditioni exponas*, (as to which see *Rule* 539), and *distringas*.

2. Writs of sequestration: *Rules* 847-850.

Where necessary concurrent writs of execution to different counties may be issued: *Lee* v. *Dongor*, 1892, 1 Q. B. 237; 66 L. T. 548.

In aid of execution, proceedings might also be taken by way of,

(*a*) Attachment of debts and garnisbee process: *Rules* 590, *et seq.*

(*b*) Equitable execution: Jud. Act, s. 17, and see p. 80, *supra*.

The word "judgment" in this *Rule* includes "order: *Rule* 3 (*g*). Where execution is required to enforce an order, the original order, or an office copy thereof, should be produced to the officer required to issue the execution, unless he has access to the book in which it is entered: *People's B. & L. Assn. v. Stanley*, 4 O. L. R. 644; where costs are to be set off against costs payable under an order, the execution should be issued only for the balance after making the set off: *Ib.*

An order may also be enforced by action: *Seldon v. Wilde*, 1911, 1 K. B. 701; 104 L. T. 194; but it has been held that an action cannot be brought on a Division Court judgment: *Crowe v. Graham*, 22 O. L. R. 145 because the obligation thereby created is not absolute, but subject to the discretion vested in the Judge to defer payment in certain cases; and the fact that the Division Court is now a Court of Record makes no difference in that respect.

A judgment that a plaintiff "do recover" is not equivalent to a judgment that "the defendant do pay": see *Re Oddy, Major v. Harness*, 1906, 1 Ch. 93; 94 L. T. 146; see *Pritchard v. Pritchard*, *infra*, in note to *Rule* 534, and note to *Rule* 549.

Where in ignorance of the payment of a judgment debt a writ of execution was issued, and a man placed in possession by the Sheriff, the plaintiff and his solicitor are held liable to the defendant in tres-

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pass, though no malice was proved: *Clissold* v. *Cratchley*, 1910, 2 K. B. 244; 102 L. T. 520.

Effect of judgment for payment into Court.

534. Any judgment for the payment of money into Court may be enforced in the same way as a judgment for payment to any person, and the person having the carriage of the judgment shall be deemed to be a judgment creditor for the purpose of its enforcement. C.R. 838 and 839, *amended*.

See Eng. (1883) R. 582.

A judgment or order for payment into Court may be enforced by execution in the same way that any other judgment or order for payment of money may be enforced. If execution is issued it directs the Sheriff to pay the money levied thereunder into Court, except any costs which are payable to the litigant: see *Rule* 536.

In *Stanger Leathes* v. *Stanger Leathes*, W. N. 1882, 71, payment of money into Court was enforced by the appointment of a receiver of the dividends of moneys invested in Court, of rents of lands, and of shares in a mining company, in which the party ordered to pay had an interest: so also in *Coney* v. *Bennett*, 33 W. R. 700; 29 Ch. D. 993, where money was payable by a trustee into Court, he being out of the jurisdiction.

The Eng. (1883) R. 582, enables an order for payment into Court to be enforced by writ of attachment in certain cases: see *Hutchinson* v. *Hartmont*, W. N. 1877, 29; *Carter* v. *Roberts*, 1903, 2 Ch. 312; *Re Oddy, Major* v. *Harness*, *supra*, p. 1159; but that process cannot be employed here: see notes to *Rule* 545.

For payment into Court.

Where a solicitor is ordered to pay money into Court, which he has improperly obtained out of Court, but he fails to obey the order, the party having the carriage of the order is not obliged to enforce such an order by issuing a *fi. fa.* but may apply to commit the solicitor for contempt notwithstanding *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 13; *Pritchard* v. *Pritchard*, 18 Ont. 173, and see *Berry* v. *Donovan*, 21 Ont. App. 14; *Roberts* v. *Donovan*, 16 P. R. 456; *Swyny* v. *Harland*, 70 L. T. 227.

On execution by infant, person of unsound mind, or a class, money to be paid into Court.

535. A judgment for the recovery of money on behalf of an infant, lunatic, or person of unsound mind or on behalf of a class shall direct the money to be paid into Court, and no payment to the guardian, next friend, or committee of money of such infant or person of unsound mind, or person having the conduct of the proceedings on behalf of the class, shall be a valid discharge as against the infant or person of unsound mind, or the class. C.R. 840 (*part*).

As to the enforcement of such a judgment: see *Rules* 534, 536.

Execution for money to be paid into Court.

536. Every writ of execution for the levying of any money to be paid into Court shall be indorsed by the officer issuing the same with the following notice: "All

money made under this execution is to be paid into Court by the Sheriff." C.R. 840 (*part*). Rules 537, 538.

537. Where any party is by a judgment entitled to any relief subject to or upon the fulfilment of any condition or contingency, he may, upon the fulfilment of the condition or contingency, apply for leave to issue execution. C.R. 841. Judgment for conditional relief.

See Eng. (1883) R. 587.

In an action for specific performance of a contract for the purchase of leaseholds, judgment was obtained for the payment of purchase money on the delivery of deeds. The vendor tendered the deeds, but the purchaser refused to accept them or pay the money. On motion under this *Rule* the vendor was ordered to deposit the deeds in Court, and the purchaser was ordered to pay the money within four days: *Bell* v. *Denvir*, 34 W. R. 638; 54 L. T. 724. W. N. 1886, 113; see also *Morgan* v. *Brisco*, 31 Ch. D. 216; 32 Ch. D. 192.

538. Every judgment creditor shall be entitled immediately to issue one or more writ or writs of *fieri facias*; but if the judgment is for payment within a period therein mentioned, the writ shall not be issued until after the expiration of such period. C.R. 843, *amended*. Fi fa.

See Eng. (1883) R. 595.

As to the jurisdiction of a Judge at the trial to stay execution: see *Rule* 495; *semble*, it cannot be exercised by qualifying a judgment for recovery of money, so as to make it payable by instalments: *Brien* v. *Sullivan*, 14 L. R. Ir. 391. Staying execution.

Unless otherwise ordered, judgment may be entered as soon as it is given.

The word "immediately," in this *Rule*, means *instanter*, i.e. immediately on its being signed, without waiting till it is entered; *Rossiter* v. *Toronto Ry.*, 15 O. L. R. 297; *Clarke* v. *Creighton*, 14 P. R. 34, and its use probably sets at rest the question raised in *Cullen* v. *Cullen*, 2 Chy. Ch. 94, and *Coolidge* v. *Bank of Montreal*, 6 P. R. 73, as to whether the party to pay is entitled to any time to pay, before the issue of execution. See *People's B. & L. Assoc.* v. *Stanley*, 4 O. L. R. pp. 645-6.

Notwithstanding this *Rule*, a writ of execution against a mutual or a cash mutual insurance company cannot, under *The Ontario Insurance Act* (R. S. O. c. 183), s. 153, issue until after the expiration of sixty days from the recovery of judgment: see *Lowson* v. *Canada Farmers' Ins. Co.*, 9 P. R. 185; *Lount* v. *Canada Farmers' Ins. Co.*, 8 P. R. 433. (That provision in R. S. O. 1877, c. 161, s. 61, did not apply to a judgment recovered on a policy issued on the cash premium principl *Lowson* v. *Canada Farmers' Mutual Ins. Co.*, 9 Ont. App. 613.) The above section 153 now applies to a mutual, or a cash mutual company, except where more than sixty per cent. of the premium, or premium note or undertaking, was paid in cash at the time of the insurance, or Execution against mutual insurance companies.

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the application therefor; and a Judge, or the Master in Chambers may, on application of the judgment creditor, inquire into the question, whether sixty per cent. was paid, and, if he certifies that more than 60 per cent. was so paid, execution may issue forthwith. s. 12 (2), *supra*, p. 1161.

Against municipal corporations

For the mode of enforcing execution against a municipal corporation, see *The Execution Act* (R. S. O. c. 80), s. 37.

Staying execution

The Appellate Division is the proper Court to which to apply to suspend any order which that Court has made; consequently the application should be made to it to stay proceedings under its own order pending an appeal from that order: *The Khedive*, 5 P. D. 1.

In *Murray* v. *Infield*, 1 Charl. (Ga.) (Court) 112, an action for libel a verdict was given for the plaintiff for £100. "Hiddleston, B., said that although he was now able to order immediate execution, he would adopt the old (English) practice, and give execution in fourteen days."

In *Taylor* v. *Sherley*, 1 Charl. (Ga.) (Court) 143. "Following the old practice," Pollock, B., gave execution in fourteen days. In Ontario the same result is sometimes attained by staying the entry of the judgment.

See *Hodges* v. *Finchman*, 1 Ch. D. 9.

Execution before taxation of costs

This *Rule* abrogates the old practice, under which if a judgment creditor issued execution before costs were taxed, he was held to have waived his right to costs: *Harris* v. *Jewell*, W. N. 1883, 216.

Where an application to stay execution has been refused by the Judge at the trial, special circumstances must be shown on a subsequent application to the Court, as to which: see *Monk* v. *Bairnan*, 1892, 1 Q. B. 346; *Booth* v. *Walkden Spinning Co.*, 1909, 2 K. B. 368.

The Master in Chambers, and other judicial officers, have no jurisdiction to stay execution: *Rule* 208 (16).

Property exigible under fi. fa.

What may be Seized under a fi. fa.—As to what may be taken under executions against goods and lands respectively: see *The Execution Act* (R. S. O. c. 80), ss. 9, 10-27, 31, 34-37.

The writ affects only the interest which may be in the judgment debtor at the time of its delivery to the Sheriff, or which the debtor may acquire while the writ is in the Sheriff's hands; see *Parke* v. *Riley*, 3 E. & A. 215; *Re Lewis & Thorne*, 14 Ont. 133; *Re Trusts Corporation & Bochmer*, 26 Ont. 191. *Davey* v. *Williamson*, 1898, 2 Q. B. 194.

A pawnbroker's interest in redeemable pledges may be taken in execution under a *fi. fa.* goods: *Re Rollinson*, 43 Ch. D. 495; and see *The Execution Act*, s. 19.

Formerly the writ against goods bound the debtor's equity of redemption in chattels only from seizure: *Allan* v. *Place*, 15 O. L. R. 476; but see now *The Execution Act*, s. 10 (1).

Growing crops.

As to the effect of an execution in the Sheriff's hands upon growing crops: see *Smith* v. *Union Bank*, 15 C. L. T. 15 (Man.).

Property out of the jurisdiction, if brought within the jurisdiction by means of a violation of the law of a foreign country, is not exigible, and will be ordered to be returned to the foreign country from whence

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it came: *Houghton* v. *May*, 22 O. L. R. 434; 23 O. L. R. 252; (a ship wrongfully cut loose from her moorings).

Timber license, mining claim.

The interest of a licensee under a timber license is exigible under a *fi. fa.* lands: *McPherson* v. *Temiskaming Lumber Co.*, 1912, A. C. 145; but see *Clarkson* v. *Wishart*, 1913, A. C. 828, where it seems to have been held that a mining claim is exigible under a *fi. fa.* goods.

Oil lease.

On the other hand the interest of a defendant in an "oil lease" under which he was entitled to prospect for oil during a term of 5 years, was held to be an interest in land, and not exigible under a *fi. fa.* goods: *Canadian Ry. Accident Co.* v. *Williams*, 21 O. L. R. 472.

Property not exigible.

A right of dower in an equity of redemption before assignment, is not exigible under a writ of *fi. fa.*, nor is the share of one of several tenants in common of an equity of redemption: *Canadian Bank of Commerce* v. *Rolston*, 4 O. L. R. 106; nor is the right of property in a registered specific trade-mark; such a right can be sold, if at all, only as appurtenant to the business in which the trade-mark has been used: *Clegg* v. *Bassett*, 3 O. L. R. 263.

Equity.

Where an equity of redemption has been sold, and only in part satisfied the judgment, and the purchaser sells his interest in the lands to the mortgagor, the lands again become liable to the execution: *Chittick* v. *Lowery*, 6 O. L. R. 547.

Trust estate.

The Sheriff may seize and sell under a *fi. fa.* lands, lands which are vested in any person in trust for the debtor: *The Executors Act*, s. 9; but *semble*, this can only be intended to apply to simple cases where the debtor has a right to call for a conveyance of the legal estate.

Free grant lands when not sold under execution.

Lands patented under *The Public Lands Act* (R. S. O. c. 28), s. 45 (2), are exempt from liability to execution against the grantee even after the 20 years mentioned in the Act, in respect of judgments either previously to the grant, or during such period of 20 years recovered against him: *Re Beatty & Finlayson*, 27 Ont. 642 and s. 45 of the Act.

Ven. ex.

539. When a Sheriff returns that he has "goods (or lands) on hand for want of buyers," a writ of *venditioni exponas* may be issued. The Sheriff may make this return by certificate and the original writ of execution shall remain in force for the residue. C.R. 845 and 884.

See Eng. (1883) R. 617, which embraces other writs, viz.: writs of "*distringas nuper vice comitem: fieri facias de bonis ecclesiasticis: sequestrari facias de bonis ecclesiasticis*; and all other writs in aid of a writ of *fieri facias*, or of *elegit*."

The sheriff should sell the goods or lands under a writ of *fi. fa.* without the issue of a *ven. ex.*, but where he has seized, but, for some reason, has not sold, goods, or lands, he may be required to make a return respecting the *fi. fa.*, and thereupon a writ of *ven. ex.* may issue on *praecipe*. After the delivery of this writ to the sheriff he is bound to sell the goods (or lands) and have the money in Court immediately after its execution: Chit. Arch., 13th ed., 584: *Keighley* v. *Birch*, 3 Camp. 521.

For form of writ of *ven. ex.*: see Forms Nos. 115, 116.

See *Rule* 558, for the particulars required in a return of "goods on hand," etc.

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Where a seizure has been made under a writ, the judgment creditor cannot have another *fi. fa.* upon the judgment until a return has been made to the first, even though he has abandoned the seizure, but this does not apply where the sheriff has seized only goods not belonging to the debtor: *Ex p. Smith*, 1902, 2 K. B. 260.

Execution for recovery of land.

540. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession. C.R. 846.

See Eng. (1883) R. 583.

Under a writ of possession, issued on a judgment for possession, in an action by a landlord against his tenant, sub-tenants, not parties to the action, may be put out of possession: *Synod of Toronto* v. *Fisken*, 29 Ont. 738.

A writ of possession was ordered to issue in an action by a landlord against a tenant, notwithstanding that the landlord's reversion terminated before the trial, the defendant not showing affirmatively that it would be unjust and futile to issue the writ: *Knight* v. *Clarke*, 15 Q. B. D. 294.

A final order of foreclosure is not a judgment for the recovery or delivery of possession of land within this *Rule*: see *Wood* v. *Wheate*, 22 Ch. D. 281, although the bringing of an action for foreclosure stops the running of the Statute of Limitations: *Heath* v. *Pugh*, 6 C. P. D. 345. Under the practice in Ontario, an order for the delivery of possession forthwith may be contained in the judgment in a foreclosure action, where it is claimed by the indorsement on the writ of summons: see *Rule* 460, and Forms Nos. 101, 102; H. & L. Forms, Nos. 904 and 905.

See *Rudd* v. *Frank*, 17 Ont. at p. 764.

For the purpose of recovering possession of land, the writ of possession supersedes the old writ of assistance: *Wyman* v. *Knight*, 39 Ch. D. 165.

The officer to whom a judgment or order is delivered for entry may properly issue execution thereon *instanter* without waiting until it is actually entered in his books: *Rossiter* v. *Toronto Ry.*, 15 O. L. R. 295.

Writ of possession.

541. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person on or at any specified time after being served with the judgment, the person prosecuting the same shall, without any further order for that purpose, be entitled to issue a writ of possession, on filing an affidavit showing due service of the judgment and that the same has not been obeyed. C.R. 847.

See Eng. (1883) R. 645.

In Chitty's Forms (12th ed.), p. 596, note, it is said that the affidavit is only necessary in cases within the words of the *Rule*, viz., where the judgment directs the defendant "to deliver up possession."

The judgment on an award is in this form, and judgments in mortgage actions ars so drawn: eee Forms Nos. 101, 102; H. & L. Forms, Nos. 104 and 905. In other cases the form is usually "that the plaintiff do recover," etc.: see Form No. 93; H. & L. Forms, Nos. 843, 844. Rule 542.

Wbere plaintiff's title has expired *pendente lite*: see *Rule* 262 and note.

C. R. 848 provided that "A writ of possession shall have the effect of a writ of assistance ns well as of a writ of *habere facias possessionem*," hut this provision has not heen continued. Effect of writ.

Tbis writ of possession supersedes the oid Cbancery writ of assistsnce so far as the recovery of land is concerned: *Hall* v. *Hall*, 47 L. J. Chy. 680; *Wymon* v. *Knight*, 39 Ch. D. 165; hut in England it seems that, in case of necessity, the writ of assistance may stiii he used, *e.g.*, to recover possession of personai property which is in danger of being removed beyond the jurisdiction of the Court: *Wyman* v. *Knight*, *supra*. It may be douhted whether this is so in Ontario, in view of *Rule* 2. A speciai form of writ of delivery might probahiy in such case be framed from Form No. 118; H. & L. Forms, Nos. 1126, 1127.

For the form of writ of possession: see Form No. 117; H. & L. Forms, No. 1126.

The chief difference between a writ of assistance and the former writ of *habere facias possessionem* was, that the iatter used merely to order the Sheriff to put the plaintiff in possession, whereas ths formsr inetructed the Sheriff to "defend and keep" the plaintiff "and his assigns in peaceabie and quiet possession when and as often as any interruption may or shaii be given or offered to them or sny of them": see Danieli's Forms 982; thus it is presumed, rendsring unnecessary applications for a new writ where a defendant wrongfuiiy reaumed possession after heing ejected by the Sheriff: see *Doe d. Peck* v. *Roe*, 2 U. C. Q. B. 27; *Edwards* v. *Bennett*, 6 P. R. 161; *McDermott* v. *McDermott*, 4 P. R. 252. This is now ths ianguage of Form No. 117, and a defendant who retakes possession wrongfuiiy, after heing ejected, is iiable to be committed for contempt: see *Re Higgs, Goddard* v. *Higgs*, 97 L. T. Jour. 11. Difference between writ of assistance and hab. fac. poss.

Where a piaintiff has been put in possession under a writ of possession, and a defendant soon after regaine possession after the return of the writ executed, the piaintiff, on motion, is entitled to an order for a new writ of possession: *Proctor* v. *Weller*, 3 C. L. T. 551; see *Stacpoole* v. *Wolsh*, 6 L. R. Ir. 444. Defendant regaining possession.

If, in executing the writ, a person is found in possession not claiming under the defendant, and is dispossessed hy the Sheriff, such person may appiy for ieave to defend the action under *Rule* 53; *Minet* v. *Johnson*, 63 L. T. 607.

542. When a judgment directs recovery of any land and money, one writ or separate writs of execution for the recovery of possession and for the moncy may be issued at the election of the party entitled to recover. C.R. 849. Execution for lands and costs.

It is held in Ireland, under sec. 209 of the C. L. P. Act (16 & 17 V. c. 113), repeated in the Rules under the Ir. Jud. Act, that where a piaintiff has ohtained a verdict for possession, mesne profits and

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costs, execution for possession cannot issue till the costs are taxed, unless he has waived them: *Beasley* v. *Chapman*, 6 L. R. Ir. 393.

That section is as follows:

"209. Upon any judgment in ejectment there may be either one or several writs of execution for the recovery of possession and for the damages, the rents ascertained to be due and costs, at the election of the plaintiff."

Writ of assignment of dower.

543. A judgment for the recovery of dower may be enforced by a writ of assignment of dower, directed to the Sheriff of the County in which the lands lie; and the writ shall set forth the lands out of which the plaintiff is to recover dower. C.R. 859.

This *Rule* is based on C. R. 850, not 859.

See Forms Nos. 122, 123; H. & L. Forms, Nos. 1128, 1129.

A judgment in an action to establish a will, declaring plaintiff entitled to land in question in fee simple subject to the dower of the testator's widow (a defendant) is not a judgment for the recovery of dower within the meaning of this *Rule*: *Cope* v. *Cope*, 26 Ont. 441.

Execution for specific delivery of goods.

544. Where a judgment directs the recovery of specific goods, chattels, deeds, securities, documents or any property other than land or money, a writ of delivery may be issued commanding the judgment debtor specifically to deliver up forthwith the property demanded, and directing that in case of refusal the judgment debtor be arrested and detained in prison until he complies with the terms of the writ, and also that the goods and chattels of the judgment debtor to double the value of the property in question be taken and kept until the further order of the Court to enforce obedience to the writ. C.R. 852.

See Eng. (1883) R. 647.

The judgment for delivery of the property, or payment of its value, does not divest the plaintiff of the property in the chattel until the satisfaction of the value found by the judgment, even though satisfaction is prevented by the bankruptcy of defendant: *Ex p. Drake*, 5 Ch. D. 866.

It is doubtful under the English Rules, whether an order for the writ is necessary: *Ivory* v. *Cruickshank*, W. N. 1875, 249. In Ont. it is probable that the writ may issue in like manner as any other writ of execution.

In *Ivory* v. *Cruickshank*, W. N. 1875, 249; 1 Chsrl. Ch. Ca. 128, an action for rent and for the return of specific goods, judgment having been signed for the amount of rent in default of appearance, the plaintiff was allowed to sign judgment also for the return of the specific goods, and then to proceed under Eng. R. 584 as he might

be advised hy writ of delivery, attachment or sequeetration. In *Battley* v. *Scars* (Timee, 7th March, 1876, cited Charley's Jud. Act, 3rd ed., p. 669), it is etated that a rule *nisi* for an attachment was granted against a defendant for refusing to give up a diamond ring or pay for it, execution having proved futile, as the defendant was a married woman. Rule 545.

Under this *Rule* a writ may be iseued for delivery of a chattel, and authorizing the Sheriff in default to arrest the defaulting party, and detain him until he compliee with the terme of the writ, and also to seize goods and chattele of douhle the vaine of the property in queetion until the further order of the Court. So that the writ combines (a) a writ for delivery; (h) and in case of default an attachment, and (c) a sequeetration of goode to the extent of douhle the value of the property in question.

545. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by attachment, or by committal. C.R. 853. Judgment requiring person to do or leave undone.

See Eng. (1883) R. 585.

A technical difference exiete according to the English practice between attachment and committal; an attachment heing held to he the proper remedy for punishing the refusal to do any act ordered to be done, and committal the proper remedy for punishing the doing of any act which hy any order is prohihited. In England, while an attachment is directed to the Sheriff, committal is executed hy an officer (Sergeant at Arme) of the Court. This distinction is etill ohserved in England: *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271; *Mander* v. *Falcke*, 1891, 3 Ch. 488; 64 L. T. 791; *Callow* v. *Young*, 56 L. T. 147; and see *Harvey* v. *Harvey*, 26 Ch. D. 654; 51 L. T. at p. 512, and *D.* v. *A. & Co.*, 1900, 1 Ch. 484. Formerly an attachment issued at the inetance of the party aggrieved, and at his own risk, and without motion; whereas a committal could only he ohtained on motion: *Ib.*; under theee *Rules*, however, a notice of motion ie neceseary now in the case of attachment: eee *Rule* 546. Difference between attachment and committal.

On a notice of motion to commit the defendant, Malins, V.-C., ordered a writ of attachment to issue against him: *Piper* v. *Piper*, W. N. 1876, 202; hut after ohtaining an order for an attachment, a party cannot move *ex parte* for an order for committal inetead: *Buist* v. *Bridge*, 43 L. T. 432; 29 W. R. 117; and on a motion for an attachment, where the proper remedy was committal, Chitty, J., required the notice of motion to he amended, and re-eerved.

In Ontario hoth an attachment, and an order for committal, are directed to the Sheriff, and how far the technical difference between the two remedies which prevaile in England has any application here does not appear to have heen conaidered. The only apparent difference in the procedure in Ontario hetween an attachment and committal is, that in the former case a writ of attachment issues, and in the caee of a committal no writ iesuee and the Sheriff acte under the order.

An attachment, or committal, for contempt, ie a punitive process, and not a mere civil proceeding, though iesued to enforce private

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rights, and the Sheriff is bound to break open the outer door if necessary in order to execute it: see *Harvey* v. *Harvey*, 26 Ch. D. 654.

But it is not a criminal proceeding where issued in a civil action so far as an appeal from the order is concerned: see *Scott* v. *Scott*, 1913, A. C. 417; 109 L. T. 1.

As to mode of obtaining a writ of attachment: see notes to *Rule* 546.

An order for committal may be obtained not only for enforcing a judgment, but also to punish persons guilty of acts calculated to interfere with the cause of justice.

The Court will not encourage motions where the object is not really to commit, but only to obtain an apology and costs, and therefore in *Plating Co.* v. *Farquharson*, 17 Ch. D. 50, no costs were given; and see *Regina* v. *Poyne*, 1896, 1 Q. B. 577.

Non-payment of money, when punishable by attachment.

Under *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 12, process of contempt for non-payment of money or costs is abolished; but where, for the purpose of giving a party the equitable relief to which he is entitled, a defendant is ordered to do an act, *e.g.*, procure a mortgage to be discharged which he has wrongfully caused to be put upon the registry, the performance of such act may be enforced by attachment, notwithstanding that, in order to perform the act, it may be necessary for the defendant to pay money to some other person: *Berry* v. *Donovan*, 21 Ont. App. 14; and see *Roberts* v. *Donovan*, 16 P. R. 456; *Pritchard* v. *Pritchard*, 18 Ont. 173; *Swyny* v. *Harland*, 70 L. T. 227.

Married woman.

Where a married woman living with her husband was in contempt for disobeying an order of the Court it was formerly considered that her husband was answerable, unless he could satisfy the Court that he had used his best endeavours to get his wife to comply with the order: see *Maughan* v. *Wilkes*, 2 Chy. Ch. 91; *Murcheson* v. *Donohoe*, 6 P. R. 138; but it would seem that a married woman is now personally liable for her default: see *Re Turnbull*, 1900, 1 Ch. 180; 81 L. T. 439; *Evans* v. *Jenkins*, 115 L. T. Jour. 457.

Order should limit time.

An order or judgment sought to be enforced by attachment should limit the time for the performance of the act therein required to be done, and it should be served on the party required to obey it a reasonable time before the time thereby limited has expired: *Berry* v. *Donovan*, 21 Ont. App. 14; *Re Seol*, 1903, 1 Ch. 87; except in the case of an injunction order of which the party or his solicitor or counsel has notice; but where the judgment or order directs two persons to perform an act, one may be proceeded against for disobedience before the other has been served: *Re Ellis*, *Hardcastle* v. *Ellis*, 93 L. T. 80.

Where after a writ of possession has been executed, the defendant wrongfully retakes possession, he is liable to attachment: see *Re Higgs*, *Goddard* v. *Higgs*, 97 L. T. Jour. 11.

An attachment will only be granted for disobedience of an order, or judgment, where the disobedience has been wilful: see *Fairclough* v. *Manchester Ship Canal*, 102 L. T. Jour. 292.

As to obtaining a writ of sequestration, where an attachment is ineffectual: see notes to *Rule* 547. Also in the case of a corporation: *Cook* v. *Credit Valley Ry. Co.*, 8 P. R. 167; *Demorest* v. *Midland*, 10

P. R. 82; *McKeown* v. *Joint Stock Institute*, 1899, 1 Ch. 671; *Re Bolton* & *Wentworth*, 23 O. L. R. 390. Rule 545.

As to enforcing injunctions, and punishing a breach thereof: see the Jud. Act, s. 17, and notes, *supra*, p. 72.

If the Court had no jurisdiction to make the order sought to be enforced, that is a good answer to a motion to commit for disobedience of it: *McLeod* v. *Noble*, 28 Ont. 528.

Where there is a remedy by action, and also by attachment, in respect of the same matter, the plaintiff is not precluded from exercising the one remedy by having made an unsuccessful attempt to enforce the other: *Godfrey* v. *George*, 1896, 1 Q. B. 48; 73 L. T. 599; 44 W. R. 246; but *semble*, if a writ of attachment is obtained and defendant is taken under it, the remedy by action is gone: *Ib.*

An action cannot be brought in a Division Court to enforce a judgment of the Supreme Court, or County Court, where execution can be issued upon it: see *The Division Court Act* (R. S. O. c. 63), s. 61 (*e*).

Contempt of Court.

The publication in a newspaper of scurrilous abuse of a Judge with reference to his conduct as a Judge in a judicial proceeding which has terminated, is a contempt of Court, punishable on summary process: *Reg.* v. *Gray*, 1900, 2 Q. B. 36.

It was laid down by the Judicial Committee of the Privy Council that committal for contempt of Court is to be used only with reference to the administration of justice, and not for the vindication of a Judge as a person; thus a person innocently and without knowledge of its contents lending a newspaper to another containing scandalous matter reflecting on a Court of justice, was held not to be thereby guilty of contempt of such Court, and his committal was set aside: *McLeod* v. *St. Aubyn*, 1899, A. C. 549; 81 L. T. 158. In that case Lord Morris said "committals for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

Interfering with course of justice.

A proprietor of a newspaper publishing comments on matters in litigation, calculated to interfere with the fair trial of the action by exciting prejudice against one of the parties, is liable to committal and also to be fined for contempt of Court: *Re Crown Bank*, 44 Ch. D. 649; 63 L. T. 304; *Re Labouchere, Kensit* v. *Eng. News*, 18 T. L. R. 208; *Phillips* v. *Has*, *Ib.*, 400; *Rex* v. *Hammond*, 111 L. T. 206; even where the case is pending before an inferior tribunal: *Rex* v. *Parke*, 1903, 2 K. B. 432; 89 L. T. 439; *Rex* v. *Russell*, 119 L. T. Jour. 398; *Rex* v. *Bacchouse*, *Ib.*, 399; *Rex* v. *Davies*, 1906, 1 K. B. 32; 93 L. T. 773; *Rex* v. *Clarke*, 103 L. T. 636. As to the extent to which newspaper comments on cases in litigation are allowable: see *Re O'Brien*, 16 S. C. R. 197. On the same principle any person knowing of an injunction, and wilfully assisting, or participating in, a breach of it, is liable to be committed for contempt of Court, for interfering with the course of justice: *Seaward* v. *Paterson*, 1897, 1 Ch. 545; 76 L. T. 215; and see *Favard* v. *Favard*, 75 L. T. 664. The fact that the order has not been served on the party sought to be punished is no answer: *Ib.* Issuing fraudulent circulars to influence the course of pending litigation was held to be a contempt: *In re Parsonage & Co.*, 1901, 2 Ch. 424. A motion to com-

Rule 545.

mit for contempt in publishing comments must be made in Court, and not in Chambers: *Southwick* v. *Hare*, 15 P. R. 239.

An order to discharge a mortgage improperly put upon the registry, may be enforced by attachment, notwithstanding that the person required to obey the order may have to pay money in order to comply with it: see *Berry* v. *Donovan*, 21 Ont. App. 14; *Roberts* v. *Donovan*, 16 P. R. 456; so also, an order requiring a solicitor to refund money he has obtained from the Court under circumstances which make him liable to refund it: *Pritchard* v. *Pritchard*, 18 Oct. 173; or which has been paid to him under an undertaking to refund it, if required: *Swyny* v. *Horlond*, 70 L. T. 227.

Effect of attachment.

By C. R. 854, it was provided that a writ of attachment against the person should be issued under the same circumstances, and should have the same effect, as under the practice of the Court of Chancery, prior to *The Ontario Judicature Act*, 1881; and see Eng. (1883) R. 620; but this provision is not continued in the present *Rules*.

Chancery Order 288 provided as follows:

Chy. O. 288.

"288. If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing with the Registrar an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon *præcipe*, to a writ or writs or attachment against the disobedient party."

But *Rule* 546 requires a notice to be served, and leave to be obtained, before an attachment is issued. To this extent the former practice preserved by C. R. 854 was varied.

Chy. O. 293.

Chy. Order 293, provided that every order requiring a party to do an act, other than the payment of money, should have indorsed upon the copy of the order served, a memorandum to the effect set forth in Schedule N to the Chy. Orders notifying the party as follows:

Schedule N.

"If you, the within named (*here insert the name of the party*), neglect to obey this order by the time therein limited, you will be liable to be arrested by the Sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey this order without further notice. If you wish to apply to the Court to add to, vary or set aside the said order, or to suspend the operation thereof, you must do so before the expiration of the time within limited."

Whether notice should be indorsed on order or judgment.

This Chy. O. 293, is not consolidated in the Ont. *Rules*, but the corresponding Eng. O. is continued in the Eng. (1883) R. 573. Under the new practice it was held in England under the Rules of 1875 (but of course not under the Rules of 1883, R. 573: see *Hampden* v. *Wallis*, 26 Ch. D. 746, and *Treherne* v. *Dale*, 27 Ch. D. 66; 54 L. J. Chy. 83), that this indorsement was not necessary, as an attachment under the new procedure could not be obtained except upon notice: see *Rule* 546, but the rule might be different in the case of a sequestration: *Thomas* v. Colin, 21 Ch. D. 360; and see *Wallace* v. *Graham*, 11 L. R. Ir. 369. In Ontario a sequestration does not issue on *præcipe* except where a party is already in custody under an attachment: see *Rule* 547; and in other cases, is not, under *Rule* 548,

obtained without notice; so that the indorsement would seem to be not necessary in cases either of attachment or sequestration: see *Rule* 2; *sed vide per* Maclennan, J.A., *Berry* v. *Donovan*, 21 Ont. App. at pp. 29, 31. Rule 546.

If the notice referred to above is indorsed, the words "without further notice," at all events, should be now omitted: see *Rule* 546.

Eng. (1883) R. 573 has no application to a prohibitive order: *Selous* v. *Croydon*, 53 L. T. 210; 29 Sol. Jour. 485; such an order is enforced by committal: see *supra*, p. 1167.

Where default in complying with an order was not clearly enough shown to justify an order for attachment, if the opposite party had not appeared, the defect was held to be cured by his appearing and resisting the motion on other grounds: *Treherne* v. *Dale*, 27 Ch. D. 66.

546. A writ of attachment shall not be issued without the leave of the Court or a Judge, on notice to the person against whom the attachment is to be issued. C.R. 855. Leave to issue.

See Eng. (1883) R. 621.

As to the difference between attachment and committal: see *supra*, *Rule* 545 and notes.

This *Rule* introduced an important change in the Chancery Practice: see *Rule* 545 and notes. A writ of attachment can now never issue as of right without an order, granted after notice to the party: *Baigent* v. *Baigent*, 1 P. D. 421; W. N. 1875, 218; *Abud* v. *Riches*, 2 Ch. D. 528; *Dollas* v. *Glyn*, 3 Ch. D. 190; see *Re Heiron's Estate*, *Hall* v. *Ley*, 12 Ch. D. 795; *Re Knight*, *Knight* v. *Gardiner*, 25 Ch. D. 297; *Re Chatham Horvester Co.* v. *Compbell*, 12 P. R. 666. This was the rule in the Common Law Courts, except in the case of an attachment against a Sheriff for disobeying an order to return a writ; in which case the rule was made absolute *ex parte*: Reg. Gen. T. T. 1856, R. 140; see *Jupp* v. *Cooper*, 5 C. P. D. 26. In *Jupp* v. *Cooper*, all that the attention of the Court was called to was whether the order should be absolute in the first instance, or only an order *nisi*, and the latter was granted, as also was done in *Fowler* v. *Ashford*, 45 L. T. 46. An attachment against the Sheriff, like any other attachment, is now governed by the new *Rule*; *Eynde* v. *Gould*, 9 Q. B. D. 335; see also *Dallas* v. *Glyn*, *supra*; *Re Heirons's Estate*, *supra*. Motion for order.

The provisions of Jud. Act, s. 74, *supra*, apply to an application for an attachment. The costs are therefore in the discretion of the Court: *Abud* v. *Riches*, *supra*, and should be asked for and disposed of on the application for the attachment: *Ib.* Costs of motion.

An interlocutory order, under *Rule* 369 *et seq.*, may be enforced by attachment: *Hutchinson* v. *Hartmount* W. N. 1877, 29; and an order directing a solicitor to repay into Court moneys which had been paid out to him has been so enforced: *Pritchard* v. *Pritchard*, 18 Ont. 173; *sed vide*, *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 13. Enforcing interlocutory orders.

An order should be drawn up and entered before being enforced by process: *Ballard* v. *Tomlinson*, 48 L. T. 515. Order to be issued and served before motion.

Rule 546.

A motion for attachment when made for non-compliance with orders of course, or orders in Chambers, may be made to a Judge in Chambers: see *Salm Kryburg* v. *Posnanski*, 13 Q. B. D. 218; *Amstell* v. *Lessor*, 53 L. T. 759; 34 W. R. 230, but when made for non-compliance with an order, or judgment of the Court, it should be made in Court: *Klein* v. *Union Fire Ins. Co.*, 3 C. L. T. 602. The practice in England is not similar to that in Ontario: see *Davis* v. *Galmoye*, 39 Ch. D. 322; 40 Ch. D. 355.

Neither the Master in Chambers, nor a Local Judge, or Master (acting under *Rules* 208, 209), has jurisdiction to entertain a motion to attach or commit, as such matters are excepted from the powers conferred upon them: see *Rule* 208 (1), (4), and *Keefe* v. *Ward*, 9 P. R. 220, but as to Local Judges: see *Rule* 210.

Service of the order to be obeyed.

In *Re Steele*, 23 Sol. Jour. 906, the question was raised whether the order to be obeyed need be personally served since an attachment can now only be had upon notice. It is submitted, however, that there is nothing to alter the former practice which required personal service of the order to be obeyed (except in cases under *Rule* 353, and except where it is shown that the order has come to the knowledge of the person sought to be attached, and that he is evading service of it: *Kistler* v. *Tettmor*, 1905, 1 K. B. 39; 92 L. T. 36), more especially if the notice of motion to attach is not personally served. Where the director of a company was sought to be attached for disobedience of an order against the company, it was held that he must be personally served with the order: *McKeown* v. *Joint Stock Institute*, 1899, 1 Ch. 671; 80 L. T. 641. The order, or judgment, must be served a reasonable time before the time limited thereby for the performance of the act ordered to be done, has expired: *Berry* v. *Donovan*, 21 Ont. App. 14; and though the party required by an order to do some act was in Court when the order was pronounced, that does not dispense with service of the order on him: *Re Tuck, Murch* v. *Loosemore*, 1906, 1 Ch. 692; 94 L. T. 597; but where the order restrains a party from doing an act, he may be attached for disobedience of the order before service of it if he had actual notice of it; S. C.: see *per* Cozens-Hardy, M.R. Where the order limits a time for doing an act the order should be served a reasonable time before the limited time has expired, or it may become necessary to apply to the Court to appoint a new day.

Enforcing undertaking.

An undertaking given by a suitor may be enforced by process of contempt, though the order embodying the undertaking may not have been served: *Re Launder, Lounder* v. *Richards*, 1908, W. N. 49; 124 L. T. Jour. 381.

Corporations in contempt.

A judgment or order against a corporation may be enforced by sequestration against the corporation, or by attachment against the directors: *Rule* 553.

Where a corporation is, by judgment, or order, required to do any act, it is sufficient if the corporation has been served therewith, it is not necessary also to serve all the officers thereof, in order to found proceedings for contempt against them in case of default; although it may be an answer to such proceedings if they show affirmatively that they have had no notice of the judgment, or order. Where a corporation is in default its officers who are aiding or abetting, or permitting, such default, are liable to be proceeded against individually.

and they may be punished either by fine or imprisonment in the discretion of the Court: see *Re Bolton & Wentworth*, 23 O. L. R. 390. Rule 546.

The copy of order served must be an exact copy: *Re Holt*, 11 Ch. D. 163; see also *Ex p. Smith*, 28 W. R. 174.

An order to deliver a bill of costs served on a solicitor's clerk at his office was disobeyed. On motion for attachment the solicitor swore that he had not been personally served. A letter from him giving reason for delay, and promising to deliver bills was produced, but it was held that the necessity for personal service was not waived by the letter: *Re Cunninghom*, 55 L. T. 766.

The application for an order for an attachment must be on notice: *Thomas* v. *Polin*, 21 Ch. D. 360; 57 L. T. 207.

Two clear days' notice of motion is sufficient. The practice laid down in *Abell* v. *Hills*, 6 P. R. 122, and *Bryce* v. *McIntyre*, 7 P. R. 134, is not now in force: *Monoghan* v. *Dobbin*, 2 C. L. T. 215; see also *Cook* v. *Credit Valley Ry. Co.*, 8 P. R. 167. The notice of motion should specify the breach or default complained of: *Hipkiss* v. *Fellows*, 101 L. T. 701. Notice of motion.

It is not necessary to serve with the notice of motion copies of the affidavits filed in support of it: *Hannum* v. *McRae*, 18 P. R. 185.

In *Mann* v. *Perry*, W. N. 1881, 4; 44 L. T. 248; 50 L. J. Cby. 251, it was held that notice of motion to commit must be served personally, unless some reason is shown for dispensing with personal service. On a motion for an attachment, however, it had previously been held that service of notice of motion upon the solicitors on the record of the party to be attached was sufficient, though personal service was not shown to be impracticable: *Browning* v. *Sohn*, 5 Ch. D. 511; *Richards* v. *Kitchen*, 25 W. R. 602; or by leaving the notice at the residence of the party affected thereby: *Re a Solicitor*, 14 Ch. D. 152 See also *Tilney* v. *Stansfield*, W. N. 1880, 77; *Trout* v. *Loney*, 13 C. L. T. 64; and it has since been held that in the case of a defendant who has not entered an appearance service of notice of motion may be made by leaving it in the office (see *Rule* 200): *Re Evans*, *infra*. Service of.

In Ontario it has been held that *Mann* v. *Perry*, is to be followed: *Smith* v. *Marrin*, 4 C. L. T. 493; except where *Rule* 353 applies: *Re Harnden*, 11 P. R. 35.

Where the order to be obeyed has been personally served, it is nevertheless necessary, in case of disobedience, to serve personally any notice of motion for attachment, or committal: *Rule* 546, see also *Ellerton* v. *Thirsk*, 1 J. & W. 376; *Angerstein* v. *Hunt*, 6 Ves. 488; *Hope* v. *Carnegie*, L. R. 7 Eq. 254; *Nelson* v. *Worssam*, W. N. 1890, 216; except in the case provided for by *Rule* 353 of disobedience of an order to bring accounts into the Master's office, or for production, or inspection of books and papers; in cases under *Rule* 353 it is not necessary to serve a notice of motion to attach personally upon the disobedient party, if he has a solicitor: see *Wilson* v. *Wilson*, 7 P. R. 57.

Where personal service of notice of motion to attach the defendant could not be effected, the order was made on affidavit of service of the notice on a solicitor who had appeared in the action for the defendant, although the solicitor had ceased to act for him: *Collow* v. *Young*, 55 L. T. 543; and see *Re Evans*, 1893, 1 Ch. 252; 68 L. T. 271; and

Rule 546.

where a father took his child, a ward of Court, out of the jurisdiction of the Court contrary to his undertaking given to the Court, an order for an attachment was made against him, and personal service of notice of the motion was dispensed with: *Rex* v. *Wigond*, 1913, 2 K. B. 419; 109 L. T. 111.

Where a motion is made to attach a defendant who has not appeared in the action: see notes to *Rule* 200.

Where a party has not been personally served, his appearance on the return of the motion to take the objection is not a waiver of it. *Mander* v. *Folcke*, 1891, 3 Ch. 488; *Taylor* v. *Roe*, 68 L. T. 213; but service of notice is waived by counsel appearing and consenting to an enlargement: *Ex p. Alcock*, 1 C. P. D. 68. But *semble*, an objection that personal service has not been effected, though given effect to, if taken on the return of the motion (see *Taylor* v. *Roe*, *supra*), will not of itself be a sufficient ground for setting aside the attachment, if granted, where the party did not appear on the return of the motion: *Petty* v. *Daniel*, 34 Ch. D. 172; 55 L. T. 745; and see *Re Evans*, *Evans* v. *Norton*, 1893, 1 Ch. 252; 68 L. T. 271.

Substituted service.

The provisions as to substituted service have been held not to apply to an application for an attachment, but only to service of writs of summons: *Anon.*, W. N. 1876, 105; but see cases *supra*, p. 335, and *Williams* v. *Johns*, 2 Dick. 477; 1 Mer. 303 (d); *Pulteney* v. *Shelton*, 5 Ves. 147; *DeManneville* v. *DeMonneville*, 12 Ves. 202; *Lechmere Charlton's Case*, 2 M. & C. 335; also *Hope* v. *Carnegie*, L. R. 7 Eq. 254; *Howarth* v. *Howorth*, 11 P. D. 95; *Tilney* v. *Stansfield*, W. N. 1880, 77; *Monder* v. *Folcke*, 1891, 3 Ch. 488; 65 L. T. 454; *Trout* v. *Loney*, 13 C. L. T. 64; *Re Bassett*, *Bossett* v. *Bassett*, 1894, 3 Ch. 179.

In England it is now held that there is jurisdiction to order substitutional service where every reasonable effort to effect personal service has been made: *Mander* v. *Folcke*, 1891, 3 Ch. 488; *Re Bassett*, 1894 3 Ch. 179.

Service of notice made on the clerk of a solicitor at his office, his residence not being known, was held to be good service, but, notwithstanding, the order was stayed for a week, and notice thereof directed to be served on the solicitor: *Tilney* v. *Stansfield*, *supra*.

Issue, and execution, of writ of attachment.

On a motion to commit for contempt, an attachment may issue: *Piper* v. *Piper*, W. N. 1876, 202; but on a motion for an attachment an order to commit cannot be obtained *ex parte*: *Buist* v. *Bridge*, 43 L. T. 432; 29 W. R. 117.

On a motion for attachment for contempt in committing a breach of undertaking contained in an order, a preliminary objection was raised that the proper remedy was committal. The objection was allowed, and the plaintiff given leave to amend his notice of motion and serve it again: *Callow* v. *Young*, 56 L. T. 147; 56 L. J. Chy. 690. The distinction between attachment and committal still exists in England: see note to *Rule* 545. See also *D.* v. *A. & Co.*, 1900, 1 Ch. 484.

Contemnor out of jurisdiction.

A writ of attachment may be issued against a party out of the jurisdiction, though it can only be enforced in the event of his coming within the jurisdiction: *Bloomfield* v. *Brooks*, 6 P. R. 264; *Trout* v. *Loney*, 13 C. L. T. 64; and see *Rex* v. *Wigond*, *supra*.

Return of writ.

No particular return day is inserted in the writ: see Form No. 120; H. & L. Forms, No. 1153; but after a reasonable interval a return may be required: *Owen* v. *Pritchard*, W. N. 1876, 147.

Rule 547. Execution of writ.

The officer charged with the execution of the writ may break open the outer door of the house in order to execute it: *Harvey v. Harvey*, 26 Ch. D. 844.

A further opportunity to comply with the order may be given, or the order may be stayed, pending an appeal, in the discretion of the Judge: *Mellor v. Thompson*, W. N. 1883, 128.

No detainer for costs.

A person attached for misconduct will not be detained for costs: *Jackson v. Mawby*, 1 Ch. D. 86; see also *Earl of Lewes v. Barnett*, 6 Ch. D. 252; and *Micklethwaite v. Fletcher*, 27 W. R. 793. But, in order to punish anyone who has been guilty of a contempt, he may be imprisoned for a stated period: see *Rule* 851; and allowed to be discharged if he pays the costs before the expiration of such period: *Harris v. Meyers*, 1 Chy. Ch. 229; see also *Morris v. Ingram*, 13 Ch. D. 338.

Corporation in contempt.

The president of a company cannot be attached for non-performance of an act which could only be performed by a majority of the board of directors: *Demorest v. Midland Ry. Co.*, 10 P. R. 82; but see *Rule* 554.

Member of Parliament.

As to attaching a Member of Parliament: see *Re Anglo-French Co-operative Soc.*, 14 Ch. D. 533.

Arrest after compliance with order.

Where an attachment issued against a defendant for not complying with an order for discovery, and compliance was then made, but the defendant was, nevertheless, thereafter arrested, it was held that the arrest was irregular and that it was the duty of the plaintiff's solicitor to have stayed the enforcement of the attachment: *Goy v. Hancock*, 48 L. T. 207.

Hab. corp.

A party committed for contempt of Court is not entitled to a *habeas corpus*: *Re Anderson v. Yonstone*, 16 P. R. 243; not even for the purpose of attending in person to move for his discharge: *Roberts v. Donovon*, *Ib.* 458.

But where a motion is made against a person, in close custody, it is in the discretion of the Court whether a *habeas corpus* be granted to enable him to attend in person to show cause: *Ib.*

Acceptance of part—no waiver.

Where an attachment had been properly issued against a solicitor, for non-payment of money, it was held that the subsequent acceptance of part, and giving time for payment of the balance, was no waiver of the right to enforce the attachment for non-payment of the balance as agreed: *Re Feredoy*, 1895, 2 Ch. 437; 73 L. T. 56.

Discharge of contemnor.

Provision is made by Jud. Act, s. 139, *supra*, for the discharge of a person, committed for certain contempts, who is entitled to his discharge but neglects to apply for it.

Upon attachment of contemnor, sequestration may issue on motion.

547. Where a person is taken or detained in custody under a writ of attachment, without obeying the judgment, then upon the sheriff's return that the person has been so taken or detained, the party prosecuting the judgment shall be entitled upon motion to a writ of sequestration against the estate and effects of the disobedient person. C.R. 857.

C. R. 857 provided that in the circumstances mentioned in this *Rule* the sequestration might issue on *præcipe*, but under the present

Rule 547. *Rule* it cannot now issue without a special order to be obtained on motion, and on notice: see *Rules* 313, 315.

Sequestration. **Sequestration.**—Originally the writ of sequestration was the last prerogative process, issued out of the Court of Chancery, for the purpose of enforcing obedience to its decrees. The right of the Court of Chancery to issue such writs was at first contested by the Common Law Courts, on the ground that the Court of Chancery could not enforce its decrees by process *in rem*, but only *in personam*. And it was even ruled at Law, that to kill a sequestrator in the execution of such process was no murder. But the authority of the Court to issue such writs was ultimately established, in spite of the "bloody and desperate resolutions" of the common lawyers: see Gilbert's Chy Pr., 77.

"A grand distress." A sequestration is in "the nature of a grand distress." It is a process of contempt *in rem*: *Totham* v. *Porker*, 1 Sm. & G. 508 (see, however, observations of Spragge, C., in *Meyers* v. *Meyers*, 21 Gr. 216); and may be issued to enforce any mandatory order, or judgment. It affects the personal estate, and the rents and profits of the realty, of the person whose estate, is sequestered: *Jackson* v. *Jackson*, 1 Chy. Ch. 115; but it does not appear to bind the land itself: *Hyde* v. *Greenhill*, 1 Dick. 107; and lands cannot be sold under a sequestration: *Meyers* v. *Meyers*, 21 Gr. 218. According to English authorities, it is said that the writ binds from its date, and not merely from its delivery for execution: *Burdett* v. *Rockley*, 1 Vern. 58; but see *Angel* v. *Smith*, 9 Ves. 336; *Morris* v. *Meyers*, 3 Chy. Ch. 107; but though the property be bound, yet the seizure under the writ does not create a charge on the property in favour of the creditor: *In re Pollord*, 1903, 2 K. B. 41; 87 L. T. 61.

Binds personalty, and rents and profits of realty. From date of sequestration.

The writ of sequestration has been shorn of much of its original efficacy by the enlarged operation given in Ontario to the writ of *fi. fa.* it is now only to be employed as a last resource. *Fi. fa.* goods and proceedings for attaching debts, etc., are first to be used, and if by these the debtor's property cannot be reached, a writ of sequestration may be issued on application in Chambers, upon notice, as a general rule, but it will in general only be granted when the debtor's lands are insufficient to satisfy the debt, and it therefore becomes of importance to enter upon the land and realize the profits thereof during the year which must elapse before they can be sold under a *fi. fa.* lands; or where the interest of the debtor is such that it cannot be taken under a *fi. fa.*: *Nelson* v. *Nelson*, 6 P. R. 194. The Court has, however, power to order a sequestration instead of a *fi. fa.*, if occasion should require, *Ib.* See note to *Rule* 549.

Discretion as to granting writ. The granting of the writ is discretionary, and the discretion will not be interfered with by an appellate Court: *Hulbert* v. *Cathcart*, 1896, A. C. 470. An order for a sequestration must be absolute, and not conditional, and where further time is intended to be given to the debtor, the writ should be directed to lie in the office, or not to issue until the expiration of the further time given: *In re Lumley*, 1894, 2 Ch. 271.

Where it was shown that a debtor had no effects which would be available in execution, a writ of sequestration was granted to enforce payment of costs which had been ordered to be paid: *Snow* v. *Bolton*, W. N. 1883, 73. The Court must be satisfied that the application is

reasonable, but it is not necessary to point to any property which may be made available: *Hulbert* v. *Cathcart*, *supra*. Rule 547.

It is not necessary here to serve the judgment, or order, for payment, or to make a demand thereunder as a condition precedent to an application for a sequestration: *Long* v. *Long*, 6 P. R. 137; and see *Re Deakin, Ex p. Cathcart*, 1900, 2 Q. B. 478.

A sequestration to enforce compliance by a railway company with a peremptory mandamus was refused, and an attachment against the directors was held to be the proper remedy: *Demorest* v. *Midland Ry. Co.*, 10 P. R. 82; see, however, *Rule* 548; but it seems to be a proper mode of enforcing an injunction against a corporation: see *Young* v. *Ridgetown*, 18 Ont. 140; but see *Rule* 552; *Re Bolton & Wentworth*, 23 O. L. R. 390.

Property Liable to Sequestration.—All goods and chattels in the possession of the contemnor, are liable to be seized; and also any property belonging to him which can be reached by the sequestrator without suit or action. And if the keys are denied him, the sequestrator may open rooms, and boxes, that are locked, and schedule the contents; but may not remove properly off the premises without the special order of the Court: *Pelham* v. *Newcastle*, 3 Sw. 290 n. A debtor's seat in the Stock Exchange is not exigible under sequestration: *London & Canadian L. & A. Co.* v. *Morphy*, 10 Ont. 86. By The Jud Act, s. 138, *supra*, sequestrators have the same power over documents in the custody of a person committed for not delivering them, or depositing them in Court, as they have over the contemnor's own property. Property liable; goods and chattels. Documents in custody of contemnor.

Choses in Action.—At one time it was doubted whether choses in action could be reached by sequestration; the later authorities establish that they can: *Irving* v. *Boyd*, 15 Gr. 157; and see *McDowell* v. *McDowell*, 1 Chy. Ch. 140; *Wilson* v. *Metcalfe*, 1 Beav. 263; *Crispin* v. *Curano*, L. R. 1 P. & M. 622. As regards *choses in action*, an order of the Court is necessary, to enable the sequestrators to sue for their recovery: *Irving* v. *Boyd*, 15 Gr. 157; or they may be reached by motion in the action in which the sequestration issued: see *Ward* v. *Booth*, L. R. 14 Eq. 195; *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41. Choses in action, how far bound.

But the *chose in action* is not bound by the writ of sequestration, until either the sequestrator, or the party prosecuting the writ takes steps to obtain payment: *McDowell* v. *McDowell*, 1 Chy. Ch. 140; 10 U. C. L. J. 48; *London and Canadian Loan and Agency Co.* v. *Merrill*, 12 C. P. 375; and the writ does not constitute a charge on a *chose in action*, even after notice to the debtor: *Re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

If the debtor admits the liability, and submits to the order of the Court, an order may be made, without further suit, authorizing the debtor to pay, and deliver, the fund, or property, to the sequestrator; or authorizing the latter to seize the property: *Wilson* v. *Metcalfe*, 1 Beav. 263; *Re Slade, Slade* v. *Hulme*, 18 Ch. D. 653; 45 L. T. 276; *Crispin* v. *Cumano*, L. R. 1 P. & M. 622; but such order cannot be made without the debtor's assent: *Ib.* How recovered under.

A claim to indemnity, which a surety has against his principal, before payment by the surety, is not a *chose in action*, which can be reached by sequestration: *Irving* v. *Boyd*, 15 Gr. 157.

Rule 547.

The accrued dividend of a fund in Court, to the income of which a married woman is entitled for her separate use without power of anticipation: *Cloydon* v. *Finch*, L. R. 15 Eq. 266; *Bryant* v. *Bull*, 16 Ch. D. 153; a deposit on appeal: *Conn* v. *Garland*, L. R. 9 Chy. 101; and a rent charge: *Wilson* v. *Metcalfe*, 1 Beav. 263, have been held liable to sequestration, but as to property subject to a restraint against anticipation, according to the latest case, it would appear not to be subject to a sequestration either before, or after, it has become payable: see *Wood* v. *Lewis*, 110 L. T. 994.

Money in bank.

Money in Bank.—Money of the debtor on deposit in a bank is not bound by a sequestration, until an order has been obtained for its payment to the sequestrator: *In re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

Pensions and salaries.

Pensions, and Salaries.—Pensions granted entirely for past services, may be sequestered: *Willcock* v. *Terrell*, 3 Ex. D. 323; *Dent* v. *Dent*, L. R. 1 P. & M. 366; *McCarthy* v. *Goold*, 1 Ba. & B. 387; but pensions and salaries for services, still being rendered, or which may be required *in futuro*, cannot be sequestered: *Fenton* v. *Lowther*, 1 Cox. 315. *McCarthy* v. *Goold*, *supra*; *Collyer* v. *Follon*, 1 T. & R. 459; *Spooner* v. *Payne*, 1 D. M. & G. 383; and see *Lloyd* v. *Cheetham*, 3 Giff. 171.

Rent and profits of realty bound, but land not saleable under.

Rents and Profits of Real Estate, including crops, or other natural produce, or rents paid in kind, are liable to sequestration, but land, whether freehold or leasehold cannot be sold under the writ, which only confers a right to the possession, but does not transfer any title to the land, or term, to the sequestrator: *Show* v. *Wright*, 3 Ves. 22, or confer any priority over prior specific charges: *Meyers* v. *Meyers*, 20 Gr. 185; 21 Gr. 214. Tenants in possession should be notified to attorn to the sequestrator, and pay their arrears and growing rents to him: Dani. Pr., 5th ed., 916; and upon refusal the sequestrator may obtain an order compelling them to attorn: *Rowley* v. *Ridley*, 3 Sw. 306; *Jackson* v. *Jackson*, 1 Chy. Ch. 115.

Tenants to be notified.

Order against.

Paying rents after attornment.

If a tenant attorns to the sequestrator, and afterwards pays his rent to another party, he may be compelled to pay it over again to the sequestrator: *Harris* v. *Meyers*, 2 Chy. Ch. 121. A sequestrator, with the sanction of the Court, may make leases, for any period during which the aggregate rents, will not exceed the amount for which the sequestration issued: *Harris* v. *Meyers*, 3 Chy. Ch. 89. But the sequestrator cannot, by his lease, affect the right of a person holding an incumbrance prior to the claim of the party issuing the sequestration: *Meyers* v. *Meyers*, 19 Gr. 541.

Lease by sequestrator.

Where a sequestration is issued against a person in contempt for not delivering books, papers, or any other articles or things, the sequestrator may seize such books papers, writings, or other articles; and the Court may then deal with them as shall be just: and after such seizure the person in contempt may be discharged from custody: see Jud. Act, s. 138, *supra*, p. 302.

Disposition of property sequestered.

Disposition of Property Sequestered.—*Primâ facie* a sequestration confers merely a right of detainer of the property sequestered. Where the sequestration, however, is issued for non-payment of money, the proceeds of the goods seized will be ordered to be applied in satisfaction of the demand: *Davis* v. *Davis*, 2 Atk. 24. The sequestrator

should not, however, eo apply them, but should pay the proceede into Court upon leave obtained on motion in Chambere: Dani. Pr., 5th ed., 917. Rule 547.

The Court may, at the inetance of the sequestrator, order payment into Conrt of the baiance standing in a banker'e books to the credit of the debtor, upon notice to the banker: *Millar* v. *Huddlestone*, 22 Ch. D. 233; but where, after notice of the requestration, hut before an order to pay had been obtained, the hanker honored checks of the debtor, the Court refused to order tbe hank to re-pay to the eequestrator the amount so paid out: *In re Pollard*, 1903, 2 K. B. 41; 87 L. T. 61.

Booke, papers, or other articies, writinge, &c., ordered to he delivered up, which are seized by a eequeetrator, may ba dealt with as the Court thinks just: see the Jud. Act, s. 138, *supra*, p. 302.

Sale, when ordered.

Sale of Property.—Where necessary, a sale of pereonai property sequeetered, may, on the application of the sequestrator, be ordered, *e.g.*, where goods are of a perishable nature: *Shaw* v. *Wright*, 3 Ves. 22; or it is neceseary for the satisfaction of the claim for whicb the writ issued: *Id.*; *Mitchell* v. *Draper*, 9 Ves. 208; a defendant'e reversionary Intereet in a fund in Court, has been ordered to he sold: *Cowper* v. *Toylor* 16 Sim. 314. The application for ieave to seli must be made on notice to tbe debtor: *Mitchell* v. *Draper*, *supra*; *Forbes* v. *Connolly*, 1 Chy. Ch. 6; but eervice of notice may be dispensed with: *Re Rush*, 19 W. R. 417.

Notice of application for sale must be given to debtor.

Lands sequestered cannot be sold.

Lands sequestered cannot be sold,—"All that the Court does is to direct the application of the rents and profits, and this, not by way of execution, but upon the ground that the party is in contempt for disobedience of some order of the Court": *Meyers* v. *Meyers*, 21 Gr. at p. 218; eee aiso *Nelson* v. *Nelson*, 6 P. R. 194.

Parties having claims adverse to eequestration—proceedings by.

Adverse Claims.—Where property affected by a sequestration, or any interest therein, is claimed by eome third person, the eequestrator, and possibly the claimant, may apply to the Court for reiief, hy a eummary application in the cause: see *Rule* 625, *et seq.* And see Holmested's Chy Ordere, 217. The right of the eequestrator ae against euch third person, where disputed, cannot he determined in proceedings to which the third person ie not a party: *Craig* v. *Craig*, 1896, P. 171.

The clalmant ehould not commence an action against the sequestrator, or disturh his possession without the leave of the Court. If he does so, he may be restrained hy injunction.

Obstruction of sequestrator a contempt.

Obstruction of Sequestrator, is a contempt of Court: *Angel* v. *Smith*, 9 Vee. 335; *Pelham* v. *Newcastle*, 3 Sw. 289 *n*, and see *Francklyn* v. *Colhoun*, 3 Sw. 276. But persons having claime on the property sequestered, adverse to the sequestrator, are not driven to bring nctions, but may appiy to the Court for reiief in a summary way by originnting notice in the actlon: *Rule* 10; and see *Meyers* v. *Meyers*, 19 Gr. 541.

Death of contemnor, when proceedings may be continued against his representative.

Death of Contemnor.—Where a sequeetration has issued to compel payment of money, In case the contemnor die, an order mny be obtained to continue proc..dings against hie reai representative, where the lands descended, or devised, would he nssets for the payment of the debt: *Hyde* v. *Greenhill*, 1 Dick. 107; *Pratt* v. *Inman*, 43 Ch. 175; 61 L. T. 760; and also as against hie personal representativē; but where the writ iseues for personal contempt, on the part of the con-

Rules 548, 549.

temnor, on the death of the contemnor, no order to continue proceedings can he ohtained: *Turley* v. *Meyers*, 3 Chy. Ch. 102; Gilbert's Chy. Pr., 86-87; except perhaps for the costs: see *Rule* 306.

Where attachment cannot be executed, etc.

548. If an attachment cannot he executed against the person refusing or neglecting to obey the judgment, by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, or if in any other case the Court may think proper to dispense with a writ of attachment, an order may be granted for a writ of sequestration against the estate and effects of the disobedient person; and it shall not be necessary for that purpose to issue an attachment. C.R. 858.

Sequestration pending appeal.

An order for sequestration will not he granted against a defendant required to do an act, where an appeal is pending from the judgment directing its performance, and the defendant has perfected the security if any, required to entitle him to a stay of proceedings: *Dundas* v. *Hamilton & Milton R. Co.*, 19 Gr. 455; *McGarvey* v. *Strathroy*, 6 Ont. 138.

Attachment need not issue to found sequestration.

Originelly the aequestration only issued after an sttschment, and all other process had heen exhausted. Under this *Rule* in cases where it would he impossihle to execute an attachment, it is unnecessary to go through the form of issuing one; and see *Snow* v. *Bolton*, W. N. 1881, 73.

An attachment may he ordered against a party who is out of the jurisdiction: *Bloomfield* v. *Brooke*, 6 P. R. 264, and see *Farewell* v. *Wollbridge*, 3 Gr. 628; hut see *Rex* v. *Pinckney*, 1904, 2 K. B. 84; 90 L. T. 468, where it was held that there is no jnrisdiction to order the issue of a writ of *hob. corp.* directed to a person out of the jurisdiction.

A writ of sequestration was issued against a person of unsound mind, not so found, in *Robinson* v. *Gallond*, W. N. 1889, 108; for noncompliance with an order made hefore he hecame of unsound mind: see 37 W. R. 396, 60 L. T. 697.

In granting a sequestration for disobedience of an order, the Court acts on the same principle as where committal is sought; a casual, accidental, or unintentional disobedience will not be sufficient ground; the Court must he satisfied that a contempt has heen committed: *Fairclough* v. *Manchester Ship Canal Co.*, W. N. 1897, 7.

Sequestration for default in payment of money.

549. If a person who is ordered to pay money, neglects to obey the judgment, the Court may, upon the application of the party proseeuting the same, at the expiration of the time limited for performanee, make an order for a writ of sequestration. C.R. 859.

Sequestration when granted to enforce payment of money, demand.

Where a writ of sequestration is sought, to enforce the payment of money, unless some special ground is made for proceeding *ex parte*, notice of motion must be given; and the ordinary procedure for recovering money demands, viz.: writs of *fi. fa.*, etc., and attachment of debts, should he first resorted to, or shewn to be unavailing: *Nelson* v. *Nelson*.

6 P. R. 194; but see *Re Russell, Burnet* v. *Allen*, before Spragge, C., January 24th, 1876, where the writ of sequestration was granted without such preliminary proceedings; and see *Snow* v. *Bolton*, W. N. 1881, 73, where the sequestration was granted on it being shewn that the debtor had no effects exigible under execution. Rules 550-552.

An order for payment of money need not be personally served in order to found a motion for a sequestration: *Long* v. *Long*, 6 P. R. 137.

It was at one time held that the writ could not properly be issued to enforce an ordinary judgment for the recovery of money, which does not expressly order payment, or limit a time therefor: *London and Canadian L. & A. Co.* v. *Merritt*, 32 C. P. 376; *Ex parte Nelson, Re Hoare*, 14 Ch. D. 41; such a judgment not being regarded as the equivalent of a personal order to pay: see *Re Oddy, Major* v. *Harness*, 1906, 1 Ch. 93; and that an order cannot be got limiting the time for payment of an ordinary judgment for debt, merely to enable a sequestration to be issued thereon: *Hulbert* v. *Cathcart*, 1894, 1 Q. B. 244; 70 L. T. 558; and that the writ could only be issued to enforce the payment of money where the non-payment is still, notwithstanding *The Fraudulent Debtors' Arrest Act* (R. S. O. c. 83), s. 13, a contempt of Court: *Stoner* v. *Fowle*, 13 App. Cas. 20; 58 L. T. 1; *Berry* v. *Donovan*, 21 Ont. App. 14; *Pritchard* v. *Pritchard*, 18 Ont. 173; but it would now seem that the writ may be issued to enforce an ordinary judgment, or order, for payment of money or costs: see *Re Slade, Slade* v. *Hulme*, 18 Ch. D. 653; 45 L. T. 276; *Hulbert* v. *Cathcart*, 1896, A. C. 470, 76 L. T. 302.

550. A writ of sequestration shall be directed to the Sheriff, unless otherwise ordered. C.R. 860. Writs of sequestration.

For form of writ: see Form No. 121; H. & L. Forms, No. 1142.

551. In case a person has been committed to gaol for contempt of Court, there to be detained and imprisoned until he shall have purged his contempt, if it be made to appear that he is in actual custody under such committal, the Court may modify the order and limit the term of imprisonment or grant such other relief as may in the nature and circumstances of the case seem just, but any relief that may be granted to any such person shall not relieve him from any civil liability. C.R. 861. Release from custody, or other relief, of persons committed for contempt.

See *Rule* 689.

Where the contempt consists in not executing a deed or other instrument, the Court has power to appoint some one to execute it on behalf of the contemnor: see Jud. Act, section 137. And as to the discharge of prisoners in custody for contempt, who are entitled to their discharge, but neglect to apply for it: see *Ib.*, c. 138.

552. If a *mandamus* granted in an action or otherwise, or a mandatory order, injunction, or judgment for specific performance of any contract is not complied with, the Mandatory order, how enforced.

Rules 553-555.

Court, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the judgment has been obtained, or some other person appointed by the Court, at the cost of the disobedient party; and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and execution may issue for the amount so ascertained and costs. C.R. 862.

See Eng. (1883) R. 608. It extends to all kinds of mandatory orders and injunctions, a power which previously existed in regard to a mandamus: see R. S. O. 1877, c. 52, s. 9.

In an action for specific performance, where an order had been made requiring defendant to make a certain road, and on his default the plaintiff applied for liberty to complete the road at the cost of defendant, it was held that the case was not within this *Rule*, but an order was made permitting plaintiff to do the work with liberty to apply that the defendant should pay the expense: *Mortimer* v. *Wilson*, 33 W. R. 927.

Enforcement of judgment against corporation.

553. Any judgment against a Corporation wilfully disobeyed may be enforced by sequestration against the Corporation or by attachment against the directors or other officers of the Corporation. *New.* *See* English Rule 609.

This *Rule* though new is merely affirmative of the previous practice of the Court: see notes to *Rule* 546.

Corporation may be fined for disobedience.

554. Any Corporation or individual disobeying a judgment, or guilty of any other contempt of Court, may be fined. Such fine may be in lieu of or addition to punishment by attachment, committal or sequestration. *New.*

This *Rule* though new, also appears to be merely an affirmance of the inherent jurisdiction of the Court to fine persons who commit contempts of Court.

"It is a necessary incident to every Court of Justice . . . to fine and imprison for a contempt of the Court acted in the face of it:" *Rex* v. *Almon* (1765), Wilmot's Notes and Opinions, 243. What is here said as to contempts committed in the face of the Court applies also to other contempts: see *Rex* v. *Hammond*, 137 L. T. Jour. 8; *Re Bolton & Wentworth*, 23 O. L. R. 390.

In case of persons not parties.

555. Any person not a party against whom obedience to a judgment may be enforced shall be liable to the same process and punishment as if he were a party. C.R. 865, *amended.*

See note to *Rule* 566.

Rules 556, 557.

Partnership assets not to be taken in execution under execution against one of partners. Execution creditor may obtain charging order.

556.—(1) Under an execution against one partner, partnership assets shall not he taken in execution, hut an order may he made charging the partner's interest in the partnership property and profits with the payment of the amount of the executions in the Sheriff's hands, and hy the same or a suhsequent order a receiver may he appointed of the partner's share of profits whether already declared or accruing, and of any other money which may be coming to him in respect of the partnership, and the Court may direct all accounts and inquiries and give all such other directions as might he directed or given if the charge had heen given by the partner.

(2) The other partners may redeem the interest charged or in event of a sale may purchase the same. (*New. See* Eng. Partnership Act, 1890, sec. 23.)

Under the English Partnership Act, 1890, on s. 23 of which this *Rule* is based, where an order is ohtained charging the interest of one of the members of the firm in favour of an execution creditor, that gives the other partners a right to dissolve the partnership, hut there is no such statutory remedy in Ontario, and *semble*, they would not have that right.

A charging order obtained under this *Rule* would have a wider effect than an execution formerly had, hecauss it would charge the execution debtor's whole interest in the partnership, whereas an execution would only hind his interest in the goods and chattels or lands seized. The ohtaining of a charging order would give the execution creditor a right to apply for the appointment of a receiver; such appointment may be ohtained hy summary application in the action in which the execution is recovered. The execution creditor obtaining a charging order will also be entitled to an order for the sale of the execution debtor's interest in the partnership: see *supra*, clause 2, and *semble*, such an order may be ohtained without commencing another action.

The creditor ohtaining a charging order would, in England, have no right during the continuance of the partnership to sue for an account of the partnership transactions: see Lindley, Partnership, 8th ed., p. 421; but in Ontario it would seem that such an action would lie hy the chargee: see *Whetham* v. *Davey*, 30 Ch. D. 574; *Glyn* v. *Hood*, 1 Giff. 328; 1 DeG. F. & J. 334; and see *Cassels* v. *Stewart*, 6 App. Cas. 64, 73. And a purchaser of a partner's share under execution would also have a right to bring an action for an account of the partnership. Whether the sale would have the effect *ipso facto* of dissolving the partnership is not very clear, it seems, at all events, to give the other partners a right to dissolve: see Lindley on Partnership, 8th ed., p. 660; *Ib.* (2nd Am. ed.), pp. 583, 584. It would seem that any claim for an account would have to be brought hy a separate action, and could not be enforced on any summary application.

Sheriff to deliver inventory to the owner, etc.

557. Where goods or chattels are seized in execution under a writ of *fieri facias*, the Sheriff, or his officers acting for him, shall, on request, deliver to the owner, his

Rules 558, 559.

agent or servant, an inventory thereof before they are removed from the premises on which they have been so seized; and no Sheriff or other officer shall sell any goods or chattels under a writ of execution until he has previously thereto given at least 8 days public notice in writing of the time and place of sale in the most public place in the municipality where such goods or chattels have been seized. C.R. 875.

There must be reasonable and proper care taken in giving notice of the sale as this *Rule* requires; failure to give proper notice will render a sale invalid, and subject the purchaser, and the Sheriff to liability: *McLaughlin* v. *Allan*, 4 O. W. R. 67.

A sale by a Sheriff or his bailiff under execution is within *The Statute of Frauds* (R. S. O. c. 102), s. 12, and either of them may sign for the purchaser the memorandum in writing in the same manner as an auctioneer or his clerk: see notes to *Rule* 444. The entry of the purchaser's agent as the purchaser will bind the principal if he afterwards acknowledges the agent's authority: *Flintoft* v. *Elmore*, 18 C. P. 274.

A sale under execution of goods the subject of a patent, which the execution debtor has a license from the patentee to use, will not confer on the Sheriff's vendee a right to use them: *British Mutoscope Co.* v. *Horner*, 1901, 1 Ch. 671; 84 L. T. 26.

Return where goods remain in Sheriff's hands unsold.

558. The Sheriff shall where goods seized by him under a writ of *fieri facias* remain unsold in his hands for want of buyers, state in his return of "goods on hand for want of buyers," the time and place when and where such goods were offered for sale by him, and the names of at least three persons who were present at the time of such attempted sale, if so many were present, but if so many were not present, then the names of those who were present, if any, and that there were no others, and if no person was present then he shall state that fact. C.R. 876.

Lands not to be sold within a year.

559. The Sheriff shall not expose lands for sale under a writ of *fieri facias*, or sell the same within less than twelve months from the day on which the writ is delivered to him. C.R. 877.

Where the execution debtor has absconded the sale may, by leave, take place without waiting twelve months: *Rule* 560; before a sale of lands a return of *nulla bona* should be made: *Rule* 561.

It would seem that the Crown is not bound by this *Rule* and that an execution against lands in favour of the Crown may be made returnable before the expiration of twelve calendar months: *Reg.* v. *Desjardins Canal Co.*, 29 U. C. Q. B. 165.

Where a *fi. fa.* lands has been in the Sheriff's hands for a year and is returned, nothing having been dons under it, the Sheriff may nevertheless sell, under an *alias fi. fa.* lands issued thereon, without waiting a year: *Compbell* v. *Delihanty*, 24 U. C. Q. B. 236; *Nickall* v. *Crawford*, Tay. 277; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495. Rule 559.

A sale of lands under an expired writ is void: *Doe* d. *Burnhom* v. *Simmonds*, 9 U. C. Q. B. 436; *Gordiner* v. *Juson*, 2 E. & A. 188; *Doe d. Greenshields* v. *Gorrow*, 5 U. C. Q. B. 237; *Reynolds* v. *Streeter*, 3 P. R. 315; *Lee* v. *Howes*, 30 U. C. Q. B. 292; *Daby* v. *Gehl*, 18 Ont. 132, but where there has been an inception of execution during its currency, e.*g.*, by advertising the land for eale under it: see *Rules* 563, 564, the sale may be made, and carried out, after tbe writ has become returnabie: *Holl* v. *Goslee*, 15 C. P. 101; *Rule* 564. Though the advertisement may be published during the currency of the writ, yet hy tbe exprees terme of this *Rule* the day named for the sale must not he earlier than tweive calendar months from the day on which the writ was delivered to tbe Sheriff. Advertisements of sale under the writ, first published after the writ has expired, are invaiid, and a sale in pursusnce of such advertisement is void: *Gardiner* v. *Juson; Reynolds* v. *Streeter; Lee* v. *Howes, supra;* and a return of "iands on hand" made after tbe writ has expired, and without any previoue inception of execution under it, is invaiid, and wiii not authorize the issue of a *venditioni exponas*, and if issued, and a saie be made under it, the sale may be set aside: *Lee* v. *Howes, supra*. The Sheriff's teiling the execution dehtor that he has a *fi. fa.* against his iands, and that bis lands wiii be soid, unlese he pays up, is not an inception of execution: *Brodburn* v. *Hall*, 16 Gr. 518, neither is the mere eending of a list of iands for sale under an execution to the *Gozette* for publication an inception of execution; there must be an actuai publication of the advertisement during the currency of tue writ: *Reynalds* v. *Streeter*, *supro*. Sale of lands, when invalid.

Lands in tho Districts of Manitoulin, or Rainy River, which are situate more than 20 miiee from a iine of railway, cannot be soid in execution except during the months of July, August, September, or Gctober: *The Sheriff's Act* (R. S. O. c. 16), s. 23. Sale of lands in Manitoulin and Rainy River.

The eeiling of iand by the Sheriff before the proper perlod has expired is not a mere irreguiarity, but rendere the sais void: see cases *supra*; whereas defects in the advertisement of sale, to which the purchaser is no party, wiii not affect the vaiidity of the sale: *Poterson* v. *Todd*, 24 U. C. Q. B. 296; *Ross* v. *Malone*, 7 Gnt. 215, 397; unless the circumstances are such that the purchaser'e taking the deed can be said to amount to a fraud: *McDonald* v. *Comeron*, 13 Gr. 84; but where irregularities are committed by the Sheriff by instructions of the execution creditor's eoiicitor, and the execution creditor bimseif becomes the purchaser, the Court may, if the eale has been prejudiced, refuse to maintain the Sheriff's deed, if attacked, except as a security for the debt: *Ib.*; and see *In re Davis*, 17 Gr. 603; *Kerr* v. *Bain*, 11 Gr. 423; and where land has been soid under execution at a groes undervaiue, owing to the titie being in dispute, the Court may refuse to give effect to the Sheriff'e deed, except as a security: *Cholmers* v. *Piggott*, 11 Gr. 475; and see *Malloch* v. *Plunkett*, 11 Gr. 439; but the inadequacy of price must be very exceseive to induce the Court to refuse to maintain a Sheriff's deed: *Laing* v. *Matthews*, 14 Gr. 36. Defects in advertisement of sale, effect of

Irregularities of sale, effect of.

Rules 560-563.

Where the sale has been improperly conducted, the Sheriff may be restrained by injunction from executing a conveyance: *Jones* v. *Jones*, 15 Gr. 40.

The execution creditor may be a purchaser at the sale under execution, and a *bonâ fide* sale to him though at an undervalue cannot be successfully impeached: *McNichol* v. *McPherson*, 15 O. L. R. 393; but possibly in such a case the Sheriff might be liable for negligence: *Ib.*

Fi. fa. as to lands against absconding debtor.

560. Where a writ of *fieri facias* is issued against an absconding debtor in an action in which an order for attachment has been issued, the Court may order the Sheriff to sell lands of the absconding debtor before the expiration of the twelve months. C.R. 878.

This *Rule* constitutes an exception to *Rule* 559, *supra*.

No sale of lands until return of nulla bona.

561. A sale of lands shall not be had under any writ of *fieri facias* until after a return of *nulla bona*, in whole or in part, in the same action or matter by the Sheriff of the same county. C.R. 879.

The omission to make a return of *nulla bona*, as required by this *Rule*, before selling lands, is an irregularity only, and will not render the sale of the lands void: *Ross* v. *Malone*, 7 Ont. 215, 397; *Doe d. Spafford* v. *Brown*, 3 O. S. 92. So also a return of *nulla bona*, where there are in fact goods liable to execution, is only an irregularity: *Ontario Bank* v. *Kerby*, 10 C. P. 35, 41; *Molson's Bank* v. *McMeekin* 15 Ont. App. 535.

If the debt is realised under writ against goods.

562. If the amount authorized to be made and levied under a writ of *fieri facias* is made and levied thereunder out of goods and chattels, the person issuing the writ shall not be entitled to the expenses of any seizure or advertisement of lands thereunder; and the return to be made by the Sheriff to the writ for sale of lands shall be to the effect that the amount has been so made and levied as aforesaid. C.R. 880.

The effect of this *Rule* is to make the execution creditor's right to recover any expenses relating to the seizure of lands dependent on whether or not the execution is satisfied out of goods and chattels.

Advertisement by Sheriff.

563. Before the sale of lands under a writ of *fieri facias*, the Sheriff shall publish once, not less than three months and not more than four months preceding the sale, an advertisement of sale, in *The Ontario Gazette*, specifying:

(*a*) The property to be sold;

(*b*) The name of the plaintiff and defendant;

(*c*) The time and place of the intended sale; Rules 564, 565.

(*d*) The name of the debtor whose interest is to be sold;

and he shall, upon one day at least in each week for four successive weeks next preceding the sale, also publish such advertisement in a public newspaper of the County or District in which the lands lie; and he shall also for three months preceding the sale, put up and continue a notice of such sale in the office of the Clerk of the Peace, and on the door of the Court House or place in which the General Sessions of the Peace of the County or District is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day. C.R. 881.

It would seem that the omission to advertise, where there is an uncertainty as to what has been sold, though it may give a right against the Sheriff, will not invalidate the sale as against a *bonâ fide* purchaser: *Osborne* v. *Kerr*, 17 U. C. Q. B. 134, 141; and see *Lee* v. *Howes*, 30 U. C. Q. B. 292. Defects in the advertisement will not invalidate the sale as against a third person, or even the execution creditor, who *bonâ fide* becomes the purchaser: *Paterson* v. *Todd*, 24 U. C. Q. B. 296; but where the execution creditor becomes the purchaser, if he has in any way, by himself, or his solicitor, participated in the irregularities, his deed may be ordered to stand merely as a security: *McDonald* v. *Cameron*, 13 Gr. 84; *In re Davis*, 17 Gr. 603.

The want of regularity in giving public notice of an adjournment of the sale was held to be cured where the debtor attended the sale by his agent, and afterwards ratified what had been done: *Doe d. Dissett* v. *McLeod*, 3 U. C. Q. B. 297. But where a Sheriff refused to execute a deed on the ground of there having been an irregularity in the advertisement, but readvertised the lands and put them up for sale again, when they brought a price far exceeding that offered by the first purchaser, the Court refused to interfere summarily on the application of the first purchaser to compel the Sheriff to make a deed to him: *In re Campbell*, 10 U. C. Q. B. 641.

564. The advertisement in the *Ontario Gazette* of any lands for sale under a writ of *fieri facias*, during the currency of the writ, shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable. C.R. 882. Notice in Gazette shall constitute incipient execution.

565. As between the original parties to a judgment, execution may, without leave, issue at any time within six years from the date of the same. C.R. 863. Execution within 6 years.

See Eng. (1883) R. 600.

Rule 566.

Garnishee process is not a form of *execution* within *Rule* 3 (k), so as to be subject to *Rules* 565 and 566; garnishee proceedings may, therefore, be taken without leave, though more than six years have elapsed: *Fellows* v. *Thornton*, 14 Q. B. D. 335.

Execution by leave of Court.

566. Where the six years have elapsed or any change has taken place by death or otherwise in the parties entitled or liable to execution, or where a party is entitled to execution upon a judgment of assets *in futuro*, the party alleging himself to be entitled to execution may apply for leave to issue execution accordingly, or to amend any execution already issued. C.R. 864.

See Eng. (1883) R. 601.

The Eng. Rule includes the further case of a party entitled to execution against any of the shareholders in a joint-stock company upon a judgment against the company. Previously a writ of *scire facias* was necessary, and in Ont. *Rules* 523, 535, will probably apply in such a case.

The practice at Common Law in reviving pecuniary judgments for the purpose of execution, after the lapse of six years, or the death of parties, was formerly governed by C. L. P. Act, R. S. O. 1877, c. 50, ss. 322 to 330 (corresponding with Eng. C. L. P. Act, s. 128, *et seq.*). Under those provisions the party seeking execution could apply to the Court or a Judge for leave to enter a suggestion to the effect that such party was shown to be entitled to execution, and to allow execution to issue, and, if the case was made clear, the suggestion and the consequent execution were allowed. If the case was not made clear, the suggestion and execution consequent upon it were disallowed, and the party was left to his writ of revivor. This was a new action, in which, by the ordinary processes of pleading, the questions in dispute were brought to issue and decided.

The above *Rule* preserves alternative processes, according as the right to execution is, or is not, sufficiently clear to be enforced summarily by a Judge; but a somewhat simpler process is provided; if the case be clear, the Judge may order execution to issue; if it be not, he may direct an issue to try the right.

The *Rules* do not prescribe any form of order to be made on the application, they do not seem to contemplate that the applicant in the case of the death of the plaintiff, or that the representatives of a deceased defendant, are to be made parties to the action, and the somewhat anomalous proceeding of issuing execution by or against persons who are not parties seems to be sanctioned.

It would have been more logical to have required any stranger to the action, by or against whom any proceedings are to be taken, to be first made a party under *Rule* 301; and this would appear to be the proper and legitimate equivalent for the entry of a suggestion as formerly required at law, or the obtaining of an order of revivor as was formerly customary in equity, as in this way the stranger to the record by or against whom the execution is to issue is made a party to the record; and in this way the anomaly is avoided of issuing a writ in favour of, or against, persons apparently strangers to the record. But

whether this procedure is compulsory under the *Rules* it is difficult to say. Rule 568.

An order giving leave to issue execution against an executor of the debtor does not operate as a judgment so as to make the executor a judgment debtor, and is not equivalent to an order to continue proceedings under *Rules* 300 *et seq.*, and whenever any further matter or proceeding is desired to be taken other than the mere issue of execution, it is necessary that an order, to continue proceedings should be first obtained. Thus, on the death of a sole plaintiff, his representatives cannot apply under this *Rule* for the appointment of a receiver by way of equitable execution, without first making themselves parties to the action by obtaining an order to continue the proceedings in their names under *Rule* 301; *Norburn* v. *Norburn*, 1894, 1 Q. B. 449; 70 L. T. 411; so also where a charging order under *Rule* 689 is sought: *Stewart* v. *Rhodes*, 1900, 1 Ch. 386; *sed vide*, *Re Bagley*, 1911, 1 K. B. 317; 103 L. T. 470, where it was held that a trustee in bankruptcy of a judgment creditor might obtain leave to issue execution without first obtaining an order to continue the proceedings in his name. Leave to issue execution.

Where judgment is obtained by several executors, and one of them dies after the entering of judgment, there is no "change" of parties within the meaning of this *Rule*. The surviving plaintiffs are entitled to issue execution in the name of all the survivors, adding simply after the name of the deceased plaintiff the words "since deceased," and no order for leave to do so is necessary: *Baird* v. *Thompson*, 14 L. R. Ir. 497. So also in the case of partners the action survives: *Davies* v. *Andrews*, 28 Sol. Jour. 411; W. N. 1884, 94.

Successors in title are not bound by a judgment against their predecessors restraining the continuance of a nuisance: *Atty.-Gen.* v. *Birmingham, etc., Board*, 17 Ch. D. 685.

A writ of *hab. fac. poss.* is within this *Rule*, and therefore, if issued without leave after the death of a sole plaintiff, is irregular, and may be set aside by the defendant without first reviving the action: *Chambers* v. *Kitchen*, 18 P. R. 219.

An application for leave to issue execution should be made on notice: *Mercer* v. *Lawrence*, 26 W. R. 508; *Lysaght* v. *McGrath*, 7 L. R. Ir. 532; *Allison* v. *Breen*, 19 P. R. 119, 143; *Re Trusts Corporation, etc., and Boehmer*, 26 Ont. 191.

Where writs had expired, leave was given, on notice to defendant, under this *Rule*, to issue new writs to include the costs of the former ones and the costs of the motion: *McDougall* v. *McDougall*, 3 C. L. T. 42.

At Common Law, after 20 years without payment, a presumption arises that the judgment is satisfied: see Coke, 2 Inst. 470; *Mortimer* v. *Piggott*, 2 Dowl. 615. But this presumption may be rebutted: *Williams* v. *Welch*, 3 D. & L. 565, and possibly does not arise where execution has never been issued: see *Jenkins* v. *Kirby*, 2 C. L. J. 164. Period of limitation.

But now under *The Statute of Limitations* (R. S. O. c. 75), s. 49 (*b*), the right of action on a judgment of a Court of Record is barred after the lapse of twenty years from its recovery, or from the last payment on account, or acknowledgment in writing: *Ib.*, s. 54; *Boice* v. *O'Loane*, 3 Ont. App. 167; *Butler* v. *McMicken*, 32 Ont. 422. An order granting a receiver by way of equitable execution was held to give a new starting point for the statute: *Kinnear* v. *Clyne*, 18 O. L. R. 457.

Rules 567, 568.

Leave to issue execution was given where a judgment recovered in 1856 was revived in 1869, twenty years not having elapsed: *McCullough* v. *Sykes*, 11 P. R. 337; *Allison* v. *Breen*, 19 P. R. 139, 143.

Where more than 20 years had elapsed after the last execution issued on a judgment had been returned it was held that a motion for leave to issue execution was properly refused on the ground that no evidence of part payment, or acknowledgment, within the 20 years was adduced: *McMahon* v. *Spencer*, 13 Ont. App. 430; in this case a doubt was thrown out whether leave to issue execution was necessary at all, execution having issued within six years of the recovery of the judgment; possibly, however, if execution had issued without leave it would have been open to the defendant to apply to stay the proceedings: see *Rule* 565. In *Price* v. *Wade*, 14 P. R. 351, an application for leave to issue execution was made under similar circumstances and refused, because it was held that as *The Statute of Limitations* (R. S. O. c. 75), s. 49 (*b*), was a bar to an action on the judgment it was therefore a bar to the right to enforce it by execution: see also *Boice* v *O'Loane*, 3 Ont. App. 167; *Caspar* v. *Keachie*, 41 U. C. Q. B. 599; *McDonald* v. *Elliott*, 12 Ont. 98; *Macdonald* v. *Macdonald*, 11 Ont. 190; *Mason* v. *Johnston*, 20 Ont. App. 412, and *McCullough* v. *Sykes*, 11 P. R. 337; *Allison* v. *Breen*, *supra*. An order for a receiver by way of equitable execution of a judgment gives a new point of departure for *The Statute of Limitations*: *Kinnear* v. *Clyne*, 18 O. L. R. 457.

As to proceedings under this *Rule* in actions against executors, etc., under a judgment of assets *quando*, etc.: see note to *Rule* 510.

Indorsement of name and address.

567. Every writ of execution shall be indorsed with the name and address of the solicitor issuing the same; and if he issues the same as agent for another solicitor, the name and address of such other solicitor shall also be indorsed. Where the writ is issued by a suitor in person his name and address shall be indorsed. C.R. 868.

See Eng. (1883) R. 591.

Where the Sheriff, being misled by an indorsement made on a writ by the plaintiff's solicitor, seized the goods of a wrong person, the plaintiff was held liable in an action of trespass: *Morris* v. *Salberg*, 22 Q. B. D. 614. See also *Smith* v. *Keal*, 9 Q. B. D. 340; *Lee* v. *Rumilly*, 7 T. L. R. 303; but not where there is nothing untrue in the indorsement so as to mislead: *Condy* v. *Blatberg*, 7 T. L. R. 424.

Where a solicitor issues an execution on a satisfied judgment though by mistake, he is liable in trespass if it is acted on: *Clissold* v. *Cratchley*, 1910, 2 K. B. 244; 102 L. T. 520.

Indorsements on writ.

568. Every writ of execution for the recovery of money shall be indorsed with a direction to the officer to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon at the rate of 5 per cent. per annum from the time when the judgment was entered. C.R. 869.

See Eng. (1883) R. 594.

A contract for payment of a higher rate of interest than the legal rate, when sued on, becomes merged in the judgment under which the statutory rate only will be recoverable: see *St. John* v. *Rykert*, 4 Ont. App. 213. At all events, in the absence of any agreement operating subsequently to judgment, interest is limited to the statutory rate, though the debt on which the judgment was recovered bore a higher rate: *Re European Central Ry. Co.*, 4 Ch. D. 35; *Ex p. Fewings*, 25 Ch. D. 338. Rule 569. Interest on judgments.

This *Rule* prescribes that the indorsement for interest shall run from the date of entry; but a judgment takes effect in many cases from its date and not from its entry. Notwithstanding this *Rule*, therefore, on indorsing a writ to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment; that, and not the day of formal entry thereof, is the day from which the judgment takes effect: *Rule* 512, and is, therefore, the day upon which it is entered within the meaning of this *Rule*: *Kelcher* v. *McGibbon*, 10 P. R. 89; see *Rule* 512, and *McLoren* v. *Canada Central* there noted.

The date from which the interest is to be computed has been further made clear by the Jud. Act, s. 35 (4), *supra*.

As a general rule, interest cannot be allowed on untaxed costs though awarded out of a fund in Court: *West* v. *West*, 17 L. R. Ir. 49; but see *Taylor* v. *Roe*, 1894, 1 Ch. 413; 70 L. T. 232; where costs payable under an interlocutory order were held to bear interest from the date of the order.

Where costs of all parties of an action for the construction of a will were ordered to be paid out of an estate and were taxed, but no estate was available for their payment for five years, interest on the costs was not allowed out of the estate: *Archer* v. *Severn*, 12 P. R. 648.

Where costs are paid with interest thereon, under a judgment or order, which is subsequently reversed on appeal, and are then refunded, but on a further appeal the original judgment is restored, the costs bear interest from the date of the original judgment: *Ashworth* v. *English Cord Clothing Co.*, 1904, 1 Ch. 704; 90 L. T. 263.

Interest on costs runs from the date of the judgment, if the amount is specified in the judgment, but if taxed afterwards, then from the date of the certificate of taxation, that being the date given in the form of a writ No. 111 in the App.; H. & L. Forms No. 1104; *Schroeder* v. *Clough*, 46 L. J. C. P. 365; *Trinity College* v. *Hill*, 8 Ont. 286.

See also notes to sec. 35 of the Act, *supra*, p. 196.

569. The officer issuing the writ or renewal thereof, shall indorse upon the same a memorandum signed by him of the amount which the party issuing such writ is entitled to receive for the costs of such writ, and any renewal and for any further or other writs or renewals, and no sum not so indorsed is to be collected for such costs. C.R. 870. Indorsement of amount to be levied for costs of writs.

For the amounts which may be collected: see the Tariff of Costs, "A," Item 24.

Rules 570, 571.

Sheriff's fees and poundage, etc.

570. Upon every execution there may be levied, in addition to the sum recovered by the judgment and interest thereon, the poundage, fees, expenses of execution. C.R. 871.

See the Eng. (1883) R. 593.

Poundage was originally given to Sheriffs by 29 Eliz. c. 4.

As to the Sheriff's right to poundage: see notes to *Rule* 686.

For the fees to which Sheriffs are entitled: see Tariff C.

As to taxation of Sheriff's fees: see *Rule* 683 (1).

Currency of writ of fi. fa.

571. A writ of *fieri facias* shall remain in force for three years from its issue, unless renewed before its expiration, when it shall be in force for a further period of three years from the date of such renewal, and so on from time to time. A writ may be renewed by being marked in the margin with a memorandum signed by the proper officer, stating the date of the day, month and year of such renewal, or by a certificate of renewal signed by such officer; a writ so marked (or if renewed by certificate the certificate) shall be placed in the hands of the Sheriff before its expiry, when it shall have effect and be entitled to priority, according to the time of the original delivery thereof. C.R. 872. *Amended.*

See Eng. (1883) R. 598.

Renewal of writs.

A writ is, for the purpose of renewal, necessarily taken out of the actual possession of the Sheriff, without affecting the position of the party who so withdraws it; but where more than a reasonable time for renewal elapsed, and by mistake a writ was not returned renewed, for more than six months, though there was no intention of withdrawing it except for purposes of renewal, it was held that a mortgage registered before the withdrawal had gained priority, and that it made no difference that no new rights had intervened: *Re Hime v. Ledley*, 13 P. R. 1; and see other cases noted, p. 1041.

This *Rule* appears to require that the writ renewed, or the certificate of renewal, where it is renewed by certificate, shall be delivered to the Sheriff before the writ has expired; whether this means the time at which the writ would have expired if not renewed, or after the period for which it is renewed, is not clear. Until the point is otherwise determined, it would seem to be safer to assume that the former period is the one intended.

There is no power to enlarge the time for renewing writs where, by an accident, they have not been renewed within the time limited for renewal: *Lowson v. Canada Farmers' Ins. Co.*, 9 P. R. 309.

A writ of assistance was held to be a writ of execution within R. S. O. 1887, c. 66, s. 11, and to be not in force for more than one year from the *teste* unless renewed: *Adamson v. Adamson*, 12 P. R. 21.

it may, however, now be open to question whether write of execution, other than write of *ca. sa.* (ae to which eee *The Fraudulent Debtors Arrest Act* (R. S. O. c. 80), s. 28 (3), and writs of *fi. fa.* do not now remain in force until executed without any renewal. Rules 572, 573.

Thie *Rule* only provides for the renewal of writs of *fieri facias;* there seems therefore to be now no provision for renewing any other writs of execution except *fi. fas.*, nor any provision limiting the time they are to be in force as in the case of *fi. fas.*

Making the execution creditor a party to an application for partition under *The Partition Act* (R. S. O. c. 114), will not have the effect of keeping the execution alive after the three yeare have expired: *Macdonell* v. *Best*, 6 O. L. R. 18.

A sale of land under a *fi. fa.*, after the expiration of the writ, where there hae been no previous inception of exeeution, and no renewal of the writ, is null and void: *Daby* v. *Gehl*, 18 Ont. 132.

Where a writ ie ioet in transmiseion to tbe Sheriff after renewal, an order may be mnde for the issue of a new writ *nunc pro tunc*, to bear the same indorsement and evidence of renewal marked by the proper officer as the iost writ, and to have the same force and effect as the iost writ: *Fairchild* v. *Crawford*, 32 C. L. J. 638; 16 C. L. T. 359 (Man.).

Where a writ under whicb a seizure had been made, but from which the Sheriff improperly withdrew, was euffered to run out pending a motion to compel the Sheriff to return the writ, it was ordered to be renewed *nunc pro tunc*, eo ae to continue it in force, and the time for mnking the return was extended: *Gengc* v. *Freeman*, 14 P. R. 330.

In *Neil* v. *Almond*, 29 Ont. 63, and *Re Woodall*, 8 O. L. R. 288, it wss held that a writ against lande, though kept renewed, must be enforced by eale within 10 yeare from its first delivery to the Sheriff, otherwise the lien ereated thereby would be barred under *The Statute of Limitations* (R. S. O. c. 75); but s. 24 of that Act now prevente the Act from barring the lien or charge created by the placing of an execution against lands in the Sheriff's hands, where the writ has been kept alive by renewals or otherwise.

572. The Sheriff to whom a writ is directed shall indorse on such writ all returns thereto and shall give a certificate thereof when demanded, which certificate shall be deemed a return. C.R. 883. Certificate in lieu of return of fi. fa. as to goods.

For Form of certificate: see No. 124; H. & L. Forms No. 1158.

573. Where the party who delivered any writ or process to any Sheriff to be executed, or any other person entitled to call for a return requires, by a demand in writing, the Sheriff to return the writ either by returning the writ to the Court from which the writ issued, or by granting a certificate under the preceding rule, the Sheriff shall, within eight days, return the writ according to the terms of the requisition; and if he wilfully Sheriff refusing to make return when demanded by party who delivered writ to him.

Rules 574-577.

refuses or neglects to do so, he may be ordered to return the writ, and may be further proceeded against as in other cases of contumacy. C.R. 888. *Amended.*

Orders to return writs, or bring in body, to be six-day orders.

574. Upon filing the demand and proof of service an order against the Sheriff to return the writ in six days from service shall be issued on *præcipe*. C.R. 885.

Before an order to return a writ is issued, it would seem that a demand for a return should first be made under *Rule* 573. The neglect to make the demand first would probably be held to disentitle the party issuing the order to the costs thereof: see *Rule* 576.

An order to bring in the body upon a return of *cepi corpus* may be issued immediately after the time for putting in security in the action has expired: *Pouchee* v. *Lieven*, 4 Ma. & Sel. 427; *Hutchins* v. *Hind*, 5 T. R. 479; *Potter* v. *Marsden*, 8 East, 525. But the order should not issue until the day after the expiration of an order (if any) to return the order for arrest: see *Hutchins* v. *Hind*, *supra*. The order to bring in the body cannot be properly issued where the plaintiff has taken an assignment of the bond to the Sheriff: 2 Saund. 60b; nor where he accepts a *cognovit*, or other security from the defendant, without the privity of the Sheriff: *Rex* v. *Sheriff of Surrey* in *Brewer* v. *Clarke*, 1 Taunt. 159. The order should be issued and served promptly: *Rex* v. *Sheriff of Middlesex*, 1 Dowl. 53. It would seem that an order to return the writ or bring in the body need not be personally served on the Sheriff, if he cannot conveniently be found: see *Rule* 575.

As to the effect of an order to bring in the body: see *The Fraudulent Debtors Arrest Act* (R. S. O. c. 83), s. 23.

This order must issue from the office in which the proceedings were commenced: see *Rule* 762.

Personal service on Sheriff unnecessary.

575. Personal service of the demand or order on the Sheriff shall not be necessary, if it appears by affidavit that inquiry was made for him, and that he could not conveniently be found, and the demand or order was served upon the Sheriff's clerk, or bailiff in, or having charge of, the Sheriff's office. C.R. 891.

When Sheriff liable to costs for not returning writs.

576. Where a Sheriff neglects or refuses to return any writ when so demanded, he may be ordered to pay the costs of any order taken out to compel the return, and all other costs consequent thereon, and also the costs of the previous demand. C.R. 890.

Attachments for non-return of writ may be issued unless further time for return granted.

577. Where the Sheriff is ordered to return a writ, and does not make the return within the time specified in the order, the Court may order the Sheriff to be attached, or direct that an attachment shall issue unless a return be made within a limited time. C.R. 893. *Amended.*

Rules 578, 579.

When attachment may issue.

578. If the writ is not returned at the expiration of any further time limited, and if the service of the order and the failure of the Sheriff to return the writ are proved, the Court may order the attachment to issue forthwith against the Sheriff upon an *ex parte* application. C.R. 894. *Amended.*

Sheriff to file writ in office from which order to return issues.

579. The Sheriff when required to return a writ to the Court, shall file the writ or his certificate under Rule 572, in the office from which the order to return the same was issued and the officer with whom it is filed shall indorse the day and hour when it was filed. C.R. 886.

Where a Sheriff disobeys the order to return the writ, he is liable to attachment for contempt, but an attachment can only be obtained on motion, of which the Sheriff is entitled to notice: see *Rule* 546.

CHAPTER XX.

EXAMINATION OF JUDGMENT DEBTORS AND ATTACHMENT OF DEBTS.

Examination of judgment debtors before Local Registrars, etc.

580. A judgment creditor may, without an order, examine the judgment debtor upon oath before the proper officer of the County in which he resides, touching his estate and effects, and as to the property and means he had when the debt or liability which was the subject of the cause or matter in which judgment has been obtained against him was incurred (or in the case of a judgment for costs only, at the time of the commencement of the cause or matter), and as to the property and means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting such debt or incurring such liability (or in case of a judgment for costs only, since the commencement of the cause or matter), and as to any and what debts are owing to him. C.R. 900.

See Eng. (1883) RR. 610, 611.

"Judgment," "judgment creditor," and "judgment debtor": as to these expressions: see *Rule* 3 (*e*), (*f*), (*g*).

Under C. R. 900 the "proper officer" in Toronto was the Master in Ordinary, or Special Examiner, and in outer counties the Local Master, or Special Examiner, or Local Registrar, or the Deputy Clerk of the Crown, or the Judge of the County Court of the county in which the debtor resided.

The present *Rule* is not so explicit, but it would seem that those who under the C. R. 900 were expressly empowered to take such examinations would still be regarded as "proper officers" under the present *Rule*.

An examination should not be had under this *Rule* without necessity. The ordinary procedure to obtain payment through the Sheriff should therefore in general be taken, and a return of *nulla bona* obtained from the Sheriff, or intimation procured from him that he is prepared to make such a return. *Ontario Bank* v. *Trowern*, 13 P. R. 422; but the judgment creditor is *primâ facie* entitled to examine his judgment debtor under this *Rule*, and the onus is on the debtor of showing affirmatively that the issue of the appointment is an abuse of the process of the Court: *Grant* v. *Cook*, 17 P. R. 362.

The express language of the present *Rule* has removed the doubts formerly entertained as to whether examination of a debtor, and attachment of debts due to him, could be had where the judgment or

order was for costs only: see *McLachlin* v. *Blackburn*, 7 P. R. 287; *Meyers* v. *Kendrick*, 9 P. R. 363; *Troutman* v. *Fisken*, 13 P. R. 153; *Re Irvine*, 12 P. R. 297; *Elliot* v. *Capell*, 9 P. R. 35, and notes to *Rule* 590. Rule 580.

A judgment for recovery of land, and awarding costs, is within the *Rule*: *Lloyd* v. *Wolloce*, 9 P. R. 335. So also is an order for costs in interpleader proceedings: *Rule* 3 (*g*); see formerly *McKinnon* v. *Crowe*, 17 P. R. 291; *Hartley* v. *Shemwell*, 1 B. & S. 1.

Where the debtor was a member of Parliament residing in another Province, although temporarily resident in Ontario in discharge of his parliamentary duties, an order to compel him to attend for examination was refused: *Logan* v. *McGreevy*, 5 P. R. 94.

A judgment creditor is entitled to examine the judgment debtor, notwithstanding the latter has made an assignment for the benefit of his creditors: *McEachern* v. *Gordon*, 18 P. R. 459; *Bank of Hamilton* v. *Scott*, 40 C. L. J. 432.

Not only the judgment debtor, but, by order, under *Rule* 582, his clerks or employees, may be examined. The *Rules* in this respect are wider than those in England: see *Irwell* v. *Eden*, 18 Q. B. D. 588; *Hood-Barrs* v. *Heriot*, 1896, 2 Q. B. 338. Who may be examined.

As to the examination of officers of a corporation debtor, see *Rule* 581.

A debtor under arrest on final process may be examined: *Brown* v. *Bemmige*, 2 U. C. L. J. 213; or a garnishee who has been ordered to pay over: *Cowan* v. *Carlill*, 33 W. R. 583; 52 L. T. 431.

A married woman may be examined as to her separate estate: *Standard Bank* v. *McQuaig*, 7 P. R. 356; *Aylesford* v. *G. W. Ry. Co.*, 1852, 2 Q. B. 626; and see *McLeod* v. *Emigh*, 12 P. R. 450; *Re Teasdall* v. *Brady*, 18 P. R. 104; *Kistler* v. *Tettmar*, 1905, 1 K. B. 39; 92 L. T. 36.

Though an examination may be had without an order in the first instance, yet, where a party wishes to examine a judgment debtor a second time, he must make a substantive motion for that purpose on notice to the judgment debtor, and show grounds for the order: *London & Canadian Loan, etc.*, v. *Merritt*, 2 C. L. T. 260; *Re Central Bank, Watson's Case*, 15 P. R. 327; affirmed by Divisional Court, 16 P. R. 55; and see *Sturges* v. *Warwick*, 136 L. T. Jour. 111.

The examination is intended to be a cross-examination of the strictest character: *Beattie* v. *Barton*, 2 C. L. T. 104; *Re Central Bank, Watson's Case*, *supra*; and any question "fairly pertinent to the subject matter of the inquiry, which means put with a view to ascertain so far as possible, by discovery from a reluctant defendant, what debts are owing to him, ought to be answered by the defendant." He must also "give all necessary particulars to enable the plaintiffs to recover under a garnishee order": *Republic of Costa Rica* v. *Strousberg*, 16 Ch. D. 8, 12; see also *McLean* v. *Bruce*, 13 P. R. 504. Scope of examination.

The examination may extend to property assigned by the debtor to a third party by way of security: *Watkins* v. *Ross*, 68 L. T. 423. It should not be so conducted as to try to entrap the debtor, but it should be full, fair and searching: *Graham* v. *Devlin*, 13 P. R. 245.

Where the person examined cannot speak as to the facts about which examination may be had, without referring to books, etc., the

Rules 581, 582.

Examiner's duty is to require their production, and they must be produced: *Russell* v. *Macdonold*, 12 P. R. 458.

Inquiry as to the means of the debtor is not restricted to the period of contracting the debt, but it may be shewn that at some anterior time the debtor had property as to which he may be required to give an account, and it is not a sufficient answer to say merely that it has all been disposed of before the debt was incurred: *Ontario Bank* v. *Mitchell*, 32 C. P. 73; and this is also the rule where the judgment is for costs only: *Bortlett* v. *Bortlett Mines Co.*, 3 O. W. N. 328.

See further as to nature of the examination which may be had under this *Rule*: notes to *Rule* 587.

As to the mode of compelling attendance: see *Rule* 585.

Application for examination of officers of corporations.

581. Where the judgment is against a corporation the judgment creditor may in like manner examine any of the officers of such corporation, touching the names and residences of the stockholders in the corporation, the amount and particulars of stock held or owned by each stockholder and the amount paid thereon, and as to what debts are owing to the corporation, and as to the estate and effects of the corporation; and as to the disposal made by it of any property since contracting the debt or liability, in respect of which the judgment was obtained, or, in the case of a judgment for costs only, since the commencement of the cause or matter. C.R. 902.

See Eng. (1883) R. 610. Before this *Rule* there was no power to order the examination of an officer of the corporation in such a case: *Dickson* v. *Neath, etc., Ry. Co.*, L. R. 4 Ex. 87.

A person who was, but has ceased to be, an officer, may be examined under this *Rule*: *Societé Generole* v. *Johonn Morie Farina*, 1904, 1 K. B. 794; 90 L. T. 472.

Where an officer of a company is examined under this *Rule* the judgment creditor is entitled to a full disclosure of the company's affairs, and as a consequence to have access to its books pertinent to that inquiry: *Chorlebois* v. *Great North-West Ry. Co.*, 15 P. R. 10. The person examined must procure the necessary information to enable him to answer all questions the creditor is entitled to have answered: *Ib.* The creditor has no right to examine as to the dealings with paid-up stock: *Ib.*

"Officer" includes a director of the company: *Powell-Rees* v. *Anglo Candian Mortgage Corp.*, 26 O. L. R. 490; 27 O. L. R. 274. No order is necessary for the examination of an officer: *Ib.*

Examination of certain persons as to a debtor's means.

582. The Court may order any clerk or employee or former clerk or employee of the judgment debtor, or any person or the officer or officers of any corporation to whom the debtor has made a transfer of his property or effects, exigible under execution, since the date when

the liability or debt which was the subject of the action in which judgment was obtained was incurred (or where the judgment is for costs only since the commencement of the cause or matter), to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he had when the debt or liability aforesaid was incurred (or in the case of a judgment for costs only, at the date of the commencement of the cause or matter), and as to the property or means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any and what debts are owing to him. C.R. 903. Rule 582.

Examination of transferees of debtor.

An order under this *Rule* should not be made without notice to the transferee; nor without proof that the transfer was made after the date when the liability of the judgment debtor was incurred: *Blokeley* v. *Bloose*, 12 P. R. 565.

A chattel mortgage is a transfer of property and effects within this *Rule*: *Ib.*

The wife of a debtor to whom he has transferred property, may be examined notwithstanding that he alleges that the property was her own, and that he was acting as her agent only: *Goodeve* v. *White*, 15 P. R. 433; so also where the transfer has been made to a mortgagee of the wife and she receives a benefit by the reduction of the incumbrance: *Croft* v. *Croft*, 17 P. R. 452.

The examination of a third mortgagee of real estate of the judgment debtor was refused, and the mortgagee was held not to be a transferee of property exigible in execution under this *Rule*: *Canadian Mining Co.* v. *Wheeler*, 3 O. L. R. 210; *sed vide*, *The Execution Act* (R. S. O. c. 80), s. 31; and *Donovan* v. *Bacon*, 16 Gr. 472, note.

This provision being remedial, is to be construed so as to advance the remedy given by it, so far as the fair meaning of the words will permit: *Gowans* v. *Bornet*, 12 P. R. 330; *Coleman* v. *Hood*, 4 O. W. R. 309.

It has therefore been held that the word "transfer" in this Rule should not be limited to the transfer of the *title* to the property or effects, but should be regarded as equally applicable to the transfer of the *possession*, and, therefore, a solicitor to whom, under a power of attorney to receive it, the consideration money on a sale of property had been paid, was held to be examinable: *Ib.*

It has been said by Boyd, C., that "transfer" in this *Rule* does not cover an "assignment" for the general benefit of creditors, as such an assignment virtually ends all litigation with respect to property and effects of a debtor, and this *Rule* is only to aid a judgment creditor in proceeding against the debtor's property, which he can no longer do after a valid assignment for all creditors: *British Can. L. & I. Co.* v. *Britnell*, 13 P. R. 310; in *Canadian Bank of Commerce* v. *Wolf*, 11 C. L. T. 201, the contrary was decided by Street, J.

Rules 583-586.

Examination of persons in possession of property of judgment debtor.

583. Where the Court is satisfied that there is reasonable ground for supposing that any person or corporation is in possession of any property of the judgment debtor exigible under execution, it may order such person or any officer of said corporation to attend and submit to examination touching the property and means of the judgment debtor. C.R. 904.

See notes to preceding *Rule*.

Examination in other cases.

584. Where a difficulty arises in or about the execution or enforcement of a judgment, the Court may make such order for the attendance and examination of any party or person as may seem just. C.R. 910.

See Eng. (1883) R. 611.

Rule 580 provides for the examination of the debtor himself; *Rule* 581, for the examination of officers of a debtor corporation; *Rules* 582, 583, for the examination of clerks, employees and transferees of the debtor, and the present *Rule* enables the Court to make an order for the attendance of any other person whom there is any reason to believe can give information which will assist in the enforcement of the judgment creditor's claim.

Compelling attendance and production of documents.

585. A person liable to be examined under the preceding Rules may be compelled to attend and testify, and to produce books and documents, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as in the case of a witness. C.R. 905.

The procedure by this *Rule* directed to be followed is that provided in case of examination of witnesses generally: *Rules* 178, 345; see *Rule* 338.

This *Rule* merely regulates the mode of procuring the attendance of a party for examination; it does not enable the subpœna, and appointment under *Rule* 345, to be issued without a previous order for the examination being first obtained, where one is necessary, see *Rules* 582, 583, 584; see *Rule* 586.

If a party liable to examination refuses to be sworn, he will be ordered to attend again at his own expense and to take the oath and submit to be examined; and if he makes default, an application may be made to attach him for contempt: *Uhrig* v. *Uhrig*, 15 P. R. 53; and such order may be made where the party has been sworn and has objected to answer questions on the advice of his counsel, and though the Examiner has sustained the objection and there has been no appeal from his ruling: *Hamilton* v. *Essery*, 15 P. R. 202.

Service of appointment

586. A person liable to be examined as a judgment debtor or as an officer of a corporation which is a judgment debtor need not be served with a subpœna, but

may be served with an appointment signed by the officer before whom he is to be examined at least 48 hours before the time fixed for his examination, and the person to be examined shall be paid the same fees as a witness. C.R. 906. Rule 587.

Formerly if the original order were not shown at the time of service, the person served could not be brought into contempt for disobedience of it: *Blokeley* v. *Bloose*, 12 P. R. 565. Now it is only necessary to show the original if it is demanded: see *Rule* 203.

Insufficient service is waived by attending and submitting to be examined: *Dayfoot* v. *Byrens*, 7 C. L. T. 21; *Jones* v. *Macdonald*, 14 P. R. 109.

An appointment signed by the Judge, or officer, is what is required to be served, not a copy, nor a subpœna, nor copy: *Meyers* v. *Kendrick*, 9 P. R. 363.

As an original appointment is required to be served, it would seem advisable, in order to prove service, that the appointment should be signed by the Judge or officer in duplicate.

An order to examine a defendant as a judgment debtor, and an appointment under it, are together equivalent to an order that the debtor should attend on the day mentioned in the appointment: *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666. Where he attends and offers to be examined, the force of the order is spent, and to obtain a fresh appointment a fresh order is necessary: *Ib.*

In England there is no corresponding provision with reference to the present subject, but there, also, the debtor or other person to be examined is entitled to conduct money. An attachment was refused for disobedience to an order to come up to London for examination, without an affidavit showing tender of conduct money, and reason for not examining the debtor at his own residence: *Protector Endowment Co.* v. *Whitlom*, 36 L. T. 467.

587. Where the judgment debtor does not attend, does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the Court may order the debtor to be committed to the common gaol of the County or district in which he resides, for any term not exceeding twelve months; or that a writ of *capias ad satisfaciendum* may be issued against the debtor, or in case the debtor is at large upon bail, may make an order for his committal to close custody; and the Sheriff, on due notice of the Committal of debtor for non-attendance, refusal to answer, answering unsatisfactorily, etc.

Rule 587.

order, shall forthwith take the debtor and commit him to close custody until he obtains an order allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law. C.R. 907.

The fact that the debtor has made an assignment for the benefit of his creditors is no excuse for his not attending for examination: *McEachern* v. *Gordon*, 18 P. R. 459; *Bank of Hamilton* v. *Scott*, 40 C. L. J. 432.

In *McKinnon* v. *Crowe*, 17 P. R. 291, it was objected that an order for examination under *Rule* 582 could not properly be made under a judgment for costs in an interpleader issue, but the point not having been raised until a motion to commit for concealment of property, it was held to be too late, and was not adjudicated on: see now *Rule* 3 (*g*), 580.

An order committing a debtor to close custody under this *Rule* is "process" in an action within the exception in *The Ontario Habeas Corpus Act* (R. S. O. c. 84), s. 2, so that a *habeas corpus* should not be granted in such case, and if granted may be quashed as improvidently issued: *Re Anderson* v. *Vanstone*, 16 P. R. 243.

Unsatisfactory answers.

The broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is, having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that a full and true disclosure has been made: *Graham* v. *Devlin*, 13 P. R. 245; *Millar* v. *Macdonold*, 14 P. R. 499; *Charlebois* v. *Martin*, 4 O. W. N. 412.

Answers are not "unsatisfactory" because they do not account for the application of the debtor's assets in a proper manner: *Hobbs* v. *Scott*, 23 U. C. Q. B. 619; but see *Crooks* v. *Stroud*, 10 P. R. 131. The debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all: *Lemon* v. *Lemon*, 6 P. R. 184; see also *Merrill* v. *McFarren*, 1 C. L. T. 133; *Beattie* v. *Barton*, 2 C. L. T. 104, and the authorities fully reviewed in *Schneider* v. *Agnew*, 6 P. R. 138. Where the defendant, a widow, was shown to have received $500 insurance money payable on the death of her husband, part of which she had lent to her brother, part she had expended on clothing for herself and children, and the remainder, $100, she still had, but refused to apply on the judgment, as she had no other means with which to support herself and three children, an order to commit for unsatisfactory answers was refused: *McKay* v. *Atherton*, 12 P. R. 464.

An agreement by a debtor to work for his wife, in order to repay her a debt due by him to her was held to be neither an illegal, nor unreasonable, arrangement: *Baby* v. *Ross*, 14 P. R. 440.

It is the debtor's duty to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out as best they may, what it is the business of the debtor to make clear. It is not enough for the debtor to say, touching any transaction, that he does not know, or does not remember, if he has the means at hand to qualify himself to explain: *Foster* v. *VanWormer*, 12 P. R. 597. He must produce books, etc., which will

enable him to answer; and submit to examination upon them: see *Russell* v. *Macdonald*, 12 P. R. 458; and any question fairly pertinent and properly asked with a view to ascertain full particulars of what debts there are, and which of them may be attached, must be answered: *Rep. of Costa Rica* v. *Strousberg*, 16 Ch. D. 8; 43 L. T. 399. Rule 887.

Where particulars, wherein dissatisfaction is felt, have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions, or explaining what may appear to be admissions: *Grohom* v. *Devlin*, 13 P. R. 245.

Where answers were considered unsatisfactory the Judge allowed defendant a week to pay costs of examination and of the motion, and attend again and give further information, before making an order on the motion to meet the justice of the case: *Dyment* v. *Jerrett*, 9 C. L. T. 141.

Where a debtor swears that he has lost money by gambling, the Court refused to order him to disclose the particular transactions in which the money was lost, or to commit him for unsatisfactory answers, or for making away with his property: *Harvey* v. *Aikine*, 17 P. R. 71.

Although the Examiner rules that the debtor need not answer questions, he is not necessarily protected, and it is not necessary for the creditor to appeal from the Examiner's ruling; but on a motion to commit the debtor for not answering, the order may be made for him to attend again at his own expense, if it should appear that the Examiner was wrong: *Bank of Hamilton* v. *Essery*, 15 P. R. 202.

The latter part of the *Rule* is confined to the case of a *ca. sa.*, or re-commitment upon a *ca. sa.*, and not to the case of a penal order of commitment for not disclosing property or transactions. In such case, therefore, *quære* whether, by submitting to another examination and disclosing his property, the debtor could be relieved from the imprisonment imposed: *Bo by* v. *Ross*, 14 P. R. 440.

An order for committal for a fixed period, is said to be the appropriate punishment authorized by this *Rule*: *Jones* v. *Macdonald*, 15 P. R. 345; an order for a writ of attachment requiring the Sheriff to hold the debtor in custody for an indefinite period was held to be improper: *Re Chatham Harvester Co.* v. *Campbell*, 12 P. R. 666. Motion for committal.

A notice of motion, seeking relief on the ground of unsatisfactory answers, should particularize the answers complained of: *Foster* v. *VonWormer*, 12 P. R. 597.

The application is to a Judge in Chambers: see *Royal Can. Bank* v. *Lockman*, 7 P. R. 102. It may be made at the time of the examination and without further notice, if the officer before whom the examination takes place has jurisdiction to entertain it, *e.g.*, in County Court cases, where the examination is before the Judge: *Ponton* v. *Bullen*, 2 E. & A. 379; *Baird* v. *Story*, 23 U. C. Q. B. 624.

An order to commit must be absolute, not upon a condition, *e.g.*, unless the debtor forthwith gives a note: *Chichester* v. *Gordon*, 25 U. C. Q. B. 527.

A married woman is liable to be committed: *Metropolitan L. & S. Co.* v. *Mara*, 8 P. R. 355; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; *Watson* v. *Ontario Supply Co.*, 14 P. R. 96; *Kistler* v. *Teffmar*, 1905, 1 K. B. 39; 92 L. T. 66.

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The committal is for a contempt, and the fact that the judgment is one for costs does not make the committal an imprisonment for non-payment of costs: *Pearson* v. *Essery*, 12 P. R. 466; and see *Re Teasdall* v. *Brady*, 18 P. R. 104. The committal is penal in its nature, and a second punishment cannot be awarded for the same offence; therefore where the debtor ordered to be committed was released by mistake it was held that a second order for attachment could not issue; but *semble*, an order for re-arrest under the first order might be made: *Church's Trustee* v. *Hibbard*, 1902, 2 Ch. 784.

Substituted service of notice of motion to commit for unsatisfactory answers was allowed in *Trout* v. *Loney*, 13 C. L. T. 61, and an order was made for committal of defendant though he was out of the jurisdiction: *Ib.*, following *Bloomfield* v. *Brooke*, 6 P. R. 264.

On a motion to commit under this *Rule* for unsatisfactory answers, where the depositions show on their face that the party was being examined as a judgment debtor, it is not necessary to prove service of the appointment and payment of conduct money: *Jones* v. *Macdonald*, 14 P. R. 109. *Secus*, where the motion is to commit for non-attendance. The certificate of the Examiner of the proceedings before him is good evidence, although it may have been given *ex parte*: *Ib.*

The order must commit the debtor *to the common gaol of the county in which he resides*; it is not proper, nor warranted by the *Rule*, to direct that he be committed to the gaol of any other county where he may be found: *Baby* v. *Ross*, 14 P. R. 440.

Where a debtor contumaciously refused to answer questions, he was committed for three months, and an application for his discharge before the expiry of the three months was refused, though the creditor consented: *Jones* v. *Macdonald*, 15 P. R. 345. Where after a reasonable opportunity the debtor refused to disclose the whereabouts of his property, he was committed for three months: *McKinnon* v. *Crowe*, 17 P. R. 291.

Appeal.

An appeal lies to a Divisional Court from the order of a Judge in Chambers refusing an order to commit for unsatisfactory answers: *Millar* v. *Macdonald*, 14 P. R. 499; but the Appellate Court will not reverse the order unless the Judge has erred in principle, or is almost overwhelmingly wrong: *Ib.*

Where, therefore, the Court of first instance in its discretion refused to order the debtor to answer questions, the Court of Appeal refused to do so, although of opinion that the Court below would not have been wrong if it had ordered them to be answered: *Watkins* v. *Ross*, 68 L. T. 423.

An order made in a County Court action by the Judge of the County Court, under this *Rule*, committing a debtor, is appealable to the Appellate Division: see *The County Courts Act* (R. S. O. c. 59), s. 40 (*b*), *supra*, p. 127; and *Baby* v. *Ross*, 14 P. R. 440. Where the debtor is ordered to be committed he may also be ordered to pay costs of the motion: *McKinnon* v. *Crowe*, 17 P. R. 291.

Committal of officer of corporation in like manner.

588. Where any officer of a corporation or other person liable to be examined does not attend, and does not show a sufficient excuse for not attending, or if attending, refuses to disclose any of the matters in respect of

which he may be examined, the Court may order him to be committed to the common gaol of the County or district in which he resides, for any term not exceeding six months. C.R. 908. Rules 588, 589.

Rule 587, it will be noted, is confined to the case of a debtor himself not attending, or making unsatisfactory answers, etc., and this *Rule* is confined to the case of officers of corporations making default, but there appears to be no express provision for the committal of employees or transferees of the debtor ordered to attend for examination under *Rule* 582 who make default; such cases are left to be governed by the ordinary procedure of the Court for the enforcement of its orders against recalcitrant witnesses. See *Rule* 585.

589. Where a person has been committed to gaol, the Court may limit the term of imprisonment or grant such other relief as may seem just, but the order shall not relieve such person from any civil liability to any other person. C.R. 909. Release or other relief of persons committed for contempt.

See *Rule* 551.

590.—(1) The Court, upon the *ex parte* application of the judgment creditor, upon affidavit stating that the judgment is unsatisfied, and Court or Judge may order attachment of debts

(*a*) that some person within Ontario is indebted to the judgment debtor, or

(*b*) that some person not within Ontario is indebted to the judgment debtor and that the debt to be attached is one for which he might be sued in Ontario by the judgment debtor ;

may 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 debt and that the garnishee do at a time named 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 judgment debt and the claims of any other execution creditors. Notice of the application to pay over shall, unless dispensed with, be given to the judgment debtor. Order that garnishee appear.

(2) When the garnishee is not within Ontario, and is neither a British subject nor in British dominions, notice of the order and not the order itself shall be served. C.R. 911. *Amended.* Garnishee out of Ontario.

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Attachment of debts owing from a firm.

(3) Where a debt owing from a firm carrying on business within Ontario, but having members out of Ontario, is attached, service may be effected upon any person having control or management of the partnership business or any member of the firm within Ontario. C.R. 229. *Amended.*

Clause (2) contains a similar provision to that made by *Rule* 29, in the case of writs of summons issued against a foreigner out of the jurisdiction: see notes to *Rule* 29. See Eng. (1883) R. 622. The affidavit was formerly required to be by the creditor or his solicitor: *Builder* v. *Kerr*, 7 P. R. 323; *Boyd* v. *Hoynes*, 5 P. R. 15; but it would now seem to be sufficient if made by any person aware of the facts deposed to. Where the judgment creditor is a corporation: see *Rule* 294.

Where a judgment is payable *in futuro* an attaching order obtained before the judgment is actually payable is premature and invalid: *White* v. *Stennings*, 1911, 2 K. B. 418; 104 L. T. 876; and where the entry of judgment is stayed proceedings to attach debts thereunder cannot be taken: *Scully* v. *Madigon*, 4 O. W. N. 981, 1003.

A creditor who attaches a debt is deemed to do so for the benefit of himself and all other creditors of the debtor: see *The Creditors' Relief Act* (R. S. O. c. 81), s. 5; and as to the right of a sheriff to attach debts due to an execution debtor: see *Ib.*, s. 38; and as to his right to recover money due on a mortgage to an execution debtor: see *The Execution Act* (R. S. O. c. 80), ss. 25-27.

The provisions of this *Rule* are held not to apply to the Division Courts: *Simpson* v. *Chose*, 14 P. R. 280.

For Form of Order: see No. 77; H. & L. Forms, No. 1174.

Scope of the Rule.—As to the meaning of "judgment," "judgment creditor," and "judgment debtor," see *Rules* 3 (*e*), (*f*), (*g*). 533, 534.

Under those *Rules* an order for payment of money into Court may, it would seem, be enforced by attachment of debts under *Rule* 590. This cannot be done in England: see *Re Greer, Nopper* v. *Fanshawe*, 1895, 2 Ch. 217; 72 L. T. 865.

The judgment creditor mentioned in *Rule* 590 is a judgment creditor who may examine his debtor under *Rule* 580, and, under that *Rule* where the judgment, or order, of the creditor is only for costs, the creditor is a judgment creditor within that *Rule*, and therefore also within this *Rule*: *Lloyd* v. *Wallace*, 9 P. R. 335; *Elliott* v. *Capell*, 9 P. R. 35; see also *Whittaker* v. *Whittoker*, 7 P. D. 15; and *Manchester, etc.*, v. *Porkinson*, 22 Q. B. D. 173.

An assignee of the judgment being a "person entitled to enforce the judgment," is "a judgment creditor": *Rule* 3 (*e*); *Goodman* v. *Robinson*, 18 Q. B. D. 332; *McLean* v. *Bruce*, 14 P. R. 190. But *semble*, he must first obtain an order to continue the proceedings, under *Rule* 301: see *Boynord* v. *Simmonds*, *infra*, p. 1216.

The creditor must be one who is entitled to enforce immediate payment. Therefore the holder of a bond of a corporation containing a condition that all bondholders should be paid *pari passu*, was held not to be such a creditor, since an attachment would have given him

priority over other bondholders: *Kennett* v. *Westminster Improvement Commissioners*, 11 Ex. 349. Rule 590.

Only such property can be attached as the debtor could deal with properly, and without violation of the rights of other persons, at the time the attaching order is served: see *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238; *Re General Horticultural Co.*, 32 Ch. D. 512; *Vyse* v. *Brown*, 13 Q. B. D. 199; *McCraney* v. *McLeod*, 10 P. R. 541; *Porker* v. *Howe*, 12 P. R. 351; *Beaty* v. *Hockett*, 14 P. R. 395.

Proceedings to attach a judgment debt may be taken after the pronouncing, but before the actual entry, of the judgment debtor's judgment: *Holtby* v. *Hodgson*, 24 Q. B. D. 103; *Davison* v. *Taylor*, 14 P. R. 78.

A judgment against a married woman, to be executed against her separate estate, is a judgment enabling the judgment creditor to attach debts due to the married woman: *Holtby* v. *Hodgson*, *supra*.

Where a claim can be attached it has been held that a receiver should not be appointed, even though the claim be one which could formerly be reached only by way of equitable execution: *Fleming* v. *Stephenson*, 28 C. L. J. 370 (Dartnell, J.C.C.)

A foreign corporation not shewn to carry on one of the principal parts of its business in Ontario is not within Ontario for the purposes of this *Rule*: *Parker* v. *Odette*, 16 P. R. 69; *Canada Cotton Co.* v. *Pormalee*, 13 P. R. 308; *Boswell* v. *Piper*, 17 P. R. 257; *sed vide*, *Haggin* v. *Comptoir D'Escompte de Paris*, 23 Q. B. D. 519; and *Wentworth* v. *Smith*, 15 P. R. 372. The mere fact that the foreign corporation has a resident agent, or chief agency in Ontario, is not sufficient to bring the corporation within this *Rule*; but a Canadian banking corporation authorized by Parliament to do, and doing, business in Ontario, although its head office is in another Province, is resident within Ontario within the meaning of this *Rule*: *Wentworth* v. *Smith*, 15 P. R. 372.

Where the garnishee is not within Ontario, the test whether the debt due by him may be attached, is whether it is one which the debtor could sue the garnishee for in Ontario. If he could not, then the debt is not attachable: *McMulkin* v. *Traders' Bank*, 26 O. L. R. 1.

Debts owing from a firm carrying on business within the jurisdiction may be attached under this *Rule*, although one or more members of the firm be resident out of the jurisdiction: *Rule* 590 (3); but the attaching order must be served on the person having the control or management of the partnership business, or on one of the partners within Ontario: *Ib.* Partnership firms.

Attachment of Debts.—This *Rule* applies where the interest of the debtor is in the shape of a *debt* whether legal or equitable: see cases *infra* of debts held to be attachable. Attachment of debts.

The affidavit for an attaching order need not state the amount of the debt: *Lucy* v. *Wood*, 28 Sol. Jour. 326; W. N. 1884, 58; and will be sufficient if it states that the deponent is informed and believes showing grounds thereof: *Rule* 293, that the garnishee is indebted to the judgment debtor: *Coren* v. *Borne*, 22 Q. B. D. 249; *De Pass* v. *Capitol & Industries Corporation*, 1891, 1 Q. B. 216; 64 L. T. 93; S. C., *sub nom. Vinall* v. *De Pass*, 1892, A. C. 90; 66 L. T. 422. In answer to such an affidavit it is not sufficient for the garnishee to deny owing the particular debt referred to in the affidavit filed in support of the application, Affidavit

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but he must deny owing any debt to the judgment debtor or he may be ordered to pay over: *Ib.*

Where the judgment creditor is unable to specify the debts owing to the judgment debtor, an application for the appointment of a receiver may be the appropriate remedy: see *Goldschmidt* v. *Oberheinische Metallwerke*, *supra*, p. 82.

No distinction between legal and equitable debts.

Since *The Judicature Act* the power of garnishing debts has been very extensive. The word debt has been given a more extended meaning than it had at the time of the passing of the original garnishee clauses in the C. L. P. Act, and under those clauses now embodied in the *Rules* a creditor may attach any debt due by any other person to his judgment debtor, whether legal or equitable: *Leaming* v. *Woon*, 7 Ont. App. 42; *Wilson* v. *Dundas*, W. N. 1875, 232; *Summers* v. *Morphew*, 61 L. T. Jour. 140; *Re Cowan's Estate*, 14 Ch. D. 638; *Hamer* v. *Giles*, 11 Ch. D. 942; *Webb* v. *Stenton*, 11 Q. B. D. 518.

Under the present *Rule* it is clear that an immature legal claim, which has not ripened into a debt, and, by possibility, may never do so, cannot be attached: see *Simpson* v. *Chase*, 14 P. R. at p. 286.

Moneys in a receiver's hands.

Money of the debtor actually in the hands of a receiver may be attached: *Re Cowan's Estate*, 14 Ch. D. 638; but the future accruing income of a trust fund in the hands of trustees, to which the debtor may become entitled, is not attachable: *Webb* v. *Stenton*, 11 Q. B. D. 518; nor is the interest of a debtor in the proceeds of land to be sold by trustees attachable before the sale has taken place; *Stuart* v. *Grough*, 15 Ont. App. 299; and see *Hunsberry* v. *Kratz*, 5 O. L. R. 635.

Before the Judicature Acts, it was held that on a judgment against a company, money of the company in the hands of an official liquidator might be attached: *Ex parte Turner*, 2 D. F. & J. 354; and though this was afterwards questioned in *Re Hunter* v. *Greensill*, L. R. 8 C. P. 24, *The Judicature Act*, or the present *Rule*, will probably be held to have removed any difficulty in holding the money to be attachable. See also cases, *infra*, p. 1210.

Test of attachable debt.

A fair test as to a debt being attachable has been said to be, whether the debt is capable of being the subject of a set-off: *Webster* v. *Webster*, 31 Beav. 393; *McNaughton* v. *Webster*, 6 U. C. L. J. 17; see also *Parker* v. *Howe*, 12 P. R. at p. 353.

The debt must be an absolute and perfected debt, not merely a conditional one, *e.g.*, payable upon the execution of a conveyance: *Howell* v. *Metropolitan District Ry. Co.*, 19 Ch. D. 508, or payable on a contingency which has not happened: *Carswell* v. *Langley*, 3 O. L. R. 261, and must be owing to the judgment debtor alone; where it is due to him jointly with another person it cannot be attached: *Macdonald* v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535; *Parker* v. *Odette*, 16 P. R. 69; *Marshall* v. *James*, 1905, 1 Ch. 432.

Where the judgment debtors were persons authorized under *Rule* 75 to defend on behalf of all persons constituting an unincorporated association, money deposited in a bank at the credit of that association was held to be not the property of the judgment debtors, and therefore not attachable for costs payable by the judgment debtors: *Metallic Roofing Co.* v. *Local Union, &c.*, 10 O. L. R. 108; *supra*, p. 433.

Where a husband and wife joined as plaintiffs in an action for damages for personal injury to the wife, and the jury awarded them

each a specific sum, but judgment was entered for the plaintiffs for tha whola amount awarded, without stating the proportions assigned to each, it was held that the amount awarded to ths wife could not be attached by a judgment creditor of the husband: *Beosley* v. *Roney*, 1891, 1 Q. B. 509; 65 L. T. 153. Rule 590.

Tha *Rule* applies to dabts accruing, as well as debts actually owing: see *Sparks* v. *Younge*, 8 Ir. C. L. 251; *Tapp* v. *Jones*, L. R. 10 Q. B. 591; *ex porte Joselyne*, 8 Ch. D. 327; but a future debt, *i.e.*, a debt which has no present existence but can only arise on the happening of soma future event, *e.g.*, moneys which may in the futura come into tha bands of a trustea for tba benefit of his *cestui que trust*, cannot be attached: *Fellows* v. *Thornton*, 14 Q. B. D. 335; and sea *Mopleson* v. *Sears*, 105 L. T. 639; but such claims havs been mada avaliabla under equitabla execution by the appointment of a receiver: *Block* v. *Cox*, before Robertson, J., see Judgment Book Chy. D. No. 12, fo. 28. Debts due, but not payable till a futura time, may bo ordered to be paid at such future date; and it is not necessary to wait and obtain a fresh order for payment of each instalment as it becomes payabie: *Topp* v. *Jones*, L. R. 10 Q. B. 591; sea alao *Re Cowan's Estate*, and *Leoming* v. *Woon*, *supra*, p. 1208; *Booth* v. *Trail*, 12 Q. B. D. 8, and *Rule* 594 (2); but tha garniabee cannot ba compelled to pay befora credit given to him has expired: *Hording* v. *Borrott*, 3 U. C. L. J. 31. Debts accruing.

Whether money dus on cheques, or promissory notes, or other negotiabla instruments, is attachahle seems doubtful: *pro.* aee *Hyam* v. *Freeman*, 35 Sol. Jour. 87; *Roblee* v. *Rankin*, 11 S. C. R. 137; *contra*, see *Jockson* v. *Cassidy*, 2 Ont. 521; *Exley* v. *Dey*, 15 P. R. 353. Under ths present state of tbe autborities such deht may probably be better made exigible by receiver and injunction: *Exley* v. *Dey* (*No. 2*), 15 P. R. 405.

Where a garnisbee, before service of an attaching order, had given a cheque for the debt due by him to the judgment dehtor, which was duly paid, it was neld that therc was no debt owing, or accruing, between the time of giving the cheqne and its payment, and no duty upon tha garnishee to stop payment on being served with the attaching order: *Elwell* v. *Jockson*, 1 Cab. & El. 362.

Wbare, before an attaching order issued, a legacy was payable to the defendant, and he had made a settlement of it, it was heid that no debt was due from the executor of the will to tha defendant, as, even if the settiement were set aside by the plaintiff, there was no ground for saying that the executor was obliged to pay over to the defendant. The defendant could not revoke the settlement, and even if it were set aside as void against creditors, it would be still valid as between the executor and the defendant: *Vyse* v. *Brown*, 13 Q. B. D. 199; 1 Cab. & El. 225.

Where the trustees of an annuity, payabls to a judgment debtor half-yearly, had advanced to him more than was payable at the end of the iast half-yearly period, it was held that nothing was attachable ss elther owing, or accruing: *Webb* v. *Stenton*, 11 Q. B. D. 518; see *Booth* v. *Trail*, 12 Q. B. D. 8. So a salary whicb is not payahle till earned is not attachable as a debt before the date when it is payable: *Hall* v. *Pritchett*, 3 Q. B. D. 215; *Re Shanley* v. *Moore*, 9 U. C. L. J. 264. But a dehtor's interest in a trust fund not yet payable by tha trustee has been held to be attachable: *Nash* v. *Pease*, 47 L. J. Q. B. 766; *Lloyd* v. *Wolloce*, 9 P. R. 335.

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An order to attach a debt may be made, notwithstanding that six years have elapsed since the judgment was obtained by the judgment creditor: *Fellows* v. *Thornton*, 14 Q. B. D. 335.

Rule 100 does not apply to garnishee proceedings. Where the debt attached is due by a firm the attaching order should be made not against the firm, but against the several members of the firm: *Walker* v. *Rooke*, 6 Q. B. D. 631.

Attachable debts.

Debts Attachable.—The following have been held to be attachable:—

Rent.

Rent due by a tenant: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259. Formerly, rent not due was not attachable: *Commercial Bank* v. *Jarvis*, 5 U. C. L. J. 66; *McLoren* v. *Sudworth*, 4 U. C. L. J. 233; but since *The Apportionment Act* (R. S. O. c. 156), s. 4, by which rent is made apportionable, it has been held in Ontario that it may be attached as a debt accruing between gale days; and the judgment creditor is entitled to be paid, on the gale day, such portion as had accrued due on the day of service of the attachment: *Massie* v. *Toronto Printing Co.*, 12 P. R. 12; but see *contra*, *Barnett* v. *Eastman*, 67 L. J. Q. B. 517, where notwithstanding the Apportionment Act, rent was held not to be attachable before it was due; and in Division Courts only rent due can be attached: see *Christie* v. *Cosey*, 31 C. L. J. 35; *Birmingham* v. *Malone*, 32 C. L. J. 717.

The attachment of rent intercepts the rent up to the day of attachment: *Re Wilson*, 5 R. 455, and suspends the landlord's right of distress therefor: *Patterson* v. *King*, 27 Ont. 56.

Rents due to a mortgagor before a notice given by the mortgagee to the tenant to pay subsequent rents to him: *Patterson* v. *O'Reilly*, 10 L. R. Ir. 304, and see *Massie* v. *Toronto Printing Co.*, *supra*.

Money due by Sheriff.

Money in the hands of a Sheriff, the proceeds of an execution levied by him: *Murray* v. *Simpson*, 8 Ir. C. L. App. xlv.; *Re Smart* v. *Miller*, 3 P. R. 385, or in the hands of a Division Court Clerk; *Bland* v. *Andrews*, 45 U. C. Q. B. 431; or Bailiff: *Lockhart* v. *Gray* 2 C. L. J. 163, though the contrary has been held in England: *Dolphin* v. *Loyton*, 4 C. P. D. 130.

By Receiver.

Money in the hands of a receiver, which is presently payable to the debtor: *Re Cowan's Estate*, 14 Ch. D. 638; *Leoming* v. *Woon*, 7 Ont. App. 42; *Webb* v. *Stenton*, 11 Q. B. D. 530; *Stuart* v. *Grough*, 15 Ont. App. 299; *Corswell* v. *Longley*, 3 O. L. R. 261; or an official liquidator: *Ex parte Turner*, 2 D. F. & J. 354; see *Mack* v. *Ward*, W. N. 1884, 16; and *Stuart* v. *McKim*, 8 Ont. 739; but see *contra*, *Prout* v. *Gregory*, 24 Q. B. D. 281; 61 L. T. 696; *Re Hunter* v. *Greensill*, L. R. 8 C. P. 24.

By liquidator.

By mortgagee.

Surplus money in the hands of mortgagees after sale under a power in a mortgage: *Nicol* v. *Ewin*, 7 P. R. 331; see *McKay* v. *Mitchell*, 6 U. C. L. J. 61; see also *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259, where it was held that a judgment debtor, who had obtained a garnishee order against a mortgagor debtor of his debtor, was not entitled to surplus proceeds of a sale by a prior mortgagee, which took place after his garnishee order, but the holder of a garnishee order obtained after the sale against the prior mortgagee was entitled.

By bankers.

Money in the hands of Bankers: *Re United Eng. & Scot. Ins. Co.* L. R. 5 Eq. 800; L. R. 3 Chy. 787; *Miller* v. *Huddlestone*, 22 Ch. D. 233; *Wentworth* v. *Smith*, 15 P. R. 372; even though the money be

deposited in a branch of a bank outside the jurisdiction of the Court, provided that the head office of the bank is within Ontario, and the claim is such that the debtor might himself have maintained an action for it under *Rule* 25: *McMulkin* v *Traders Bank*, 26 O. L. R. 1. Rule 590.

Dividends on Bank stocks: *Salaman* v. *Donovan* (1860), 10 Ir. C. L. R. App. xiii.

Money payable under a contract for work done for a municipal corporation: *Alden* v. *Boomer*, 2 P. R. 339. By contractee.

Money payable under a contract to supply a lunch, was held to be due when the purveyor had performed his part and supplied the food, tables and accessories, and where the lunch was over at 2 p.m., the amount was held to be attached by service of an attaching order at 5 p.m.; *Kelly* v. *Rider*, 11 T. L. R. 206.

Money due to a railway company for the purpose of distribution among its shareholders under an agreement sanctioned by Act of Parliament, may be attached by a creditor of the company: *Bouch* v. *The Seven Oaks, etc., Railway Company*, 4 Ex. D. 133.

A debt for which a cheque has been given by the garnishee, if the cheque is dishonored or stopped: *Cohen* v. *Hale*, 3 Q. B. D. 371; but see *Elwell* v. *Jackson*, *supra*, p. 1209.

Money due for calls on shares in a company: *Re De Pass* v. *Capital & Industries Corporation*, 1891, 1 Q. B. 216, S. C., *sub nom. Vinall* v. *De Pass*, 1892, A. C. 90; 66 L. T. 422.

Money in the hands of an agent in this Province may be garnished though the garnishee resides out of the jurisdiction: *Brown* v. *Merrills*, 3 U. C. L. J. 31; but not where the garnishee is a foreign corporation; *Bank of British North America* v. *Laughrey*, 2 C. L. J. 44; *Lundy* v. *Dickson*, 6 U. C. L. J. 92; and see *Canada Cotton Co.* v. *Parmalee*, *supra*, p. 1207, unless the debtor could sue for the debt in Ontario: see *McMulkin* v. *Traders Bank*, *supra*. By agent.

Money placed in the hands of solicitors by their client (the judgment debtor) for a specific purpose which had failed, and even though the solicitors claimed a larger sum to be due them from their client: *Stumore* v. *Campbell*, 1892, 1 Q. B. 314. By solicitor.

Upon a judgment against a deceased person, when proceedings are continued against his executor, or in an action against an executor as such, a debt due to the testator's estate may be attached: *Burton* v. *Roberts*, 6 H. & N. 93; *Fowler* v. *Roberts*, 2 Giff. 226; *Tiffany* v. *Bullen*, 18 C. P. 91; *McDonald* v. *Sullivan*, 5 O. L. R. at p. 90. So also a debt due by an executor to a judgment debtor is attachable, but the order in such case should show on its face that it is directed to the executor as such: *Stevens* v. *Phelips*, L. R. 10 Chy. 417; but such a debt is not attachable after an administration judgment has been granted: *Ib.* Debt due to or by executor.

A debt of which an incomplete gift has been made: *Davidson* v. *Cochrane*, 34 C. L. J. 318. Imperfect gift.

After the analogy of a *fi. fa.* under which the goods of any one of those against whom it is issued may be taken, a debt due to one of several judgment debtors may be attached to satisfy the judgment against all: *Miller* v. *Mynn*, 1 E. & B. 1075; but a debt owing to two cannot be attached for a debt of one: *Re Smart* v. *Miller*, 3 P. R. 385; Debt due one of several debtors.

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McCormick v. *Pork*, 9 C. P. 330; *Macdonald* v. *Tacquah Gold Mines Co.*, 13 O. B. D. 535; *Parker* v. *Odette*, 16 P. R. 69; *Marshall* v. *James*, 1905, 1 Ch. 433.

Pensions.

As to pensions and superannuation allowances: see *Innes* v. *East India Co.*, 17 C. B. 351; *Dent* v. *Dent*, L. R. 1 P. & D. 366; *Ex parte Hawker*, L. R. 7 Chy. 214; *Willcock* v. *Terrell*, 3 Ex. D. 323; *Sansom* v. *Sansom*, 4 P. D. 69; *Birch* v. *Birch*, 8 P. D. 163; *Lucas* v. *Harris*, 18 Q. B. D. 127; 55 L. T. 658; *Crowe* v. *Price*, 22 Q. B. D. 429; *Booth* v. *Trail*, 12 Q. B. D. 8; *Re Webber*, 18 Q. B. D. 111; a pension after its receipt by the pensioner, and deposit thereof in a bank loses its character of a pension and becomes attachable in the hands of the bank: *Jones* v. *Coventry*, 1909, 2 K. B. 1029; 101 L. T. 281; *Knill* v. *Dumergue*, 1911, 2 Ch. 199; 105 L. T. 178.

Salaries of civil servants.

As to garnishment of salaries of civil servants of the Ontario Government: see *The Ontario Public Service Act* (R. S. O. c. 14), s. 15, and *Hyde* v. *Cowan*, 31 Ont. 189.

As to salaries or remuneration of municipal officers: see *Wilson* v. *Fleming*, 1 O. L. R. 599; *Edmunds* v. *Edmunds*, 1904, P. 362.

Fees payable to a public vaccinator and registrar of births, etc.: see *Edmunds* v. *Edmunds*, *supra*; and salary of police constable: *Fallis* v. *Wilson*, 13 O. L. R. 595.

Debts not ascertained in amount.

A debt of an unascertained amount, if only it be payable as soon as ascertained: *Re Sato* v. *Hubbord*, 8 P. R. 445; *Macpherson* v. *Tisdale*, 11 P. R. 261, where costs remained to be taxed: *Re Withrow*, *Poucher* v. *Donovan*, 19 C. L. J. 97, 114, where the amount to be found due to a plaintiff who had been declared entitled to a mechanic's lien, was attached; so also a residuary bequest, though it is undetermined whether anything, and, if anything, how much is due: *McLean* v. *Bruce*, 14 P. R. 190. As to the mode of making inquiry to ascertain the amount, see *Ib.*

Money due under a judgment for unliquidated damages, pronounced but not formally entered, is attachable: *Holtby* v. *Hodgson*, 24 Q. B. D. 103; 61 L. T. 297, affirmed in appeal, 62 L. T. 145; followed in *Davidson* v. *Taylor*, 14 P. R. 78.

(1) Not attachable as debts, but sometimes exigible by equitable execution.

Moneys not Attachable.—The following are not attachable, but probably, in some cases, may be reached, by the appointment of a receiver by way of equitable execution: see *Exley* v. *Day*, 15 P. R. 353, 405:—

Unliquidated damages.

Unliquidated damages: *Johnson* v. *Diomond*, 11 Ex. 73; though secured by bond in a penal sum, *Ib.*: *Griswold* v. *Buffalo, Brantford & Goderich Ry. Co.*, 2 P. R. 178; though the amount has been ascertained by the verdict of a jury, or award, but no judgment has been obtained to make the claim a debt: *Jones* v. *Thompson*, E. B. & E. 63; *Dresser* v. *Johns*, 28 L. J. C. P. 281; *In re Newman*, 3 Ch. D. 494; *Boyd* v. *Haynes*, 5 P. R. 15; *Tate* v. *Corporation of Toronto*, 3 P. R. 181; *Bank of Toronto* v. *Burton*, 4 P. R. 56; *Gwynne* v. *Rees*, 2 P. R. 282; *Roberts* v. *City of Toronto*, 16 Gr. 236; insurance moneys unadjusted, and not payable in respect of any admitted claim, as long as the company's right to have the money applied in rebuilding remains: *Simpson* v. *Chase*, 14 P. R. 280; and see *Canada Cotton Co.* v. *Parmalee*, 13 P. R. 308.

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Where a claim for work done under a contract, and one for unliquidated damages are referred, there can be no garnishment of the latter until after award: *Tote* v. *The Corporation of the City of Toronto*, 10 U. C. L. J. 66; 3 P. R. 181. See also *Rondoll* v. *Lithgow*, 12 Q. B. D. 525.

So any claim which might, or might not, result in a debt, *e.g.*, a notice to treat under the English Lands Clauses Act, on which notice nothing had been done: *Richardson* v. *Elmit*, 2 C. P. D. 9; an unascertained balance due from one partner to another: *Compbell* v. *Peden*, 3 U. C. L. J. 68.

Salary.

Salary not yet payable: *Holl* v. *Pritchett*, 3 Q. B. D. 215; *Re Shanley* v. *Moore*, 9 U. C. L. J. 264; *Central Bonk* v. *Ellis*, 20 Ont. App. 364; *Follis* v. *Wilson*, 13 O. L. R. 595; *Mapleson* v. *Seors*, 105 L. T. 639; but as to the garnishment of the ssisries of civil servants: see *The Ontorio Public Service Act* (R. S. O. c. 14), s. 15.

Full pay of an officer in the Royal Navy on active service cannot he assigned, or attached: *Apthorpe* v. *Apthorpe*, 35 W. R. 728; 12 P. D. 192; nor the pay of a retired officer in the Army: *Crowe* v. *Price*, 22 Q. B. D. 429. See *Stewart* v. *Jones*, 1 O. L. R. 34; *Jones* v. *Coventry*, *supro*.

Barristers' fees: *Wells* v. *Wells*, 111 L. T. 399; hut see *Armour* v. *Kilmer*, 28 Ont. 618.

Negotiable instruments.

A negotiable promissory note not yet due: *Jackson* v. *Cossidy*, 2 Ont. 521; *Pyne* v. *Kinno*, 11 Ir. C. L. R. 40; *Exley* v. *Doy*, 15 P. R. 353; but a receiver may be appointed: *Exley* v. *Doy*, 15 P. R. 405.

Legacy.

A legacy in the hands of an executor, unless there has been such sn account stated by the executors as would entitle the legatee to sue: *McDowall* v. *Hollister*, 25 L. T. Jour. 185; *sed vide*, *McLean* v. *Bruce*, 14 P. R. 190, and *Fleming* v. *Stephenson*, 28 C. L. J. 570 (Dartnell, J.C.C.), which was, however, decided under the former Con. Rule before its amendment by C. R. 1361.

The interest of a residuary legatee in tbe estate of a testator who had died within a year of the application for attachment: *Hunsberry* v. *Krotz*, 5 O. L. R. 635.

Deposit with stock brokers.

Money deposited with a stock broker to secure any loss on speculations in stocks and shares, so long as the transactions in the stocks and shares are open: *Hutt* v. *Show*, 3 T. L. R. 354.

Gifts.

Money sent by a father to his son, the debtor, as a gift, through a hsnk, was garnished before the debtor was advised of the deposit; it was heid not garnishabie, as the father hsd till then power to revoke the gift: *Caisse* v. *Tharp*, 5 P. R. 265.

Wbera debtor disclaims interest.

Money in the hands of a solicitor as purchase money of lsnds in which the debtor is alleged to have had an interest as tenant by the curtesy which he disclaims: *Palmer* v. *Lovett*, 14 P. R. 415; and *quære*, even though the debtor hsd been tenant by the curtesy: see *Ib.*, *per* Armour, C.J.

Money payable by trustees.

A dividend payable to the judgment dehtor under an administration in bankruptcy of the estate of a person dying insolvent: *Prout* v. *Gregory*, 24 Q. B. D. 281; 61 L. T. 696.

Surplus, if any, after payment of the debts of A. hy the terms of a trust deed to be paid to the judgment debtor: *McKindsey* v. *Armstrong*, 10 Ont. App. 17.

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Surplus share due debtor, of a fund of a company in liquidation, paid over to the Inspector General by the liquidator pursuant to a statute: *Spence* v. *Colemon*, 1901, 2 K. B. 199; 84 L. T. 703.

In the following cases, the claims can neither be attached nor reached by equitable execution:—

(2) Not attachable or exigible by equitable execution.

Money on deposit to the credit of the debtor "on trust" where the debtor has no beneficial interest in it: *Stobart* v. *Axford*, 29 C. L. J. 383 (Man.).

Money payable on notice.

Where in order that a debt may become payable it is necessary that the creditor should give notice to the debtor, in the absence of any such notice by the judgment debtor, the debt is not attachable: *Cowley* v. *Taylor*, 124 L. T. Jour. 569.

Where debtor has no beneficial interest in fund.

A debt payable to the debtor only as agent for another person: *Burrell* v. *Read*, 11 T. L. R. 36.

Money in a bank at the credit of the judgment debtor, a stock brokar, which was shown to be wholly money of his clients: *Hancock* v. *Smith*, 41 Ch. D. 456.

A debt due by the garnishee to the judgment debtor as executor: *Macaulay* v. *Rumball*, 19 C. P. 284; and a debt due to an administrator as such, cannot be attached to answer a private debt: *Bowman* v. *Bowman*, 1 Chy. Ch. 172; but *secus* where the personal representative is also beneficially entitled to the debt: *McDonald* v. *Sullivan*, 5 O. L. R. 87.

Money was held not attachable under a contract which was not performed according to its terms, so that nothing was due at the time of the attaching order: see *McCraney* v. *McLeod*, 10 P. R. 539.

When subject to restraint against anticipation.

The income of trust funds payable to a wife for her separate use, subject to a restraint against anticipation, accrued since a judgment against her and her husband, was held not attachable, as otherwise it would in effect enable her to anticipate her income in violation of the restraint on anticipation: *Chapman* v. *Biggs*, 11 Q. B. D. 27; see also *Stanley* v. *Stanley*, 7 Ch. D. 589; and notes, *supra*, p. 486; but in the more recent case of *Hood-Barrs* v. *Heriot*, 1896, A. C. 174; 74 L. T. 373, the restraint on anticipation was held to be at an end as regards the instalments of income, as soon as they became payable; but see *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho* v. *Gidley*, 1905, A. C. 98; 92 L. T. 369; and *Wood* v. *Lewis*, 110 L. T. 994, where it was held that the restraint against anticipation will prevent the income subject thereto from liability to attachment, even after it has become payable.

Alimony.

Money payable to a married woman for her alimony: *Re Robinson*, 1884, 27 Ch. D. 160; *Paquine* v. *Snary*, 1909, 1 K. B. 688; 100 L. T. 220.

Alleged trustee for debtor.

Money due to the wife of a debtor for purchase money of lands alleged to have been vested in the wife in fraud of the debtor's creditors: *O'Donohoe* v. *Hull*, 24 S. C. R. 683.

Money of prisoner in hands of police.

Money taken from a prisoner, and in the hands of a police officer: *North* v. *Kerry*, cited 112 L. T. Jour. 495 (N. S. W. W. N. vol. 18, p. 250).

Juror's pay.

The allowance of a juror is not attachable in the hands of the County Treasurer: *Phillips* v. *Austin*, 3 C. L. T. 316.

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Wages or salary of servants, etc., to the extent of $25, are exempt from attachment: *The Wages Act* (R. S. O. c. 143), s. 7. The salary of the secretary of a company amounting to £200, payable quarterly, was held not to be within the meaning of a similar Imperial protecting Act: *Gordon* v. *Jennings*, 9 Q. B. D. 45.

Wages.

The future earnings, as wages, or salary, of the debtor: *Holmes* v. *Millage*, 1893, 1 Q. B. 551; 68 L. T. 205; *Central Bank* v. *Ellis*, 20 Ont. App. 364.

The salary of a municipal officer which has been, even though irregularly, paid in advance: *Wilson* v. *Fleming*, 1 O. L. R. 599; and see *Fallis* v. *Wilson*, 13 O. L. R. 595.

A debt due to a firm cannot be attached to answer a debt of one of the partners: *Morshall* v. *James*, 1905, 1 Ch. 432.

Debts due to partnership.

An attaching order cannot be made attaching a debt due from a partnership firm described by its partnership name: *Walker* v. *Rooke*, 6 Q. B. D. 631.

Action by debtor, no bar to attachment.

A debt which is attachable does not cease to be so because the debtor has brought an action to recover it; and the giving of a cheque by the garnishee to the debtor, payment of which was stopped on service of the order *nisi*, was held not to prevent the debt from being attached: *Cohen* v. *Hole*, 3 Q. B. D. 371; but it is otherwise where a cheque has been given and accepted in payment of a debt, though the cheque has not been presented: *Elwell* v. *Jackson*, 1 T. L. R. 454; 1 Cab. & E. 362, and it is not the duty of the garnishee to stop payment on being served with an order attaching debts: *Ib.*, and where the garnishee, before the attaching order, has given his creditor a negotiable instrument in payment of the debt attached, that would seem to be a defence to any application against the garnishee to pay over: see *Bence* v. *Sheorman*, 1898, 2 Ch. 582; payment to the debtor after service of the attaching order is of no avail against the attaching creditor: *Edmunds* v. *Edmunds*, 1904, P. 362. An attaching order is no bar to an action by the judgment debtor to recover the debts attached, but payment over by the garnishee pursuant to an order is a defence, but it does not arise until the payment is made, and does not relate back to the date of the attaching order: *Pickord* v. *Tims*, 19 P. R. 109.

Payment to debtor by cheque, effect of.

Effect of Attaching Order.—The order attaching a debt does not create a charge upon the property of the garnishee, so as in any way to prevent his alienating his assets *bonâ fide*. Thus, where, after a debt due by a limited company was attached, the company *bonâ fide* charged all its assets in favour of a debenture holder, it was held that the debenture holder was entitled to priority over an execution issued by the attaching creditor against the company for the debt attached: *Geisse* v. *Taylor*, 1905, 2 K. B. 658; 93 L. T. 534. Neither does the attaching order alter the property in the debt attached, and therefore a person who has obtained a prior floating charge on the debt of the company which has been attached, may, before an order to pay over has been obtained, assert his claim by obtaining the appointment of a receiver: *Norton* v. *Yates*, 1906, 1 K. B. 112; and see *Weekes* v. *Frawley*, 23 Ont. 235; *Fisken* v. *Horsholl*, 10 O. L. R. 552.

Where a second mortgagee secured the appointment of a receiver of the rent due by a tenant of his mortgagor, but gave no notice to the tenant to pay the rent until after an attaching order has been served

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on the tenant as garnishee; and the receiver made no demand of the rent and was no party to the proceedings, it was held, that the equitable rights of the mortgagee could not prevail as against the attaching creditor: *Vacuum Oil Co.* v. *Ellis*, 1914, 1 K. B. 693; 110 L. T. 181.

The attaching order may now be made to attach debts not only to answer the claim of the applicant but also those of all other creditors of the debtor entitled under *The Creditors Relief Act* (R. S. O. c. 81), s. 5, to share in the debt attached.

Death of garnishee.

Death of Garnishee.—There was formerly at Law no power to order or permit a suggestion to be entered of the death of a garnishee, so as to get execution against his representative: *Re Ward* v. *Vance*, 3 P. R. 323; but that end possibly may now be attained under *Rule* 301.

Judgment creditor.

Death of Judgment Creditor.—An executor or administrator of a judgment creditor who has not made himself a party to a judgment cannot proceed under this *Rule* without making himself a party to the record: *Boynard* v. *Simmonds*, 5 E. & B. 59: see *Rule* 301.

Assignment of the debt garnished.

Assignment by Debtor, of Debt due by Garnishee.—A garnishing order can only charge what the judgment debtor can honestly deal with himself, without affecting the interests of third persons. *Re General Horticultural Co.*, 32 Ch. D. 512; *Honcock* v. *Smith*, 41 Ch. D. 456; see also *Wood* v. *Joselin*, 18 Ont. App. 59; *O'Connor* v. *Ireland*, 1897, 2 Ir. Rep. 150. A debt, therefore, *bona fide* assigned, before service of the attaching order, is not bound by the order: *Hirsch* v. *Cootes*, 18 C. B. 757; *Wise* v. *Birkenshow*, 29 L. J. Ex. 240; *Grahom* v. *Bourque*, 6 O. L. R. 428, 700; even though the garnishee had no prior notice of the assignment: *Pickering* v. *Ilfracombe Railway Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, L. R. 3 C. P. 264; *Brown* v. *McGuffin*, 5 P. R. 231; *Grant* v. *McDonell*, 39 U. C. Q. B. 412; *Beaty* v. *Hackett*, 14 P. R. 395; *Parker* v. *McIlwain*, 17 P. R. 84; *Badeley* v. *Con. Bank*, 38 Ch. D. 238; *Davis* v. *Freethy*, 24 Q. B. D. 519; *Grahom* v. *Bourque*, 6 O. L. R. 428, 700; and formerly, even though the assignment were attacked as a fraud on creditors: *Vyse* v. *Brown*, 13 Q. B. D. 199; *O'Donohoe* v. *Hull*, 24 S. C. R. 683: but this is no longer the case: see *Rule* 591; *Edmunds* v. *Edmunds*, 1904, P. 362; and an assignment which is void under *The Fraudulent Conveyances Act* (R. S. O. c. 105), s. 3, will be of no avail against an attaching order: *Glegg* v. *Bromley*, 106 L. T. 825; but an assignment as security for a preexisting debt is not void under that Act: *Ib.*

An attaching order though in form attaching "all debts due and owing or accruing due" by the garnishee to the judgment debtor, does not preclud n assignment by the debtor of any part of the debt attached, not req ..ed for the satisfaction of the claim of the attaching creditor; thus, when, after an attaching order, the debtor assigns part of the debt attached and the assignee gives notice of the assignment to the garnishee, the assignee is entitled to priority over any subsequent attaching creditor; under such circumstances the garnishee cannot safely pay into Court more than sufficient to satisfy the first attaching creditor's claim without setting up the claim of the assignee; and if he does, and the second attaching creditor gets the surplus money out, the garnishee may have to pay it over again to the assignee: *Yates* v. *Terry*, 1902, 1 K. B. 527; 86 L. T. 133; *sed vide* the provisions of *The Creditors Relief Act* (R. S. O. c. 81), s. 5.

An equitable charge given before an attaching order is obtained takes priority of the order, even in the absence of prior notice of the charge: *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; 38 Ch. D. 238. Rule 590.

An incomplete gift of a debt is no bar to its attachment: *Davidson* v. *Cochrane*, 34 C. L. J. 318.

A declaration by a debtor in favour of husband, wife, child, grandchild or mother will, even though made after an attaching order is obtained, protect a policy of insurance on the life of the debtor, in favour of such beneficiaries as against the attaching creditor: *The Insurance Act* (R. S. O. c. 183), s. 178; *Weekes* v. *Frawley*, 23 Ont. 235; *Fisken* v. *Marshall*, 10 O. L. R. 552.

Payment by Garnishee.—The order for payment by the garnishee should direct him to pay the debt attached into Court: (see Form 79), not to the attaching creditor, and the amount after deducting costs is to be paid out to the Sheriff of the county where the garnishee resides for distribution under *The Creditors Relief Act* (R. S. O. c. 81), s. 5. *Semble*, he should be ordered to pay the whole debt due and not merely sufficient to satisfy the debt of the attaching creditor, or, at all events, enough to satisfy all creditors' claims. Payment by garnishee.

Solicitors' Lien. — An attachment of a judgment overrides a solicitor's lien or control over it in respect of general costs: *Davidson* v. *Douglas*, 15 Gr. 347; *Reg.* v. *Benson*, 2 P. R. 350; *Bank of U. C.* v. *Wallace*, 2 P. R. 352; *Cotton* v. *Vansittart*, 6 P. R. 96; *Hough* v. *Edwards*, 1 H. & N. 171; *Burchell* v. *Pugin*, 32 L. T. 495; but the special lien for costs of the action in which the debt attached has been recovered will be protected where the garnishee has notice of it: *The Jeff Davies*, L. R. 2 A. & E. 1; *The Leader*, *Ib.*, 314; *Canadian Bank of Commerce* v. *Crouch*, 8 P. R. 437; *Shippey* v. *Grey*, W. N. 1880, 99; 28 W. R. 877; *Berneski* v. *Tourangeau*, 18 P. R. 263; but the solicitor may, by conduct, waive his lien: *Ib.* Solicitor's lien.

As to the effect of an attachment upon a solicitor's lien, see further *Hough* v. *Edwards*, 1 H. & N. 171; *Eisdel* v. *Coningham*, 28 L. J. Ex. 213; *Sympson* v. *Prothero*, 26 L. J. Chy. 671; *Cole* v. *Eley*, 1894, 2 Q. B. 180.

Set-off by Garnishee.—The Judge has no power to go into the state of the accounts between the garnishee and the judgment creditor, or to allow the former to deduct any amount due to him from the latter, but must order execution to issue for the whole amount due by the garnishee, or for so much thereof as may be sufficient to satisfy the debt due from the judgment debtor to the judgment creditor and other creditors entitled to share under *The Creditors Relief Act*: *Sampson* v. *Seaton & Beer Railway Co.*, L. R. 10 Q. B. 28. He may, however, go into the state of accounts between the judgment debtor and the garnishee, and give effect to any set-off or cross debt arising before (*Ib.*, and see *Nathan* v. *Giles*, 5 Taunt. 558), but not after (*Tapp* v. *Jones*, L. R. 10 Q. B. 591), the service (see *Rule* 592), of the attaching order; but the garnishee cannot set off a counterclaim which he has against the judgment debtor: *Stumore* v. *Campbell*, 1892, 1 Q. B. 314; 66 L. T. 218. Set-off by garnishee.

A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee) from the judgment debtor, if the garnishee

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was aware, from the commencement of the transaction which resulted in his becoming indebted to the judgment debtor, that the latter's right to such debt would only be as trustee for the judgment creditor: *Fitt* v. *Bryant*, 1 Cab. & El. 194.

A garnishee can set off against a judgment creditor costs incurred by him, but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee: *Rymill* v. *Wandsworth, Dist. Bd.*, 1 Cab. & El. 92.

Where amount is within the jurisdiction of County or Division Court.

Application for Payment by Garnishee.—In an action in the Supreme Court where the amount claimed from the garnishee is within the jurisdiction of a County or Division Court, the garnishee is to be directed to appear to shew cause before the County Court Judge of the County where he resides, or the Judge of the Division Court within whose division the garnishee resides: *Rules* 597, 598.

Payment over.

The garnishee should not pay over without an order to do so, or he may also have to pay the judgment debtor: *Clork* v. *Clark*, 8 U. C. L. J. 107; *Turner* v. *Jones*, 1 H. & N. 878; *Plummer* v. *Coldwell*, Ch. Divisional Court, March, 1892.

The judgment debtor should be notified of the application for the order to the garnishee to pay over: *Beoty* v. *Hackett*, 14 P. R. 395; *Ferguson* v. *Cormon*, 26 U. C. Q. B. 26.

Charging stocks.

Charging Stocks, etc.—See *The Judicature Act*, ss. 140-2, *supra*, p. 303.

Debentures are not stock within the statute: *Sellars* v. *Bright*, 1904, 2 K. B. 446.

Where under a will a judgment debtor was interested in e shars of the estate payable after 6 years, and the trustees under the will had invested the fund in stock pending the arrival of the period of distribution, it was held that the debtor hed an interest in the stock which might be charged: *Bollard* v. *Young*, 1904, 2 K. B. 824.

The Act does not apply to enable stock to be charged which does not stend in the neme of the debtor or a truetee for him, though it he alleged that the stock hae been fraudulently assigned: *Caffrey* v. *Phelps*, 24 Gr. 344.

The Court hae not juriediction on eummary proceedings to order a eale of stock to enforce a charging order: *Leggott* v. *Western*, 12 Q. B. D. 287; *Kolchmann* v. *Meurice*, 1903, 1 K. B. 534; 88 L. T. 369.

Claims and demands other than debts.

Equitable Execution.—Equitable execution ie e mode of obtaining payment of a judgment hy reeching, by meens of the assistance of the Court, property of the debtor which the Sheriff, by reason of the imperfection of the atetutes or *Rules* reapecting exscution, is unable to deal with: see *Kirk* v. *Burgess*, 15 Ont. 608; *Wills* v. *Luff*, 38 Ch. D. 200; *Re Shephard*, *Atkins* v. *Shephard*, 43 Ch. D. 131; *Re Craig & Leslie*, 18 P. R. 270.

The principel mode of obteining equitable execution is by the appointment of e receiver: end it has now, after some cases to the contrary (see *Kirk* v. *Burgess*, *supra*; *Re Pope*, 17 Q. B. D. 749; *Kincaid* v. *Kincaid*, 12 P. R. 462), been decided that, es in other cases where the euxiliary jurisdiction of Equity ie invoked, the power to award equitable execution is only to be exercised, in general, whers the legal

remedy is ineffectual, and therefore a receiver was refused where an attaching order could be obtained: see *Trust & Loan* v. *Gorsline*, 12 P. R. 654; or a *fi. fa.* was sufficient: *Manchester, etc.*, v. *Parkinson*, 22 Q. B. D. 173; *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801; and see *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202; 71 L. T. 687; but see *Pemberton* v. *Royal Hospital*, 123 L. T. Jour. 39. In *Morgan* v. *Hart*, 1914, 1 K. B. 183, it is in effect laid down by the Court of Appeal that there is no jurisdiction to appoint a receiver by way of equitable execution except in such cases as a Court of Equity would make such an appointment prior to the Judicature Act. Rule 690.

Before the Jud. Act, 1881, only a legal debt could be attached. By the Jud. Act and *Rules* the right to attach was extended, and where a judgment debtor had an equitable interest in personalty, if it assumed the shape of an equitable debt, this was held to be attachable: see *Webb* v. *Stenton*, 11 Q. B. D. 518; *Stuart* v. *Grough*, 15 Ont. App. 299; and other cases, *supra*, p. 1210. There still, however, remained cases where the *Rules* respecting attachment of debts would not apply, by reason of the judgment debtor not being entitled to a debt either legal or equitable, though he, nevertheless, was entitled to some valuable interest.

The mode in which such equitable interests were reached and made available was generally by the appointment of a receiver. Receivers have thus been appointed of a reversionary interest under a will: *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Tyrrell* v. *Painton*, *supra*; *Ideal Bedding Co.* v. *Holland*, 1907, 2 Ch. 157; a legacy expectant on the death of a tenant for life: *Macnicoll* v. *Pornell*, 35 W. R. 773; the income of a trust fund: *Oliver* v. *Lowther*, 28 W. R. 381; 42 L. T. 42; *Webb* v. *Stenton*, 11 Q. B. D. 518, 530; an interest in a subsisting life insurance, and in a charge upon land: *Beamish* v. *Stephenson*, 18 L. R. Ir. 319; moneys secured by mortgage held by the debtor, who resided abroad: *Parent* v. *Lorlie*, 7 C. L. T. 195; the life interest of a married woman in stock: *Bryant* v. *Bull*, 10 Ch. D. 153; a fund in another Court: *Weslhead* v. *Riley*, 25 Ch. D. 413; the interest of a debtor in a trust estate, being a share of the proceeds of the estate when sold by the trustees: *Stuart* v. *Grough*, *supra*; an annuity payable to the execution debtor under a contract to which he is not a party, but for which he has given consideration, and to the benefit of which he is entitled: *Mool* v. *Gibson*, 21 Ont. 248; a receiver by way of equitable execution may be appointed of a debt due by the Crown to the judgment debtor: *Stewart* v. *Jones*, 19 P. R. 227; but a sum payable merely by the bounty of the Crown cannot be so reached: S. C. 1 O. L. R. 34, and the Court refused to appoint a receiver by way of execution of weekly payments of salary falling due *in futuro*: *Holmes* v. *Millage*, 1893, 1 Q. B. 551; 68 L. T. 205; *Central Bank* v. *Ellis*, 20 Ont. App. 364; see also other cases referred to, *supra*, pp. 80-84. Receivers.

The debtor's equity of redemption in chattels is saleable under execution: see *The Execution Act* (R. S. O. c.), s. 19.

The proper form of equitable relief can only be granted where proper parties are before the Court, therefore after the death of the debtor it cannot be granted without first making parties those in whom his estate is vested: *Re Shepherd*, 43 Ch. D. 131. See *Rule* 301.

Where a receiver is appointed of a debtor's reversionary interest in property: *Flegg* v. *Prentice*, 67 L. T. 107; 1892, 2 Ch. 428; or a future accruing fund, as for instance a policy on the life of a person still in

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case: *Weekes* v. *Frawley*, 23 Ont. 235, that does not give the creditor a charge entitling him to realize it by sale; and where the estate of the debtor is a legal remainder it can only be sold by and under the usual process of execution; there is no jurisdiction to order a sale of it merely because a receiver of it has been appointed by way of equitable execution: *Re Harrison and Bottomley*, 1899, 1 Ch. 465; 80 L. T. 29; the appointment of a receiver does not create a charge on the land: *Ib.*, and see *Thomson* v. *Cushing*, 30 Ont. 123, 388.

And the appointment of a receiver of a debtor's interest in a policy of insurance on his life does not preclude him from making a declaration of trust thereof in favour of his wife, children, or grandchildren, under *The Insurance Act* (R. S. O. c. 183), s. 178, which will prevail over the attaching order: *Weekes* v. *Frawley*, *supra*; *Fisken* v. *Marshall*, 10 O. L. R. 552.

Where the trustees of a will are, in their absolute discretion, authorized to make payments out of the income of the estate of the testator to a judgment debtor, that is not an interest which can be reached by equitable execution: see *Re McInnes* v. *McGaw*, 30 Ont. 38.

A receiver by way of equitable execution was refused in respect of a sum earned by the debtor, but not yet payable and liable to certain contingent deductions: *Manufacturers' Lumber Co.* v. *Pigeon*, 22 O. L. R. 378; 24 O. L. R. 354.

The appointment of a receiver operates as a new starting point for the running of The Statute of Limitations, though nothing can be reached thereby for more than twenty years after the date of the judgment; and the order will be operative against the fund provided it can be reached within less than twenty years after the date of the order appointing the receiver: *Kinnear* v. *Clyne*, 18 O. L. R. 457.

Equitable interests in land.

Where the debtor has an interest in land of such a nature that it cannot be sold under a *fi. fa.*, the judgment creditor may reach it, by action; but he must have an execution in the hands of the Sheriff at the time of the commencement of the action: *Thomson* v. *Cushing*, 30 Ont. 123, 388; *Union Bank* v. *Brigham*, 5 O. W. R. 142, 144; but see *Johnson* v. *Bennett*, *infra*.

A receiver was appointed, *ex parte*, of a mortgaged estate, by way of execution against the mortgagor: *Minter* v. *Kent*, 72 L. T. 186.

An equity of redemption in mortgaged lands is saleable under an execution, by virtue of *The Execution Act* (R. S. O. c. 80), ss. 30-33, only in the case of a simple equity arising upon a single mortgage of the land, or at most existing between one mortgagor and one mortgagee: see *Samis* v. *Ireland*, 4 Ont. App. 122; and cases in which an equity of redemption is not so saleable, furnish familiar examples of suits for equitable execution: see *Donovan* v. *Bacon*, 16 Gr. 472; *Kerr* v. *Styles*, 26 Gr. 309; *Johnson* v. *Bennett*, 9 P. R. 337, in which last case there were no writs of execution in the Sheriff's hands, as to which see *infra*, p. 1222.

Where a receiver was appointed of the interest of a debtor in lands devised to him "during his life for the support and maintenance of himself and his three children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," it was held that although there was no trust in favour of the children, yet that they had an equity which would prevent the whole of the

income being appropriated by the creditors to their prejudice, and as they were infants, and in need of maintenance, and the debtor had not otherwise sufficient means to maintain them, the Court ordered that only one-fourth of the fund should be appropriated to the benefit of the creditors: *Allen* v. *Furniss*, 20 Ont. App. 34; but where land was devised upon trust to permit the debtor and his wife and children to use it for a home, and then to convey it as the debtor by his will should appoint, it was held that the debtor took no estate which could be made available in execution: *Cameron* v. *Adams*, 25 Ont. 229. Rule 590.

Property settled on a married woman subject to a restraint against anticipation, cannot be made available in execution against her, or by attachment or sequestration, or by the appointment of a receiver, as regards instalments of income accruing due after the judgment: *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho* v. *Gidley*, 1905, A. C. 369, and notes, *supra*, p. 486; *Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559; *Pillers* v. *Edward*, 71 L. T. 788; but it was held that a receiver may be appointed of instalments of income so settled which had accrued due before judgment, but which have not been paid over to the married woman: *Hood-Barrs* v. *Heriot*, 1896, A. C. 174; 74 L. T. 353; but it has been more recently decided that no instalments of income subject to a restraint against anticipation can be attached, no matter whether they became due and payable before judgment recovered against the married woman or afterwards: *Wood* v. *Lewis*, 1914, 3 K. B. 73; 110 L. T. 994. Married women debtors.

Money payable to a married woman by way of alimony would not appear to be exigible; see *Re Robinson*, 27 Ch. D. 160; *Paquine* v. *Snary*, 1909, 1 K. B. 688; 100 L. T. 220.

Practice as to Receivers by way of Equitable Execution.—As to equitable execution by the appointment of a receiver at the instance of the judgment creditor, see further, notes, *supra*, pp. 80-84; and for the form of such orders: see *Hewett* v. *Murray*, 52 L. T. 380; 54 L. J. Chy. 572; H. & L. Forms, Nos. 1333, 1335. *Sed quære*, whether in view of *The Creditors Relief Act* (R. S. O. c. 81), s. 5, these forms do not need modification: see Form No. 79; but see *infra*. Receivers by way of equitable execution.

An order appointing a receiver was held to be "a process of execution" within the Imperial Act, 27 & 28 Vict. sec. 112: *Re Pope*, 17 Q. B. D. 743; but not an execution within *Rule* 3 (*k*).

An attaching order against a garnishee, and a receiver as against the debtor, were granted on the same application in *Whittaker* v. *Whittaker*, 7 P. D. 15; but the authority of that case has been doubted in *Manchester, etc.*, v. *Parkinson*, 22 Q. B. D. 173.

The appointment of a receiver would seem to be an effective mode of procedure in circumstances such as existed in *Donavan* v. *Bacon*, 16 Gr. 472. There the debtor was entitled to the equity of redemption in land, but the land was subject to two mortgages held by different persons, and the mortgagor was in possession and in receipt of the rents. See also *Webb* v. *Stenton*, 11 Q. B. D. 518; *London and Canadian, etc.*, v. *Merritt*, 32 C. P. 383, 384, 386.

The receiver will be entitled to an order for leave to bring an action in the name of the debtor, if the latter refuses to bring an action, or unnecessarily delays doing so: *McLean* v. *Allen*, 14 P. R. 291; *Mones* v. *MacCallum*, 17 P. R. 398; the debtor is entitled to an indemnity against costs: *Ib.*

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A receiver was appointed on an interlocutory application in a fresh action by the judgment creditor in *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; see also *Ex parte Evans*, 13 Ch. D. 252. But a fresh action is unnecessary; the application for receiver may be in the original action after judgment: *Salt* v. *Cooper*, 16 Ch. D. 544; *Smith* v. *Cowell*, 6 Q. B. D. 75.

A receiver will, however, only be granted in cases where the amount of the judgment debt warrants the expense, and where there is a fair reason to suppose that there is something to receive: *I. v. K., W. N.* 1884, 63. See also *Manchester, etc.*, v. *Parkinson*, and other cases *supra*, p. 81; *Taylor* v. *Gallagher* (before Robertson, J., 7th January, 1890.)

A judgment creditor who has obtained a receiver subject to existing incumbrances, cannot place himself in a better position than the debtor, and by giving notice to a trustee obtain priority: *Arden* v. *Arden*, 29 Ch. D. 702.

Where the interest of the judgment debtor is not one which is exigible under writs of *fi. fa.* goods or lands respectively, it was said by Osler, J.A., that the issue of such writs is an unmeaning and needless formality, and is, therefore, an unnecessary preliminary to proceedings for equitable execution: *Stuart* v. *Grough*, 15 Ont. App. 309; see formerly *Shea* v. *Denison*, 14 Gr. 513; *Wilson* v. *Proudfoot*, 15 Gr. 103; and see *Thomas* v. *Cushing*, 30 Ont. 123, 388, where the issue of a *fi. fa.* was held to be still necessary. The issue of such writs will not give any priority. The equitable interest of the debtor is only bound by, and from the time of, the issue of the appropriate form of equitable execution: *Stuart* v. *Grough*, *supra*, and see *supra* p. 1220.

Whether money realized under equitable execution is subject to the provisions of *The Creditor's Relief* Act is doubtful: see *Sylvester* v. *McEachon*, 9 C. L. T. 138; *Dawson* v. *Moffatt*, 11 Ont. 484; *McLean* v. *Allen*, 14 P. R. 84.

A receiver may be appointed by way of execution on an *ex parte* application, but such an order should not be made *ex parte*, except in exceptional cases: *Minter* v. *Kent*, 72 L. T. 186; and *semble* the defendant is entitled to notice though he has not appeared: see *Tilling* v. *Blythe*, 1899, 1 Q. B. 557; 80 L. T. 44. Where such an order is made *ex parte* the debtor is not driven to appeal, he may move to rescind it: see *Rule* 217.

An interim injunction restraining a debtor from dealing with the property sought to be reached by way of equitable execution ought not to be granted in the absence of evidence that there is danger of his making away with the property before a receiver can be appointed: *Lloyd's Bank* v. *Medway Navigation Co.*, 1905, 2 K. B. 359; 93 L. T. 224.

Where a receiver has been appointed by way of equitable execution, on a misapprehension of facts, a third party prejudiced thereby may apply to rescind the order: *McLean* v. *Allen*, 18 P. R. 255.

Effect of Appointment of a Receiver.—Where a receiver is appointed of a fund by way of equitable execution, the debtor cannot thereafter alienate or incumber the fund to the prejudice of the creditor at whose instance the receiver was appointed: *In re Anglesey, De Galve* v. *Gardner*, 1903, 2 Ch. 727: *sed vide, Weekes* v. *Frawley*, *supra*, p. 1220.

591. The garnishee shall be deemed to be indebted, although any debt sought to be attached has been assigned, charged or incumbered by the judgment debtor, if the assignment, charge or incumbrance is fraudulent as against creditors or is otherwise impeachable by them. C.R. 912.

Garnishee deemed indebted notwithstanding an impeachable assignment of debt.

Formerly a *de facto* assignment, even though impeached as a fraud, prevented the attachment of the debt so assigned: see *Vyse* v. *Brown*, 13 Q. B. D. 199; *O'Donohoe* v. *Hull*, 24 S. C. R. 683.

592. The order from the time of service shall bind the debts attached. C.R. 913.

Binds debts from service.

See Eng. (1883), R. 623.

Service of an attaching order does not operate as an assignment in equity, or amount to a transfer of the debt, so as to create the relation of debtor and creditor between the garnishee and attaching creditor: *Wardrope* v. *Canadian Pacific Railway Co.*, 7 Ont. 321; *Re Combined Weighing & Advertising Co.*, 43 Ch. D. 99; *Cooper* v. *Lawson*, 6 T. L. R. 34; *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259; *Norton* v. *Yates*, 1906, 1 K. B. 112. It is otherwise, however, after an order to pay over has been made: *Cowan* v. *Corlill*, 33 W. R. 583; 52 L. T. 431.

Service of the attaching order does not justify the Sheriff in withdrawing from possession of the goods of the garnishee under an execution issued against him by his creditor (the judgment debtor): *Genge* v. *Freeman*, 14 P. R. 330.

The effect of service is to prevent the debtor from thereafter dealing with the debt to the prejudice of the garnishor: *Wood* v. *Joselin*, 18 Ont. App. 60, except in the case of life assurance policies: see *supra*, pp. 1219-20; but the order formerly did not prevent a valid assignment by the debtor of any surplus of the debt beyond what is sufficient to satisfy the claim of the attaching creditor: *Yates* v. *Terry*, 1902, 1 K. B. 527; 86 L. T. 133; but *semble*, such an assignment could not now prevail as against the claim of other creditors, if any, entitled to share under *The Creditor's Relief Act* (R. S. O. c. 81), s. 5.

Money paid into Court in an administration suit by an executor is not money "in the hands" of the executor, and a garnishee order *nisi* against the executor is not a charge on such money, although paid in after service of the order, so as to give the attaching creditor priority over a trustee in bankruptcy of the debtor: *Stevens* v. *Phelips*, L. R. 10 Chy. 417; *Jones* v. *Brown*, 29 L. T. 79.

An order *nisi* does not create any charge till after service: *Hamer* v. *Giles*, 11 Ch. D. 942; *Re Stanhope*, *Ib.*, 160. *Holmes* v. *Tutton*, 5 E. & B. 65.

By the express terms of this *Rule* the debts are bound from the date of the service of the order of attachment, though, if nothing was attachable at the time the order was made, doubtless it cannot attach a debt or claim arising after the order, but before service: *McCraney* v. *McLeod*, 10 P. R. 539; *Porker* v. *Howe*, 12 P. R. 351; see *Kelly* v. *Rider*, 11 T. L. R. 206. The *bonâ fide* payment by the garnishee to the judgment debtor before such service will protect the garnishee:

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Cooper v. *Broyne*, 27 L. J. Ex. 446; 31 L. T. 265; *Ellcell* v. *Jackson*, 1 Cab. & Ell. 362; but payment to the debtor after service of the attaching order, is no answer to an application under *Rule* 594: *Edmunds* v. *Edmunds*, 1904, P. 362. Neither set off, nor anything else affecting the state of the accounts between the garnishee and the judgment debtor, arising after that date, can be taken into account: *Tapp* v. *Jones*, L. R. 10 Q. B. 591; though a set-off existing at that date will avail: *Sompson* v. *Seaton and Beer Railway Company*, L. R. 10 Q. B. 28; and see *supra*, p. 1217.

In *Fitzpatrick* v. *Worring*, 13 L. R. Ir. 2, two defendants, S. and W., each had an order against the plaintiff for costs. S. was indebted to the plaintiff for rent. W.'s costs were first taxed, and he obtained an order against S., attaching the rent due by S. to the plaintiff. When an order to pay over was applied for, S.'s costs had been taxed, but it was held that the rent could not be set-off against them as the order *nisi* had attached it, and S. had no claim until his costs were taxed. But see *Re Sato* v. *Hubbard*, 8 P. R. 445.

Where a banker was served with the usual order attaching all debts, etc., he was held to be justified in refusing to honour any cheques even to the extent of the amount in his hands over and above the amount required to satisfy the judgment of the attaching creditor: *Rogers* v. *Whitely*, 23 Q. B. D. 236; 1892, A. C. 118; 66 L. T. 303; but an order may be made in form restricting its operation to such amount of the debt owing by the garnishee as will satisfy the judgment debt: *Ib.*; but see *Yates* v. *Terry*, *supra*, p. 1223.

In the case of several attaching orders, the creditors formerly ranked in the order in which their attaching orders were served: *Tate* v. *The Corporation of Toronto*, 3 P. R. 181; *Sweetnam* v. *Lemon*, 13 C. P. 534; see also *Solamon* v. *Donovon*, 10 Ir. C. L. R. App. xiii.; but see now *The Creditors' Relief Act* (R. S. O. c. 81), s. 5.

Personal service is not indispensable if the service comes to the garnishee's knowledge: *Word* v. *Vance*, 9 U. C. L. J. 214, 244.

Service of an attaching order will not defeat the right of a prior mortgagee of the debt attached; thus where a mortgage debenture issued by a company charged all of its assets, and after the order to pay over the debt had been made at the instance of an attaching creditor, a receiver was appointed at the instance of the debenture holder, it was held that, notwithstanding the order, the receiver was entitled to the debt: *Coirney* v. *Bock*, 1906, 2 K. B. 746; 96 L. T. 111.

The effect of the word "bind" has often undergone discussion, and under the earlier English Bankruptcy Act the assignee was entitled, and not the attaching creditor, if bankruptcy intervened before actual payment under an order to pay over: *Holmes* v. *Tutton*, 5 E. & B. 80; *Turner* v. *Jones*, 1 H. & N. 878; *Tilbury* v. *Brown*, 20 L. J. Q. B. 46; *Rylands* v *Reordon*, 8 L. R. Ir. 1; *Stevens* v. *Phelips*, L. R. 10 Chy. 417; but if the garnishee was compelled to pay under threat of execution after notice of the bankruptcy, he was discharged as against the assignee: *Wood* v. *Dunn*, L. R. 2 Q. B. 73. He was bound, however, to set up the bankruptcy, if he had notice of it before the order to pay over: *Ib.* The present English law gives the creditor a charge which is good against the trustee in bankruptcy: *Emmanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Ex p. Joselyne*, 8 Ch. D. 327; see *Mayor of London* v. *Joint Stock Bank*, 6 App. Cas. 393; but see *Norton* v. *Yates*, 1906, 1 K. B. 112.

An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him: *Re Thompson*, 17 P. R. 109; a winding-up order does do so, unless the attaching order was obtained before the petition for winding up, and an order for payment has been made before the winding-up order: *Ex p. Hawkins*, L. R. 3 Chy. 787. Rules 593, 594.

The service does not effect a transfer of the debt or securities for it: *Chatterton* v. *Watney*, 16 Ch. D. 378; 17 Ch. D. 259; see also *Backhouse* v. *Siddle*, 38 L. T. 487.

593. If the garnishee admits his liability he may pay the amount admitted into Court, less $3 for his costs of paying in, and give notice of such payment to the judgment creditor. *New.* Garnishee admitting liability may pay debt into Court.

See *The Creditors' Relief Act* (R. S. O. c. 81), s. 5, which requires moneys attached to be paid to the sheriff of the county in which the garnishee resides; and see Form No. 79.

In England it has been held that payment by a garnishee under an order *nisi* is no discharge as against a trustee in bankruptcy of the judgment debtor: *Re Webster*, 1907, 1 K. B. 623; 96 L. T. 332; but presumably, payment under this *Rule* under an order *nisi* would discharge the garnishee. *Semble*, the garnishee must pay the whole debt into Court, or at all events sufficient of it to etaisfy the claims of the sttsching creditor, and other creditors, if any, entitled under *The Creditors Relief Act*.

Payment to ths attaching creditor without any order to pay over would not be a dischsrge as against the judgment debtor if the debt were not property attachable: see *Mayor of London* v. *Joint Stock Bank*, *infra*, p. 1226.

594.—(1) If the garnisbee does not pay into Court the amount due from bim to tbe judgment debtor, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon notice to him, then the Court may order payment into Court of the debt. C.R. 914. *Amended.* Order for execution against garnishee.

(2) If tbe debt be not payable at the time of tbe attachment, an order may be made for the payment thereof when it becomes payable. C.R. 915.

See Eng. (1883) R. 624.

See notes to *Rules* 590 and 593.

An action for a debt will lie on a garnishee order, but should not he resorted to if the amount can be recovered by execution under *Rule* 594: *Pritchett* v. *English & Colonial Syndicate*, 1899, 2 Q. B. 428. An action is proper where brought with the view of obtaining a judgment to be sued on abroad, or upon which to petition as a judgment creditor for the winding-up of a company which has property only out of the jurisdiction.

The Division Courts Act (R. S. O. c. 63), s. 61 (*e*), provides that an action shall not be brought in a Division Court on a judgment or order

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of the Supreme Court, or a County Court, where execution may issue on the judgment or order.

The judgment debtor should be notified of the application against the garnishee to pay over: *Beaty* v. *Hockett*, 14 P. R. 395.

Payment to the judgment debtor under stress of an execution issued after service of the attaching order was held to discharge the garnishee from liability to the judgment creditor: *Turnbull* v. *Robertson*, 38 L. T. 389; *sed quære*, if the garnishee should not pay the money attached into Court in such a case; he cannot discharge himself after service of an attaching order, by a voluntary payment to the garnishee, if the debt is not properly attachable: *Mayor of London* v. *Joint Stock Bank*, 6 App. Cas. 393; but having given a cheque for the debt to the judgment debtor, before service of an attaching order, the garnishee is not, on being served with the order, bound to stop payment of the cheque, and its payment would be a valid discharge of the debt: *Edmunds* v. *Edmunds*, 1904, P. 362; and where, before payment, a receiver of the fund is appointed, the garnishee should not pay without first bringing the conflicting claims of the receiver and the attaching creditor to the attention of the Court: *Stuart* v. *Grough*, 15 Ont. App. 299; and the garnishee is also bound to set up any assignment of the debt attached, of which he has notice: *Yates* v. *Terry*, 1902, 1 K. B. 527; 86 L. T. 133; and see *Rule* 596.

As to the garnishee's right to set off: see note to *Rule* 590, *supra*, p. 1217.

After an order absolute, in default of payment, the garnishee may be examined as to his means under *Rule* 580: *Cowan* v. *Carlill*, 33 W. R. 583; 52 L. T. 431.

As to rights of other creditors in the moneys attached: see *The Creditors' Relief Act* (R. S. O. c. 81), s. 5.

An order for payment by the garnishee may be rescinded on its subsequently appearing that the debtor had, before service of the attaching order, validly assigned the debt, and that the garnishee had no notice of the assignment, before the motion to pay over: *Beaty* v. *Hackett*, 14 P. R. 395; or where the order has been made and acted on under a mutual mistake of the judgment creditor and the garnishee, that the latter was indebted to the judgment debtor: *Moore* v. *Peachy*, 66 L. T. 198; *Marshall* v. *Jones*, 1905, 1 Ch. 432.

A garnishee order made absolute, although no debt was at the time due, is conclusive on the garnishee until it be set aside: see *Moore* v. *Peachy*, 66 L. T. 198; *Randall* v. *Lithgow*, 12 Q. B. D. 525.

A garnishee is bound to ascertain that the debtor of the attaching creditor is really the creditor of the garnishee, or payment, though purporting to be made under an attaching order, will not be a bar to recovery by his real creditor: *Andrew* v. *Canadian Mut. L. Co.*, 29 Ont. 385.

If upon an application to pay over it should appear that the order, if obeyed, would not effectually discharge the garnishee from liability for the debt to the judgment debtor, the Court in its discretion will refuse the order: *Martin* v. *Nadel*, 1906, 2 K. B. 26; 95 L. T. 16. This was the case of a foreigner liable to be sued for the debt in his own country, where payment under the garnishee order would not be a bar.

If the debt attached is not yet payable, the order should direct payment when it becomes payable: see Cl. 2, and see *Lloyd* v. *Wallace*, 9 P. R. 335; *Nash* v. *Pease*, 47 L. J. Q. B. 766. Rule 595. Order as to maturing claims.

595. If the garnishee disputes his liability, the Court may determine the dispute in a summary way or may order that an issue be tried in such manner as may be directed. C.R. 916. *Amended.* Issue where garnishee disputes liability.

See Eng. (1883) R. 625.

Garnishee proceedings will not he set aside efter great delay: *Re Gordon* v. *Bonter*, 6 U. C. L. J. 112, and should not in any case he opened without previous notice to all partics interested; *Bank of U. C.* v. *Wallace*, 2 P. R. 352.

As to the garnishee's right of set off: see note to *Rule* 590, *supra*, p. 1217.

In case an issue is ordered between the judgment creditor and garnishee, the judgment creditor stands in the shoes of the judgment debtor, and the garnishee can assert against him all claims he could have asserted against the judgment debtor either as plaintiff or defendant in an action; *Nathan* v. *Giles*, 5 Taunt. 558; *Tapp* v. *Jones*, L. R. 10 Q. B. 591; 1 Cab. & El. 95; up to the time of the service of the attaching order. See also notes to *Rule* 592.

This section does not render it obligatory on the Court or Judge to direct an issue. If the matter is clear upon the affidavits, the Court may refuse en issue: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240; and rescind the attaching order: *Johnson* v. *Moody*, 12 P. R. 203, where the plaintiff cannot suggest a plausible ground for supposing the money attached to belong to the debtor; but otherwise it would probably he proper to direct an issue, if the plaintiff so desired: *Ib.* On the other hand, execution may he ordered if the garnishee does not satisfy the Judge that he has real ground for disputing his liability for the debt: *Re Sato* v. *Hubbard*, 8 P. R. 445; *Newman* v. *Rook*, 4 C. B. N. S. 434; and is acting *bonâ fide* in making the dispute: *Wise* v. *Birkenshaw*, 29 L. J. Ex. 240.

Where fraud was suggested, and circumstances shewn which created a suspicion of fraud, and required explanation, the plaintiff was held to he entitled to an issue: *Millar* v. *Thompson*, 19 P. R. 294.

As to the form of issue: see *Macdonald* v. *Tacquah*, 13 Q. B. D. 535; Chitty, 469.

Where an action is pending against the garnishee at the suit of the judgment debtor, and there is no collusion between them, the Court will not grant an issue: *Richardson* v. *Greaves*, 10 W. R. 45. The Court will, unless quite satisfied that the debt is not liable to attachment, allow the judgment creditor to have an issue with the garnishee: *Seymour* v. *The Corporation of Brecon*, 29 L. J. Ex. 243. If the garnishee disputes his liability, and the judgment creditor declines to proceed to try the question, the garnishee is entitled to have the attaching order discharged with costs: *Wintle* v. *Williams*, 3 H. & N. 288.

In *Wilson* v. *Dundas*, W. N. 1875, 232, Quain, J., ordered the liability to be tried by means of a special case; and where the question is one of law, this seems to be a convenient course.

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Where an issue is directed to a County Court, the action, nevertheless, remains in the Supreme Court, and the County Court Judge has no authority to order production: *Cochrone* v. *Morrison*, 10 P. R. 606.

An order for cross-examination of the garnishee was refused in *Storer* v. *Simmons*, W. N. 1876, 40, on the ground that the English Rule corresponding with *Rule* 271 was not intended to apply to such a case, but, in Ontario the garnishee denying liability is subject to cross-examination on his affidavit: *Wilson* v. *Fleming*, 19 P. R. 203.

Order for third person to appear.

596.—(1) Where a garnishee has notice of any assignment of the debt or of any claim thereto or charge thereon he shall give notice thereof and the Court may order the assignee or the claimant to appear and state the nature and particulars of his claim. C.R. 920.

Proceedings as to claims of third persons.

(2) After hearing the allegations of such third person, and of any other person who by the same or any subsequent order may be ordered to appear, or in case of such third person not appearing when ordered, the Court may order payment of the amount due from the garnishee, or may order an issue to be tried, or may bar the claim of the third person, or may make such other order as may seem just. C.R. 920. *Amended.*

See Eng. (1883) RR. 626, 627.

A suggestion that the money attached is trust money, and does not belong to the judgment debtor, should be listened to, and upon reasonable suspicion of such a fact, the Judge has power (even though no suggestion is made that the money belongs to some third person) to direct an issue to determine whether or not the money is trust money, and any person who has a claim to the money has a *locus standi* to point out the facts to the Judge: *Roberts* v. *Death*, 8 Q. B. D. 319; 30 W. R. 76; see *Craig* v. *Craig*, 1896, P. 171. The judgment debtor may appear to inform the Court of any such material fact: *Lorely* v. *White*, 12 L. R. Ir. 381.

Where the garnishee has notice of the right of some third person to the debt attached, and neglects to bring it to the attention of the Judge, the order to pay over will not protect him as against such third person: *Parker* v. *McIlwain*, 16 P. R. 555; 17 P. R. 84. *The Leader*, L. R. 2 A. & E. 314; *Stuart* v. *Grough*, 15 Ont. App. 299; *Yates* v. *Terry*, 1902, 1 K. B. 527; 86 L. T. 133.

The "third person" is a "party affected" by the attaching order within the meaning of *Rule* 217, and may under that *Rule*, or apart from it, move to set aside the attaching order: *Parker* v. *McIlwain*, *supra*.

The fact that the judgment debtor has a collateral remedy, *e.g.*, by distress, does not prevent the debt being attached: *Mitchell* v. *Lee*, L. R. 2 Q. B. 259.

The Judge under this *Rule* has a discretion to direct, or refuse to direct, the trial of an issue, and his discretion was held properly exercised in refusing, where the plaintiff could not suggest a plausible

ground for supposing that the money in the hands of the garnishee belonged to the judgment debtor, or, after examination of the third party, to cast any suspicion upon the *bona fides* of his claim. Had the plaintiff been able to do this, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it: *Johnson* v. *Moody*, 12 P. R. 203. Rule 597.

The concluding part of this *Rule* authorizes an order for security for costs against either party to the issue, if residing out of the jurisdiction: *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121.

An order to pay over made under a mutual mistake of the judgment creditor and the garnishee, that the latter was indebted to the judgment debtor, may be rescinded on the mistake being discovered: *Moore* v. *Peachy*, 36 L. T. 198; *Marshall* v. *James*, 1905, 1 Ch. 432, where the debt attached as due to the plaintiff (the judgment debtor) was, after order to pay over, discovered to be not due to the plaintiff personally but to a firm of which he was a member.

Proceedings when amount is within the jurisdiction of a County Court.

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

In County Court actions where the amount claimed to be due from the garnishee is so large as to be not within the jurisdiction of a County Court, the Judge of the County Court in which the judgment was recovered, may make the order to appear returnable before himself, though the garnishee resides in another county: *Millar* v. *Thompson*, 19 P. R. 294.

It is not very clear from the *Rule* in what character a Judge of a County Court is to act, whether as a *persona designata* or as a Local Judge of the Supreme Court. The proceedings presumably are not transferred to the County Court: see *Cochrane* v. *Morrison* in note to *Rule* 595, *supra*, p. 1228, and would have to be carried on in the name of the Supreme Court, though before such Judge, and any execution to enforce his order would have to issue from the Supreme Court: see the different phraseology of *Rule* 598. If he acts as a *persona designata* there would be no appeal from his order except as provided in *The Judges' Orders Enforcement Act* (R. S. O. c. 79): see sec. 4.

A garnishee denying liability is subject to cross-examination on his affidavit: *Wilson* v. *Fleming*, 19 P. R. 203.

Where a garnishee sets up that the debt is owing to some third person, and the creditor claims that such third person is fraudulently substituted for the judgment debtor, he is entitled to an issue: *Millar* v. *Thompson*, 19 P. R. 294.

Rules 598, 599.

Though a garnishee may admit the debt to be due by him, yet if he has notice that it has been assigned he is bound to bring that fact to the notice of the Court on the application for the order to pay over: *Yates* v. *Terry*, 1902, 1 K. B. 527; 86 L. T. 133; and see note to *Rule* 594; and see *Rule* 596.

Proceedings when amount within the jurisdiction of Division Courts.

598.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a Division Court, the order to show cause shall require the garnishee to appear before the Judge of the Division Court within whose Division the garnishee resides, at a day to be appointed in writing by such Judge, and the garnishee shall be served with notice of the day appointed.

(2) The proceedings shall thereafter be carried on before the Judge as though the garnishee summons had issued out of the said Division Court, and all proceedings may thereafter be carried on in the Division Court, and execution may be issued in the Division Court to enforce any order or judgment made. C.R. 918. *Amended.*

The present *Rule* is intended to apply in Supreme Court cases as well as County Court cases, where the debt claimed to be due or accruing from the garnishee is of the amount recoverable in a Division Court.

This *Rule* differs from *Rule* 597 in that it seems to make the order to show cause before a Judge of a Division Court in effect a transfer of the proceedings to the Division Court of the division in which the garnishee resides, and authorizes execution to issue from that Court to enforce any order that may be made.

Garnishee discharged by payment.

599. Payment into Court or under an order by the garnishee shall be a valid discharge to him, as against the judgment debtor, or any assignee or claimant of whose claim he has given notice and who has been called upon to show cause under the preceding Rules. C.R. 921. *Amended.*

See Eng. (1883) R. 628.

The mere issue of an attaching order, or order to pay over, is no defence to an action by the judgment debtor: *Lockwood* v. *Nash*, 18 C. B. 536; *Sykes* v. *Brockville and Ottawa Ry. Co.*, 22 U. C. Q. B. 459; *Blevins* v. *Madden*, 11 C. P. 195; *Genge* v. *Freemon*, 14 P. R. 330; *Pickord* v. *Tims*, 19 P. R. 109; *Yates* v. *Terry* 1902, 1 K. B. 527; 86 L. T. 133. Payment to the judgment creditor after an attaching order served, but before an order to pay over, is not a discharge, and the garnishee is liable to pay again to the judgment debtor: *Turner* v. *Jones*, 1 H. & N. 878; *Clark* v. *Clark*, 8 U. C. L. J. 107; *McGinnis* v. *Yorkville*, 21 Q. B. 163, 171, but a garnishee order absolute for payment

over operates as a stay of an execution on the debtor's judgment against the garnishee: *Genge* v. *Freemon*, 14 P. R. 330. Payment into Court discharges the garnishee: *Clark* v. *Clark*, *supra*, p. 1230, and Rule 594; but payment under an order to pay over, will not protect the garnishee, if, before paying over, he has notice of the fund being claimed by another, who proves to have had the better right: *Stuart* v. *Grough*, 15 Ont. App. 299; *Yates* v. *Terry*, *supra*, p. 1230. Rule 599.

As to the practice where orders are made in respect of the same debt in different counties: see *Victoria Mutual Ins. Co.* v. *Bethune*, 1 Ont. App. 398.

As to the right of other creditors to share in moneys attached: see *The Creditors' Relief Act* (R. S. O. c. 81), s. 5.

Semble, having regard to the provisions of that Act the garnishee must pay into Court the whole debt, or at least sufficient of it, to satisfy the debts of the attaching creditor, and any other creditors entitled to share under *The Creditors Relief Act*. The money when paid into Court is payable out to the sheriff of the county in which the garnishee resides, less the attaching creditor's costs of the garnishee proceedings: *Ib.*, s. 6 (2), and see Form No. 79.

CHAPTER XXI.

ORIGINATING NOTICES.

Originating notices relating to trusts or questions of administration.

600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin or heir-at-law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination without an administration of the estate or trust of any of the following questions or matters:

(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin or heir-at-law, or *cestui que trust*.

(*b*) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others.

(*c*) The furnishing of any particular accounts by the executors or administrators or trustees and the vouching (where necessary) of such accounts.

(*d*) The payment into Court of any money in the hands of the executors or administrators or trustees.

(*e*) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.

(*f*) The approval of any sale, purchase, compromise or other transaction.

(*g*) The opinion, advice or direction of a Judge pursuant to The Trustee Act.

(*h*) The determination of any question arising in the administration of the estate or trust.

(i) The fixing of the compensation of any executor, administrator or trustee. C.R. 938 and 1269. Rule 600.

See Eng. (1883) R. 765. Clause (i) was not in C. R. 938.

In England the summary procedure in respect of the several matters mentioned in this *Rule*, is authorized to be taken by what is there called an originating summons.

By the English Rules it is provided that in certain cases an appearance must be entered to an originating summons as in an ordinary action commenced by writ: see Eng. R. 737 c.; in others an appearance is dispensed with: see Eng. R. 737 f.

As no provision is made by these *Rules* for any formal appearance, or for any special procedure, the practice to be followed is that in an ordinary motion.

All originating notices, unless otherwise ordered, must be served at least seven days before the day of hearing: *Rule* 215 (a).

The persons to be served in the first place with the notice of motion are specified in *Rule* 601, but other persons may, by direction of the Judge, be subsequently required to be served: see *Rule* 601.

A proceeding commenced under this *Rule* would appear to be an "action"; see Jud. Act, s. 2 (o); *Re Fowsitt*, 30 Ch. D. 231; *Re Varley*, 31 Ch. D. 275; 55 L. J. Chy. 259.

It is not an appropriate proceeding where there are questions of fact in dispute: *Lewis* v. *Green*, 1905, 2 Ch. 340; 93 L. T. 303.

Questions beyond those which would arise in administration proceedings will not be entertained. thus it has been held that the *Rule* gives no jurisdiction, on the application of persons entitled under a devise of lands subject to a restraint on alienation, to determine whether the restraint is valid: *Re Martin*, 8 O. L. R. 638; nor whether a widow can sell without the consent of her children, under a devise to her with full power to dispose of part or the whole as she and the children may think wisest and best at any time: *Re McDougall*, 8 O. L. R. 640.

Where a plaintiff proceeds by writ in a case which could as well have been determined by an application under this *Rule*, he will be allowed costs only as of a motion under this *Rule*: *Re Brown*, 32 Ont. 323.

Examples of cases determined under clause (a).

Clause (a)—As to determining a disputed debt: see *Re Powers*, 30 Ch. D. 291. As to persons to be notified: see *Rule* 601 (1), (o), (e).

The following questions have been determined under the *Rule*, viz.:

A question as to whether the moneys payable under a policy of life insurance were validly bequeathed to preferred beneficiaries under *The Insurance Act* (R. S. O. c. 183), s. 171, so as to be not subject to creditors' claims, the applicant being a creditor: *Re Cheesebrough*, 18 C. L. T. 23; see also, *Re Wrighton*, 8 O. L. R. 630; *Re Harkness*, 8 O. L. R. 720; so also, whether persons claiming as heirs and next of kin were entitled to any beneficial interest in the testator's estate: *Re Lewis*, 29 Ont. 609; *Re Gardner*, 3 O. L. R. 343; as to whether a

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devise is conditional: *Re Deller*, 6 O. L. R. 711. So also a question as to the person entitled to a legacy, where there was a misnomer of the legatee: *Re Whitty*, 30 Ont. 300; and whether a trust has arisen under a will: *Re Evans*, 3 O. L. R. 401; and whether a mortgage debt passed under a bequest of chattels: *Re McMillan*, 4 O. L. R. 415; and whether a devisee of a farm was entitled to specific performance of a covenant of the testator to build a house on the property devised: *Re Murray*, 4 O. L. R. 418; and whether buildings added after the will to premises devised passed under the devise: *Re Stokes*, 21 O. L. R. 464.

Executors having no interest in the land devised would appear to have no *locus standi* to apply under this *Rule* for the determination of questions affecting the construction of a will as to the disposition of land; *e.g.*, where there is no devise in terms to them, and no caution registered, or where, if registered, it has expired: see *In re Young*, 38 C. L. J. 81.

Where one of the possible beneficiaries under a will had disappeared, and had not been heard of for 24 years, an application by executors under this *Rule* against the personal representatives of such person was entertained, to determine the right of such person: *Neville* v. *Benjamin*, 1902, 1 Ch. 723; 86 L. T. 387; and the personal representatives were authorized to distribute the share bequeathed to the beneficiary who had disappeared, in the absence of evidence to show that he had survived the testator, after inquiry directed as to his whereabouts: *Ib.*

A claim to be entitled under a resulting trust alleged to arise in consequence of the failure of an express trust was held not to be determinable under this clause: *Re Amalgamated Society of Railway Servants, Addison* v. *Pilcher*, 1910, 2 Ch. 547; 103 L. T. 627.

Clause (b)—As to persons to be notified, see *Rule* 601 (1), (*b*).

Clause (c)—Where trustees have, without excuse, refused to render an account, they may be ordered to pay the costs of an application under this *Rule*, including the costs of vouching the account: *Re Skinner, Cooper* v. *Skinner*, 1904, 1 Ch. 289. As to persons to be notified: see *Rule* 601 (1), (*c*).

Clause (d)—*Payment into Court, etc.*—Under the corresponding Eng. Rule it is only where money is actually in the hands of the executor, administrator, or trustee, belonging to the estate in question, that its payment into Court will be summarily ordered; the admission that he is indebted will not be sufficient: *Nutter* v. *Holland*, 1894, 2 Ch. 408; 71 L. T. 508. As to persons to be notified: see *Rule* 601 (1), (d); see also *The Trustee Act* (R. S. O. c. 121), s. 39 (2, 5).

Clause (e)—An application to sanction a provision for payment of annuities payable out of residue, and for distribution of the residuary estate after making such provision was entertained under this *Rule*: *Re McIntyre*, 3 O. L. R. 212.

The Court will not authorize the continuation of the business of a deceased person by his personal representatives, where that course is not authorized by his will, except so far as necessary to enable the business to be sold as a going concern: *Re Broin*, 9 O. L. R. 1.

As to persons to be notified: see *Rule* 601 (1), (*a*), (*e*).

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Clause (f)—An application to sanction tbs raising of money by mortgage to pay debts of a testator cannot be made undsr this *Rule*, excspt in an administration proceeding: ses *Walley* v. *Robinson*, W. N. 1884, 144; nor can a Judgs order a sale; bs can only approve of ons wbicb tbs trustees, or executors, or administrators, bave power to make: *Re Robinson*, 31 Ch. D. 247; *Nelson* v. *Bell*, 32 Ont. 118.

Examples of cases determined under cl. (f).

A trustee bas been nutborized under tbis *Rule* to advancs to a tenant for life part of ths residuary personal estate for the purpose of stocking and cultivating a farm forming part of the real estate: *Household* v. *Household*, 27 Cb. D. 553.

As to persons to be notified: see *Rule* 601 (1), (*a*), (*c*).

Clause (g)—Tbs psrsons, or one of the psrsons, wbose rights or interests are sougbt to be affected, must be notified of tbs application: *Rule* 601 (1), (*a*), (*c*); see also *Re Harley's Estate*, 17 P. R. 483.

Examples of cases determined under cl. (g).

On a summary application for its opinion or advice, under *The Trustee Act* (R. S. O. c. 121), s. 66, the Court has not power to declars ths construction of a will or otber instrument: *In re Williams*, 1 Chy. Cb. 372; *In re Hooper*, 29 Beav. 656; *Re Rally*, 25 O. L. R. 112. Tbe object of tbe statute, it was said, is to assist trustees and executors in the execution of tbeir trusts, as to mattera of discretion. But under the Eng. practice, cases for tbe construction of wills upon originating summonses ars of frequent occurrence: *Re Elliot*, *Kelly* v. *Elliot*, 1896, 2 Cb. 353; 75 L. T. 138; *Re Lever*, *Cordwell* v. *Lever*, 1897, 1 Ch. 32: 75 L. T. 383; *Re De Tabley*, *Leighton* v. *Leighton*, 75 L. T. 328; *Re Stephenson*, *Donaldson* v. *Bamber*, 75 L. T. 495; and see *Re Wood*, 6 O. W. N. 611; and *infra*, clause (*h*); but see *Re Davies*, 38 Ch. D. 210; *In re Gray*, 1896, 2 Ch. 802; *In re Weeding*, 1896, 2 Cb. 364.

Under this *Rule* tbe Court bas determined wbether sxecutors havs a power to sell land: *Re Crawford*, 4 O. L. R. 313; and tbs time when moneys payable under an insurance policy were payable to the beneficiaries: *In re McKellar*, 37 C. L. J. 403.

Also whetber executors bad power to take shares in a company into wbicb it was proposed to convert a business in whicb the testator's estate was interested: *In re Morrison*, 1901, 1 Ch. 701; *In re Strathy*, 37 C. L. J. 399.

Also, whetber securities wbich were objected to hy tbe *c. q. t.* as doubtful, should be retained: *Re D'Epinoix*, *D'Epinoix* v. *Fettes*, 1914, 1 Ch. 890; 110 L. T. 808.

Tbs Court will not undsr tbis *Rule* interfers witb ths discretion given to trustees hy the terms of tbe trust, or say bow it should be exercised: *Re Sergeant*, 8 O. L. R. 260; *Re Brading*, 6 O. W. N. 642.

A petition for advice under *The Trustee Act* (R. S. O. c. 121), s. 66, was by consent turned into a motion under tbis *Rule*: *Re Rally*, 25 O. L. R. 112.

An application to declare a resulting trust, on failure for illegality of specific trusts, cannot be entertained on an originating notice: *Re Amalgamated Society of Ry. Servants*, *Addison* v. *Pilcher*, 1910, 2 Ch. 547; 103 L. T. 627.

As to the persons to he notified: see *Rule* 601 (1), (*a*).

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Examples of cases refused to be entertained under clause (h).

Clause (h)—In England it is held that only matters which, before the *Rule*, could have been determined under a judgment for the administration of an estate, or the execution of a trust, can now be determined under the *Rule*. Questions as to a legal devise could not be so determined, and cannot now be determined under the Eng. Rule: *Re Corlyon*, 56 L. T. 151; 35 W. R. 155; *Re Davies*, 36 Ch. D. 210; *Re Royle*, 43 Ch. D. 18; *Re Sherlock*, 18 P. R. 6. Nor can questions affecting a person claiming adversely to the will, or deed in question, be so determined: *Re Bridge*, 56 L. J. Chy. 779; *Re Gladstone*, W. N. 1888, 185; *Re Royle*, *supra*, but it is too late to take such an objection to the jurisdiction of the Court upon an appeal: *Re Turcan*, 58 L. J. Chy. 101; but this *Rule* is wider than the Eng. Rule (see clause (*h*)), and was intended to save the expense of the administration of an estate or trust: *Re Whitty*, 30 Ont. 300; and see cases noted *supra*, under clauses (**a**) and (**g**).

It is also held, in England, that where the application is founded on an alleged breach of trust, it cannot be maintained under the Eng. Rule, except by consent, *per* Kekewich, J., *Re Weale*, 42 Ch. D. 674; 37 W. R. 779; *Re Neil*, 62 L. T. 649; *per* Lord Macnaghten, *Dowse* v. *Gorton*, 1891, A. C. p. 202; nor where wilful neglect and default is charged: *Re Hengler*, W. N. 1893, 37. On an application under the Eng. Rule to determine whether a husband was entitled as tenant by the curtesy, a writ was ordered to be issued: *Hope* v. *Hope*, 1892, 2 Ch. 336.

Where there is only a question of law to be determined, it should be decided on the motion without putting the parties to the expense of another proceeding: *Re Powers*, 30 Ch. D. 296; *Nobbs* v. *Law Reversionary Int. Soc.*, 1896, 2 Ch. 830; 75 L. T. 309.

The construction of a will may be determined upon an application under this *Rule*, In cases where a Master in taking accounts and making inquiries in an administration proceeding, for the purpose of determining the matters referred to him, would have to place a construction upon the will: *Re Sherlock*, 18 P. R. 6. The construction of the will declared upon such an application is a sufficient protection to an executor; if he appeals, he does so at his own risk as to costs: *Ib.* For the purpose of construing the will the Court may take such evidence as may be necessary to enable it to understand the situation of matters at the date of the will, and the date of the testator's death: *Re Stokes*, 21 O. L. R. 464.

But where the question propounded is one of law arising between legal devisees under a will which does not in any way relate to the administration of the estate, it has been held that there is no jurisdiction under this *Rule* to determine it: *Re Cafferty*, 15 O. L. R. 306. The question in this case was whether a devisee took a fee simple or a fee tail.

Where the decision on the construction of a will, or deed, would not put an end to the litigation, the Court may refuse to determine it on an application under this *Rule*: see *Lewis* v. *Green*, 1905, 2 Ch. 340; 93 L. T. 303.

The Court declined to determine, as a question of management of a trust property, whether the guardian of an infant appointed by the Surrogate Court was entitled to receive from trustees a fund held by trustees for an infant under an express trust, the Official Guardian opposing the claim: *Re Mathers*, 18 P. R. 13.

Questions Determined Upon Applications Under Clause (h).— That a deceased wife had been guilty of a breach of a covenant in her marriage settlement, and that the trustees were entitled to recover damages therefor against her executors: *Re Parkin*, 1892, 3 Ch. 520. Rule 601. Examples of cases determined under cl. (h).

Which of the trustees under two different instruments was entitled to a trust estate on failure of the beneficiaries: *Re Lashmor*, 1891, 1 Ch. 258.

A dispute as to a debt, where the question was one of law, and there were no disputed facts: *Re Powers*, 30 Ch. D. 291.

Whether a power of appointment is valid: *Re Hargreaves*, 43 Ch. D. 401.

Whether a release is valid: *Re Garnett*, 50 L. T. 172; 32 W. R. 474; *sed vide*, *Re Ellis*, 59 L. T. 924, where it was held that a claim which involved the setting aside of a release could not be so determined.

The propriety of applying part of the corpus of a trust fund in the repair of real estate held on the same trusts as the fund: *Conway* v. *Fenton*, 40 Ch. D. 512; *Re De Teissier*, 1893, 1 Ch. 153; *Re Montagu*, 1897, 1 Ch. 685.

Whether a tenant for life is entitled to be let into possession: *Re Newen*, 1894, 2 Ch. 297; and see *Re Bagot*, 1894, 1 Ch. 177.

On the application of the guardians of infants who were entitled to maintenance out of a fund in the hands of the executor of their father's will, the fund was ordered to be paid into Court though there was no imputation against the character or solvency of the executor: *Re Humphries*, *Mortimer* v. *Humphries*, 18 P. R. 289, and generally this will be done where the person holding the money is a mere trustee without discretion as to the application of the money: *Whitewood* v. *Whitewood*, 19 P. R. 183.

Whether a wife is entitled in equity to a settlement of a fund claimed to be set off against her husband's debt to the testator: *Re Briant*, 39 Ch. D. 471.

Whether the representatives of a deceased tenant for life were entitled to any part of the proceeds of the sale of a reversion, which was subject to the life tenancy, but which was not sold until after the decease of the tenant for life: *Re Pitcairn*, 1896, 2 Ch. 199.

Construction of a will: see *Re Sherlock*, *supra*, p. 1236, and see *Rule* 604.

As to the persons to be notified: see *Rule* 601 (1), (*a*), (*e*). Parties to be notified.

On applications to determine questions under clause (*h*) persons cannot be made parties who would not be proper parties to an action for administration; *e.g.*, a company in respect of a possible claim for future calls on stock: *Re King*, *Mellor* v. *South Australian R. M. Agy. Co.*, 1907, 1 Ch. 72; 95 L. T. 724.

Clause (i)—See *The Trustee Act* (R. S. O. c. 121), s. 67.

As to the persons to be notified: see *Rule* 601 (1), (*a*), (*e*); and see notes to *Rule* 410 as to allowance of compensation.

601.—(1) The persons to be served with notice under the next preceding Rule in the first instance shall be as follows:— Persons to be served—

Rule 601.

1. Where notice served by executors, etc.

1. Where the notice is served by an executor or administrator or trustee,

(*a*) For the determination of any question under clauses (*a*), (*e*), (*f*), (*g*), (*h*), *or* (*i*),

the persons or one of the persons whose rights or interests are sought to be affected;

(*b*) For the determination of any question under clause (*b*),

any member or alleged member of the class;

(*c*) For the determination of any question under clause (*c*),

any person interested in taking such accounts;

(*d*) For the determination of any question under clause (*d*),

any person interested in such money;

(*e*) If there are more than one executor or administrator or trustee, and they do not all concur in the service of the notice,

those who do not concur.

2. Where served by some other person.

2. Where the notice is served by any person other than the executors, administrators or trustees, it shall be served upon the said executors, administrators or trustees. *New.*

Special directions as to service.

(2) The Judge may direct such other persons to be served as he may deem proper. C.R. 939 and 940.

The word "New" at the end of clause 2 *supra*, is erroneous. The whole of the *Rule* up to and inclusive of clause 2, is taken from C. R. 939, and the concluding clause is taken from C. R. 940. In the Official copy of the *Rules*, the last clause of this *Rule* is numbered "(1)," but it will be noticed that the first clause is also so numbered. For convenience of reference the numbering of the last clause is changed here to (2).

See Eng. (1883), RR. 767, 768.

Notwithstanding the provisions of this *Rule* the Judge will not usually determine any question affecting the rights of persons who are neither parties, nor properly represented on the application. The Court has no inherent jurisdiction to declare that the parties to an action sufficiently represent absent parties: see *Re Bullen-Smith*, 57 L. T. 924; S. C., 58 L. T. 578; *Morgan's Brewery Co. v. Crosskill*, 1902, 1 Ch. 898. An application may be entertained in the absence of a party: see *Rules* 75-78; but unless a person is clearly represented in accordance with some *Rule*, or statute, the absentee will not be bound by the adjudication unless he has subsequently, with notice

of it, adopted and acted on it: see *Re Lart*, 1896, 2 Ch. 788; 75 L. T. 175; and see *Uffner* v. *Lewis*, 27 Ont. App. 242. Rules 602, 603.

An executor having no estate in the land under the will, and none under *The Devolution of Estates Act* (the legal title having vested in the beneficiaries), is not competent to apply for the construction of a devise of real estate: see *In re Young*, 38 C. L. J. 81.

For the purpose of binding absent parties by proceedings commenced under *Rule* 600, the provisions of *Rules* 75-78, must be observed: see the notes to those *Rules*.

Although this *Rule* contemplates that the notice of motion shall, in the first instance, be served only on one, or some, of the persons whose rights are affected, yet it is not the practice of the Court to decide questions under the similar Eng. Rule unless all persons interested are either parties or sufficiently represented; on the first return of the motion, therefore, the Judge will, probably, under this *Rule*, give all necessary directions either for notifying the other persons interested, or for their representation on the application, so as to bind them by the order that may ultimately be made: see *Re Gardiner*, W. N. 1887, 59.

Service out of the Jurisdiction.—In England the Court cannot give leave to serve an originating summons out of the jurisdiction: *Re Cliff*, 1895, 2 Ch. 21. In Ontario, however, *Rules* 25 and 3 (*j*) would seem to apply to an originating notice under *Rules* 600 *et seq.* Service of originating notice out of Ontario.

An application for leave to serve it will have to be made under *Rules* 25 and 26, *semble*, the order should limit the time at which the notice should be made returnable: *Rule* 27 (2).

In England it is held that the third party procedure (see *Rules* 165-171), does not apply to proceedings commenced by originating summons: *Re Wilson*, 45 Ch. D. 266; 63 L. T. 100.

602. When upon an originating notice under the Vendors and Purchasers Act it appears that some third person is or may be interested in the question raised, the Court may require notice to be given to such person so that the question may be determined not only as between the vendor and purchaser, but so as to bind such third person. *New.* Third persons may be notified of application under V. & P. Act.

This *Rule* is intended to remedy a defect in *The Vendors and Purchasers Act* (R. S. O. c. 122), which makes no provision for the notification of third parties, or for binding them by an adjudication under the Act, such adjudication hitherto being binding only on the vendor and purchaser. Under this *Rule* third parties can now be notified of an application under that Act, and will then be bound by the decision, subject, of course, to the right of appeal.

603.—(1) Where any person claims to be the owner of land, but does not desire to have his title thereto quieted under *The Quieting Titles Act*, he may have any particular question which would arise upon an application to have his title quieted determined upon an originating notice. Particular questions of title to land may be decided.

Rules 604, 605.

Parties to be notified

(2) Notice shall be given to all persons to whom notice would be given under *The Quieting Titles Act*, and the Court shall have the same power to finally dispose of and determine such particular question as it would have under the said Act. *New.*

For proceedings under *The Quieting Titles Act* (R. S. O. c. 123), see *Rules* 692-714, *infra*. The present *Rule* is a new provision, and is probably intended to enable the owners of land to obtain an adjudication on some particular question affecting the title to land, *e.g.*, whether a particular instrument constitutes a valid subsisting claim or charge on the property, or whether a particular person in the claim of title was heir of a preceding owner, or same other single question affecting the title, and such a one as may be properly disposed of on a summary application. It does not appear to be intended to extend to matters which involve a large amount of evidence, or the notification of many parties, and which cannot be satisfactorily disposed of without a trial in the ordinary way. It does not appear to be intended to authorize the investigation of the whole title, but merely some single matter affecting it.

Under *The Quieting Titles Act*, usually, all persons appearing to be interested in opposing the claim of the petitioner are required to be notified, if possible.

Documents may be construed.

604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined. *New.*

This is a new provision and is apparently intended to enable persons interested in the construction of any document to obtain a judicial construction thereof in a summary way. But it may be taken for granted, however, that there must be some *bonâ fide* question in dispute, and of sufficient importance to warrant an application to the Court, and any attempt to obtain the opinion of the Court on any trivial or unimportant question would doubtless fail.

Construction of contracts where no evidence

605.—(1) Where the rights of the parties depend—

(*a*) Upon the construction of any contract or agreement and there are no material facts in dispute;

(*b*) Upon undisputed facts and the proper inference from such facts;

Such rights may be determined upon originating notice.

(2) A contract or agreement may be construed before there has been a breach thereof. *New.*

This also is a new provision, and is confined to the construction of contracts or agreements where no facts are in dispute. It appears to be an amplification of the preceding *Rule*.

Rules 606, 607.

Summary order.

606.—(1) The Judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require, or may give such directions as he may think proper for the trial of any questions arising upon the application. C.R. 941.

Carriage and service of judgment or order.

(2) Any special directions, touching the carriage or execution of the judgment or order or the service thereof upon persons not parties, may be given as may be deemed proper. C.R. 942.

See Eng. (1883) R. 771.

Costs.—Tbe Court has fuii jurisdiction to make such order as to the costs of the proceedings as mny seem fit: see Jud. Act. s. 74, *supro*. It appears to be the settied practice of the Court in England to give ali psrties properiy notified of an appiication by executors for directions, their costs as hetween soiicitor and client out of the estate in question: *Re Clarke, Clorke* v. *St. Mory's Convalescent Homc*, 97 L. T. 707.

Compromise Order.—Where a compromise order is made on an originating notice, the proceeding is at an end, and it is not open to the parties to continue the proceedings for the purpose of enforcing such order on a new state of facts subsequently arising: *Re Hcarn, De Bertodono* v. *Hearn*, 108 L. T. 452.

Interference with discretion of trustees, etc.

607. Service of an originating notice shall not interfere with or control any power or discretion vested in any executor, administrator or trustee, except so far as such interferencc or control may necessarily be involved in the particular relief sought. C.R. 942.

This *Rule* is not based on C. R. 942, but on C. R. 943.

CHAPTER XXII.

ADMINISTRATION, PARTITION, INFANTS' ESTATES AND DOWER.

(i) *Administration.*

Creditors, legatees, next of kin, heirs or devisees, may apply on motion in Chambers for administration.

608. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next-of-kin, or one of the next-of-kin, or the heir, or a devisee interested under the will of a deceased person, may apply by originating notice for the administration of the estate, real or personal, of such deceased person. C.R. 944.

Wilful neglect and default may be inquired into under judgment obtained under this Rule.

It is settled that an inquiry as to wilful neglect and default may be made in all cases under an administration judgment granted on motion: *Re Allen, Pocock* v. *Allen*, 9 P. R. 277; 18 C. L. J. 242, *Carpenter* v. *Wood*, 10 Gr. 354; *Sullivan* v. *Harty*, 9 P. R. 500, 19 C. L. J. 234; and that the executor may be charged with a *devastavit* arising on the account: *Re Stevens, Cook* v. *Stevens*, 1897, 1 Ch. 422; and it would seem that any breach of duty which is practically a matter of account, may be effectually inquired into, and dealt with, under a judgment obtained under this *Rule*. Where, however, there is any question, to be determined, before a judgment for administration can properly be pronounced, an action should be commenced by writ. Thus it was held that a bill must be filed where the construction of a will was necessary: *Heywood* v. *Stevenright*, 8 P. R. 79; *Franks* v. *Worth*, 35 W. R. 663; 56 L. J. Chy. 779; *Carlyon* v. *Carlyon*, 35 W. R. 155; 56 L. T. 151; where the claim was for support of the wife and children of deceased, raising substantially the same question as would be raised in an alimony suit: *Re Foster, Griffith* v. *Patterson*, 20 Gr. 345; *Groom* v. *Darlington*, 9 P. R. 298, where the claim rose out of a contract of suretyship: *Re Colton*, 8 P. R. 342; see also *Re Allan*, 9 P. R. 277; and *Re Arcedeckne*, 35 L. J. Chy. 102; or where the executor is charged with misconduct: *Re Babcock*, 8 Gr. 409, that is, misconduct which would entitle the plaintiff to apply at the outset for an injunction or a receiver: *Sullivan* v. *Harty*, 9 P. R. 500; not misconduct consisting merely in not having accounted for moneys received, and which would be shown upon the taking of accounts: *Eberts* v. *Eberts*, 25 Gr. 565; *Re McMillan*, 8 C. L. J. 285; *Re Bagwell, Anderson* v. *Henderson*, 17 P. R. 100; where the plaintiff claimed to be a creditor, and his claim appeared to be barred by the Statute of Limitations, but he claimed to avoid the operation of the Statute, on the ground of fraud on the part of the testator: *Re McDonald, Cameron* v. *McDonald*, 2 Chy. Ch. 29; and where a legatee claimed administration and it appeared that an award had been made respecting the applicant's claim, but the applicant denied being party to the reference: *Nudel* v. *Elliot*, 1 Chy. Ch. 326; and see *Groom* v. *Darlington*, 9 P. R. 298; and *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112. In *Barry* v. *Brazill*, 1 Chy. Ch. 248, special inquiries as to what would be proper to be allowed to

When writ must issue.

the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of the infant children of deceased were refused, and the applicant was left to file a bill. But where the facts are not in dispute, and there is only a question of law as to the right of the applicant to sue, it would seem that such a point would be decided on a motion without putting the parties to the necessity of bringing an action: *Re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291; and it is possible that under the enlarged powers conferred by *Rule* 600, it may hereafter be held that some cases which, under the above decisions, were held to be necessary to be commenced by writ would now be entertained on motion under *Rule* 600. Rule 606.

Where the application is made on motion, in a case in which the Court is of opinion that a writ should be issued, an order is usually made giving the applicant a day to commence his action, in default, the motion to be dismissed, but if the action be commenced, reserving the costs of the motion until the trial of the action: *Re McDonald, Cameron* v. *McDonald*, *supra*, p. 1242. But where the plaintiff commences an action, instead of applying on motion, where the latter course is proper, he will be disallowed the extra costs occasioned thereby: *Sovereign* v. *Sovereign*, 15 Gr. 559; or, if it is not clear that the action was unnecessary, the question of the additional costs will be reserved until after the Master has made his report: *Eberts* v. *Eberts*, 25 Gr. 565.

And where a creditor brings an administration action, after being informed that there are no assets applicable to the payment of his claim, if the information appears by the result to be substantially correct, he may have to pay the costs of the action: *The City Bank* v. *Scatcherd*, 18 Gr. 185; and so also, a next of kin, or residuary legatee, unnecessarily bringing an action, may be ordered to pay the costs of it: see *Parsill* v. *Kennedy*, 22 Gr. 417; *Re Woodhall*, 2 Ont. 456; so also a trustee: *Re Cubburn, Gage* v. *Rutland*, 46 L. T. 848. Where proceedings are unnecessary.

An action unnecessarily brought by a residuary legatee claiming, but failing to establish himself, to be a creditor, was on further directions dismissed with costs: *Re Johnston*, 25 Gr. 261; and see *Re Woodhall*, 2 Ont. 456; and a residuary legatee of money and stocks, subject to a prior estate for life, is not entitled, as of course, to have the property brought into Court to be administered; and where the fund is invested in the names of proper trustees, and in proper securities, the Court will refuse to interfere: *Re Braithwaite, Braithwaite* v. *Wallis*, 21 Ch. D. 121; 48 L. T. 857.

The extra costs of bringing an action where a summary application would have sufficed were disallowed between solicitor and client: *Re Allenby & Weir*, 13 P. R. 403; 14 P. R. 227.

The right of a judgment creditor of a legatee, or devisee, under a will, to bring an action for administration of the testator's estate under this *Rule* was formerly denied: see *Gilbert* v. *Jarvis*, 16 Gr. 265; *Blake* v. *Jarvis*, 16 Gr. 295; 17 Gr. 201; but see now *Mones* v. *McCallum*, 17 P. R. 102, 398. Creditor of legatee or devisee.

A judgment for administration in the form No. 104, amounts to a judgment for the sale of the lands belonging to the estate in question: see *Rule* 611 (2), and therefore operates immediately as a conversion, and if, before sale, any of the beneficiaries die, the interest of the deceased is personalty, and not realty: *Fauntleroy* v. *Beebe*, 1911, 2 Ch. 257; 104 L. T. 704. Effect of judgment for administration.

Rule 606.

Parties.

Parties.—The provisions of *Rules* 74 (1), 79-87, apply to proceedings under this *Rule*. All parties from whom an account is sought, should be served with notice: see *Rule* 79, p. 445, note.

Personal representatives of deceased legatee may apply.

Personal Representative.—The personal representative must always be notified where the application is made by any creditor, devisee, legatee, next of kin, or heir.

Where he makes the application himself he may sometimes do so *ex parte*: see *Rule* 610, and note. If the application is made by one of two or more executors or administrators, the others must also be notified: see *Rule* 601 (1), (*c*).

There appears to be some conflict of authority as to whether a deficiency of assets, for the payment of debts, is a sufficient ground for the personal representative to apply to the Court for administration: see cases *infra*, in note to *Rule* 610, p. 1252.

Action to obtain indemnity against covenants in lease.

The personal representative is entitled to bring an action for administration in order to obtain an indemnity in respect to leasehold estates: *Re Bosworth*, 45 L. T. 136; or contingent liabilities, *e.g.*, possibility of future calls on shares: *Re King, Mellor* v. *South Australian L. M. Agency Co.*, 1907, 1 Ch. 72; 95 L. T. 724; but he has no right to institute an action for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392; *Borry* v. *Borry*, 19 Gr. 458; and he may be refused his costs of an action if unnecessarily brought: *Graham* v. *Robson*, 17 Gr. 319; *Springer* v. *Clarke*, 15 Gr. 664; but see *Farrow* v. *Austin*, 18 Ch. D. 58; 45 L. T. 227; *Re McClellon*, 29 Ch. D. 495; 52 L. T. 741; or he may be ordered to pay the costs of the action: *Sullivan* v. *Sullivan*, 16 Gr. 94; *Re Dineen*, before Boyd, C., 13th May, 1881; or the costs of an action brought by a creditor or legatee, rendered necessary by the action of the executor: *McGill* v. *Courtice*, 17 Gr. 271; *Re Radcliffe*, 44 L. T. 96; 50 L. J. Chy. 317; *Killins* v. *Killins*, 29 Gr. 472. An application was held to be proper where one of the legatees was absent from the Province and the executor had taken proper steps to find him, and could not get a discharge without coming to the Court: *Re Wade*, 18 Gr. 485. So also executors have been charged with so much of the costs of the reference as were incurred in establishing charges against them which they disputed: *Stewart* v. *Fletcher*, 18 Gr. 21; *Smith* v. *Roe*, 11 Gr. 311; *Bald* v. *Thompson*, 17 Gr. 154; and see *Ashbough* v. *Ashbough*, 10 Gr. 433. But an executor may be allowed his costs though he has committed a breach of trust, if the estate has suffered no loss: *Wiard* v. *Gable*, 8 Gr. 458. But a personal representative in default was held not entitled to costs until he had made good his default: *Re Bashaw, Hannay* v. *Bashaw*, 23 Ch. D. 195; 48 L. T. 476; *McEwan* v. *Crombie*, 25 Ch. D. 175; 49 L. T. 499. In *Tebbs* v. *Carpenter*, 1 Mad. 290, it was laid down that if the suit would have been proper, and the executor a necessary party, if the executor had not misconducted himself, he ought not to pay all the costs of the suit, though in the course of the suit it appears that he has misconducted himself; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs. This rule was approved in *Smith* v. *Roe*, 11 Gr. 321; and *Simpson* v. *Horne*, 28 Gr. 1; but see remarks in the latter case at p. 9.

Personal rep., when entitled to costs.

May be ordered to pay costs of unnecessary action, or of action rendered necessary by his misconduct.

Application, when to be made.

Application, how made.—Applications under this *Rule* are made in Chambers: *Rule* 207 (3). By *Rule* 212 motions for administration

may be made before a Judge in Chambers, or the Local Judge of the county where the land or any part of it is situate, or where the testator or intestate died. The Master in Chambers, or Local Masters, also appear to have jurisdiction in uncontested cases: *Rules* 207 (3), 208 (8), 209; if the motion is contested, the jurisdiction of the Master in Chambers, or Local Master, is excluded, and the motion must be adjourned before a Judge in Chambers: see *Rule* 208 (8), and the Judge may, if necessary, direct an action to be brought: see *Re Underhill*, 33 Ch. J. 40; 17 C. L. T. 9. Rule 606.

Formerly a Local Master had no jurisdiction to grant a judgment for administration unless the deceased had resided in his county: see C. R. 947, but that *Rule* has not been continued; and probably the practice on that point is now changed: see *Rule* 209. Local Masters.

Under the present *Rules* it would appear that an application can no longer be made in the name of an infant by his next friend, because wherever an infant is interested he must now be a defendant: see *Rule* 609. Infants must be defendants.

Rule 215 (2), provides that seven clear days' notice of the motion must be given. Motions for administration, therefore, constitute an exception to ordinary motions, which only require two clear days' notice: *Rule* 215 (1); and see *Exchange Bank* v. *Newell*, 19 C. L. J. 253. Seven clear days' notice of motion to be given.

Where an administration judgment is made in Chambers, the reference should *primâ facie* be to the Master of the County in which the person, whose estate is to be administered, resided: *Thompson* v. *Fairbairn*, 10 P. R. 533; *Armstrong* v. *Armstrong*, 18 P. R. 55. Place of reference.

A judgment for the administration of the realty alone will not be granted, unless the personal estate has been previously administered: *Rowsell* v. *Morris*, L. R. 17 Eq. 20; *Re Armour*, *Moore* v. *Armour*, 10 P. R. 448; but see *Dey* v. *Dey*, 2 Gr. 149.

Although it is not necessary to serve all the parties interested in the realty with notice of the application for administration, they must, nevertheless, all be served in the Master's office with an office copy of the judgment as prescribed by *Rule* 87: see note to that *Rule*; parties who are not served will not be bound by the accounts: *Norris* v. *Bell*, 9 Gr. 23; *May* v. *Newton*, 34 Ch. D. 347; *Uffner* v. *Lewis*; *Boys' Home* v. *Lewis*, 27 Ont. App. 242. A party improperly served may move to set aside the service: *Re Symons*, *Betts* v. *Betts*, 54 L. T. 501; and see *Rule* 87. Parties to be served with judgment.

For form of judgment on applications under this *Rule*: see Form No. 104; H. & L. Forms, Nos. 878, 879, 880, 1377.

The judgment must be entered in the same way as other judgments in an action: *Rule* 515. Entry of judgment.

C. R. 958 constituted the offices of the Local Masters offices for entering judgments for administration, or partition, granted by them; but that *Rule* has not been continued: see now *Rule* 515 (3).

Where more than one application is made for administration of the same estate: see note to *Rule* 610, *infra*, p. 1254.

Creditors.—A creditor whose debt is payable, may make application for administration of his deceased debtor's estate, without waiting a year from his decease. To an application by a creditor for the administration of the personal estate, no one but the personal representative, and any persons interested who are infants (see *Rule* 609), need Application for administration by creditors.

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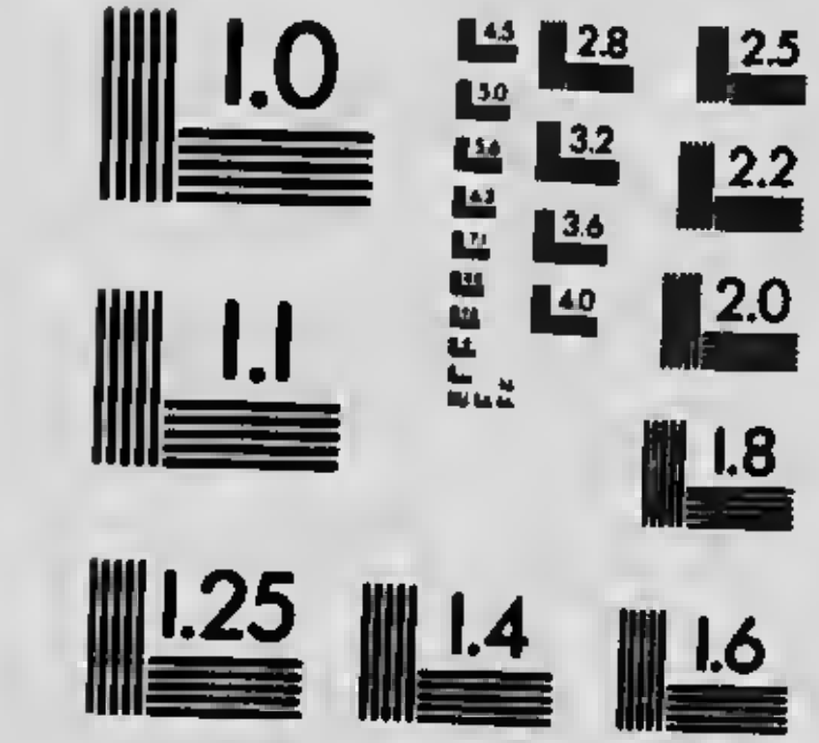

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be made defendants. Formerly if an administration of the realty was also sought, some one must be made a party who was interested in the realty: C. R. 951, that Rule has not been continued, but its omission is probably not intended to alter the practice. Under the *Devolution of Estates Act*, the personal representative sufficiently represents, for the purpose of an application under this *Rule*, both the real and personal estate of all persons dying since 1st July, 1886, and it is not proper to make the heirs or devisees of such persons parties unless the estate has become vested in them under *The Devolution of Estates Act* (R. S. O. c. 119), s. 13; *sed vide Ianson* v. *Clyde*, 31 Ont. 579, per Boyd, C., p. 586; but the beneficiaries must be served with the judgment under *Rule* 87. Where the letters of administration are limited to the personalty, it will be necessary to get letters of administration as to the realty, in order to obtain proper representation of the realty.

Personal representative must be served.

Where the realty has become divested from the personal representative by reason of the omission to file a caution, he ceases to represent it; and it remains liable to administration in the hands of the devisee or heir: see *The Devolution of Estates Act* (R. S. O. c. 119), s. 13.

If more than one all must be served.

Where there are several personal representatives all must be served, even though some be resident out of the jurisdiction: *Re Freeborn, Freeborn* v. *Carroll*, 6 P. R. 188; *Latch* v. *Latch*, L. R. 10 Eq. 464.

Executor de son tort.

A judgment for administration can not be granted as against an executor *de son tort* where there is no legal personal representative before the Court: *Rowsell* v. *Morris*, 17 Eq. 10. Nor against an executor named in the will who has not proved the will: *Outram* v. *Wyckhoff*, 6 P. R. 150; *Re Colton, Fisher* v. *Colton*, 8 P. R. 542. Former C. RR. 194-5 which permitted such procedure have not been continued. See further as to parties: *Rules* 79-84, and notes.

Formerly an action by a creditor for the administration of real estate had to be brought on behalf of himself and all other creditors, but since *The Devolution of Estates Act* (R. S. O. c. 119), that is no longer necessary: *In re James, James* v. *Jones*, 1911, 2 Ch. 348; 106 L. T. 214.

Evidence required on application. Proof of grant of probate, or administration.

On the motion, the applicant, must be prepared with proof that the defendant is the personal representative; ordinarily, the letters of administration, or letters probate should be produced: *Re Marshall, Fowler* v. *Marshall*, 1 Chy. Ch. 29; *Re Israel*, 2 Chy. Ch. 392. But where the plaintiff swore that the defendant was administrator, and the fact was not disputed, production of the letters was dispensed with: *Re Bell, Bell* v. *Bell*, 3 Chy. Ch. 397. It is sufficient if the letters of administration be granted at any time before the hearing of the motion, even though subsequent to the giving of the notice: *Edinburgh Life Assurance Company* v. *Allen*, 19 Gr. 593; *Re Masonic & Gen. Life Assce. Co.*, 32 Ch. D. 373; *Trice* v. *Robinson*, 16 Ont. 433; *Dini* v. *Fauquier*, 8 O. L. R. 712; *Doyle* v. *Diamond Flint Glass Co.*, *Ib.* 499. It has been held that letters of administration obtained *pendente lite* will not relate back to the commencement of the action so as to bar the running of the Statute of Limitations: *Chard* v. *Rae*, 18 Ont. 371; but doubt seems to be thrown upon this decision by *Dini* v. *Fauquier, supra*; see 40 C. L. J. 836; *Johnston* v. *Dominion of Canada G. & A. Co.*, 17 O. L. R. 462. Where the motion was refused on the ground that the personal representative was not a party, only the costs necessary to raise that objection were allowed: *Irwin* v. *Buck*, 6 P. R. 183.

Proof of applicant's claim.

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The creditor applying must also give *prima facie* evidence of his claim as creditor: *Re Clarke*, 2 Chy. Ch. 57; and where his claim is disputed, he must establish it by proper evidence—his own uncorroborated evidence is insufficient: *Vivian* v. *Westbrooke*, 19 Gr. 461; *Re Finch*, 23 Ch. D. 267; *Re Ross*, 29 Gr. 385; see *The Evidence Act* (R. S. O. c. 76), s. 12, which applies to actions by, or against, heirs, next of kin, personal representatives, or assignees of a deceased person; and as to the nature of corroboration required: see *Stoddart* v. *Stoddart*, 33 U. C. Q. B. 203; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154, 179; *McDonald* v. *McKinnon*, 26 Gr. 12; *McKay* v. *McKay*, 31 C. P. 1; *Adamson* v. *Adamson*, 28 Gr. 228; *Brown* v. *Capron*, 24 Gr. 91; *Holleran* v. *Moon*, 28 Gr. 319; *Re Lows, Laws* v. *Lows, Ib.*, 382; *Re Robbins*, 23 Gr. 162; *Re Ross*, 29 Gr. 385; 18 C. L. J. 11; *Parker* v. *Parker*, 32 C. P. 113, approved in *Radford* v. *Macdonald*, 18 Ont. App. 167; *Watson* v. *Severn*, 6 Ont. App. 559; *Watson* v. *Bradshaw*, *Ib.*, 666; *Cook* v. *Grant*, 32 C. P. 511; *Re Murray*, 29 Gr. 443; 9 Ont. App. 369; *Burn* v. *Burn*, 8 Ont. 237; *Tucker* v. *McMahon*, 11 Ont. 718; *Hogg* v. *Maguire*, 11 Ont. App. 507; *Davis* v. *Walker*, 5 O. L. R. 173; *Thompson* v. *Coulter*, 34 S. C. R. 261; *Re Curry*, 32 Ont. 150; *Re Jelly, Union Trust Co.* v. *Gamon*, 6 O. L. R. 481; *O'Connor* v. *O'Connor*, 5 O. W. R. 10; *Scott* v. *Allen*, 26 O. L. R. 571. The corroboration may be furnished by production and comparison of the hand-writing of deceased: *Thompson* v. *Thompson*, 4 O. L. R. 442. It is sufficient if the corroboration is in some material facts, but it is not necessary that the whole of the facts should be established by independent testimony: *Radford* v. *Macdonald*, *supra*; *McGregor* v. *Curry*, 31 O. L. R. 261.

Corroboration of claim must be given, if contested.

Where there is corroborative evidence of the debt, interest thereon may be allowed without any corroborative proof of an agreement to pay interest: *Secor* v. *Gray*, 3 O. L. R. 34.

An interested party (*e.g.*, a *cestui que trust*) may give corroborative evidence of a claim: *Bolzold* v. *Upper*, 4 O. L. R. 116.

No corroboration is necessary as to claims against the estate of a deceased person arising after his death: *McClenoghon* v. *Perkins*, 5 O. L. R. 129.

An annuitant whose annuity is payable under a covenant made by a testator is not entitled to apply for administration of the testator's estate so long as the annuity is not in arrear, even though the estate be deficient: *Re Horgreaves, Dicks* v. *Hare*, 44 Ch. D. 236; 62 L. T. 819; and see *Re Potter, Potter* v. *Potter*, *infra*, p. 1250.

Partnership.

A partnership creditor suing for the administration of the estate of a deceased partner must join the surviving partner as a party, even though he is insolvent: *Re McCrae, Forster* v. *Davis*, 25 Ch. D. 16; 49 L. T. 544.

An application by a partnership creditor was refused, where it was shown that the separate estate of the deceased was insufficient to pay his separate creditors: *Re Barnard, Edwards* v. *Barnard*, 32 Ch. D. 447; 55 L. T. 40. In *Armstrong* v. *Armstrong*, 18 P. R. 55, the plaintiff being out of the jurisdiction, and his probable interest in the estate appearing to be $273, he was absolved from giving security for costs, he agreeing that his share in the estate should be charged with any costs he might be ordered to pay.

Applicant must be creditor of the deceased.

Where the applicant was merely a creditor of the personal representative for advances made to him as such, the application was refused: *Campbell* v. *Bell*, 16 Gr. 115; *Farhall* v. *Farhall*, L. R. 7 Chy. 123; *Re Pettee*, 6 P. R. 157; *Owen* v. *Delamere*, L. R. 15 Eq. 134;

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Ewart v. *Steven*, 18 Gr. 35; Seton, 5th ed., 1315; and see *Henry* v. *Sharp*, 18 Gr. 16. Creditors whose debts are incurred by the executor, in carrying on a business of his testator are entitled to indemnity out of the deceased's estate to the extent, if any, to which the executor is entitled: *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548; 43 L. T. 372; and where the business of the testator was carried on by his executors in accordance with his will, creditors of the business were entitled to apply for the administration of the estate although there were no unpaid creditors of the testator himself: *Re Shorey*, 79 L. T. 349; *Re Bach*, W. N. 1892, 108; and a plaintiff, who had made advances to pay the debts of a deceased person to save the estate the costs of suits to recover them, was held entitled to administration: *Glass* v. *Munsen*, 12 Gr. 77; see also, *Mills* v. *Cottle*, 17 Gr. 335; *Strickland* v. *Symonds*, 48 L. T. 188; which were cases of advances to trustees.

Effect of judgment for administration as to claims of other creditors.

A judgment for administration cannot be set aside on the ground that the applicant was not a creditor, after other creditors have proved under it: *Re Connon, Gates* v. *Cannon*, 13 Ont. 70.

Where the personal representative has duly advertised for creditors under *The Trustee Act* (R. S. O. c. 121), s. 56, and has distributed the estate, that is an answer to a subsequent application for administration by a creditor who has failed to send in his claim: *Re Bracken, Doughty* v. *Townson*, 1889, 43 Ch. D. 1; 61 L. T. 531; unless it can be *primâ facie* shown that on a proper accounting the personal representative has still assets applicable to the payment of the applicant's claim.

Statute of Limitations.

Statute of Limitations.—A judgment for administration of the estate of a deceased person operates as from its date, not merely in favour of a creditor, but also in favour of the estate, *i.e.*, of the personal representative, and other creditors, when the estate is insolvent, in regard to a set-off against the creditor's demand, and the judgment prevents the further running of the statute (R. S. O. c. 75), s. 49, against the set-off: *Re Ballard*, 88 L. T. Jour. 379. The judgment also enures to the benefit of residuary legatees, and makes a fresh starting point in their favour against the running of the Statute of Limitations: *Uffner* v. *Lewis*, 27 Ont. App. 242.

A judgment for administration, is equivalent to a judgment in favour of all the creditors of the estate, but creditors who are not parties to the action can only claim the benefit of it from its date; as to the claims of the latter, the running of The Statute of Limitations is not stopped until the judgment is obtained: *Re Cannon*, 13 Ont. 705; *Re Greaves*, 18 Ch. D. 551; 45 L. T. 464; *Manby* v. *Manby*, 3 Ch. D. 101; but see *Crooks* v. *Crooks*, 4 Gr. at p. 619. The judgment, however, does not prevent the Statute from running in favour of debtors to the estate: *Archer* v. *Severn*, 12 Ont. 615; 14 Ont. App. 723; (but see *Re Ballard, supra*); and a judgment for the administration of the estate of the owner of the equity of redemption, does not stop the running of the Statute in favour of a mortgagee in possession: *Crooks* v. *Watkins*, 8 Gr. 340.

The personal representative is not bound to set up the Statute of Limitations as a bar to a creditor's claim: *Lewis* v. *Rumney*, L. R. 4 Eq. 451; and if the personal representative, and such of the parties beneficially interested as are parties to the action, or who have come

in under the judgment, do not set up the Statute, the Court is not bound, on behalf of absent parties beneficially interested, to disallow claims against the estate which are barred by the Statute: *Alston* v. *Trollope*, L. R. 2 Eq. 205. But although the personal representative may refuse to set up the Statute as against the claim of a creditor of the estate, yet any party interested in the estate, whether as creditor, legatee, or next of kin, may set it up as a bar to the claim: *Shewen* v. *Vanderhorst*, 1 R. & M. 352; *Re Wenham. Hunt* v. *Wenham*, 1892, 3 Ch. 59; 67 L. T, 648; *Briggs* v. *Wilson*, 5 D. G. M. & G. 12; *Re Lacey, Howard* v. *Lightfoot*, 1907, 1 Ch. 330; 96 L. T. 306; and after a judicial decision that a claim is barred by the Statute of Limitations, if the personal representative pay the claim, it will be a *devastavit*: *Midgley* v. *Midgley*, 1893, 3 Ch. 282; 69 L. T. 241. But a trustee, or executor, cannot be compelled by a beneficiary to set up the Statute of Limitations as a bar to any debt which the trustee or executor has himself incurred, and for which the estate is liable: *Budgett* v. *Budgett*, 1895, 1 Ch. 202; 71 L. T. 632.

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Refusal to set up statute.

Debts incurred by personal representative.

Though a personal representative may pay, or retain, debts barred by the Statute, though otherwise justly due, he cannot properly pay, or retain, a debt due under a promise which cannot be enforced by reason of its not being in writing under *The Statute of Frauds* (R. S. O. c. 102): *Re Rownson, Field* v. *White*, 29 Ch. D. 358; 52 L. T. 825.

Where a cause of action accrues in the lifetime of the creditor, the Statute begins to run against him, and continues to run against his estate, notwithstanding there is no executor, or administratrix thereof; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative: *Grant* v. *McDonald*, 8 Gr. 468; *Stevenson* v. *Hodder*, 15 Gr. 570. A claim cannot be kept alive by any acknowledgment or payment, by an executor *de son tort: Ib., Boatwright* v. *Boatwright*, L. R. 17 Eq. 71, and see *Ellis* v. *Ellis*, 1905, 1 Ch. 613.

A personal claim barred as to personal estate by the six years limitation may be preserved by a charge of debts on land as against real estate, so as to become liable to be barred only after ten years: *Re Stephens, Warburton* v. *Stephens*, 4 Ch. D. 39; *The Statute of Limitations* (R. S. O. c. 75), s. 24, and see *Barnes* v. *Glenton*, 1898, 2 Q. B. 223; 1899, 1 Q. B. 885; 80 L. T. 606.

Where a contract for payment of money at a future time provides that in default of payment of interest for 21 days, at any time, the principal may be called in, the Statute will begin to run as against the principal money from the time when it might have been first called in under such provision, where there has been no subsequent payment: *Reeves* v. *Butler*, 1891, 2 Q. B. 509; 65 L. T. 329.

A personal representative cannot set up his own *devastavit* and claim that the Statute of Limitations bars any claim against him by reason of such *devastavit;* but if he is sued for a *devastavit*, he may rely on the Statute as a bar: *Re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609; 59 L. T. 237.

A Statute barred debt owing by one executor of a deceased person's estate to his testator cannot be set off against the executor's beneficial distributive share in the testator's estate: *Re Bruce Lawford* v. *Bruce* 1908 2 Ch. 682; 99 L. T. 704.

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Staying creditor's action after administration.

Staying Proceedings.—As to staying a creditor's action when an administration judgment has been granted: see *Re Langtry*, 18 Gr. 530; *Re Henderson*, 26 Gr. 297; *Bailey* v. *Monteith*, 3 C. L. T. 599; *Henderson* v. *Maxwell*, 19 L. R. Ir. 225; *Monteith* v. *Merchants Bank*, 4 C. L. T. 41; *Harrison* v. *Stubb*, W. N. 1878, 79; *Re Tims*, W. N. 1878, 141; and see *Doner* v. *Ross*, in note to *Rule* 610; and as to staying proceedings on the administration judgment: see *Rule* 613 (b).

In *Re Womersley, Etheredge* v. *Womersley*, 29 Ch. D. 557; 53 L. T. 260, the Court refused to restrain a creditor who had recovered judgment previously to the administration order, from proceeding against the executor personally.

Proceedings by a creditor may be stayed on the application of any person interested in the estate, on payment of his claim and costs: *Fitten* v. *Dawson*, 3 Chy. Ch. 461; *Re Henderson*, 26 Gr. 297; 15 C. L. J. 132.

Where some defendants in an administration action by a creditor offered to satisfy the plaintiff's claim and the costs of the action, the Court refused to stay proceedings unless the rights of an infant defendant were provided for: *Clegg* v. *Clegg*, 17 L. R. Ir. 118.

After judgment for administration, a creditor cannot, in an action for trespass brought against him by the personal representative, counter-claim for a debt due by the deceased to him: *Monteith* v. *Walsh*, 10 P. R. 162; 20 C. L. J. 71.

Applications for administration by legatees, or next of kin, cannot be made until lapse of a year from death.

Legatees, Next of Kin, etc.—Applications by legatees, or next of kin, for administration cannot be made until the lapse of a year from the death of the deceased: see *The Devolution of Estates Act* (R. S. O. c. 119), s. 32; *Slater* v. *Slater*, 3 Chy. Ch. 1; *Vivian* v. *Westbrooke*, 19 Gr. 461; *Grant* v. *Grant*, 9 P. R. 211: but see *contra*, *Wollis* v. *Wallis*, 9 Ir. Chy. 511; *Prosser* v. *Mossop*, 29 W. R. 439, which were not followed in *Re Morley, Tucker* v. *Morley*, September, 1882, by Proudfoot, J. When the action is brought unnecessarily, the legatee may be ordered to pay the costs of all parties: *Re Woodhall, Garbutt* v. *Newson*, 2 Ont. 456. Whenever a legatee, if alive, may apply, his personal representative, in case of his death, may also apply: *Simpson* v. *Horne*, 28 Gr. 1. As to parties to an application by legatees: see *Rules* 79, 80, and note *supra*, p. 444, *et seq.* The fact that legatees applying for an administration judgment dispute the claim of the personal representative to be a creditor of the estate is no ground for refusing the application: *Re Bagwell, Anderson* v. *Henderson*, 17 P. R. 100.

Where a legatee is a debtor to the estate, the personal representative may set off the debt against his legacy *pro tanto*, notwithstanding that the debt may be barred by the Statute of Limitations: *In re Taylor, Taylor* v. *Wade*, 1894, 1 Ch. 671; 70 L. T. 556; 8 R. 186.

Where land is devised subject to the payment of an annuity, so long as the annuity is promptly paid the annuitant cannot claim to have the land sold: *Re Potter, Potter* v. *Potter*, 50 L. T. 8; and see *Re Hargreaves, Dicks* v. *Hore*, *supra*, p. 1247; and where a will creates a life estate in chattels, the executor is discharged when he hands over the chattels to the tenant for life; the latter, and not the executor, then becomes liable to the remainderman: *Re Munsie*, 10 P. R. 98; 20 C. L. J. 112.

Administration was refused on the application of a legatee whose claim, including interest on his legacy, only amounted to $28, notwithstanding that it was alleged that other legacies remained unpaid,

which amounted to a considerable amount: *Reynolds* v. *Coppin*, 19 Gr. 627; and see *Re Johnston*, *Johnston* v. *Hogg*, 25 Gr. 261. Rule 609.

The fact that the estate was small, and that no misconduct was imputed to the executors, and that it was inadvisable to incur expense, was held to be no ground for refusing the application of a legatee for administration: *Re Falconer*, 1 Chy. Ch. 273. Where, however, the executor swore that the personal estate did not exceed $50, the Court, before granting the order, required the applicant, who was one of the residuary legatees, to file an affidavit stating that he had reason to believe, and did believe, that the result of the proceedings would shew a substantial balance to be divided among the legatees: *Foster* v. *Foster*, 19 Gr. 463; and see *Westbrook* v. *Browett*, 17 Gr. 339; *Shaw* v. *Freedy*, 8 C. L. J. 186; *Gilbert* v. *Braithwait*, 3 Chy. Ch. 413.

Infants.—An application for administration under this *Rule* cannot be made on behalf of an infant by his next friend; see formerly *Re Hill*, 10 C. L. T. 87; but see now *Rule* 609 and note; and an action by an infant by a next friend for administration would probably be also considered to offend against *Rule* 609. Administration has been granted on the mere suggestion that it would be for the infant's benefit: *Re Wilson*, *Lloyd* v. *Tichborne*, 9 P. R. 89; but where the ground of motion was that strangers had got possession of most of the estate, an order was refused, there being no allegation that the executor refused to account, or was colluding, and the Court thought he ought to apply for the order if it were necessary: *Re Dearing*, *Mitchell* v. *Dearing*, 12th June, 1882, Proudfoot, J.; see also *Re Blake*, 29 Ch. D. 913. Applications in which infants are interested.

An administration action should not be instituted, where the object is simply to obtain an allowance for the maintenance of infant beneficiaries out of the estate, which can be as readily got by application under *Rule* 618, *et seq.*: *Fenwick* v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, *Ib.*, 425.

Where the guardian *ad litem* of an infant defendant had made no objection to the unnecessary proceedings, no costs were given either to the executors, or the guardian, of such proceedings: *Springer* v. *Clarke*, 15 Gr. 664.

Where the estate in question is small, an action for administration should not be brought until all reasonable means of avoiding the action have been exhausted; and where a next friend of an infant brought a suit for administration, without having taken steps to avoid litigation, and the suit afterwards appeared to have been unnecessary, he was ordered to pay the costs of the suit: *Hutchinson* v. *Sargent*, 17 Gr. 8; *McAndrew* v. *Laflamme*, 19 Gr. 193; *Moodie* v. *Leslie*, 12 Gr. 537; and see *Re Johnston*, 25 Gr. 261; *Carroll* v. *Carroll*, 23 Gr. 438; *Re Blake*, 29 Ch. D. 913. Administration, when estate of trifling amount.

Removal of Trustees, or Executors.—The Court has jurisdiction on motion at any time during the proceedings to remove trustees, or executors, if it considers such removal is necessary for the preservation of the trust, or the welfare of the c.q.t., and that notwithstanding that such removal has not been originally asked for: *Re Wrightson*, *Wrightson* v. *Cooke*, 1908, 1 Ch. 789; 98 L. T. 799; and see *The Trustee Act* (R. S. O. c. 121), s. 40. Removal of trustees or executors.

609. A judgment for the administration of an estate in which an infant [or a lunatic who has no committee Representation of infants.

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except the Inspector of Prisons and Public Charities, is interested], shall not be made unless the infant is made a party defendant and notice is given to the Official Guardian. [Notice of such application shall, unless otherwise ordered, also be given to such lunatic]. C.R. 948. (*As amended* by Rule 773.)

The words in [ ] indicate the amendments.

This *Rule* extends to all cases of administration either of real or personal estate, or of both.

The Official Guardian *ad litem* must be served with the notice of motion: *Rules* 3 (*j*), 18, and only one copy thereof need be served, no matter how many infant parties there may be: *Rule* 18 (4). The notice of motion should, of course, be directed to the several infants interested, by name.

There seems to be nothing in this *Rule* forbidding an application on behalf of a lunatic as plaintiff. Notice of such an application would have to be given to the Official Guardian where the plaintiff had no committee except the Inspector.

Order may be obtained by personal representative.

610. An executor or administrator may, upon summary application, obtain a judgment for administration. C.R. 950.

Where no infants are interested a personal representative may apply *ex parte*: *Re Dunlevy*, Order Book 11, fo. 778; *Re Ette*, 6 P. R. 159; *Re Bromley*, before Blake, V.-C., 28th January, 1878; where infants are interested they must be made defendants and notice of the application must be served on the Official Guardian *ad litem*: *Rule* 3 (*j*), 18, 609. The notice of motion must be seven clear days unless otherwise ordered: *Rule* 215 (2).

Where a lunatic having no other committee than the Inspector of Prisons and Public Charities is interested the Official Guardian must be notified of the application: see *Rule* 609.

Where the application is made by the personal representative *ex parte*, the proceedings should be entitled "In the matter of (*the Estate*)," and no persons should be named as plaintiffs or defendants: *Re Curry, Curry* v. *Curry*, 17 P. R. 69. Where no sufficient ground was shewn for making the order, it was refused: *Barry* v. *Barry*, 19 Gr. 458; and it is clear that the personal representative cannot apply for administration merely to obtain an indemnity by passing his accounts: *White* v. *Cummins*, 3 Gr. 602; *Cole* v. *Glover*, 16 Gr. 392.

Deficiency of assets, how far it justifies application by personal representative.

How far a deficiency of assets justifies a personal representative in applying for administration is the subject of some doubt. In 1874 orders were made on that ground, on the application of the personal representative, in *Swetnam* v. *Swetnam*, 6 P. R. 149, and *Re Ette*, *Ib.* 159. But in the subsequent cases of *Re Shipman, Wallace* v. *Shipman*, 24 Gr. 177; Blake, V.-C., said that the reasons which existed for making the order in *Re Ette* no longer held good, and that the personal representative, on being sued at law, could set up the deficiency of assets, and claim administration under *The Administration of Justice Act*. That Act, however, was in force when *Swetnam* v.

Swetnam and *Re Ette* were decided. In 1877 in *Marsh* v. *Marsh*, 7 P. R. 126, Spragge, C., held that the course pointed out in *Re Shipman* should be followed, and refused the order; and in *Re Jack*, *Jack* v. *Jack*, 13 C. L. J. 358, Proudfoot, V.-C., did the same. On the other hand, in *Re Bromley*, before Blake, V.-C., 28th January, 1878, the order was granted, the applicant having been sued by one creditor in the Division Court, and another creditor having written to him, urging him to obtain the order. Rule 610.

As to the grounds justifying a personal representative in obtaining administration: see further *Rule* 84, p. 450.

On deficiency of assets, personal representatives must distribute pari passu among creditors.

It is the duty of an executor, on a deficiency of assets to pay all creditors *pari passu* and even his right of retainer cannot be set up so as to give his own debt any preference, but the lien of any creditor on the real or personal estate, created in the lifetime of the deceased, is not to be prejudiced by this rule: see *The Trustee Act* (R. S. O. c. 121), s. 53; *Meyers* v. *Meyers*, 20 Gr. 185; *Willis* v. *Willis*, 29 Gr. 296; *Re Ross*, 29 Gr. 385; foreign creditors are entitled to the same rights as creditors living within the jurisdiction: *Re Klabe*, *Kannreuther* v. *Geiselbrecht*, 28 Ch. D. 175; 21 C. L. J. 155; *Milne* v. *Moore*, 24 Ont. 456; a creditor who has recovered execution against the executor has no priority: *Bank of British North America* v. *Mallory*, 17 Gr. 102; and debts due by the deceased as trustee form no exception to the rule: *Brock* v. *Cameron*, 25 Gr. 369. And it would seem, notwithstanding what is said by Mowat, V.-C., in *Doner* v. *Ross*, *infra*; that creditors who have been overpaid may be compelled to refund, on the application of a creditor who has not received his due proportion: *Chamberlen* v. *Clarke*, 1 Ont. 135; 9 Ont. App. 273. But a creditor's claim against a legatee or creditor who has been overpaid, to compel him to refund, will be barred in six years from the time of the overpayment, notwithstanding that the creditor's claim against the testator's estate is not barred: *Blake* v. *Gale*, 31 Ch. D. 196; this case was subsequently affirmed by the Court of Appeal, however, on the ground that the creditor had acquiesced in the overpayment: 55 L. T. 234; as to the circumstances under which beneficiaries who have been paid more than their distributive share can be compelled to refund at the instance of other beneficiaries: see *Re Winslow*, *Frere* v. *Winslow*, 45 Ch. D. 249. Creditors overpaid may be compelled to refund.

Action improperly brought, or occasioned by personal representatives, costs of.

Where an executor improperly institutes an action for administration he may be ordered to pay the costs of it: *Sullivan* v. *Sullivan*, 16 Gr. 94; or he may be refused his costs and commission: *Graham* v. *Robson*, 17 Gr. 310; and where he improperly renders an action necessary by a creditor, he may also be ordered to pay the costs of it: *McGill* v. *Courtice*, 17 Gr. 271.

Where the personal representative obtains the judgment, the conduct of the reference may be transferred to a beneficiary: *Re Curry*, *Curry* v. *Curry*, 17 P. R. 69.

The judgment may be awarded for the purpose of preventing creditors from bringing actions, and the proceedings thereon may be stayed if thought proper: see *Rule* 613 (*b*).

An executor, who has suffered a creditor of the estate to recover judgment against him by default of appearance, cannot, on subsequently obtaining a judgment for administration, restrain the creditor from proceeding on his judgment, even though there be a deficiency

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of assets: *Doner* v. *Ross*, 19 Gr. 229; and see *Hutchinson* v. *Edmison*, 11 Gr. 477.

Several applications —only one judgment should be granted.

Several Applications.—Where two or more applications are made by different persons under *Rules* 608, 610, only one judgment for administration shall be granted; and the Court may determine which of the applicants shall have the carriage of it, the rule being to give the conduct of the proceedings *ceteris paribus* to the party most interested in prosecuting them properly and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. 452; *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283; *Re Draggon*, 8 P. R. 330; *Re Prime*, 48 L. T. 208; *Penny* v. *Francis*, 7 Jur. N. S. 248; but see *Re Swire, Mellor* v. *Swire*, 46 L. T. 437. The conduct was given to the first applicant in *Re West, West* v. *Fatkiner*, 7 C. L. T. 85; but a creditor whose claim is admitted should be preferred to a creditors whose claim is disputed: *Re Ross, Wingfield* v. *Blair*, 1907, 1 Ch. 482; 96 L. T. 814; the carriage of the judgment may be changed in case of delay: *Patterson* v. *Scott*, 4 Gr. 145; and see *Rules* 402, 407, and notes. As between a separate creditor and a partnership creditor of the person whose estate is to be administered, the conduct of the proceedings is given to the former: *Re McRae, Foster* v. *Davis*, 25 Ch. D. 16; 48 L. T. 544.

The conduct of the reference under a judgment obtained by a personal representative may, for good cause, be transferred to a beneficiary named as a defendant, although not actually served with notice of the application on which the judgment was pronounced: *Re Curry, Curry* v. *Curry*, 17 P. R. 69.

An accounting party should not, as a rule, have the carriage of the proceedings, especially where there is a competition between him and beneficiaries as to who should be first in obtaining an administration order: *Ib.*

See also notes to *Rule* 86.

Master's proceedings to administer.

611.—(1) Where judgment for administration is granted the Master to whom the matter is referred shall proceed to administer the estate in the most expeditious and least expensive manner, and in doing so shall, without special direction, take:—

(*a*) An account of the personal estate of the deceased, in the pleadings mentioned, come to the hands of his executors (or administrator);

(*b*) An account of his debts;

(*c*) An account of his funeral expenses;

(*d*) An account of the said testator's legacies;

(*e*) An inquiry as to what parts, if any, of the real and personal estate are outstanding or disposed of;

(*f*) An inquiry as to what real estate the deceased was seised of, or entitled to, at the time of his death;

(*g*) An inquiry as to what incumbrances affect the real estate; Rule 611.

(*h*) An account of the rents and profits of the real estate received by any party since the death;

(*i*) An account of what is due to such of the incumbrancers as shall consent to sale in respect of their incumbrances;

(*j*) An inquiry as to what are the priorities of such last mentioned incumbrances.

(2) The Master shall, under any such reference, have power to deal with both the real and personal estate, including the power to give all necessary directions for its realization, and shall finally wind up all matters connected with the estate, without any further directions, and without any separate, interim, or interlocutory reports or orders, except where the special circumstances of the case absolutely call therefor. Master to have full power to deal with realty and personalty, and dispose of costs, etc.

(3) All money realised from the estate shall forthwith be paid into Court, and no money shall be distributed or paid out for costs or otherwise, without an order of a Judge, and on the application for an order for distribution, the Judge may review, amend, or refer back the report, or make such other order as may seem just. C.R. 953. Moneys realised to be paid into Court, and not paid out except on Judge's order.

For Forms of judgment: see No. 104, and H. & L. Forms, Nos. 878 and 879.

In simple cases, where all parties interested are represented before the Master, it would be possible, under this *Rule*, for the Master to defer making any report until the accounts were taken and the estate realized, and then by one general report to wind up all matters connected with the estate, and this course is pursued wherever practicable. In simple cases only one report necessary.

The Master has power to give any special directions he may think proper respecting the carriage of the judgment, where there are conflicting claims, and also to transfer its carriage from one party to another, if occasion should require, or to transfer the conduct of the reference to any party he may find entitled: see *In re Curry, Curry* v. *Curry*, 17 P. R. 69; the rule being to give the conduct of the proceedings *ceteris paribus*, to the party most interested in prosecuting them properly and economically: *Perrin* v. *Perrin*, 3 Chy. Ch. 452; *Re Draggon*, 8 P. R. 330; and see *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283; *Lambier* v. *Lambier*, 9 P. R. 422; *Re Prime*, 48 L. T. 208; see, however, *Re Swire, Mellor* v. *Swire*, 46 L. T. 437; *Townsend* v. *Townsend*, 23 Ch. D. 100; 48 L. T. 694; *Re West, West* v. *Falkiner*, 52 L. T. 85, where it was held that the party first originating proceedings was entitled to the conduct: *sed vide, In re Curry, supra*; but as Master may give special directions as to conduct of proceedings.

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between a creditor whose claim is admitted and one whose claim is disputed the former is to be preferred: *Re Ross, Wingfield* v. *Blair*, 1907, 1 Ch. 482; 96 L. T. 814.

The administration of two estates may be consolidated, where intimately connected: *Re Adams, Adams* v. *Muirhead*, 6 P. R. 283.

Rule intended to do away with further directions in administration suits.

The object of this *Rule* is to do away with the necessity of a hearing on further directions in administration suits; the judgment granted by the Master covers all those directions which, by the former practice, were usually made on the hearing on further directions, except the order for payment of the fund out of Court: *e.g.*, it directs any balances found in the hands of accounting parties to be paid into Court, it also authorizes a sale of the land, the payment of the purchase money into Court, the execution of conveyances by all proper parties, and empowers the Master also to execute such conveyances for infants, who are incapable of executing the same themselves: see Form No. 104, H. & L. Forms, No. 878; *Rules* 438, *et seq.*

Judgment, form of.

The Master has also power to make any order, or report, which may be necessary for completely winding up the estate, or protecting the rights of the parties to the action. Where the executor is insolvent a receiver may be appointed: *Horrold* v. *Wallis*, 9 Gr. 443; and it would seem that a receiver may be appointed, when necessary, in proceedings commenced under *Rules* 608, 610; *Re Francke, Drake* v. *Francke*, 38 L. T. 305; but any motion for a receiver, or an injunction would have to be made to the Court: see Jud. Act, s. 17, and *Rules* 205, 207; as to the rights of a specific devisee or legatee in regard to property taken possession of by a receiver, or manager: see *Re Day*, 1898, 2 Ch. 510; 79 L. T. 486.

Injunction or receiver, how obtained.

Separate orders and reports only to be made when essential.

The words "without any separate interim, or interlocutory reports, or orders, except where the special circumstances of the case absolutely call therefor," indicate that it is only unnecessary orders, or reports, that are dispensed with, but that so far as such interlocutory reports, or orders, may be essential to the winding up of the estate, the Master is to have power to make them. Under *Rule* 421, a party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master without any formal order being served for that purpose. The provisions of that *Rule*, of course, only apply when the party attends the Master in person or by solicitor, and has notice of the direction.

Master not to proceed ex parte.

The Master should not proceed with the reference *ex parte*, even though the defendant did not appear on the motion for judgment: *Jackson* v. *Matthews*, 12 Gr. 47; *Robinson* v. *Whitcombe*, 20 Gr. 415; and see *Rule* 403.

Accounts which may be taken under administration judgment.

Under an ordinary administration judgment, the Master may take an account of timber cut with which a defendant is chargeable: *Stewart* v. *Fletcher*, 18 Gr. 21; and may also, without any special directions, take evidence, and report the facts, as to payments made by executors for the maintenance and education of infant beneficiaries: *Stewart* v. *Fletcher*, 16 Gr. 235; and may also take the accounts on the footing of wilful neglect and default: see *supra*, *Rules* 409 and 608, and notes; and when the widow of the deceased is found a debtor to the estate, her indebtedness may be set off against her claim for past and future dower: *Williams* v. *Reynolds*, 25 Gr. 49; and a debt due by a legatee to the estate may be set off *pro tanto* against his legacy: *In re Taylor, Taylor* v. *Wade*, 1894, 1 Ch. 671, 70 L. T. 556;

8 R. 186. The Master would have similar powers under a judgment granted by himself; he would also be entitled to make all proper allowances to executors, administrators, and trustees, by way of compensation for their services. Rule 611. Compensation to executors, etc., may be allowed

As to compensation to be allowed executors and trustees: see notes to *Rule* 410, *supra*, p. 956.

The executor's claim for compensation is prior to the claims of creditors: *Harrison* v. *Patterson*, 11 Gr. 105; and a trustee's claim for compensation must be satisfied before a conveyance of the trust estate to the *cestui que trust* will be ordered: *Life Association of Scotland* v. *Walker*, 24 Gr. 293. Compensation prior to right of creditors.

An administration judgment as to realty operates as an immediate conversion and if any beneficiary should die after judgment but before sale, his share would be personalty and distributable as such: *Fauntleroy* v. *Beebe*, 1911, 2 Ch. 257; 104 L. T. 704. Effect of judgment.

The only order which the Master appears to be precluded from making in suits for administration, in which he has awarded judgment, is that for the payment out of the money in Court; but the Master should state the amount of the commission, and what he finds would be a proper apportionment thereof among the different solicitors under *Rule* 653, and also the amounts he finds payable to creditors, and other beneficiaries, respectively. Order for payment out of Court cannot be made by Master.

The order for payment is to be made by a Judge in Chambers: *Rule* 207 (13). Application for this order is to be made in Chambers on a Tuesday or Friday: *Rule* 234; except in Ottawa and London, where it may be made on Saturday at the weekly sittings. The application is to be made upon notice; and it would seem that all persons who, under the former practice, would be entitled to notice of a hearing on further directions, would be entitled to notice of such an application. Application of Judge, how made.

Where a party is not satisfied with the findings of the Master, the Judge, on any motion for distribution, may, on notice being given by the complaining party to the other parties, review the Master's decision without an appeal, if the matters complained of can be investigated and disposed of on reading the pleadings (if any), and judgment, and the Master's report without reference to the evidence; otherwise an appeal in the usual way under *Rule* 502, *et seq.*, is necessary; *Kendrick* v. *Kendrick*, 9 C. L. T. 310. Appeal from Master necessary.

Creditors' Claims.—As to the mode of making inquiries for, and investigating, claims of creditors: see *Rules* 412-415, and notes. Creditors' claims.

Where an executor, or trustee, is in default, usually any claim he may have against the estate may be set off *pro tanto* against his indebtedness to the estate; and usually he cannot otherwise get any benefit from the estate until he has properly accounted for, and paid what he owes to the estate; but where an executor has assigned a specific legacy, those entitled to the residuary estate are not entitled as against the assignee to have the specific legacy set off *pro tanto* against what the executor is owing to the residuary estate: *Re Towndrow, Grattan* v. *Mochen*, 1911, 1 Ch. 662; neither can a debt due by the executor to the estate which is barred by the Statute of Limitations be set off against, or deducted from, moneys to which he is beneficially entitled out of the estate: *Re Bruce, Lawford* v. *Bruce*, 1908, 2 Ch. 682; 99 L. T. 704. Indebtedness by executor or trustee to estate.

Rules 612-614.

Court not bound to order administration.

612. It shall not he ohligatory on the Court to pronounce or make a judgment or order for the ndministration of any trust or of the estate of any deceased person, if the questions hetween the parties can be properly determined without such judgment or order. C.R. 954.

See Eng. Rule (1883) 772: *Campbell* v. *Gillespie*, 1900, 1 Ch. 225; *Re Ryan*, 32 Ont. 224; *Re McCully, McCully* v. *McCully*, 23 O. L. R. 156.

Administration was refused in *Re Ghent*, 5 O. W. R. 148, but an order was made for payment to the applicant, a legatee, of a sum on account of his share under the will.

Orders other than for administration which may be made.

613. In any action or proceeding for the administration or execution of trusts by a creditor or beneficiary under a will, intestacy or instrument of trust, where no accounts or insufficient accounts have heen rendered, the Court may, instead of pronouncing judgment for administration:—

Rendering of account.

(*a*) Order that the executors, administrators or trustees shall render to the plaintiff or applicant a proper statement of their accounts, with an intimation that if it is not done they may be made to pay the costs of the proceedings, and may direct the action or proceeding to he stayed or to stand over in the meantime, as may seem just;

Stay of proceedings.

(*b*) Where necessary, to prevent proceedings hy other creditors, or hy heneficiaries, make the usnal jndgment for administration, with a provision that no proceedings are to be taken thereunder withont the leavc of the Conrt. C.R. 955.

See Eng. (1883) R. 772 (*a*).

After a judgment for administration has been granted, creditors will ordinarily be restrained from hringing actions to enforce their debts against the personal representative: see *Re Langtry*, 18 Gr. 530, and following cases cited in note to *Rule* 608, *supra*, p. 1250.

The effect of clause (*b*) of this *Rule* is to enable the Court, in a proper case, to stay actions hy creditors hy granting a judgment for administration, and at the same time to stay proceedings on the judgment. But such a stay would probahly not be granted if it were shown that creditors were likely to he unduly prejudiced thereby.

Special directions as to carriage of judgment may be given.

614. Special directions touching the carriage or execution of the judgment may be given as may he deemed expedient; and in case of applications by two or more persons, or classes of persons, judgment may be granted

to one or more of the claimants as may seem just; the carriage of the judgment may be subsequently given to other persons interested. C.R. 989. Rule 615.

This *Rule* is based on C. R. 649, and not on C. R. 989, as it purports to be.

(ii) *Partition.*

615.—(1) An adult person entitled to compel partition of land or any estate or interest therein may, by originating notice served on one or more of the persons entitled to a share therein, apply for partition or sale. Adult party may apply for partition on motion.

(2) Where an infant [or lunatic who has no committee except the Inspector of Prisons and Public Charities], is interested, he shall be made a party defendant before judgment, and notice shall be given to the Official Guardian. [Notice of such application shall, unless otherwise ordered, also be given to such lunatic]. (*As amended by Rule 773*). Infants interested must be represented by official guardian.

(3) The Master shall proceed in the least expensive and most expeditious manner, for partition or sale, the adding of parties, the ascertainment of the rights of the various persons interested, the taxation and payment of costs, and otherwise. Proceedings on judgment for partition.

(4) All money realized shall forthwith be paid into Court, and no moneys shall be distributed or paid out for costs or otherwise, without an order of a Judge; and on the application for an order for distribution, the Judge may review, amend, or refer back to the Master his report or make such other order as may seem just. C.R. 956. *Amended.* Moneys realized to be paid into Court and paid out on Judge's order.

The words in [ ] indicate the amendments made in cl. 2 by *Rule* 773. See *infra*, *Rule* 616, and notes.

For Form of judgment, see No. 105; H. & L. Forms Nos. 926, 1386.

The Form 105 must be read in the light of legislation by which the Court has been given power to order a sale, and its meaning is that a partition is to be made unless it is shown by those who ask for a sale, that partition cannot be made without injury to the interests of the owners: *Ontario Power Co.* v. *Whattler*, 7 O. L. R. 198.

Under a judgment, therefore, in the Form No. 105; H. & L. Forms, No. 926, the Master is to make partition unless it is shown that it cannot be made without prejudice to the rights of some of the owners: *Ontario Power Co.* v. *Whattler*, *supra*.

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Where infant plaintiff seeks partition, writ must be issued.

This *Rule* is confined to the case of proceedings instituted by adult persons. The provisions of *Rules* 79-85 extend to applications for partition; formerly it was necessary to make all tenants in common of the land in question parties to the bill; under this *Rule*, it suffices to notify one or more of such persons; all other persons interested must be served with the judgment in the Master's Office: *Rule* 87, unless such service is dispensed with; an order dispensing with service must be obtained from the Master to whom the matter is referred: *Re Hynes*, 19 P. R. 217. As to parties who have not been heard of for 3 years, see *The Partition Act* (R. S. O. c. 114), s. 6; a guardian may be appointed for them by a Judge in Chambers: *Ib.*; *Re Hynes*, *supra*. Parties on whom service of a judgment is dispensed with are not bound by the proceedings: see note to *Rule* 79. The application cannot be made for the partition of an estate of a deceased person, until the lapse of one year from his death: *The Partition Act*, s. 5 (2); *Grant* v. *Grant*, 9 P. R. 211. Where the interests are unequal, the person having the largest interest should, as a general rule, be notified of the application.

Summary application cannot be made, when any party claims adversely.

This *Rule* does not apply where it is necessary to add a defendant whose claim to share in the estate is contested, *e.g.*, where a stranger is in possession claiming adversely to the plaintiff and his co-tenants, an action must be brought by writ: see *Macdonell* v. *McGillis*, 8 P. R. 339; *Bennetto* v. *Bennetto*, 6 P. R. 145; *Young* v. *Wright*, 8 P. R. 198; *Re McMillan*, 8 P. R. 546; 17 C. L. J. 86; *Hopkins* v. *Hopkins*, 9 P. R. 71; and where the defendant claimed to have acquired a title by possession in severalty to part, and to have only an easement in the residue: *Stroud* v. *Sun Oil Co.*, 7 O. L. R. 704; 8 O. L. R. 748. Where it appears that some preliminary question must be decided before it can be determined whether partition should be granted, the motion will be adjourned until after the trial of an action to be brought to determine such question: *Smith* v. *Smith*, 1 O. L. R. 404; but where the Master assumes to decide the preliminary question, his judgment is appealable; *semble*, under *Rule* 605: see *Stroud* v. *Sun Oil Co.*, *supra*. And where after judgment for partition has been granted a question is raised as to the validity of an outstanding lease, it would seem that the Master has no jurisdiction to try it, but an issue may possibly be directed by a Judge under *Rule* 233: see *Re Rogers*, *Rogers* v. *Rogers*, 11 P. R. 90.

Service of judgment.

All parties interested in the land who are not served with the notice of motion for the judgment, will have to be served with an office copy of the judgment: *Rule* 404; and they will be entitled to move to vary, or set it aside, as provided by *Rule* 405.

Execution creditors' claims are not kept alive merely by the creditors being made parties in a partition action, and their executions will lapse unless kept duly renewed, at all events, until there is some judicial declaration of their rights to a lien: *Macdonell* v. *Best*, 6 O. L. R. 18.

Accounts of rents and profits, etc.

A tenant in common who has been himself in actual occupation of the whole estate cannot be charged with an occupation rent: *Henderson* v. *Eason*, 17 Q. B. 701; *Rice* v. *George*, 20 Gr. 221; *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson*, 10 P. R. 4; *Hill* v. *Hicken*, 77 L. T. 127, except in favour of an infant co-tenant: *Courcier* v. *Courcier*, 26 Gr. 307. He is, however, liable to account to his co-tenants for rents and profits received from third parties: *Goodenow* v. *Farquhar*, 19 Gr. 614; *Curtis* v. *Coleman*, 22 Gr. 561; and if he makes any claim

for improvements made, or for prior incumbrances paid off, by him, he must submit to account for an occupation rent, otherwise he cannot be allowed them: *Rice* v. *George*, *supra*, p. 1260; *Rivet* v. *Desourdi*, 12 C. L. J. 203. But as against a mortgagee: *Hill* v. *Hicken*, *supra*, p. 1260, or an execution creditor of the tenant who has been in possession, the other tenants in common cannot charge his share with the excess of rents received by him, in priority to ths mortgage, or execution: *McPherson* v. *McPherson*, 10 P. R. 140. Where a tenant in common is lessee of his co-tenant'a sbares and continues in sole possession after the expiration of the lease, he becomes liable to bis lessor for use and occnpation: *Leigh* v. *Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60; 50 L. T. 124; 52 L. T. 790. Only sucb improvements as are made hy a tenant in common to prevent the estate going to ruin are recoverable: *Ib.* Rule 618.

Improvements made by a tenant in common before the tenancy in common becomes an estate in possession, *e.g.*, during a prior life estate, are not recoverable against his co-tenants: *Lasby* v. *Crewson*, 21 Ont. 255.

In making partition, those portions on wbich improvements have been made by any of the tenants in common should, as far as possibie be allotted to the parties by whom they were made: see *Wood* v. *Wood*, 16 Gr. 471. Improvements, how to allot.

As to the principle on which improvements made by a tenant in fee of a moiety should be allowed as against a tenant for life of the other moiety: see *Williams* v. *Williams*, 81 L. T. 163.

In making a distribution of purchase money derived from land held in common, a tenant in common who has made permanent improvements is entitled to be allowed therefor: see *Re Cook*, 1896, 1 Ch. 923; 74 L. T. 652.

Where a sale is directed in a partition action the Master should inquire as to incumbrances existing on the shares of the parties interested up to the time of sale, and not merely up to tbe commencement of the proceedings: *Robson* v. *Robson*, 10 P. R. 324; 20 C. L. J. 192. Such persons as have incumbrances should be made parties under *Rule* 404, and if not made parties they will not be bound by ths proceedings.

As to the allowance of a sum in gross in lieu of dower: see *The Infants Act* (R. S. O. c. 153), s. 19, and *The Partition Act* (R. S. O. c. 114), s. 8; and *Gleeson* v. *Byrne*, 25 L. R. Ir. 361.

616. An application for partition on behalf of an infant by his guardian or next friend may be made with the sanction of a Judge to be first obtained upon notice to the Official Guardian. *New.* Official guardian to be notified of application by infant.

See *Rule* 615 (2), which requires that an infant shall be made a defendant before judgment to applications by adults.

Rule 615 (2) may seem to be inconsistent with *Rule* 616, the former providea that where an infant is interested he shall be made a defendant; whereas *Rule* 616 provides that he may be a plaintiff, and be, of course, cannot in the same action be botb plaintiff and defendant. This *Rule* may be harmonized, however, by construing clause 2 of *Rule* 615 as merely applying to actions by adults.

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Applications for partition.

The notice of motion for a judgment for partition of sale must be a seven days' notice unless otherwise ordered: *Rule* 215 (2).

The Master in Chambers, and Local Masters, appear to have jurisdiction to entertain unopposed motions for administration or partition: *Rules* 208, 209; but see *Rule* 212, which gives jurisdiction to a Judge in Chambers, or the Local Judge of the County where the land or part of the land is situate, or where the testator died, to entertain motions for administration or partition.

A Local Master formerly had no power to make an order for partition of lands out of his jurisdiction, *i.e.*, his county, and if he did so his order was null and void, even as to lands within his county: *Nichol* v. *Allenby*, 17 Ont. 275; but the present *Rules* do not appear to contain any such restriction: see *Rule* 209; and see Jud. Act, s. 16 (*h*).

Formerly when lands were situate in the County of York, or in more counties than one, the application for partition thereof had to be made to a Judge in Chambers; but that restriction does not appear to exist in the present *Rules*, and applications apparently may now be made to the Master in Chambers, or any Local Master, or Local Judge, no matter where the lands are situate, and it is only where the application is opposed that their jurisdiction is ousted: see *Rule* 208 (3), and must be referred to a Judge in Chambers: *Rule* 207 (8).

Lands in County of York, or in several counties.

Formerly where two or more judgments are granted for partition of different parts of the same person's estate, the proceedings might be consolidated under C. R. 957, but this *Rule* has not been continued. Possibly it may be done still under the general jurisdiction to consolidate actions: *Rule* 320.

Accounting parties to be made original defendants.

Wherever an account is required from any person, such person should be made a defendant in the first instance, as it would seem that parties served with the judgment in the Master's office cannot be made to account thereunder: *Walker* v. *Seligmann*, L. R. 12 Eq. 152; *Hopper* v. *Harrison*, 28 Gr. 22; *Re Parkes*, 66 L. T. 151.

The plaintiff was formerly bound to allege, and, if it was disputed, to prove, his title, and under this *Rule* it will still be necessary that the affidavits in support of the application should establish the applicant's title, and it would also appear to be necessary to show thereby the estates and interests of all other persons interested as joint owners. The existence of a discretionary power of sale in trustees does not exclude the jurisdiction of the Court to order partition: *Boyd* v. *Allen*, 48 L. T. 628; but a partition was refused in a case where the trustees were taking active proceedings to execute the power: *Re Dennis*, 14 Ont. 267.

Partition not granted while land vested in personal representative.

The fact that the estate in question is vested in the personal representative is an answer to any application by a beneficiary for partition: *Re McCully*, *McCully* v. *McCully*, 23 O. L. R. 156; and it is immaterial that an *ex parte* order allowing the personal representative to register a caution has been obtained after the notice of motion for partition was served: *Ib.*

Where the only defendant was the lessee for 7 years, of an undivided moiety, it was held that the parties interested were sufficiently represented to entitle plaintiff to a judgment for sale: *Mason* v. *Keays*, 78 L. T. 33.

Infant applicant.

The leave required to institute proceedings for partition on behalf of an infant should be obtained before the notice of motion is served, and should in the notice be stated to have been given.

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A partition cannot be ordered in favour of a person beneficially entitled under a will to a certain portion of the income of an estate, where there is no joint tenancy, or tenancy in common: *Dodd* v. *Cottell*, 1914, 2 Ch. 1.

Partition not granted of unpatented land.

The Court will not decree partition of lands for which no patent has issued, neither will it decree a sale of such lands at the instance of the representatives of a deceased locatee: *Abell* v. *Weir*, 24 Gr. 464; *Cuthbert* v. *Cuthbert*, 11 Gr. 88, at p. 91; *Jenkins* v. *Martin*, 20 Gr. 613; but the Court may, in an action commenced by writ, make a declaratory judgment as to the rights of parties in unpatented lands, which, if the Crown is willing to act on the judgment of the Court, may have the effect of a partition: see *Pride* v. *Rodger*, 27 Ont. 320; *Bull* v. *Frank*, 12 Gr. 80, *sed vide*, *Brown* v. *West*, 1 O. S. 287.

Tenant for life, or dowress, how far entitled to partition.

A tenant for life of the whole estate is not entitled either to a partition or sale: *Fisken* v. *Ife*, 28 Ont. 595; *Goskell* v. *Gaskell*, 6 Sim. 643; and see *Lalor* v. *Lalor*, 9 P. R. 455.

A tenant for life of a moiety is entitled to partition as against a tenant in fee of the other moiety: *Williams* v. *Williams*, 81 L. T. 163. A decree for partition was made at the suit of a dowress: *Harrison* v. *Bottrill*, before Blake, V.-C., 21st January, 1880; *Devereux* v. *Keorns*, 11 P. R. 452, overruling *Rody* v. *Rody*, 1 C. L. T. 546; but her right to partition is subject to judicial discretion, and it will only be granted when her dower cannot conveniently be otherwise set apart: *From* v. *From*, 12 P. R. 185. A dowress in the whole estate is not entitled to partition or sale: see *Fisken* v. *Ife*, *supra*; but where the dower is claimed out of an undivided share, the dowress would seem entitled to partition or sale, as the only way by which her claim can be properly ascertained and satisfied. A mortgagee of an undivided share, whose title has not been perfected by foreclosure or otherwise, has been held not to be entitled to partition: *Train* v. *Smith*, before Spragge, C., 14th April, 1875; followed by Meredith, J., in *Mulligan* v. *Hendershott*, 17 P. R. 227; and see *Laplante* v. *Seamen*, 8 Ont. App. 560; but in *Foll* v. *Elkins*, 9 W. R. 861, it seems to have been assumed that a mortgagee was entitled to this relief; and see *Davenport* v. *King*, 49 L. T. 92; *Agar* v. *Fairfax*, 2 W. & T. L. C. 7th ed., 181; as to whether a tenant in common who has mortgaged his share can have a partition without first paying off his mortgage, see *Gibbs* v. *Haydon*, 47 L. T. 184; it would seem not, if his mortgagee objects: *Sinclair* v. *Jones*, 1894, 3 Ch. 554; 71 L. T. 483. In this Province it would seem that he can, if his mortgagee does not object, and that his mortgagee should be made a party either in the first instance, or in the Master's office, but any additional costs so occasioned must be borne by the mortgagor: *McDougall* v. *McDougall*, 14 Gr. 267; *Cotton* v. *Banks*, 1893, 2 Ch. 22; 1894, 3 Ch. 554; *sed vide Belcher* v. *Williams*, 45 Ch. D. 510; 63 L. T. 673; *Re McCully*, *McCully* v. *McCully*, 23 O. L. R. 156, where is was held that the application of a mortgagor should not be granted where other parties interested object; a mortgagee who comes in and consents to a sale, is not entitled to either six months' notice or six months' interest: *Re Houston*, *Houston* v. *Houston*, 2 Ont. 84; and see as to mortgages made since 1st July, 1888: *The Mortgages Act* (R. S. O. c. 112), ss. 15-18.

Mortgagees not entitled to partition.

Tenant in common, whose share is mortgaged, may have partition.

Extra costs must be borne by his share.

A party wall held in common may be partitioned: *Moyfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508; 70 L. T. 485.

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A mortgagee having a mortgage affecting the whole land should not be made a party unless a sale is to be had, and he consents to its being made free from his mortgage: *Sinclair* v. *James*, 1894, 3 Ch. 554; 71 L. T. 483.

Not ordered against tenant for life of whole estate.

A partition or sale cannot be ordered as against a tenant for life of the whole estate on the application of those entitled in remainder: *Murcar* v. *Bolton*, 5 Ont. 164; *Rajotte* v. *Wilson*, 40 C. L. J. 702.

Where the plaintiff claimed as vendee of the equity of redemption of one of four tenants in common under a sale by the Sheriff, a decree for partition was set aside on appeal, on the ground that the interest was not so saleable: *Wood* v. *Hurl*, 28 Gr. 146.

Sale, when ordered.

In determining whether a sale, or partition, should be directed, the Master will be guided by what is best for all parties interested: *Blasdell* v. *Baldwin*, 3 Ont. App. 6. When the property is not susceptible of partition, a sale should be directed: *Steven* v. *Hunter*, 14 Gr. 541; but where partition can be made without injury to the interest of the owners, it would seem that a partition ought to be made where any of the parties so desire: *Ont. Power Co.* v. *Whattler*, 7 O. L. R. 198.

The discretion exercised by a Judge in granting a partition, or sale, will not be interfered with by the Court of Appeal: *Re Dyer, Dyer* v. *Paynter*, 53 L. T. 744; but where the discretion is exercised by an officer of the Court having judicial functions his discretion may be reviewed: see *Bryant* v. *Reading*, 17 Q. B. D. 128; 54 L. T. 300; *Clench* v. *Dooley*, 56 L. T. 122.

Where the judgment is pronounced by a Local Master it is appealable under *Rule* 505: *Stroud* v. *Sun Oil Co.*, 7 O. L. R. 704.

Several actions, consolidation of.

Where two or more applications are made by different persons to the same Local Master, the latter has jurisdiction to pronounce judgment in one of them, and stay the others: *Lambier* v. *Lambier*, 9 P. R. 422; 19 C. L. J. 158. Where an action is stayed, the costs are *primâ facie* payable out of the estate *pari passu* with the costs of the action which is carried on: *Re Clark, Cumberland* v. *Clark*, L. R. 4 Chy. 412.

Costs.

Formerly when a Local Master's jurisdiction was confined to lands in his own county, if lands were discovered in another county after a judgment had been pronounced by a Local Master, the Judge in Chambers might award judgment as to the lands so discovered: *Clark* v. *Clark*, 8 P. R. 155; but *semble*, the Local Master may himself now make a supplemental judgment in such a case. But see and cf. *Rules* 208 (8), 209, 212.

Effect of Judgment for Sale.—A judgment for sale in a partition action operates, as regards all persons *sui juris*, as a conversion of the estate, even before the sale has taken place: *Re Dodson Yates* v. *Morton*, 1908, 2 Ch. 633; 98 L. T. 395; *Herbert* v. *Herbert*, 1912, 2 Ch. 258; 107 L. T. 491; *semble*, a married woman notwithstanding *The Married Women's Property Act*, is not a person who is *sui juris*, and therefore a judgment of sale does not operate before sale as a conversion: *Ib.*

Form of judgment.

The proceeds of an infants' share in the land would seem to descend on his death as real estate: *Re Norton*, 1900, 1 Ch. 101. See also *The Infants Act* (R. S. O. c. 153), s. 17.

By this *Rule* the Master is empowered to award such a judgment as the Court of Chancery was accustomed to grant in partition suits.

except the order for payment of the money out of Court: see *Rule* 615 (4). Under this judgmsnt an account of rents and profits may be taken, and a sum in gross may be allotted in lieu of dower, curtesy, or any other life estate, and all other ususl and necessary accounts, and inquiries, may he taken and made, ss the circumstances of the case may require. Rules 617, 618.

(iii) *Dower.*

617. Where the right to dower is not disputed, either the dowress or the tenant of the freehold may apply upon originating notice for a writ for the assignment of dower. C.R. 959. *Amended.* Assignment of dowar.

For the form of writ of assignment of dower: see Form 123, H. & L. Forms, Nos. 1128, 1129.

(iv) *Infants' Estates.*

(See 1 Geo. V., ch. 35, secs. 6 and 7.) (*a*)

618. All applications for the sale, mortgage, lease, or other disposition of an infant's estate shall be made to a Judge upon notice to the Official Guardian. C.R. 960 and 1309. Applications to sell, etc., infant's estate, where made.

The jurisdiction of the Master in Chambers, and Local Master, doee not extend to such applications: see *Rule* 208 (7), nor does that of Local Judges: *Rule* 210. Applications under this *Rule* must be made to s Judge in Chambers, *Rule* 207 (2).

A similsr procedure prevails in the State of New York: see Tyler on Infancy, p. 300, s. 196. Apart from the power given hy the statute, the Court has no authority to direct the sale of an infant's estate on the mere ground that it would be henefioial: *Calvert* v *Godfrey*, 6 Beav. 197.

These *Rules* (618-621) apply to casos where some disposition is sought to he made of an infant's estate, either for the purpose of raising money to pay charges thereon, or to provide for the maintenance and education of the infant owners, or where the appointment of guardians of their persone or estates ia songht.

Applications for the sale, leasing, or other disposition of the real estate of infants, are authorized hy *The Infonts Act* (R. S. O. c. 153), s. 5, where it is made to appear to the Court that it is neceseary, or proper, for the maintenance or education of the infant; or that, hy reason of any part of the property heing exposed to waste and dilspidation, or to depreciation from any other cause, the interest of the infant requires, or will be suhstantially promoted hy, such disposition. Ths Act is held to apply to estates tail: *Re Groy*, 26 Ont. 355. Where a sale is necessary for the payment of the dehta of the ancestor it may be ordered: *Re McDonald*, 1 Chy. Ch. 97; *Re Borker*, 6 P. R. 225. But it should he shewn that unless the sale, or other disposition, is made, Sale of infant's estate, on what ground authorised. Interest of infant to be considered.

(*a*) See now R. S. O. c. 153, ss. 13, 14.

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the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit: *Re Boddy*, 4 Gr. 144. Where none of the circumstances mentioned in the Act are proved to exist, the Court has no authority to make any order: *Calvert* v. *Godfrey*, 6 Beav. 197; *Re Phelan*, 6 P. R. 259; *Re Robinson, Pickard* v. *Wheeler*, 31 Ch. D. 247; 53 L. T. 365; *Re Hibbard*, 14 P. R. 177; and see *Re Jackes*, 3 C. L. J. 69, where the Court refused to sanction a renewal of a lease made by the infant's ancestor; but see *Bican* v. *Bican*, 16 Ont. 693; and see *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 56.

Circumstances which justify a sale of infant's estate.

The circumstances justifying a sale, lease, or mortgage, of an infant's estate, under the statute, are: (a) The fact that the sale, lease or mortgage, is necessary, in order to maintain, or educate, the infant; or, (*b*) that for any cause, the interest of the infant requires, or will be substantially promoted by, such disposition: see *The Infants Act* (R. S. O. c. 153), s. 5.

Maintenance of infants.

Maintenance.—An application for an allowance for maintenance out of an infant's estate will be entertained, even though it be not necessary to ask for a sale, lease, or mortgage, of any part of the infant's property: see *Re Wilson*, 14 P. R. 261.

Duty of father to maintain his children.

Where the father of an infant is living, it is his duty *primâ facie* to support and maintain, and educate, the infant, no matter what the infant's fortune may be: Simpson, on Infancy, p. 161; and maintenance is not ordinarily allowed out of the infant's estate, except upon proof that the father is unable to maintain, and educate, his children, according to their station and prospects in life; and although, where there is an express trust in the marriage settlement, to which the father is a party, requiring the trustees to expend the trust fund for the support of the children of the marriage, such a trust may be enforced by the father: *Mundy* v. *Earl Howe*, 4 Bro. C. C. 223; yet where the trustees have an option, or a mere power, to do so, the Court will not compel them so to apply the trust fund, except on evidence of the father's inability to maintain the infant: *Wilson* v. *Turner*, 22 Ch. D. 521; 48 L. T. 370. The duty of a father to maintain his infant children is at Common Law a moral, and not a legal, obligation: *Wright* v. *McCabe*, 30 Ont. at p. 396; *sed vide* Cr. Code, ss. 242, 244.

Mother not so bound.

A mother is not under any legal obligation to support her offspring, and consequently maintenance will be allowed out of the children's own property, without reference to her ability to support them: Simp. 161.

As to claims for past maintenance, see *infra*, p. 1267.

On sale being directed, inquiry as to debts of ancestor made.

Upon an application under *The Infants Act* (R. S. O. c. 153), s. 5, for the sale, lease or mortgage of an infant's estate, it is usual before directing any application of the proceeds, to require proof of payment of the debts of the ancestor, in cases where the infant has become entitled to the property directed to be sold, as heir-at-law, or devisee; or to require an advertisement to be issued for creditors, where no sufficient advertisement has previously been issued by the personal representative, and the Court then makes provision for the payment of the debts, if any. Where the sole object of the sale is the maintenance of the infant, the proceedings ought to be taken under *The Infants Act*, s. 2, and not by way of action for the general administration of the estate; and the Court has refused, where the latter proceeding has been adopted unnecessarily, to sanction a sale in the administration proceedings, for the purpose of maintenance: *Fenwick*

Sale not ordered in administration action, when brought merely for maintenance of infants.

v. *Fenwick*, 20 Gr. 381; *Goodfellow* v. *Rannie*, Ib., 425; *Foster* v. *Patterson*, *Ib.*, 345. Rule 618.

Proceeds retained in Court.

The proceeds of the sale of an infant's lands will not be ordered to be paid to the infant's guardian; but will be retained by the Court in its own custody until the infant attains majority: *Flanders* v. *D'Evelyn*, 4 Ont. 704; *Mitchell* v. *Richey*, 13 Gr. 445; *Blake* v. *Blake*, 2 Sch. & Lef. 26; *Campbell* v. *Dunn*, 22 Ont. 98; *Re Mathers*, 18 P. R. 13; *Re Harrison*, 18 P. R. 303; *Re Humphries*, 18 P. R. 289; and see *Re Chatard's Settlement*, 1899, 1 Ch. 712; 80 L. T. 845; *Whitewood* v. *Whitewood*, 19 P. R. 183; *Re Thompson*, 19 P. R. 304; *Re Lloyd*, *infra*; but see *Huggins* v. *Law*, 14 Ont. App. 383; *Hanrahan* v. *Hanrahan*, 19 Ont. 396; *Sanborn* v. *Sanborn*, 11 Gr. 359.

Principal not easily broken into.

As a general rule the Court will not break in upon the principal money, for the maintenance and education of infant legatees, still it may be done where necessary: *Ashbough* v. *Ashbough*, 10 Gr. 430; *Crane* v. *Craig*, 11 P. R. 236.

Maintenance was ordered out of a fund in which the infant had only a contingent interest, on security being given by way of life insurance for those who would be entitled upon the death of the infant under age: *Re Campbell*, 13 P. R. 400, following *Re Arbuckle*, 14 W. R. 585.

Where money was given to a widow subject to a trust for "the maintenance and bringing up" of her infant children, she was held to be guilty of a breach of trust in maintaining the infants in her house where she was living in adultery; and the Court assumed the administration of the fund: *Re G.*, 1899, 1 Ch. 719; 80 L. T. 470.

Past maintenance.

Where it appeared that the application was made more for the benefit of the infants' father than of the infants themselves, the application was refused: *Re McDonald*, 1 Gr. 90; *Re Hibbard*, *supra*, p. 1266; and a sale will not be ordered to repay a relative, such as a father, mother, or brother, for the past maintenance of the infant: *Kellar* v. *Tache*, 1 Chy. Ch. 388; *Re Blair*, 14 P. R. 220; and see *Edwards* v. *Durgen*, 19 Gr. 101; *Re Lloyd*, 31 O. L. R. 475. Nor after a sale has been made, will past maintenance be ordered to be paid out of the corpus of the fund, where it appears that the person making the claim had not maintained the infant on the basis, or with the expectation of being compensated therefor: *In re Renwick*, *Renwick* v. *Crooks*, 14 P. R. 361.

No disposition can be authorized contrary to any will or deed.

No sale, lease, or other disposition can be ordered under this *Rule*, against the provisions of any will or conveyance by which the estate has been devised, or granted, to the infant, or for his use: *The Infants Act* (R. S. O. c. 153), s. 5 (2); *Re Smith*, 6 P. R. 282; *Re Wilson*, 7 P. R. 244; *Re Callicott*, 1 Chy. Ch. 26, 182; but see *Re Bishoprick*, 21 Gr. 589.

A guardian of an infant appointed by the Surrogate Court has power without the sanction of the Court, to make a valid lease of his ward's land during the latter's minority, but not beyond that period: *Clarke* v. *Mcdonell*, 20 Ont. 554, overruling *Collins* v. *Martin*, 41 U. C. Q. B. 602; *Switzer* v. *McMillan*, 23 Gr. 538; *Townsley* v. *Neil*, 10 Gr. 72; the report of the last case appears to be erroneous in describing the guardian who made the lease as a guardian *ad litem*, instead of a guardian of the estate of the infant.

Application for sale, etc., how to be made.

The statute says the application is to be made in the name of the infant by his next friend, or his guardian, but cannot be made without the infant's consent, if he is of the age of fourteen, or upwards

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unless the Court otherwise directs or allows: *The Infants Act* (R. S. O. c. 153), s. 8; and see *Rule* 620 (1).

Execution of conveyance.

Tha Court may order tha axecution of tha conveyance by the infant, or soma ona on his behalf, and a conveyaoce so executed is binding on the infant, as if made after he had attained his majority: *The Infants Act* (R. S. O. c. 153), ee. 14, 15; *Rae* v. *Geddes*, 3 Chy. Ch. 404. Where a mortgage of an infant's land held in trust is authorized hy the Court, the infant *cestui que trust* cannot properly ho required to giva any covenant for repayment of the loan: *Brown* v. *Grady*, 31 Ont. 73.

Proceeds of sale, retain quality of estate sold.

The proceeds of lands sold, or disposed of, under the direction of the Court, retain the quality of the estate sold, or disposed of, so far as the rights of the infont'e heirs, and next of kin, are concerned: *The Infants Act*, s. 17; *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134; *Thompson* v. *McCaffrey*, 6 P. R. 193; *Campbell* v. *Campbell*, 19 Gr. 254 aod see *Hopkinson* v. *Richardson*, 1913, 1 Ch. 284; 108 L. T. 502. But where such moneys descend as realty, if tha heir does not effect an actual reconversion, they will pass to his representatives as personalty: *Mordaunt* v. *Benwell*, 19 Ch. D. 302; 45 L. T. 585. And as to adult parties jointly interested with the infants, the order for sale operates as a conversion, and the share of such a person dying before sale, but after the order, will descend as personalty: *Hyett* v. *Mekin*, 25 Ch. D. 735; 50 L. T. 54; *Burgess* v. *Booth*, 1908, 2 Ch. 648; 99 L. T. 677.

Order for bar of dower.

Formerly where the mother of the infant was a lunatic, an application might be made for an order barring her dower: R. S. O. (1897), c. 164, s. 16. Tha application must be made to a Judge in Chambers: *Re Colthart*, 9 P. R. 356; hut under the statutes as now revised it is not quite clear that this may be done; the above-mentioned s. 16 not having been continued in the present revision, and the Act as it now stands not appearing to apply to cases where the dower is complete, but only where it is inchoate: see however *The Dower Act* (R. S. O. c. 70), s. 11.

Marriage of ward of Court.

Marriage of Ward of Court.—The marriage of a female ward of Court without consent of the Court, is a contempt for which the husband may he punished hy imprisonment. The Court in such cases usually requires a settlement to be made of the wife's property as a condition of the husband's release, and will provide that the husband shall take no benefit under the settlement, and will also ordinarily exclude the wife from power of appointing by will in his favour in default of issue: *Re Wall*, 50 L. T. 435; and see *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. T. 795; and see *Field* v. *Moore*, 19 Beav. 176. Bot the Court has no power to compel a male infant marrying without leave to execute a settlement of his property against his will: *Re Leigh*, *Leigh* v. *Leigh*, 40 Ch. D. 290; 60 L. T. 404.

The jurisdiction of the Court over its wards ceases on their attaining 21. Where the Court authorized a man to visit a female ward of Court to pay his addresses, with a view of asking her hand in marriage, on his undertaking to abide hy the order of the Court, such undertaking expires on the ward attaining her majority, and the Court has no jurisdiction to compel him to execute a settlement of her property where he has married her after she attained 21 without a settlement, and without the sanction of the Court: *Bolton* v. *Bolton*, 1891, 3 Ch. 270; 65 L. T. 698.

Rule 618.

Settlements of Infants' Estates.—The Court has jurisdiction to sanction the execution of a settlement of an infant's estate on marriage: see *The Infants Act* (R. S. O. c. 153), ss. 22, 24. Applications for that purpose are expressly excluded from the jurisdiction of the Master in Chambers, and Local Masters, and Local Judges: see *Rules* 208-210, and from a Judge in Chambers, and must therefore be made to a Judge in Court: *Rules* 205, 207 (1), (2).

Settlement of infant's estate, when ordered.

Upon an application to obtain the sanction of the Court to infants making settlements on marriage, evidence should be produced to show,—

Evidence required.

(1) The age of the infant;

(2) Whether the infant has any parents or guardians,

(3) With whom, or under whose care, the infant is living; and if the infant has no parents or guardians, what near relatives the infant has;

(4) The rank and position of life of the infant, and parents, if any;

(5) The nature and value of the infants' property, and income thereof;

(6) The age, rank and position in life of the person to whom the infant is about to be married;

(7) What property, fortune, and income such person has;

(8) The fitness of the proposed trustees and their consent to act duly verified.

Effect of settlement.

A marriage settlement made by an infant without the sanction of the Court is not void, but voidable; and if not repudiated within a reasonable time after the infant has attained majority will be binding: *Edwards* v. *Carter*, 1893, A. C. 360; *In re Jones, Farrington* v. *Forrester*, 1893, 2 Ch. 461; and *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307.

The provision of *The Infants Act*, s. 22, only removes the bar of infancy, but does not enable an infant to do more than an adult could do, *e.g.*, when an infant was also a married woman and made a post-nuptial settlement with the sanction of the Court, under that Act, but the settlement was one which would not have bound her if she had been an adult, it was held to be invalid, notwithstanding it had received the sanction of the Court: *Buckmaster* v. *Buckmaster*, 35 Ch. D. 21; 56 L. T. 795. But the Act enables an infant, with the sanction of the Court, to make a valid post-nuptial settlement so far as an adult could make one: *Re Woll*, 50 L. T. 435.

A male infant ward marrying without the consent of the Court cannot, against his will be required to execute a settlement of his estate, and a settlement made by an infant in such circumstances, unwillingly, but with the sanction of the Court, was set aside on the application of the settlor on attaining his majority: *Re Leigh, Leigh* v. *Leigh*, 60 L. T. 404.

Guardians of infants.

Guardians of Person, or Estate.—The Surrogate Court has also power to appoint guardians to minors: see *The Infants Act* (R. S. O. c. 153), s. 26. This statute, however, does not exclude the jurisdiction of the Supreme Court: *Re Stennard*, 1 Chy. Ch. 15; *Re McQueen, McQueen* v. *McMillan*, 23 Gr. 191; and see *The Infants Act* (R. S. O. c. 153), s. 26.

Rule 616.

Guardians, appointment of.

Where a guardian has been appointed by the Surrogate Court, the Supreme Court will not appoint any other except for cause, and it should therefore be shewn, on applications to appoint guardians under these *Rules*, that the minor has no guardian.

A guardian may, in England, be appointed for an infant who is a British subject, though he is resident out of the jurisdiction, and has no property within the jurisdiction: *Re Willoughby*, 30 Ch. D. 324; 53 L. T. 926; but see *In re Bourgoise*, 41 Ch. D. 310; and *quære*, whether the Supreme Court could exercise such extra-territorial jurisdiction.

Security.

Where the Supreme Court appoints a guardian of the person and estate of a minor, it usually requires the guardian to give security. And if a guardian has been appointed by a Surrogate Court, an inquiry is sometimes ordered as to whether the guardian so appointed has given sufficient security; and if he has not, then he is required to give additional security before he is empowered to receive moneys on account of the infant. Where, however, the fortune of the infant is trifling, and the fund is lodged in Court, the Court frequently dispenses with security being given by the guardian; and requires instead an affidavit to be filed by the guardian from time to time, shewing the due application of moneys paid to him under the order of the Court.

Security, when dispensed with.

In appointment of guardian, Court considers interest of infant.

The Supreme Court has also jurisdiction to appoint trustees, or guardians, for infants, to receive insurance moneys payable to them under any policy effected by their deceased father: see *The Insurance Act* (R. S. O. c. 183), s. 175; *Re Hovey*, 29 O. L. R. 336, or the Court may make order for the payment of such insurance moneys to a guardian appointed by the Surrogate Court, or even by a foreign Court. The proceedings to obtain such appointment of a guardian, or trustee, or the payment of such insurance moneys, may be made to a Judge in Court: *Re Slosson*, 15 P. R. 156; where the application is for the appointment of a guardian to receive insurance money, the person appointed will be required to give security; and where the application is for payment of the money to a guardian appointed by the Surrogate Court, or a foreign Court, it must be shewn that such guardian has given security sufficient to answer the amount he is to be authorized to receive: *Re Slosson*, *supra*; *Re Thin*, 10 P. R. 490; but see *Re Andrews*, 11 P. R. 199; and where the security given to a foreign Court would not cover assets received in this Province, a foreign guardian will be ordered to give additional security as a condition of being authorized to receive the money: *Re Slosson*, *supra*.

Different considerations will naturally influence the Court in the appointment of a guardian of the person, and a guardian of the estate, of an infant. In the case of a person who is to be appointed guardian only of an infant's estate, probity and business capacity may be sufficient qualifications. Where a person is proposed as guardian of an infant's person, other considerations have necessarily to be taken into account.

Although the Court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where it is clearly shewn that a compliance therewith would be prejudicial to the happiness, and moral training, of the infants: *Anon.*, 6 Gr. 632; *Re McQueen, McQueen v. McMillan*, 23 Gr. 191.

So, where there was a contest between a step-father and an uncle, and the child preferred the former, the Court being satisfied that it

was better for the infant that the uncle should be appointed, appointed him: *Re Irwin*, 16 Gr. 461. The Court may remove testamentary guardians and trustees for the same causes as other guardians: *The Infants Act* (R. S. O. c. 153), s. 29. Rule 618.

Where the father is living, if it is proposed to appoint any other person guardian, the father must be notified of the application: *Re Henricks*, 2 Chy. Ch. 418.

It is improper to give a reversionary guardianship of wards in Court to the successors in office of any person named: *Murphy* v. *Lomphier*, 12 Gr. 241.

Removal of ward from jurisdiction a contempt.

It is contempt of Court to remove a ward of Court from the jurisdiction, without the sanction of the Court; and the Court will interfere on the application of his guardian to prevent his removal: *Re Giltrie*, 3 Gr. 279; but the Court, if it is for the interest of the ward, will authorize his removal out of the jurisdiction, upon the undertaking of a guardian resident within the jurisdiction to produce the ward to the Court if, and when, required: *Re Callaghan*, 23 Ch. D. 166; 52 L. T. 7.

The removal of a ward of Court out of the jurisdiction without the leave of the Court, is punishable by imprisonment, and it is no answer to a motion to commit that the act was done at the solicitation of the ward, and that though there was knowledge that the infant was a ward, there was no knowledge of the effect of that status; ignorance that the infant was a ward does not altogether exonerate, but is an allegation of the contempt: *Re J.*, 106 L. T. 554.

Powers of guardian.

A guardian appointed either by the Surrogate Court, or by the Supreme Court: *Huggins* v. *Law*, 14 Ont. App. 363; or a tutor appointed by a Quebec Court: *Honrahon* v. *Honrahon*, 19 Ont. 396; is entitled to receive, and can give, a valid discharge for a legacy due to his infant ward; as to his power to make leases of the infant's lands in his name: see p. 1267, *supra*; and see further as to leases by infants: *Lipsett* v. *Perdue*, 18 Ont. 575.

Leases.

The sanction of the Court should be obtained to all dispositions, whether by sale, lease, or mortgage, of an infant's estate; except in the case of leases made by a guardian appointed by the Surrogate Court, as to which, see p. 1267, *supra*, whether a guardian appointed by the Supreme Court may make a lease of his ward's land without the sanction of the Court, *quære*.

Accounts of guardians.

Where there are two or more guardians of an infant, the fact that one of the guardians who has maintained the infant, has been in sole receipt of the income of the infant's estate, is no discharge to the other guardians therefor, but if it is shewn that the infant has been properly maintained and educated by the guardian who received the income, a proper sum will be allowed for that purpose without the details of the expenditure being vouched: *Re Evans, Welch* v. *Chonnell*, 51 L. T. 175.

Matters to be stated in affidavits.

619.—(1) The affidavits filed shall state the nature and amount of the personal property to which the infant is entitled, the necessity of resorting to the real estate, its nature, value, and the annual profits thereof; the

Rule 620.

occupation of the lands to be disposed of, and state specifically the relief desired, and circumstances sufficient to justify the order sought.

If maintenance desired

(2) If an allowance for maintenance is desired, a case shall also be stated and made, to justify such an order, and to regulate the amount.

If appointment of guardian desired.

(3) If the appointment of a guardian is desired, a case shall be stated and made, for the appointment of the person proposed. C.R. 964.

As to the circumstances which justify an application under *The Infants Act* for the lease, sale or mortgaging of an infant's lands: see the notes, *supra*, p. 1265.

As to applications under *The Settled Estates Act* (R. S. O. c. 74): see the notes, *infra*, p. 1273.

As to applications for maintenance of infants under *The Infants Act* (R. S. O. c. 153): see notes to *Rule* 618, *supra*, p. 1266.

And as to applications under that Act for the appointing of guardians to infants: see the notes to *Rule* 618, *supra*, p. 1269.

The infant to be produced to Judge or Master.

If over 14 years to be examined.

620.—(1) Unless otherwise directed by the Judge, the infant shall be produced before him or before a Master, and the infant, where above the age of 14 years, shall be examined apart by the Judge or officer before whom he is produced, upon the matter of the petition, and as to his consent thereto.

Where infant abroad.

(2) Where the infant is out of Ontario the Judge may direct inquiry as to the infant's consent by his examination in such manner as may seem proper.

Infants under 14 need not be examined.

(3) It shall not be necessary to examine an infant under 14 years of age, unless otherwise ordered, but it shall be sufficient for the officer before whom such infant is produced, to certify that he has been produced, and that he is under the age of 14 years. C.R. 965, 966 and 967.

The sale is not to be ordered without the consent of the infant if he is of the age of fourteen years or upwards, unless the Court otherwise directs or allows: *The Infants Act* (R. S. O. c. 153), s. 13; but where there are several infants interested who are over fourteen years, it has been held that the consent of a majority of them is sufficient to authorize the Court to direct a sale, not merely of the shares of the infants who do consent, but also of those who have not consented: *Re Harding*, 13 P. R. 112. In this case one of the infants interested, had disappeared and could not be found, and her examination was dispensed with. Where an infant over fourteen was an imbecile, her examination and consent were dispensed with: *Re Delanty*, 13 P. R. 143.

Where the infants had been examined and consented to a sale, which had been ordered by the Court, but which was not carried out, their further examination and consent to a sale at a less price was dispensed with, on its being shewn that they were out of the jurisdiction, and were satisfied to accept the price offered: *In re Bennett*, 17 P. R. 408. Rule 621.

The Judge, or officer, before whom the infant is examined, should take down his examination in writing, and also his consent, where the consent is necessary; and this should be signed by the infant and by the Judge or officer, and should be attached to the petition: *Re Axford*, 6 P. R. 192.

Where the infant is under fourteen, the Judge or officer should not only certify the fact, but should also state that the infant was produced before him, and examined apart.

Evidence should be given before the Judge or officer identifying the infant and proving his age so as to enable the master to certify under *Rule* 620 (3).

Where the infants under fourteen were living with their mother out of the jurisdiction, and the mother swore that she was unable to produce them, owing to the expense, and the property was shewn to be worth only $400, the production of the infants was dispensed with: *Re Lane*, 9 P. R. 251.

Where the infant is out of the jurisdiction, and not of an age making his consent to the proceedings essential, his production before the Master may, on application to a Judge, be ordered to be dispensed with: *Re Lane*, 9 P. R. 251; S. C., *sub nom.*; *Re Love*, 18 C. L. J. 371. Production of infant, when dispensed with.

But unless this order be obtained, the infant should in all cases be produced before the Master, even though he be under fourteen years.

621. Witnesses in support of the application may be examined *vivâ voce* before the Judge making the order or before a Master of the Supreme Court. C.R. 968. Witnesses in support of petition to be examined before Judge or Master.

A subpœna may be issued under *Rule* 228 for the examination of witnesses in support of the application: *Raymond* v. *Tapson*, 23 Ch. D. 430; 48 L. T. 403; *McMillan* v. *Wansborough*, 10 P. R. 377.

PROCEEDINGS UNDER SETTLED ESTATES ACT.

Settled Estates.—In addition to the power given to the Court by *The Infants Act* (R. S. O. c. 153), in reference to the estates of infants, power is also given to the Court by *The Settled Estates Act* (R. S. O. c. 74)—to authorize leases, s. 3—or sales or mortgages of settled estates: s. 14; and there were formerly special Rules regulating the procedure under that Act: see C.RR. 973-990, none of which have been continued. It would seem that such applications are not included in the business authorized to be taken in Chambers under *Rule* 207 (1), and therefore that they can only be entertained in Court: see *Rule* 205. The procedure subject to any special provisions of *The Settled Estates Act* would appear to be similar to proceedings under *The Infants Act*: see *The Settled Estates Act* as to sales, etc., s. 14 (3); and as to persons on whom notice of such applications must be served: see *The Settled Estates Act*, ss. 20, 21, 22.

The application was originally required to be made by petition, but it is probably now intended to be made by originating notice as in the case of applications under *The Infants Act* (R. S. O. c. 153).

Proceedings under Settled Estates Act.

Sale of settled estate when ordered.

The Court has no inherent jurisdiction in such matters, and has no power to sanction schemes for the improvement of settled estates for the benefit of the *cestuis que trustent*, save so far as is authorized by the statute: see *Re Montagu*, 1897, 1 Ch. 685; 76 L. T. 485. Formerly the Court had no power to order the sale of a part of a settled estate, in order to make improvements on the remainder: *Re Moore*, 6 P. R. 281; *Re Chambers*, 28 Beav. 653; nor could it sanction an exchange of part merely for the purpose of improving the remainder: *Re Bishoprick*, 21 Gr. 589; but in that case, on its being shown that, unless the exchange were made the property was liable to depreciation in value, the exchange was directed under R. S. O. (1877), c. 40, s. 76; but the provisions of s. 77 of that Act prohibiting any sale, or disposition against the provisions of any will, or conveyance, do not seem to have been considered.

Under *The Settled Estates Act* (R. S. O. c. 74), the jurisdiction of the Court is enlarged, and it has now power whenever it deems it proper, and consistent, with a due regard for the interest of all parties entitled under a settlement, to sanction a lease (s. 3) or sale (s. 14), of the whole or any part of a settled estate, or the sale or mortgage for the purpose of making improvements on the estate (s. 14). The statute does not in terms authorize an exchange, but *semble*, an exchange is only a form of sale.

The Court in the exercise of its jurisdiction over settled estates may authorize a lease thereof for 999 years: *Re Watson's Trusts*, 21 Ont. 528.

The Court has also authorized a sale for the support of the tenant for life and her infant child, who was entitled in remainder: *Re Smith*, 4 Ont. 518; and also where the settled land was unproductive and being eaten up with taxes: *Re Hooper*, 28 Ont. 179.

Under *The Settled Estates Act* (R. S. O. c. 74), the Court has power to sanction leases containing agreements for renewal, or renewals: s. 3 (2); and see *Re Watson's Trusts*, 21 Ont. 528.

Notice to be given.

The notice to be given by the 20th section of the said Act, if given before the hearing (or if given after the hearing and the Judge shall not otherwise direct), may, without any other direction of the Court, be given within the jurisdiction of the Court by delivering to the person to be served, a notice according to Form No. 192, in the former C.R.R., and see H. & L. Forms No. 1469, and the time to be specified in the notice for the person served to file and deliver a notification shall be not less than 7 clear days after the service: *Rule* 215 (2). The notice will be in the form of an originating notice.

Applications under *The Settled Estates Act* must be made with the consent or concurrence of any person interested as tenant in tail, or in case there be more than one, then the first of such tenants in tail, and all persons in existence having any beneficial interest under or by virtue of the settlement prior to the estate of the tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail; and in all other cases the parties whose consent or concurrence is necessary, are all persons in existence, having any beneficial estate or interest under or by virtue of the settlement, and also the trustees having any estate or interest on behalf of any unborn child prior to the estate of the tenant in tail: see *The Settled Estates Act* (R. S. O. c. 74), s. 20 (1). And where any of these persons do not concur in, or consent to the application, then they are required to be notified as provided by s. 20 (2).

Where any of such partiea are out of the jurisdiction an order for service muat he ohtained under *Rules* 25-27. Settled Estates Act.

Where property waa vested in a truatee in trust after the death of the tenant for life to seli and divida the proceeda among numerous persons who would hecome absoluteiy entitled, with power to the trustee to give receipts, on a petition by the tenant for life under Imp. Act, 19 & 20 Vict. c. 120, for a sale of the property, it was held under s. 17 of that Act (from which R. S. O. (1897) c. 71, a. 23, was taken), that the consent of all the beneficiaries was necessary: *Re Ives, Bailey* v. *Holmes*, 3 Ch. D. 690. The peraona whoee conssnt was requlred hy s. 23 were persons whose consents were capahle of being ohtained: but see now *The Settled Estates Act* (R. S. O. c. 74), a. 20 (4), whlch enahlea the Court to diapense with the conaent of peraona who cannot he found, or who cannot he notified without expense disproportionate to their interest in the land. Tbe consent of unascertained peraons who are intereated ia not requiaite: *Beioley* v. *Carter*, L. R. 4 Chy. 230; *Re Strutt*, L. R. 16 Eq. 629; *Re Potts*, L. R. 16 Eq. 631n.

Infanta, aud persons of unsound mind (not ao found hy inquisition or jndicial decia: ..ion), required to he aerved with notice of an application, must he aerved hy delivering to the Official Guardian a copy of the originating notice or other proceeding required to he served: see *Rule* 18. Service on infants and persons of unsound mind not so found.

Where the person to he served is a lunatic and haa no committtee a guardian should he appointed for him, as in an nction in which a lunatic is defendant: aee *Rule* 95, *supra*; and it ia the duty of the Official Guardian, forthwith to attend to the intereat of the infant, and to take all such proceedings aa may he neceasary for the protection of auch interesta in the proceeding in which he is ao appointed guardian, and for that purpose to communicate with all proper persons and partiea, including the father or guardian of the infant and the person with whom or under whose care the infant ia; and the like duty will devolve on a guardian of a lunatic.

In case there is more than one infant, or person of unsound mind for whom aervice is made on the Official Guardian, one copy only of tbe notice or other proceeding need he served, hut the name of each person on whose hehalf the Official Guardian ia aerved should he stated on ths copy served: *Rule* 18 (4).

In case of a pereon of unsound mind he should, where practicable, be personaliy aerved, and where personal aervice on him is not practicahle, leave to aerve him suhstitutionally ahould be obtained.

A married woman is competent to consent to, or concur in, or oppose an application under the Act, even though ehe he an infant: see *The Settled Estates Act*, a. 36.

If an infant make any application under *The Settled Estates Act* by his guardian or next friend, *semble*, the Official Guardian ahould be served with a copy of the notice, and the Official Guardian ahould thereafter attend and watch the proceedings on behalf of such infant. Where infant is applicant.

The ohject of thia is to aecure in the infant's behalf the protection afforded hy an investigation hy the Official Gunrdian of the propriety of tbe proceedings, nnd to prevent infants from heing prejudiced hy ill-advised applications heing made in their names.

Infants are by the Act enabled to consent to, or concur in, applicationa under the Act hy their guardians: aee *The Settled Estates Act*, s. 35.

Settled Estates Act.

Notice of hearing.

N ..e of ths application will be served on nll person. dissenting from, or desiring to be henrd in opposition thereto, and upon committees of lunatics, and upon the Official Guardian, or other guardian od *litem* appointed, who may be interested in the proceedings on behalf of an infant, or person of unsound mind (not so found), at least seven clear days before the day for hearing the same: *Rule* 215 (2).

As to the persons whose consent or concurrence is necessary, or who must otherwise be notified of the application, see *The Settled Estates Act*, s. 20.

Where a person whose consent or concurrence ia necessary is an infant, or of unsound mind, or cannot be found, or the expense of serving him would be disproportionate to his interest in the land, the Court has power to dispense with the consent or concurrence of such person: *Ib.*, s. 20 (4).

The petition must be heard before the Judge presiding in the Weekly Court; as to the days on which these sittings are held, see *Rules* 234, 239.

Where the interests of the infant respondents, on whose behalf the Official Guardian is served, conflict, another guardian *ad litem* will have to be appointed so that each class of infants may be properly represented. The appointment of such other guardian must be made by order, on a special application: see *Rules* 92, 93, *supra*, pp. 476, 477.

Evidence on application as to lunatic.

Where a committee of a lunatic makes, or consents to, an application, or gives a notification respecting any application, the authority of such committee to act on behalf of the lunatic should be produced to the Court, and also evidence to satisfy the Court that what is proposed is, and the committee should make an affidavit that he believes that it is, proper and consistent with a due regard to the interest of such lunatic; and if it appears that it is proper and consistent with a due regard for the interest of the lunatic that the committee should make, or consent to, the application, or give any epecific notification respecting the application, the Court may approve of his so doing.

Evidence as to consent of infant or person of unsound mind not so found.

Where the Official Guardian or other guardian *ad litem* of an infant, or person of unsound mind (not so found), consenta to an application, or gives a notification respecting an application, evidence should be produced to satisfy the Court that it is, and the guardian should make an affidavit that he believes that it is, proper and consistent with a due regard to the interest of such infant, or person of unsound mind (not so found), that such consent should be given, and thereupon the Court may approve of the same being given.

Evidence that application is proper.

Upon every application the Court will have to be satisfied by sufficient evidence that it is proper and consistent, with a due regard for the interests of all parties entitled under the settlement, that the powers should be exercised, and it should be stated in the evidence why, and upon what ground, it is deemed to be so.

Evidence of service on trustees.

Upon every petition where there are trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence should be produced that notice of the application has been served on such trustees.

Evidence of no previous application to Legislature.

Upon every application evidence should be produced to satisfy the Court that neither the applicant, nor any party entitled, has previously applied to the Legislature of the Province of Ontario for a private Act

Settled Estates Act.

to effect the same or similar object, or, if any application has been made, that the same was not rejected on its merits or reported against by the Judges to whom the bill may have been referred.

If any such application has been made and refused the Court cannot make any order: see *The Settled Estates Act* (R. S. O. c. 74), s. 23.

Where, however, the application for a private Act has been rejected on the ground that the relief sought could be obtained by proceedings under *The Settled Estates Act*, the failure of the application to the Legislature would be no bar to a subsequent proceeding under *The Settled Estates Act*.

Service of advertisement or notice.

If upon the hearing of an application under *The Settled Estates Act* (R. S. O. c. 74) the Court is of opinion that notice ought to be served on any person who has not been served, or that notice of application ought to be inserted in any newspaper, the Court will give directions accordingly, and the petition will stand over generally, or to such time as the Court directs.

If the Court directs an advertisement to be published under s. 22, the form of advertisement will probably be referred to be settled by an officer of the Court before publication. Its object is, of course, to give persons interested full information, and where that has been accomplished, small and immaterial defects in the advertisement will not be fatal: see *Re Whiteley*, L. R. 8 Eq. 574; *Re Burley*, W. N. 1868, 148; *Re Bourne*, 16 W. R. 1115; *Re Snell*, 19 W. R. 1000; *Re Nune*, W. N. 1867, 109; *Re Hemsley*, L. R. 16 Eq. 315; *Re Bicknell*, L. R. 14 Eq. 467.

The marriage of an applicant after the publication of the advertisement was held not to be a ground for requiring its republication: *Re Marshall*, L. R. 15 Eq. 66. And on the death of an applicant after advertisement, the notice may be amended by stating the fact, and substituting a new applicant: *Re Wilkinson*, L. R. 9 Eq. 71.

Where advertisement—Persons who may be heard.

When the Court has directed notice of any application to be inserted in any newspapers, any person may at the time specified in the notice, be heard in opposition to, or in support of, the application, subject to such order as to costs as to the Court may seem just.

What order is to state.

The order made on the adjudication on the petition should state, in addition to the names of the applicants, the names of the persons other than the applicants who concur or consent, or to whom notice of the application has been given, or who have appeared in opposition to, or in support of, the application, and whether any notice was received from the persons to whom notice had been given, and, if any has been received, the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any, and what rights, estate or interest of any person whose concurrence, or consent, has been refused, or who has not, or is not to be deemed to have, submitted his rights or interests to be dealt with by the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted.

In case of leases.

Where the Court authorizes a lease, the order should direct that the lease shall contain such conditions as are required by the Act, and such other covenants, conditions and stipulations as the Court deems expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions and stipulations as may be approved by the Master in Ordinary, or a Local Master: see the Act, ss. 3, 4.

CHAPTER XXIII.

MANDAMUS, ETC.

Mandamus, etc., granted on originating notice.

622. Mandamus, prohibition and *certiorari* may be granted upon a summary application by originating notice. C.R. 1080. *Amended.*

See Eng. (1883) R. 722.

A *mandamus* may be granted by judgment in an action, as well as on an application under this *Rule.*

Mandamus in action.

In any action the plaintiff may indorse upon the writ, a claim for a *mandamus;* and the plaintiff may claim in the statement of claim, either together with any other demand which may be enforced in the action, or separately, a *mandamus* commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested.

The mandamus claimed in an action is not the prerogative mandamus which may be granted where a party has no other remedy: see notes to sec. 17, *supra*, pp. 51-53; but the power to grant a mandamus in an action, which was originally a new power conferred on Common Law Courts (analogous to the powers of acting directly in *personam* possessed by the Court of Chancery) was a power "to direct the performance of some act, of something to be done, which is the result of an action, where an action will lie," *per* Brett, L.J., in *Glossop* v. *Heston Local Board*, 12 Ch. D. 122.

It was thus in the nature of an execution, applicable in cases where relief to a plaintiff, who was damaged by the non-fulfilment of a duty by defendant, would be best given by enforcing the specific performance of that duty, and is in fact the Common Law equivalent of what in Equity was called a "mandatory injunction": see *Smith* v. *Chorley*, 1897, 1 Q. B. at p. 539.

Under the system introduced by *The Judicature Act* it would seem to be proper to hold, under section 17 that, in all cases in which the appropriate relief is to compel the performance by the defendant of that which the plaintiff is in the action held entitled to have performed, performance should be compelled by a mandatory judgment. *In re London, Huron & Bruce Ry. Co.* v. *E. Wawanosh*, 36 U. C. Q. B. 93, it was held that a prerogative writ of mandamus was not the appropriate remedy to enforce a contract: see also *Re N. Simcoe Ry. Co.* v. *Toronto*, *Ib.*, 101.

And under the corresponding English enactment it was decided that the power given to grant a mandamus is only to be exercised to enforce performance of duties of a public nature, not those arising simply by contract: *Benson* v. *Paull*, 6 E. & B. 273; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; and that the duty must be one in which the applicant is interested; and the remedy by mandamus is only available where there is no other effectual legal remedy: *Bush* v. *Beaven*, 1 H. & C. 500.

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It has been said that the only class of cases, in which a mandamus is grantable is where there is a duty of a public natura, or a duty created by an Act of Parliament, in the fulfilment of which the plaintiff had a personal interest: see Harrison, C. L. P. Act, 461.

Wherever a statute gives a right to a person to have an act or duty fulfilled by another, and that other does not fulfil it, a causa of action arises, for which, at least, nominal damnges may he recovered: see *Young* v. *Erie & Huron, etc.*, 27 Ont. 531.

Section 17 of the Act goes further, however, than the previous statutes, and enacts that a mandamus may ha granted "hy an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should ha made."

Mandamus, when granted in an action.

Under that section, or this *Rule*, the remedy may he held to extend to cases of a more private nature than those to which the prerogative mandamus would nppiy: see *Norris* v. *The Irish Land Co.*, 8 E. & B. 527, per Coleridge, J., and *Swan* v. *North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175; *Worthington* v. *Hulton*, L. R. 1 Q. B. 63; and in actions even where no actual damage is sustained: *Fotherby* v. *Metropolitan Ry. Co.*, L. R. 2 C. P. 188.

A mandamus waa granted to improvement commissioners, directing them to levy a rate to satisfy the claim of tha plaintiff, a creditor: *Ward* v. *Lowndes*, 1 E. & E. 940, 956; and to apply thair funds in payment of debentures: *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642; to a railway company, compelling them to give a notice to treat, and proceed with tha purchase of lands as to which they had given notice of an intention to take: *Morgan* v. *Metropolitan Railway Co.*, L. R. 3 C. P. 553; 4 C. P. 97; *Demorest* v. *Midland Ry. Co.*, 10 P. R. 73; see also *Tyson* v. *Mayor of London*, L. R. 7 C. P. 18; and to isaue a precept for the assessment of compensation after a notice to treat had heen given: *Fotherby* v. *Metropolitan Railway Co.*, L. R. 2 C. P. 188; *Guest* v. *Poole and Bournemouth Ry. Co.*, L. R. 5 C. P. 553; to a municipal corporation to compel tha making of repairs to a drain which it was their duty to repair, and the non-repair of which had caused damage to the plaintiff: *White* v. *Corporation of Gosfield*, 2 Ont. 287; and see *Re Moulton, etc.*, v. *Haldimand*, 12 Ont. App. 503; and to compel the opening of a road allowance so aa to enahle an occupant of land to have access thereto: *Hislop* v. *McGillivray*, 12 Ont. 749; see also *Re Wilson* v. *Wainfleet*, 10 P. R. 147; *Clarke* v. *Palmerston*, 6 Ont. 616; and to compel them to raise the money to pay the claim of the plaintiff as a creditor of the corporation: *Quaintance* v. *Howard*, 25 C. L. J. 545; and to compel a canal company to repair a specified hridge: *Rex* v. *Wilts and Berks Canal Co.*, 1912, 3 K. B. 623; nnd to compel a minister of the Crown to perform a ministerial duty imposed on him: *Re Massey Manufacturing Co.*, 11 Ont. 444; 13 Ont. App. 446. See as to the discretion of the Court: *Nicholl* v. *Allen*, 1 B. & S. 916, 934.

In cases of puhlic nuisance, the pu lic has an interest in the removal of the nuisance, hut any private individual who suffers particular injury may have his action for damages: see *Brown* v. *Mallett*, 5 C. B. 599; *Dobson* v. *Blackmore*, 9 Q. B. 991. And *semble*, in such case, under the present system, such private individual can hsve a mandamus for the removal of the nuisance.

When refused.

A mandamus will not he granted to enforce the running of a railway in accordance with an agreement between it and the municipality,

Rule 622.

as that would involve a minute supervision of the management of the railway: *Kingston* v. *Kingston*, etc., 28 Ont. 399; 25 Ont. App. 462; nor will the Court by mandamus interfere with the discretion vested in, and honestly exercised by, a public body: *Smith* v. *Chorley*, *infra*; but a contract of a street railway company to sell tickets on its cars at certain specified rates, was enforced by injunction restraining them from running cars on which tickets were not carried for sale at the specified rates: *Hamilton* v. *Hamilton St. Ry.*, 8 O. L. R. 642; 10 O. L. R. 594.

Where a statutory remedy is prescribed for the neglect of a public duty, or the applicant has other appropriate remedy, a mandamus will not be granted to enforce its performance: *Peebles* v. *Oswaldtwistle Council*, 1897, 1 Q. B. 165; 76 L. T. 315. See also cases in notes to sec. 17, *supra*, p. 51 *et seq.*

Mandamus in action not granted where prerogative mandamus is the proper remedy.

But where the proper procedure is to apply for a prerogative mandamus, an action for a mandamus cannot be maintained: *Smith* v. *Chorley*, 1897, 1 Q. B. 532, 678; 76 L. T. 637; *Baxter* v. *London County Council*, 63 L. T. 767; but where an action was brought, and a motion made in it, for a mandamus, the proceedings were amended so as to turn the application into a summary motion for the prerogative mandamus: *Toronto Public Library Board* v. *Toronto*, 19 P. R. 329.

Jurisdiction to grant prerogative mandamus on motion.

The Supreme Court has, by virtue of the transference to it of the former jurisdiction of the Common Law Courts, jurisdiction to grant an order of *mandamus* wherever the prerogative writ of *mandamus* might formerly have been granted.

The prerogative writ was formerly obtained at a sitting of the Court in Term, and was not usually peremptory in the first instance, but in an alternative form, commanding the person to whom it was directed to do the act specified, or shew cause to the contrary, which was done by a return to the writ.

The enactment from which this *Rule* is taken was passed to enable applications for the prerogative writ of mandamus to be made in Chambers at any time, instead of only during the sittings of the Court in Term, and to empower the Court to grant a writ, to which obedience was the only admissible return. The preamble to the original Act, 35 Vict. c. 14, was: "Whereas in many cases very great injustice is done by the delay in the issue of the prerogative writ of mandamus; and whereas it is necessary to devise a more speedy and summary method for the issue of the same."

Application to be to Judge in Chambers.

The Jud. Act, and the present *Rule* therefore provide for a summary application to a Judge in Chambers: see *Rule* 207 (11); for the issue of a peremptory order in the first instance; so that all questions as to the right to the order, and the matters which otherwise would be raised by way of return to a mandamus *nisi*, may be argued, and disposed of at once, without any previous order and return thereto. That is the mode of procedure now generally adopted. The right, however, to move the Court for a mandamus *nisi*, as formerly, is not taken away.

The present *Rule* probably applies to both the prerogative mandamus, and that grantable in an action under sec. 17 of the Jud. Act, but, in an action, a mandamus will not be granted on an interlocutory application unless the plaintiff clearly shews that he will suffer some injury by waiting for the result of the action: *Widnes Alkali Co.* v *Sheffield*, etc., 37 L. T. 131.

The Master in Chambers, and officers having like jurisdiction, have no power to grant orders of mandamus: see *Rules* 205, 208, 209; nor has a Judge of a County Court: *Rich* v. *Melancthon*, 26 O. L. R. 48, per Middleton, J.—An application under this *Rule* is to be made to a Judge in Chambers: *Rule* 207 (11). Rule 622.

Where a summary application for a mandamus was made in Court, the costs of a Chamber motion only were allowed, where the circumstances did not justify the imposition of a larger sum for costs than was sufficient to indicate that the respondents were in the wrong: *Re Brookfield and Public School Section 12, Township of Brooke*, 12 P. R. 485.

See notes to Jud. Act, sec. 17, *supra*, p. 51, *et seq.*

On an application for a prerogative mandamus the affidavits to found the application are simply exhibited in the Court, without any cause or matter, *e.g.*, "In the Supreme Court of Ontario;" formerly, the rule *nisi* or absolute, for the writ, and all subsequent proceedings were further entitled "the King against (*naming the defendants*)."; but see Corner's Crown Pr., pp. 220, 224, where it is said that affidavits were not usually so entitled until after the granting of the rule absolute. In the case of *Toronto Public Library Board* v. *Toronto*, 19 P. R. 329, the title was amended by adding "In the matter of the Toronto Public School Board, etc., etc.," but it is doubtful whether that was a proper carrying out of the Chancellor's direction.

A notice of motion for a prerogative order of mandamus in lieu of an application for an order *nisi* is now the proper practice. The notice must be seven clear days: *Rule* 215 (2).

Demand and refusal.

In order to obtain a prerogative mandamus on motion, proof of a previous demand, and refusal to do the act required, must be adduced; but where a plaintiff has a right to a mandamus in an action, the prerequisites to obtaining a prerogative mandamus are not essential to be observed: *Young* v. *Erie & Huron Ry.*, 27 Ont. 530.

Motion to be made by counsel.

The motion for an order of mandamus must be made by counsel, an application by a suitor in person will not be entertained: *Ex p. Wallace*, 1902, 2 K. B. 488, where *In re Lewis* (1884), 14 Q. B. D. 474, was held to be no authority for a contrary practice. The notice of motion takes the place of an order *nisi*, and the order, if granted, is usually absolute in the first instance: *sed vide*, *Re Board of Education of Napanee & Noponee*, *infra*.

A peremptory order is seldom awarded *ex parte*: see Tapp. 407; and see *Re Board of Education of Napanee & Naponee*, 29 Gr. 395, 398; but the Court formerly, under C. R. 1092 might grant it *ex parte*, but that *Rule* has not been continued; but see *Rule* 216.

Answer to motion.

Every good legal cause why the prosecutor is not entitled to a mandamus, whether it arises from the prosecutor's personal incapacity to obtain it, or by reason of the absence of a legal right to what he seeks, will form a good and valid answer to the motion: see Tapp. 358. A legal impossibility to perform what is asked, is also a good answer: see *Re Bristol & Somerset Ry.*, 3 Q. B. D. 10; but the fact that the defendant had, after notice of the plaintiff's claim, by his own act, put it out of his power to comply therewith, is not a legal impossibility: see *Regina* v. *Bornordo*, 23 Q. B. D. 305.

Rule 622.

Former procedure in mandamus.

Former C. R. 1087 provided that "The return to be made to any such order, and issues joined in fact or law upon any traverse thereof, shall be made and joined by and in the name of the person to whom such order is directed; but nevertheless the same shall, if the Court thinks fit so to direct, be expressed to be made and joined on the behalf of such other person as may be ordered; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment is given for or against the party applying for the *mandamus*, such judgment shall be given against or for the person on whose behalf the return is expressed to be made, and such person shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the order was directed might and would otherwise have had.

Orders.

For or against whom judgment shall be given.

Costs.

False return.

(2) Where the person to whom an order of *mandamus* is directed shall be found by the Court or a Judge to have made a false or insufficient return thereto, the Court or Judge may order the person making such false or insufficient return to pay to the party prosecuting such order any damages occasioned by such false or insufficient return, to be assessed by such Court or Judge, or otherwise as may be directed."

Damages for false return.

(3) In case damages are awarded under this Rule, the person against whom the same are awarded shall not be liable to be sued in any other action for the making of such return."

These provisions are not continued in the present *Rules*.

Cases of death, resignation or removal, of persons making the return.

By C. R. 1088, it was also provided: "In case the return to any such order is, in pursuance of the authority given as aforesaid, expressed to be made on behalf of any other person as aforesaid, the further proceedings on such order shall not abate or be discontinued by the death or resignation of, or removal from office of the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory *mandamus* is awarded, the same shall and may be directed to any successor in office or right of such person." This Rule has not been continued.

It appeared to authorize the carrying on of proceedings in the name of a deceased person: probably that can no longer be done and in the case of any party dying, an order to continue proceedings under *Rule* 301 is now necessary.

Form of objections to return.

Former C. R. 1089 provided that "(1) Where the person prosecuting any order of *mandamus* wishes or intends to object to the validity of any return to the same, he shall do so by way of motion to strike out or set aside the return; and where a person objects to the validity of the order of *mandamus* he may in like manner move to set it aside.

Proceedings thereon.

Judgment.

(2) The Court or Judge shall adjudge whether or not the return is valid in law, or whether the order of *mandamus* is or is not valid in law; and if it is adjudged that the order is valid in law, but that the return thereto is not valid in law, the Court or Judge shall award (a) a peremptory order of *mandamus* shall issue in that behalf."

Return to mandamus.

Former C. R. 1085 provided that "Where an order of mandamus shall be issued, the person required to make a return thereto shall, on being duly served therewith, make his return thereto as thereby required, on pain of being proceeded against for contempt of Court." But neither of those *Rules* has been continued.

C. R. 1083 embodied the provisions of 9 Anne, c. 25, which was passed to do away with the former necessity of issuing *alias* and *pluries* writs. Rule 623. Present procedure.

Under the present *Rules* the former procedure as to a return to the order seems to be abolished. The order now made is probably intended to be peremptory in its terms; and if the defendant fails to comply with it, after being duly served, he may be proceeded against for contempt of Court.

The procedure of a return being abolished, it follows that the power to award damages against a person making a false or insufficient return to a mandamus no longer exists, and it would seem that the only remedy for disobedience is an application to punish the disobedient party for contempt. The jurisdiction to award damages on a summary application was not a part of the inherent jurisdiction but was purely statutory, founded originally on 9 Anne, c. 25 (see R. S. O. c. 324, s. 30), and the statute being repealed, the jurisdiction is gone: see *Rule* 2.

Formerly a mandamus differed from a mandatory injunction in that it required a return to be made to the Court of the manner in which it had been executed, whereas a mandatory injunction contains no such provision. This distinction would now appear to be abolished. No form is given in the appendix, of a mandamus under the present *Rules*, but it is probably intended, that both a prerogative, and statutory, mandamus, shall be in terms an order absolute to do the required act. Return to order of mandamus no longer required.

Enforcement of Mandamus.—Proceeding for contempt, in which the Court may impose fine or imprisonment, is now the proper and only remedy for disobeying a peremptory mandamus; *Demorest* v. *Midland Ry. Co.*, 10 P. R. 82; *Rex* v. *Hammond*, 111 L. T. 206.

623. No writ of mandamus, prohibition or *certiorari* shall be issued, but all necessary provisions shall be made in the judgment or order. C.R. 1083. *Amended.* Writs of mandamus to issue.

This *Rule*, though purporting to be founded on C. R. 1083, appears really to be founded on C. RR. 1080, 1100 and 1101. C. R. 1094 also provided that a writ of injunction should not be issued, but that a judgment or order should have the same effect as a writ of injunction formerly had: but that provision has not been continued in the present *Rules*.

As to applications for mandamus: see Jud. Act sec. 17, *supra*, pp. 50, 51, and notes to *Rule* 622.

Prohibition.—Prior to R. S. O. 1877, c. 52, s. 2, a mere surmise or suggestion of the ground for prohibition was enough to put the Superior Court in motion, and the suggestion was not required to be verified, where there was a plea in the Court below, but if there was no plea, then an affidavit was required. Prohibition.

The right to a prohibition order has to be tried now upon a motion, subject to the same rules as other motions. Amongst others, *Rules* 226-232, 338, will be applicable, and, in such cases as the Court would formerly direct a declaration and subsequent proceedings in prohibition, a Court or Judge can now upon a motion direct that evidence be taken

Rule 823. in such way as may seem proper, and if necessary that an issue be tried.

Application for, how made. The motion must be made in Chambers to a Judge: *Rule* 207 (11). The Master in Chambers, and Local Judges, and Masters, have no jurisdiction: see *Rules* 205, 207, 208, 209, 210.

It is to be made by originating notice: *Rule* 622, and must be a seven clear days notice: *Rule* 215 (2).

When granted. Prohibition is the proper remedy where the inferior Court is exceeding its jurisdiction, not where having jurisdiction it has committed an error in law, or good conscience: *Biddall* v. *Gibson*, 17 U. C. Q. B. 98; *In re Dyer & Ellis*, 30 Ont. 637; or merely an error or irregularity in procedure, the remedy, if any, in such case is by appeal, and if there is no appeal there is no remedy: *Reg.* v. *Mayor of London*, 69 L. T. 721; *Re First D. C.* v. *Huron*, 5 P. R. 467; but if a mistake in law is the ground on which the inferior Court assumes jurisdiction, then prohibition lies: *Re Royston Park*, 28 O. L. R. 629; *Re Long Point Co.* v. *Anderson*, 18 Ont. App. 401; *Ameliasburgh* v. *Pitcher*, 13 O. L. R. 417.

A prohibition may be granted though the question of jurisdiction has not been raised in the Court below, but the omission to raise the objection there may disentitle the applicant to costs: *Nerlich* v. *Clifford*, 6 P. R. 212; but if the applicant submits to the jurisdiction of the Court below and cross-examines witnesses, and argues the case on the merits without objecting to the jurisdiction, a prohibition on the ground of excess of jurisdiction may be refused: *In re Burrowes*, 18 C. P. 493; and see *Richardson* v. *Shaw*, 6 P. R. 296. Where the Judge in the Court below acts under an appealable order of the Supreme Court, which is not appealed from, prohibition will be refused though the Court may think the order of the Supreme Court erroneous: *Dierkin* v. *Philpot*, 1901, 2 K. B. 380; 85 L. T. 246.

Where the want of jurisdiction is apparent on the face of the proceedings, prohibition must be granted *ex debito justitiæ*, and the applicant is not estopped by any consent or acquiescence on his part, but the granting of prohibition is discretionary where the want of jurisdiction is not apparent, and depends on facts which the applicant has neglected to bring to the attention of the inferior Court: *Farquharson* v. *Morgan*, 1894, 1 Q. B. 552; 70 L. T. 152.

Prohibition is an extreme measure, granted summarily only in a very plain case of the unlawful exercise of jurisdiction by a subordinate tribunal: *Re Cummings & Carleton*, 25 Ont. 607; *In re Grant* v. *Allen*, 26 U. C. Q. B. 123.

Costs. A successful party on an application for prohibition is entitled to, and should be awarded, costs, unless the Court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them; and such party should not be deprived of costs, unless there appears to have been impropriety of conduct, which induced the litigation, or impropriety in the conduct thereof: *Re McLeod* v. *Emigh* (2), 12 P. R. 503; *Reg.* v. *Justices of London*, 1894, 1 Q. B. 453; 70 L. T. 148; and in case a difficulty where there is no misconduct on the part of the inferior Court, though the application be successful, costs may be refused: *Rieken* v. *Yorke Peninsular Justices*, 1908, A. C. 454; 99 L. T. 629.

Certiorari. **Certiorari.**—C. R. 1101 provided that an order for certiorari might be granted on a motion to the Court or a Judge, but that provision has

not been continued. An application for an order of certiorari must now be made to a Judge in Court: see *Rules* 205, 207. Rule 624.

The Master in Chambers, and Local Masters, and Local Judges, have no jurisdiction to entertain such applications: see *Rules* 207, 208, 209, 210.

The application is to be made by originating notice, and must be a seven clear days' notice: see *Rules* 622, 215 (2).

Where the inferior Court has the like jurisdiction as the Supreme Court in the particular matter, a *certiorari* to bring up and quash the proceedings cannot be granted: *Skinner* v. *North Allerton C. C. Judge*, 1899, A. C. 439.

After a cause is removed from an inferior Court by *certiorari*, the plaintiff cannot be compelled to prosecute it in the Supreme Court: *Harrison* v. *Bull*, 1912, I K. B. 612.

Where a motion is desired to be made to quash a conviction for alleged breach of a Provincial law, no order of *certiorari* is necessary, but a six days' notice may be given as prescribed by the Jud. Act, s. 63, *supra*, p. 223. Motions to quash convictions.

Where a motion is desired to be made to quash a conviction for breach of a Dominion law, no certiorari is necessary, but a six days' notice may also be given as prescribed by the *Rules* passed under the Criminal Code, 27 March, 1908, see *supra*, p. 140.

624. The Court may require notice to be given to any person claiming any right or interest in the subject-matter of the application. C.R. 1086. *Amended.* Court may direct notice to persons to be given interested.

This *Rule* is probably directed to meet the case of a mandamus required to be issued to officers or persons whose functions are merely ministerial, and to provide that other persons having or claiming right or interest in the matter, may be called upon to shew cause, and may be made liable to costs: see *Demorest* v. *Midland Ry. Co.*, 10 P. R. 73.

The Court may, it is presumed, give direction under this *Rule* before the service of the originating notice, or may on the return of the notice direct it to stand over for the purpose of serving some other person than those served.

Rule 626.

CHAPTER XXIV.

INTERPLEADER.

Where relief by interpleader granted.

625. Relief by way of interpleader may be granted:—

(*a*) Where the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more persons (hereinafter called the claimants) making adverse claim thereto:

(*b*) Where the applicant is a Sheriff and claim is made to any money, goods, or chattels, lands or tenements, taken or intended to be taken in execution under a writ of execution, or to the proceeds or value thereof, by any person other than the person against whom the process issued. C.R. 1103.

Jurisdiction in interpleader.

Prior to the Judicature Act, 1881, the jurisdiction of the Common Law Courts in interpleader was regulated by R. S. O. 1877, c. 54, as amended by 44 V. c. 7; 49 V. c. 16, s. 13; but the jurisdiction in Equity except in the case of interpleader by Sheriffs did not depend upon the statute: *McElheran* v. *London Masonic, etc.*, 11 P. R. 181.

A stakeholder could only obtain an interpleader order in the Common Law Courts, where he was a defendant, having been actually sued; in Equity, it was sufficient if a claim was made against the applicant, and he was in danger of being molested by conflicting rights: Story Eq. Jnr. s. 808.

At Common Law a stakeholder seeking relief could only do so, as above mentioned, when he was a defendant in respect of a claim for money or goods, of which he had to be in possession, as he had to be in a position to dispose of them in any manner directed by the Court; he also was required to have received a distinct notice of the adverse claim, an expectation of being sued was not enough. The claim of the third party had to be in respect of the same subject matter in respect to which the defendant was sued, but it was not necessary that it should be an absolute right of property in the subject matter.

Where rent was claimed from A. by B., and was garnished by creditors of C. (the father of B.), who, it was claimed, was the real lessor. A. refusing to pay rent unless protected from these claims, and being sued in a County Court by B. for the full amount of rent, was held entitled to relief under this *Rule: Re Anderson & Barker*, 13 P. R. 21.

Interpleader by stakeholders.

Interpleader by Stakeholders.—Under the present *Rule* which in effect follows the Equity practice, the person seeking relief is only

required to be under liability for the subject matter, it is not neces- Rule 625.
sary that he be first sued, before applying for relief. Probably this *Rule* does not extinguish any power to compel interpleader existing formerly in Equity upon bill filed, and now possessed by the Supreme Court: see *McElheran* v. *London Masonic, etc.*, 11 P. R. 181; *Western Canada L. & S. Co.* v. *Court*, 25 Gr. 151; *Henderson* v. *Watson*, 23 Gr. 355.

Formerly, if the defendant might be liable to both the plaintiff and the third party, he could not require them to interplead. This may be still the case under this *Rule*: see *Farr* v. *Ward*, 2 M. & W. 844.

And where a person is sued by two persons in respect of the same transaction, he is not entitled to an interpleader order on the ground that he claims to be indebted to only one of them: *Greatorex* v. *Hackle*, 1895, 2 Q. B. 299.

The Crown cannot be compelled to interplead, not having been mentioned in the Act: see *Candy* v. *Maughan*, 1 D. & L. 745; *McGee* v. *Baines*, 3 U. C. L. J. 151.

A person outside the jurisdiction may be compelled to interplead. Leave to serve the notice out of the jurisdiction must be obtained under *Rule* 25; *Belmonte* v. *Aynard*, 4 C. P. D. 352; *Credit Gerundeuse* v. *Van Weede*, 12 Q. B. D. 171; *Re Confederation Life Association* v. *Cordingly*, 19 P. R. 16, 89; and see *Rule* 3 (*b*) and (*j*); thus, where shares in a foreign joint stock company were in dispute, and the company had been sued within the jurisdiction by one of the rival claimants, it was held that the company was entitled to interplead, although the company and both the claimants were out of the jurisdiction, and although a claim for damages against the applicant was made by one of the claimants in respect of the shares: *Re Underfeed Stoker Co.*, 1 O. L. R. 42; but where the fund in dispute was payable in a foreign country by foreigners residing therein to other foreigners also residing therein, and a claimant within the jurisdiction claimed it, it was held that the person from whom the fund was claimed could not require the parties to interplead in Ontario: *Re Benfield & Stevens*, 17 P. R. 300, 339, and this may perhaps still be the case notwithstanding *Rule* 25 (3); see *Harris* v. *Bank of B. N. A.*, 19 P. R. 51.

It would seem to be immaterial whether the titles on which the adverse claimants rely are legal, or equitable, see Jud. Act, sec. 22 *supra*, p. 94, and *Ruston* v. *Pope*, L. R. 3 Ex. 269; *Bank of Ireland* v. *Perry*, L. R. 7 Ex. 14; *Duncan* v. *Cashin*, L. R. 10 C. P. 554; 32 L. T. 497; *Engleback* v. *Nixon*, L. R. 10 C. P. 645.

A debtor who is being sued, and who has notice of an assignment of the debt, may require the claimants to interplead as to part and dispute the residue; and his application may be either under this *Rule* or under *The Conveyancing and Law of Property Act* (R. S. O. c. 109), s. 49, and the proceedings in the action may be stayed under the latter provision: *Reading* v. *School Board for London*, 16 Q. B. D. 686.

Where the claim of one of the claimants is for damages for the detention of the subject matter in dispute, the applicant is entitled to an order to interplead: *Attenborough* v. *St. Katharines Dock Co.*, 3 C. P. D. 450; *Re Canadian Pacific Ry. & Carruthers*, 17 P. R. 277.

Quære, whether interpleader is a proper remedy for trying the right to securities as between co-sureties: *Trerice* v. *Burkitt*, 1 Ont. 80.

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Interpleader was ordered at the instance of an auctioneer: *Watson* v. *Henderson*, 12 U. C. L. J. 149; *Tanner* v. *European Bank*, L. R. 1 Ex. 261; of a bailee of a policy of insurance: *Attenborough* v. *St. Katharines Dock Co.*, 3 C. P. D. 450; of a broker to whom shares had been transferred for sale, a rival claim to which was set up: *Robinson* v. *Jenkins*, 24 Q. B. D. 167; 62 L. T. 439; and see *Re Underfeed Stoker Co.*, 1 O. L. R. 42; and of a wharfinger with whom were stored goods claimed by two banks, and notwithstanding a letter written by the wharfinger to one of the banks, stating that the goods were held for that bank: *Ex p. Mersey Docks & Harbour Board*, 1899, 1 Q. B. 546.

But where fire insurance was effected by a lessor and lessee, and a loss having occurred, the lessor claimed that the insurance money should be applied to the restoration of the demised premises, and the lessee claimed it should be paid to him, it was held not to be a case within clause (*a*), and therefore not a case for interpleader: *Sun Insurance Office* v. *Galinsky*, 1914, 2 K. B. 545; 110 L. T. 358.

Interpleader was ordered on the application of a purchaser *pendente lite* of land, the conveyance of which was in the action attacked as fraudulent, as against creditors of the vendor, the purchaser being sued by the vendor in another action, for the purchase money, which he was willing to pay into Court: *Molsons Bank* v. *Eager*, 6 O. W. R. 92, 180; 10 O. L. R. 452.

A solicitor who has recovered judgment for a client under an ordinary retainer has no authority, without special instructions, to engage in proceedings in interpleader: *James* v. *Ricknell*, 20 Q. B. D. 164; but where he is retained in interpleader proceedings he has the ordinary powers of a solicitor, as in other contested cases: *Hackett* v. *Bible*, 12 P. R. 482.

A bailee who is estopped from setting up *jus tertii* may nevertheless be entitled to interplead: *Ex p. Mersey Docks & Harbour Board*, 1899, 1 Q. B. 546.

Clause (*a*) of the *Rule* applies only in the case of conflicting claims to money, goods or chattels; it has no application to conflicting claims to land—Clause (*b*) enables Sheriffs to interplead in the case of conflicting claims to land taken in execution, etc. in regard to claims to which the *Rule* does not extend an action must be brought.

Practice.—Affidavits entitled "In the H. C. J. Chy. D. Between A., applicant, and B. and others, claimants," were held sufficient: *Re Anderson & Barber*, 13 P. R. 21.

Costs.

The costs of proceedings are, under Jud. Act, s. 74 *supra*, in the discretion of the Court, and were ordered to be paid by the person causing the litigation, in *Re Anderson & Barber*, *supra*.

A stakeholder applying for an interpleader order, and acting *bona fide*, is entitled to deduct from the fund in dispute the taxed costs occasioned by the interpleader: *Clench* v. *Dooley*, 56 L. T. 122, without prejudice to the question as to how the costs are to be ultimately borne: *Searle* v. *Matthews*, W. N. 1883, 176.

It is too late to apply for an interpleader after judgment: *Stevenson* v. *Brownell*, 1912, 2 Ch. 344.

Interpleader by bailees and carriers.

Bailees, and Carriers.—To an action by a bailor against a bailee to recover possession of the goods bailed, it is no defence to show that

since the bailment the bailor has parted with the property in the goods, and with the documents of title to a third person, unless it is also shown that such third person, is entitled to the goods and that the bailee defends by his authority: see *Rogers* v. *Lambert & Co.*, 1891, 1 Q. B. 318; 64 L. T. 406. Rule 625.

In *Re Canadian Pacific Ry. Co. and Carruthers*, 17 P. R. 277, an interpleader order was granted respecting claims to grain deposited under a contract in the Ry. Co.'s elevators, notwithstanding that the specific grain could not be delivered, but only grain of like standard and quality.

An interpleader order was granted on the application of a bailee notwithstanding he had by attornment to one of the claimants estopped himself from denying his title, and the claimant alleging the estoppel was restrained from bringing an action, except as to any claim he might have, by reason of the alleged estoppel, if defeated in the issue: *Ex p. Mersey Docks & Harbour Board*, 1899, 1 Q. B. 546; 80 L. T. 143.

Sheriffs.—A Sheriff's right to call on rival claimants to interplead is not confined to the cases falling within clause (*b*); but in cases not provided for by that clause he may invoke the assistance of clause (*a*): *Re Gould* v. *Hope*, 20 Ont. App. 347. Interpleader by sheriffs.

The disposition of the Court is to be more liberal in relieving the Sheriff than formerly: *Darling* v. *Collatton*, 10 P. R. 110; *Lucas* v. *Holliday*, 8 O. L. R. 542. When entitled or not to interplead.

The right of a Sheriff to an interpleader order depends on his having the subject matter of the rival claims in his possession, or his having the right to take it in execution with an intention so to do. He cannot require claimants to interplead in respect of a mortgage assigned by the debtor (the mortgagee), which (though acting under *The Execution Act* (R. S. O. c. 80), s. 25 (2)), he has neither actually seized, nor is able to seize: *Keenan* v. *Osborne*, 7 O. L. R. 134.

Where the application is made by a Sheriff under clause (*b*) the Sheriff must have made a seizure (or be ready and intending to make one: see *Keenan* v. *Osborne, supra*), before he can apply, and before the Court can have any summary jurisdiction to direct an issue: *Ogden* v. *Craig*, 10 P. R. 378; *Teskey* v. *Neil*, 15 P. R. 244; *Goslin* v. *Tune*, 2 U. C. Q. B. 177; and he must retain possession: *Wheeler* v. *Murphy*, 1 P. R. 336. An interpleader order was granted where the goods were dies, plates, etc., admittedly the property of the execution debtors, though in the hands of the claimants for the purpose of executing a printing contract with the debtors, and had not been actually seized by the Sheriff: *Brown* v. *Markland Publishing Co.*, 6 O. W. R. 142.

An interpleader order was granted where the execution creditor alleged that the debtor had a half interest in the goods, which was disputed by the person in whose possession the goods were: *Lucas* v. *Holliday*, 8 O. L. R. 541.

Where the goods seized are in the possession of the debtor, or he is in possession jointly with a third person, the proceedings detailed in *Rules* 637 and 638 should be taken to bring the claim to the notice of the execution creditor, and hear from him whether or not he acknowledges its validity, before the Sheriff applies for an interpleader order.

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An interpleader was granted as to moneys brought on the premises by the debtor after the Sheriff had, under an execution, placed a man in possession, but without his knowledge, and which were claimed by the administrator in bankruptcy of the debtor: see *Johnson* v. *Pickering*, 1908, 1 K. B. 1; 98 L. T. 68. As to seizing money in execution see that case and *The Execution Act* (R. S. O. c. 80), s. 20.

A *chose* in action is not bound by delivery of the writ, but only by seizure: *Rennie* v. *Quebec Bank*, 1 O. L. R. 303.

Money paid under protest by a claimant was held to be proceeds or value of goods and chattels within the above *Rule*: *Smith* v. *Critchfield*, 14 Q. B. D. 873.

The expression "goods and chattels" in *The Execution Act*, and in this *Rule*, includes stock of a joint stock company: *Brown* v. *Nelson*, 20 C. L. J. 390; 4 C. L. T. 594.

Goods in possession of an Assignee in Insolvency under the Insolvent Act of 1875, could not be taken in execution, and neither a Sheriff nor an execution creditor could sue the Assignee and oblige him to interplead, though the debtor might do so: *McMaster* v. *Meakin*, 7 P. R. 211.

Interpleader may be directed respecting the proceeds of a sale in the Sheriff's hands: *Booth* v. *Preston, etc., Ry. Co.*, 3 P. R. 90; and respecting money paid under protest by a claimant whose goods were seized, and who claimed the money; the Sheriff was also held to be entitled to protection against an action for trespass for entering upon the premises of a person other than the debtor: *Smith* v. *Critchfield*, 14 Q. B. D. 873; see also *Edmonds* v. *Wallingford*, 33 W. R. 647.

Where a Sheriff who, without special direction from the execution creditor, had seized and sold goods alleged to have been exempt from execution, was being sued therefor by the execution debtor, it was held that the Sheriff was not entitled to interplead as to the proceeds realized from the sale: *Re Gould* v. *Hope*, 20 Ont. App. 347.

Claim by landlord for rent.

A Sheriff may apply for an interpleader order where a claim for rent is made by a landlord: *McLaughlin* v. *Hammill*, 22 Ont. 493; and see *Flynn* v. *Cooney*, 18 P. R. 321.

But where a Sheriff seized, but put no bailiff in possession of the goods, and then the landlord seized them for rent, it was held that a second seizure by the Sheriff was illegal, as they were *in custodiâ legis*, and also that the validity of the landlord's claim could not be decided in Chambers: *Craig* v. *Craig*, 7 P. R. 209.

The right of a landlord to be paid out of the proceeds of sale under *The Landlord and Tenant Act* (R. S. O. c. 155), s. 55 (8 Anne c. 14, s. 1)), has been upheld against a trustee in bankruptcy of the debtor: *Re Mackenzie*, 1890, 2 Q. B. 566.

Where goods distrained for rent have been impounded on the premises under *The Landlord and Tenant Act* (R. S. O. c. 155), s. 50 (4), it is not requisite that anyone on the landlord's behalf should be left in possession of the goods: *Jones* v. *Biernstein*, 1899, 1 Q. B. 470; 1900, 1 Q. B. 100; 81 L. T. 553.

A Sheriff was held not entitled to an interpleader by reason of a claimant's disputing the right of subsequent execution creditors to the goods seized, where there would be no fund to satisfy such subsequent executions: *Canadian Bank of Commerce* v. *Bruce*, 2 C. L. T. 92.

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Withdrawal by Sheriff from possession.

The question whether the Sheriff by withdrawing for a time from the premises, on which he has made a seizure, has abandoned possession of the goods seized, is a question of fact. Where he goes out of possession for some temporary necessity such as to get food, or to see a doctor, he does not abandon possession; but where he went out to assist the debtor, and enable a sale of the debtor's business to be carried out, that was held to be an abandonment of possession: *Bogshawes (Limited)* v. *Deacon*, 1898, 2 Q. B. 173.

Inquiries to be made, and bringing in claimants.

A Sheriff should exercise no discretion as to the disposition of the goods seized by him, but should come at once to the Court, otherwise he will disentitle himself to protection: *Boswell* v. *Pettigrew*, 7 P. R. 393; *Adams* v. *Blackwell*, 10 P. R. 168; *Flynn* v. *Cooney*, 18 P. R. 321. He should, however, make some inquiry as to the nature of the claims made, and inform the execution creditor of them: *Wolker* v. *Niles*, 3 Chy. Ch. 59.

Sheriff may interplead as to lands.

Where a Sheriff's right to execute a writ of possession of land is contested by persons in possession on the ground that the contestants were not parties to the action, the Sheriff is entitled to interplead: *Emerson* v. *Humphries*, 15 P. R. 84; see also *Adomson* v. *Adamson*, 12 P. R. 21; so also where the premises are vacant, though the doors are locked, the Sheriff being notified of a claim, may, without considering its validity, interplead; or *semble*, he may break open the doors and put the plaintiff in possession: *Hall* v. *Bowerman*, 19 P. R. 268.

Discretion as to granting order.

In *Duncan* v. *Tees*, 11 P. R. 66, it was said that interpleader orders should only be made with caution, and, where goods were in the possession of a third person, there should be strong presumptive evidence of the goods being the debtor's, which should ordinarly appear on affidavit of the belief of the Sheriff, and also of the execution creditor. This opinion has not been, to the full extent, followed in practice, the affidavit of the execution creditor is not considered necessary: and see *Ib.* 296; also *Edmonds* v. *Wallingford*, 33 W. R. 647; and it has been held that the Sheriff is not obliged to shew that the claim of a person not in possession of goods taken in execution, is open to objection, in order to entitle him to interplead: *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103; see also *Stocker* v. *Haggerty*, 67 L. T. 27.

The Sheriff was held entitled to make a second application for an interpleader order in respect of a claim by the same claimant, alleging a different title: *Goynor* v. *Salt*, 24 U. C. Q. B. 180; but not to contest the claim of a landlord which might have been disposed of on the first application: *Clarke* v. *Forrell*, 8 P. R. 234. A claimant cannot set up another title in the same issue, but must make a subsequent application to the Court: *Barker* v. *Leeson*, 1 Ont. 114.

Where the Sheriff had sold with the consent of both parties, it was considered that he had not improperly exercised any discretion of his own: *Darling* v. *Collatton*, 10 P. R. 110.

A Sheriff may disentitle himself to an interpleader order by not coming promptly to the Court when claims are made to the goods seized. He must come within reasonable time; improper delay will be an answer to the application: *Thompson* v. *Ward*, 1 P. R. 269; *McMaster* v. *Milne*, 2 P. R. 386. What will amount to such laches will depend upon the circumstances of each case: see *Boswell* v. *Pettigrew*, 7 P. R. 393; *Wilkins* v. *Peatmon*, *Ib.*. 84. He is not justified by the

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fact that the first seizure does not embrnce all defendant's goods, in delaying to npply till he can get possession of tho residue: *Miller* v. *Nolon*, 1 C. L. J. 327.

Where the claimant of the goods pnid the Sheriff the amount of the execution, snd the latter then withdrow; it was held thst he had not disentitled himself to relief by interpleader: *Paris Manufacturing Co.* v. *Walls*, 10 P. R. 138.

A Sheriff is not justified in applying for an interpleader order, nfter he has notice that the execution creditor declines to contest the clsim of the third party; and if, notwithstanding, he does apply for sn interpleader order, it msy he refused, nnd the Court will not order that no sction he brought agsinst him: *Sodcou* v. *Shorey*, 74 L. T. 240; and see *Yule* 638.

All c'aimnnts of whom the Sheriff is sware should be brought in: *Clorke* v. *Forrell*, 8 P. R. 234. Division Court execution creditors are proper parties, and should he brought in hy the Sheriff along with Supreme Court, and County Court, execution creditors: *MacFie* v. *Hunter*, 9 P. R. 149. Claims by the Crown csnnot he so dealt with: see *supro*, p. 1287.

Claimant out of jurisdiction.

A claimant out of the jurisdiction may, hy leave, be served, and compelled to interplead: *Rules* 3 (*b*), (*j*), 25; *Belmont* v. *Aynard*, 4 C. P. D. 354; *Credit Gerundeuse* v. *Von Weede*, 12 Q. B. D. 171.

Forum.

Where some writs sre in the Supreme Court, the interpleader application should he in the Supreme Court, though the seizure was under a County Court writ, and before the Supreme Court writ came to the Sheriff's hsnds: *Strange* v. *Toronto Telegroph Co.*, 8 P. R. 1.

An issue will not he directed unless the Sheriff is in possession or is responsible for the goods: *Rondot* v. *Monetary Times*, 19 P. R. 23; or they are otherwise within the control of the Court. As to what is a sufficient bond or security for the forthcoming of the goods; see *Ontario Bonk* v. *Merchonts Rank of Halifax*, 1 O. L. R. 235.

Issue.

Issue.—Issues between the plsintiff snd other execution creditors, as to the vslidity of the plaintiff's judgment and execution agsinst creditors generally, and as to sttaching creditors in pnrticular, on the ground of fraud, or ss being a preference, were held wsrrsnted by R. S. O. 1877, c. 54, ss. 3, 10: *Leech* v. *Williamson*, 10 P. R. 226; see slso *Standard Insurance Company* v. *Hughes*, 11 P. R. 220; snd *Doyle* v. *Lasher*, 16 C. P. 263; and the present *Rule* preserves the same power ss was contained in the R. S. O. 1877, c. 54, s. 10, at nny rate as regards attaching creditors: see *Rules* 625 and 3 (*h*), (*k*); snd the language of *Rule* 625 cl. (*b*), authorizing interpleader in the case of a clsim by "any person other than the person against whom tbe process issued," would slso seem to be wide enough to enahle a claim to be made by any judgment creditor who contends thst other judgments are fraudulent ss against him: see *McLaughlin* v. *Hommill*, 22 Ont. 493, the case of s claim for rent, which was also expressly provided by R. S. O., 1877, c. 54, s. 10.

Creditor impeaching judgment of another creditor.

A judgment obtsined hy one creditor cannot he impeached by other creditors on grounds of defence which the defendant might bave, but has not raised: see *Re Hague, Traders' Bank* v. *Murray*, 13 Ont. 727; *Bowerman* v. *White*, 16 Ont. App. 679.

Who to be plaintiff in the issue.

The plaintiff in an issue should he that party on whom the onus lies to estshlish title to the subject of the interpleader proceedings:

Re Hubbell, 19 P. R. 240. Where the claimant is *out of possession* he should be the plaintiff in the issue: *Doron* v. *Toronto Suspender Co.*, 14 P. R. 103; and so also where the possession is equivocal, as where the goods seized are at the house or residence of the execution debtor, where both he and his wife reside, and the wife is the claimant; in such a case she should be made plaintiff to the issue: *Bolster* v. *Wolker*, 30 C. L. J. 140; *Hogaboom* v. *Grundy*, 16 P. R. 47; *Thompson* v. *Doyle*, 16 C. L. T. 286; and see *O'Neill* v. *Forr*, 15 C. L. T. 345; but see *Forley* v. *Pedlor*, *infra*. The Form of issue in such case is "whether at the time of (*generally* the seizure) the goods and chattels seized were the property of the claimant as against the execution creditor:" *Van Every* v. *Ross*, 11 C. P. 133. Rule 625. Form of issue.

Where the claimant is *in possession* of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue: see *Duncan* v. *Tees*, 11 P. R. 66; *Dominion S. & I. Company* v. *Kilroy*, 15 Ont. App. 487; and see *Winfield* v. *Fowlie*, 14 Ont. 105, 107. This rule has been held to apply, even though the claimant was the wife of the debtor, where the goods were on premises on which the wife carried on a business, in which the debtor, her husband, had no interest, but in which he assisted her: *Forley* v. *Pedlar*, 1 O. L. R. 570. The form of issue in such case is "Whether at the time of the seizure the goods in question were exigible under the execution of (*the execution creditors*) as against the claimant:" see *Duncan* v. *Tees*, 11 P. R. 296.

Where proceeds of a policy of insurance, originally taken out in favour of the wife of the insured, were claimed by the widow and also by a third person claiming to be an assignee, the latter was made plaintiff in the issue: *Re Hubbell*, 19 P. R. 240.

The question on the issue, where the claimant is plaintiff, is not whether the execution creditor has a right to seize the goods, but whether the claimant has such an interest in them as entitled him to resist the seizure: *Grant* v. *Wilson*, 17 Q. B. 144.

The form of issue between a claimant and an attaching creditor, is whether the goods attached were at the time of the seizure the property of the claimant as against the attaching creditor, and not as against the absconding debtor: *Doyle* v. *Lasher*, 16 C. P. 263; see form of issue where there were two execution creditors and three claimants: *Merchants Bank* v. *Herson*, 10 P. R. 117.

For an issue where the execution creditor alleged that the debtor had a half interest in the goods in question: see *Lucas* v. *Holliday*, 8 O. L. R. 541.

See also *Leech* v. *Williamson*, 10 P. R. 226; *Standard Insurance Company* v. *Hughes*, 11 P. R. 220.

Where the Sheriff sold sufficient of the goods seized to satisfy the execution creditor's claim, and paid the proceeds into Court, leaving a surplus of goods in his hands, the proper form of the issue in such a case is "whether the goods seized and sold by the Sheriff or some part thereof were the property of the claimant as against the execution creditor:" *Tebb* v. *Powell*, 93 L. T. 468.

Where claimants' rights among themselves were in dispute, they were all made defendants, and the execution creditors plaintiffs, it being held that the Court would not try the title of the claimants between themselves, the purpose of the issue being answered if it was Disputes between claimants.

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determined that the execution creditors were, or were not, entitled to have their execution satisfied out of the goods seized: *Merchants Bank v. Herson*, 10 P. R. 117. See also *Nisbet* v. *Hill*, 5 O. W. R. 293, 337, 402.

Issue to be construed distributively.

An issue is to be taken distributively, so that the claimant may succeed as to part of the goods, though not as to the rest: *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

Issue to be filed.

The issue is to be filed as soon as settled, and filed in the county in which it is directed to be tried: *Rule* 125.

Particulars.

Where an issue is directed, a claimant is not entitled to an order for particulars of the goods taken by the Sheriff: *Bonely* v. *Krook*, 65 L. T. 377.

Jury notice.

Formerly a jury notice not served with the issue but with notice of trial, was held to be an irregularity only and not a nullity: *Leeson* v. *Lemon*, 9 P. R. 103. A jury notice will now be served pursuant to the Jud. Act, s. 56, *supra*, p. 215.

Trial

The issue should ordinarily be tried in the county where the goods were seized, but where for any cause, a speedy trial is necessary in the interest of justice, the trial may be ordered to take place elsewhere; *Furley* v. *Pedlar*, 1 O. L. R. 570.

Trial in C. C.

Issues involving $400 or less are to be tried at a County Court sittings: see *Rule* 646.

Staying trial.

Where an action has been brought by the execution creditor against a claimant under an assignment, to set aside the assignment, the trial of the issue, directed on an interpleader application to be tried, was postponed till after the trial of the action: *Brown* v. *Nelson*, 10 P. R. 421.

Action against Sheriff or ex. creditor.

The interpleader order usually protects the Sheriff only from actions; without special provision the order is no protection to the execution creditor: *Park* v. *Taylor*, 1 C. P. 414; *McCollum* v. *Kerr*, 8 U. C. L. J. 71; but the Judge has authority to restrain by the interpleader order actions against the execution creditor, as well as against the Sheriff: *Buffalo & Lake Huron Railway Company* v. *Hemmingway*, 22 U. C. Q. B. 562; *Ex p. Mersey Docks & Harbour Board*, *supra*, p. 1289.

Protection from action was refused where the Sheriff entered wrongfully and took goods, and a substantial grievance was suffered by the person whose house was entered: *De Coppett* v. *Bennett*, 17 T. L. R. 273.

Effect of accepting an issue.

Accepting and contesting an interpleader issue will not make execution creditors liable for the previous seizure by the Sheriff; an execution creditor cannot thus be made a trespasser by relation, or liable for the original seizure: *Kennedy* v. *Patterson*, 22 U. C. Q. B. 556; *Phillips* v. *Findlay*, 27 U. C. Q. B. 32; neither does acceptance of an issue by the claimant bar his right to sue the execution creditor for trespass; but such an action should not be brought until the issue is disposed of: *Cotton* v. *Stokes*, 10 U. C. Q. B. 262 *McCollum* v. *Kerr*, 8 U. C. L. J. 71; *Harmer* v. *Gouinlock*, 21 U. C. Q. B. 260. Where special directions are given to the Sheriff by the execution creditor, or in writing on the writ, by his solicitor, to make the seizure, an action lies against the execution creditor: *Morris* v. *Salberg*, 22 Q. B. D. 614; but directions verbally given by the solicitors clerk were held not sufficient to render the execution creditor liable: *Smith* v. *Keal*, 9

Q. B. D. 340. So also where there is nothing untrue in t directions Rule 625. on the writ so as to mislead the Sheriff into seizing goods of wrong person: *Candy* v. *Blaiberg*, 7 T. L. R. 424. See also, as to notice to Sheriff or execution creditor: *Lee* v. *Rumilly*, 7 T. L. R. ; *Lee* v. *Dangar*, 1892, 2 Q. B. 337; *Bagge* v. *Whitehead*, 1892. 2 Q. B. 355.

The result of the issue is conclusive as between the claimant and execution creditor, but the latter is not liable for any loss sustained by the successful claimant after the date of the interpleader order: *Kennedy* v. *Patterson*, 22 U. C. Q. B. 556; *Lister* v. *Northern Ry.*, 19 C. P. 408; *Henry* v. *Mitchell*, 37 U. C. Q. . 217. Result of issue binding on all parties.

Where an execution creditor refuses to contest the claim of any claimant, he should be barred as to such claimant by the order: *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103. Barring claims.

Security.—Sometimes a party to an issue is required to give security, as for example where the goods in question are allowed to be retained by a claimant, or where a sale is postponed and the property is of a wasting character; or the Sheriff is ordered to withdraw from possession. Security.

After the claimant has given security, where a surety in the bond becomes insolvent, an order will not be made barring the claimant, in default of giving fresh security: *Hogaboom* v. *Gillies*, 16 P. R. 96, affirmed by a division of opinion in the Court of Appeal: *Ib.*, 260.

Where a bond is given as security it is usually made by the claimant and two sufficient sureties, but the sole bond of a chartered bank claimant of goods seized in execution, is sufficient: *Ontario Bank* v. *Merchants Bank of Halifax*, 1 O. L. R. 235.

Where a claimant pays money into Court to abide the result of an issue, and the execution creditor succeeds in the issue, and takes the money out of Court, he is thereby estopped from thereafter disputing that as against himself the claimant is the owner of the goods: *Haddow* v. *Morton*, 1894, 1 Q. B. 95, 565. *Semble*, he might on the determination of the issue either have the goods sold in execution, or take the money out of Court, but he cannot do both.

Where a claimant is ordered to pay into Court the value of the goods seized, as a condition of the Sheriff being ordered to withdraw from possession, and the same goods are subsequently seized by another execution creditor, and claimed by the same claimant, he will be ordered to pay into Court the full value of the goods, as a condition of the Sheriff being ordered to withdraw under the second execution: *Kotchie* v. *Golden Sovereigns, etc.*, 1898, 2 Q. B. 164; 78 L. T. 426.

Where goods seized were manufactured materials, the product of a going concern, the Sheriff was directed to continue in possession until the final disposition of the issue: *Farley* v. *Pedlar*, 1 O. L. R. 570.

As to security for costs: see *infra*, p. 1299.

Rights of Execution Creditors under Creditors' Relief Act. — Under *The Creditors' Relief Act* (R. S. O. c. 81), s. 6 (4), where the Sheriff takes interpleader proceedings, those creditors only who are parties and agree to contribute *pro rata* to the expense of contesting adverse claims, are entitled to share in any benefit derived from the contestation, so far as may be necessary to satisfy their executions or certificates. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings, and in such case his costs, as between solicitor and client, form a first charge upon the moneys or goods which may, in the proceedings, be found applicable to Creditors Relief Act, effect of

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pay creditors. See Appendix Form 82, clause 6; H. & L. Forms, No. 1286, cl. 7.

Where an issue is ordered, and, after judgment therein in favour of the execution creditors, an assignment is made by the execution debtor for the benefit of creditors, such assignment does not affect the executions creditors' rights under *The Creditors' Relief Act*, s. 6 (4), *supra*, p. 1295; *Re Henderson Roller Bearings*, 22 O. L. R. 306; 24 O. L. R. 356; S. C. *sub nom Martin* v. *Fowler*, 46 S. C. R. 119; but where the assignment is made before judgment in the interpleader issue, then the assignment will prevail over the claim of the execution creditors, under *The Assignment and Preferences Act* (R. S. O. c. 134), s. 14; *Sykes* v. *Soper*, 29 O. L. R. 193.

As to whether the provisions of *The Creditors Relief Act*, s. 6, apply only after an issue is directed, or are also applicable where, under *Rule* 632, the contest is by consent disposed of summarily, the Court of Appeal, in *Bank of Hamilton* v. *Durrell*, 15 Ont App. 500, was equally divided.

Trial of issue.

Trial of Issue.—On the trial of the issue the execution creditor is not required to prove his judgment: *Hammill* v. *DeWolf*, 10 C. P. 419; *Holden* v. *Langley*, 11 C. P. 407, 411; *McWhirter* v. *Learmouth*, 18 C. P. 136.

The object of the issue is to inform the conscience of the Court, and the Judge at the trial should receive any evidence calculated to shew what are the real rights of the parties, and should not be too strictly tied down by the form of the issue, but should amend it if necessary: *Bryce* v. *Kince*, 14 P. R. 509.

Where the claimant's case is upon a chattel mortgage, evidence is necessary to identify the goods mortgaged as to those which were seized by the Sheriff, and claimed: *Jones* v. *Jenkins*, 25 U. C. Q. B. 151. This, coupled with proof of the due execution of the mortgage, on its face purporting to be made for value, constitutes a good *prima facie* case; the consideration for the mortgage need not be proved until evidence has been given impeaching it: *Furlong* v. *Reid*, 12 Ont. 607.

Jus tertii, when it may be set up.

The defendant in the issue may shew that the goods are not the plaintiff's, by setting up the title of a third party, *e.g.*, a trustee in bankruptcy: *Richards* v. *Jenkins*, 17 Q. B. D. 544; 18 Q. B. D. 451; but the plaintiff in the issue cannot do so: *Ib.*; unless he claims under such third party: *Bryce* v. *Kince*, *supra*.

A claimant may assert title as assignee of the equity of redemption of the goods seized, as against the execution creditor of his assignor, though the legal right to possession may be in the mortgagee: *Usher* v. *Martin*, 24 Q. B. D. 272.

Neglect to bring issue to trial.

Where the plaintiff neglects to bring the issue to trial, the course is to move to rescind the interpleader order: *Sewell* v. *Buffalo, etc., Railway Company*, 3 U. C. L. J. 29. The application is made in the original cause: *Solter* v. *McLeod*, 10 U. C. L. J. 299.

Where a bank, one of several execution creditors, made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant in the event of the latter not succeeding in the issue; it was held that the bank was not in these circumstances liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to

the issue and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods: *Dundas* v. *Darvill*, 12 P. R. 347. Rule 626.

Where, on motion for an interpleader by the Sheriff, an order is made for satisfaction of the claimant's claim, the claimant is limited to his claim put forward in the proceedings, and cannot demand any amount not included in his particulars of claim, on which the order was made: *Hockey* v. *Evans*, 18 Q. B. D. 390.

Where the Sheriff sells under the order, pending the trial of an issue, it was held in *Ontario Bank* v. *Revell*, 11 P. R. 249, that he must pay into Court the gross proceeds of sale, without deducting his charges, but in *Reid* v. *Murphy*, 12 P. R. 246, 338, it has been held that the net proceeds only need be paid in, after deducting expenses of sale, and possession money. In the event of the claimant succeeding in the trial of the issue, he will not be entitled to recover from the Sheriff the amount deducted for possession money, and expenses of sale. The claimant's remedy is to apply, in a summary way in the proceedings, for recovery of the amount deducted for charges from the execution creditor: *Ib.* Sheriff's expenses.

If the execution creditor succeeds, the Sheriff becomes further entitled to his fees, poundage and expenses, other than the amounts deducted from the proceeds of sale, in respect to the property which has been found to have been exigible. These charges are payable by the execution creditor: *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180. The Sheriff's costs of the interpleader proceedings are a first charge upon the fund found liable to the execution: *Rule* 641 (1); he will in general have them taxed under *Rule* 641 (2), and the execution creditor will be entitled to move on order for them, or for such part of them as was occasioned by the claimant's claim, over against the claimant: *Ontario Silver Co.* v. *Tasker*, *supra*. Execution creditor succeeding.

The claimant, if successful, is entitled to recover from the execution creditor, as costs, the Sheriff's charges subsequent to the interpleader order: *Goodman* v. *Bloke*, 19 Q. B. D. 77, and cannot be ordered to pay the costs of taking possession, or possession money prior to the interpleader order: *Massey Mfg. Co. v. Gandry*, 7 C. L. T. 127. Claimant succeeding.

Before 56 V. c. 5, s. 10 (now *Rules* 637, 638), the Sheriff was not in general entitled to costs, where the execution creditor abandoned on the motion for an interpleader order, it being held that the latter was entitled to consider the claim when formulated, and to abandon without incurring any liability for costs: see *Wilkins* v. *Peatmon*, 7 P. R. 84; *Can. Bank of Commerce* v. *Tasker*, 8 P. R. 351; *C.* v. *D.*, W. N. 1883, 207; Arch., 12th ed., 1411; Churchill on Sheriffs, 183.; but he was entitled to costs from the execution creditor where the latter had given special directions to the Sheriff to seize the goods in question, and such special directions need not have been given in contemplation of an adverse claim: *Vanstaden* v. *Vonstaden*, 10 P. R. 428. Costs of Sheriff.

In the cases in which *Rules* 637 and 638 apply, however, as the Sheriff, before applying for an interpleader order, obtains from the execution creditor a notice or intimation that the claimant's claim is disputed, the motion is only made after consideration of the claim by the execution creditor, and if he subsequently abandons, it may be that the rule as to costs should be the same as when special directions to seize are given.

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If special directions are sworn to and denied, it must be considered that the Sheriff acted on the writ: *Vonstaden* v. *Vanstaden*, *supra*, p. 1297.

For rules generally as to Sheriff's costs: see *Searle* v. *Matthews*, W. N., 1883, 176.

As to the Sheriff's costs where no issue is directed: see *Rule* 641, and *Smith* v. *Dorlow*, 26 Ch. D. 605; *Holl* v. *Bowermon*, 19 P. R. 269.

Sheriff disobeying interpleader order.

A Sheriff was held liable to attachment by an execution creditor for not taking security, or selling, pursuant to an interpleader order, there being no claim for rent or taxes which the Sheriff was justified in acknowledging: *McLeon* v. *Anthony*, 6 Ont. 330.

Withdrawal from possession.

Where a Sheriff, with the consent of the execution creditor, and the claimant, after an interpleader order, temporarily withdrew from possession, it was held that the landlord might distrain, though he knew of the interpleader proceedings: *Cropper* v. *Worner*, 1 Cab. & El. 152.

Receiver.

In *Howell* v. *Dowson*, 13 Q. B. D. 67, a receiver of property seized in execution was appointed, pending an interpleader issue.

Costs.

Costs.—Where an issue is directed, the costs of the interpleader proceedings and issue should be disposed of at the trial of the issue, and should not be reserved to be disposed of in Chambers after the trial: see *Rule* 636: *Grothe* v. *Pearce*, 15 P. R. 432.

For an order as to costs where success was divided at the trial: see *Ont. Silver Co.* v. *Tasker*, 15 P. R. 180.

Scale of costs.

The Judge or officer who disposes of the costs may direct what scale of taxation is to be followed: *Beaty* v. *Bryce*, 9 P. R. 320.

Where the interpleader proceedings are properly instituted in the Supreme Court, though an issue is directed to be tried in a County Court, the Sheriff's costs will be taxable on the scale of the Supreme Court, and *semble*, also the costs of the parties up to the interpleader order: *Arkell* v. *Oeiger*, 9 P. R. 523. The costs before the issue will ordinarily be on the scale of the forum to which the Sheriff is compelled to resort, and after the issue, on the scale applicable to the forum in which the issue is directed to be tried: see *Beaty* v. *Bryce*, 9 P. R. 325; *Christie* v. *Conway*, 9 P. R. 529.

Appeal.

Section 24 of the Jud. Act, applies to interpleader matters as well as to actions, so that no appeal lies, without leave, from the decision of a Judge as to the disposition of the costs: *Hortmont* v. *Foster*, *supra*, p. 240; *Beaty* v. *Bryce*, 9 P. R. 323; an appeal lies from the Master in Chambers to a Judge as in other cases: *Christie* v. *Conway*, 9 P. R. 529.

County and District Court cases.

County and District Courts.—As to how far County Courts have jurisdiction under this *Rule:* see note to *Rules* 644, 645.

In *Boird* v. *Hunter*, 31 C. L. J. 663, it was held by Macdougall, J., C.C. York, that a Judge in Term has no jurisdiction under former Rule 847 (see now *Rule* 507), to rescind his order made in Chambers, even though it was not otherwise appealable.

An interpleader order made in a County Court case is not appealable to a Divisional Court unless it is final in its nature: *Hunter* v. *Hunter*, 18 C. L. T. 137, see notes, *supra*, p. 127.

The District Courts have the like jurisdiction in interpleader as is possessed by the County Courts: *Rules* 3 (c), 644, 645, and this is

determinable by the fact whether the process, under which the goods were seized, issued out of the District Court, and not by the amount for which the recovery was had: *Isbister* v. *Sullivan*, 9 C. L. T. 3. Rule 626.

Security for Costs.—Under R. S. O. 1877, c. 54, s. 10, provision was expressly made for requiring security for the Sheriff's costs to be given. Under this provision it was held that the Sheriff was only entitled to such security, in the circumstances where it would be ordered between ordinary litigants: *Sweetman* v. *Morrison*, 10 P. R. 446. In *Farley* v. *Pedlar*, 1 O. L. R. 570, an execution creditor being in insolvent circumstances was under C. R. 1122 ordered to give security for the Sheriff's costs; but *Rule* 643, which takes the place of C. R. 1122, omits the clause "as to costs and all other matters" which were in C. R. 1122; whether *Rule* 373 would now, in such circumstances, authorize an order for security for the Sheriff's costs appears doubtful. Security for costs

Formerly either party to an interpleader issue might be ordered to give security for costs: *Swain* v. *Stoddart*, 12 P. R. 490; over-ruling the dictum in *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121. In a stake-holder's interpleader, the party substantially moving in the proceedings, whether named as plaintiff, or defendant in the issue, if resident out of the jurisdiction, might be required to give security for costs: *Re Foresters & Castner*, 14 P. R. 47; and see *Bruce* v. *A. O. U. Workmen*, 11 O. L. R. 633. In a Sheriff's interpleader any party out of the jurisdiction, whether claimant, or execution creditor, and whether plaintiff, or defendant, in the issue, might be ordered to give security for costs to his opponent in the issue: *Knickerbocker* v. *Webster*, 17 P. R. 189. See *Re Milward & Co.*, 1900, 1 Ch. 405.

An execution creditor made defendant in the issue was ordered to give security, in *Lovell* v. *Wardroper*, 4 P. R. 265; and the claimant in *Walker* v. *Niles*, 3 Chy. Ch. 59.

The same grounds for ordering security applied as in an action: see *Rhodes* v. *Dawson*, 16 Q. B. D. 548; *Tomlinson* v. *Land & Finance Co.*, 14 Q. B. D. 539; *Belmont* v. *Aynard*, 4 C. P. D. 221, 352. The fact that the claimant was a married woman, and in straitened circumstances, was held an insufficient reason for ordering security: *Rhodes* v. *Dawson*, 34 W. R. 240; 55 L. J. Q. B. 134; 16 Q. B. D. 548.

Where the question at issue was occasioned by the will of a deceased person in regard to a policy of life insurance, a claimant out of the jurisdiction, who was ordered to be plaintiff in the issue, was ordered to give security for costs: *Bruce* v. *A. O. U. Workmen*, 11 O. L. R. 633.

Now, under *Rule* 373 (*j*), where either party to an interpleader "is an active claimant, and would, if a plaintiff, be liable to give security for costs," he is liable to be ordered to give security for costs.—whether this provision has enlarged, restricted, or varied, the former practice on this point as above indicated, remains to be seen. Present practice.

626. The applicant shall satisfy the Court by affidavit, or otherwise:— Matters to be proved by applicant.

(*a*) That he claims no interest in the subject-matter in dispute, other than in respect of a lien or for charges or costs;

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(*b*) That he does not collude with any of the claimants; and

(*c*) That he is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court may direct. C.R. 1104.

See Eng. (1883) R. 851.

The Master in Chambers, and officers having like jurisdiction, and Local Judges, have jurisdiction in interpleader proceedings: see *Rules* 207 (11), 208 (6), 209.

For forms of affidavits: see H. & L. Forms, Nos. 1277, 1281, 1282.

The objection that a stakeholder has, by taking indemnity from one claimant, disentitled himself to relief, cannot be taken by the claimant who gave the indemnity: *Thompson* v. *Wright*, 13 Q. B. D. 632.

A lien for "costs and charges" did not formerly deprive the applicant of his right to interplead: see *Best* v. *Hayes*, 1 H. & C. 718, also *Attenborough* v. *St. Katharines Dock Company*, 3 C. P. D. 450, 466.

As to satisfaction of any lien of the applicant: see *Rule* 643.

Adverse titles of claimants.

627. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another. C.R. 1105.

See Eng. (1883) R. 852.

When application to be made by defendant.

628. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons; and the Court may stay all proceedings in the action. C.R. 1106.

See Eng. (1883) RR. 853, 855.

Notwithstanding the words "at any time" an application made after judgment, or after the applicant has consented to judgment, though it be not actually entered, is too late: *Stevenson* v. *Brownell*, 1912, 2 Ch. 344; 106 L. T. 994.

Motion by applicant.

629. The applicant may make a motion calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them. C.R. 1107.

See Eng. (1883) R. 854.

Where the amount of claim has been stated under this *Rule* and an order for payment has been made, the claimant can only recover the amount so stated: *Hockey* v. *Evans*, 18 Q. B. D. 390.

Failure of claimants to appear.

630. Where a claimant does not appear on the motion after having been served with a notice of motion calling

n him to appear and maintain or relinquish his claim, r, having appeared, neglects or refuses to comply with ny order made thereafter, an order may be made declaring him and all persons claiming under him to he forever harred as against the applicant and all persons claiming under him, but the order shall not affect the rights of the claimants as hetween themselves. C.R. 1108. Rules 631, 632.

See Eng. (1883) R. 859.

In making an order harring a claimant, where the applicant is a defendant in an action, there is no power to make it a term of the order that the plaintiff shall pay the costs of the defendant in the original action, apart from those in the interpleader proceedings: *Hansen* v. *Maddox*, 12 Q. B. D. 100.

Where a claimant appeared, and had, in pursuance of an order, given security for the goods, and pending the trial of an issue directed to determine the ownership, the goods were sold for taxes, and the surety to the claimant'a bond hecame worthless, it was held that the claimant was, nevertheless, entitled to have the issue tried, and that there was no jurisdiction to bar his claim in default of his giving fresh security: *Hogaboom* v. *Gillies*, 16 P. R. 96, 260.

631. Where the claimants appear on the motion, any claimant may he made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or an issue between the claimants may he stated and tried, and in the latter case the order shall direct which of the claimants shall he plaintiff, and which defendant. C.R. 1109. Issue may be ordered.

See Eng. (1883) R. 856. See note to *Rule* 631.

See notes to *Rule* 625, "*Issue*," p. 1292.

632. The Court may, with the consent of hoth claimants, or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and, [subject to appeal], decide the same in a snmmary manner. C.R. 1110. Disposal of matters in summary manner.

See Eng. (1883) R. 857.

Under the English Rules 857 and 860, a decision hy the Judge summarily is not appealable: see *Lyon* v. *Morris*, 19 Q. B. D. 139; *In re Tarn*, 1893, 2 Ch. 280; *Van Laun & Co.* v. *Baring Bros.*, 1903, 2 K. B. 277; *Harbottle* v. *Roberts*, 1905, 1 K. B. 572. The words in brackets in this *Rule* are not in the English Rule, so that in Ontario the decision will he appealable as in other cases, and there is no limitation as to the amount involved: see *Harbottle* v. *Roberts*, 1905, 1 K. B. 572; 92 L. T. 723.

Rules 633, 634.

As to whether it is necessary that the consent, which gives jurisdiction under this *Rule*, should appear on the face of the order: see *Bank of Hamilton* v. *Durrell*, 15 Ont. App. 500, 513-516.

The Court has no power to impose conditions on the claimant, without his consent, affecting his right to raise defences: *Gerhard* v. *Montagu*, 38 W. R. 75; 61 L. T. 554; unless the claimant is seeking any indulgence from the Court.

Where an execution creditor declines to contest the claim of a claimant to goods seized in execution, the order should bar him of any right to contest the claim: *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103; and see *Rule* 635.

Questions of law.

633. Where the question is one of law, and the facts are not in dispute, the Court may decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. C.R. 1111.

See Eng. (1883) R. 858. The *Rule* was held only to apply to simple cases: *In re Chosen Friends, Roddy* v. *Leah*, 28 C. L. J. 95; 12 C. L. T. 72, where a case was stated for a Divisional Court, of the former High Court of Justice.

Where a case is ordered to be stated under this *Rule*, it is not specified for which branch of the Court it is to be stated—*Semble* the case must be stated for the opinion of the Supreme Court, and must, in the first place, be adjudicated by a Judge of the High Court Division, from whom an appeal would lie to the Appellate Division; but it would not appear to be intended that the case should be stated for the opinion of the Appellate Division: see *Rule* 126.

Where the question presented is one of fact, an issue must be directed: *Rondot* v. *Monetary Times*, 19 P. R. 23. Where a Sheriff was authorized to withdraw from possession under an order erroneously made under this *Rule*, on appeal therefrom, he was authorized to re-seize: *Ib.*

Order for sale of goods seized in execution.

634. Where goods or chattels have been seized in execution by Sheriff, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court may order a sale, and direct the application of the proceeds of the sale in discharge of the amount due the claimant if it is not disputed, or that sufficient to answer the claim be paid into Court pending trial of the claim. C.R. 1112. *Amended.*

See Eng. (1883) R. 861. C. R. 1112 had before "Sheriff" the letter "a."

A sale of the goods will not be ordered in an interpleader matter, where the claimant is a chattel mortgagee whose title is undisputed: see *Stern* v. *Tegner*, 1898, 1 Q. B. 37; *secus*, where his title is disputed: *Nisbet* v. *Hill*, 5 O. W. R. 293, 337, 402; see *Paquin* v. *Robinson*, 85 L. T. 5, where the claimant claimed under an absolute bill of sale.

Rules 635, 636.

The sole bond of a chartered bank was accepted as sufficient security, on proof of the responsibility of the bank: *Ontario Bank* v. *Merchants Bank of Halifax*, 1 O. L. R. 235.

Where the claimant assents to the sale under execution, and accepts part of the proceeds, he thereby adopts the sale, and cannot sue the execution creditor for conversion: *Appleby* v. *Withall*, 8 C. P. 397.

Where a sale is ordered, the purchaser acquires a good title as against all parties to the interpleader proceedings, no matter how the interpleader issue may ultimately be determined: see *Goodlock v. Cousins*, 1897, 1 Q. B. 348; 76 L. T. 86, 313. And, in the application of the proceeds of the sale, the Court is not limited by the practice in Courts of Equity in suits for redemption, and may order a chattel mortgage to be paid off before it is actually due, and without allowing anything in respect of a higher rate of interest, which the money would have earned under the mortgage: *Forster* v. *Clowser*, 1897, 2 Q. B. 362; 76 L. T. 825.

Ex. creditor not contesting may be excluded from benefit.

635. Where a Sheriff applies for relief by interpleader, and any execution creditor declines to join in contesting the claim of the adverse claimant, the Court may direct that such creditor shall be excluded from any benefit which may be derived from the contestation of the claim. C.R. 1113.

See *Doran* v. *Toronto Suspender Co.*, 14 P. R. 103, in note to *Rule* 632.

The Creditors' Relief Act (R. S. O. c. 81), s. 6 (4), provides that those creditors only who are parties to interpleader proceedings and agree to contribute *pro rata* to the expense of contesting any adverse claims, shall be entitled to share in any benefit derived from the contestation of such claims, so far as it may be necessary to satisfy their executions or certificates; and see *Bank of Hamilton* v. *Durrell*, 15 Ont. App. 500.

See *Dundas* v. *Darvill*, 12 P. R. 347, *supra*, p. 1297.

Final disposition of all matters.

636. The Court which tries the issue may finally dispose of the interpleader proceedings, including all costs not otherwise provided for. C.R. 1114.

See Eng. (1883) R. 862.

Formerly the interpleader order reserved the question of costs, and all other questions, to be disposed of in Chambers after the trial of the issue. The form of order now used reserves the disposition of all such matters for the Judge who tries the issue, "or if not so disposed of then to be disposed of in Chambers": see Form 82, clause 5; H. & L. Forms, No. 1286, cl. 6. The costs of the issue at any rate should now be disposed of by the Judge who tries it: *Grothe* v. *Pearce*, 15 P. R. 432.

In some cases it may be necessary, however, to reserve questions, for instance, if any questions in which the Sheriff is concerned are not disposed of; otherwise, unless the Sheriff is made a party to the issue, the Judge who tries the issue cannot finally dispose of the whole matter.

Rule 637.

Usually the Sheriff is not a party to the issue, and cannot be ordered to pay any costs of it: *Temple* v. *Temple*, 63 L. J. Q. B. 56; and he need not receive notice of a motion respecting the costs of the parties to the issue: O'*Brien* v. *Bull*, 9 P. R. 494. But he was held entitled to costs of appearing on a motion by a claimant for a final order barring the execution creditor for default in giving security for costs: *Gray* v. *Alexander*, 10 P. R. 358.

The parties were directed to pay their own costs, and were directed each to pay half the costs of the Sheriff, in *McLaren* v. *Canada Central Railway Co.*, 10 P. R. 328. A claimant partially succeeding was given the general costs of the issue, with a deduction of one-sixth in respect of the goods as to which he failed: *Segsworth* v. *Meriden Silver Plating Co.*, 3 Ont. 413.

Where the claimant succeeded as to part of the goods seized in execution, and the execution creditor as to the residue, and no costs were given to either party of the interpleader issue, the execution creditor was ordered to pay the Sheriff's fees and poundage on the value of that part of the goods as to which he succeeded, and his costs of the interpleader application, with an order over against the claimant for half of these costs: *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180. In this case the claimant also appears to have paid the possession money subsequent to the date of the interpleader order, and the execution creditor that incurred prior to the order.

Claims of third parties to goods in possession of debtor.

637. When a Sheriff finds property in the possession of a debtor against whose property he has a writ or other process in his hands, and a claim is set up to such property by or on behalf of a third person who is out of possession or is in joint possession with the debtor, the claim of such third person shall be made in writing, and upon receipt thereof the Sheriff shall forthwith give notice thereof to the execution creditor, and the execution creditor shall, within seven days thereafter, give notice to the Sheriff that he admits or disputes the claim. If the execution creditor admits the title of the claimant, and gives notice as directed by this Rule, he shall only be liable to such Sheriff for fees and expenses incurred before the receipt of the notice admitting the claim; and no action shall be brought against the Sheriff in respect of the seizure of the property. C.R. 1115.

See Eng. (1889), O. 57, r. 16.

Special directions from the execution creditor as to seizure, and disputing in advance the claim of the claimant, may justify the Sheriff in omitting to notify the execution creditor as here mentioned.

See note to *Rule* 625.

For forms of notice of claim by claimant to Sheriff: see H. & L. Forms No. 1283—and a notice by Sheriff to execution creditor of adverse claim: see *Ib.* No. 1278; and of notice by execution creditor to Sheriff admitting, or disputing, adverse claim: see *Ib.* No. 1279.

Rules 638-640.

When execution creditor does not admit or dispute, claim of third party within time limited.

638. Where the execution creditor does not in due time admit or dispute the title of the claimant to the property, and the claimant does not withdraw his claim thereto by notice in writing to the Sheriff, the Sheriff may apply for relief by interpleader. C.R. 1116. *Amended.*

See Eng. (1889), O. 57, r. 17.

See note to *Rule* 625.

In case of several executions, all may be embraced in one application for interpleader.

639. In case a Sheriff has more than one writ of execution against the same property, or there is more than one claimant to goods seized under the execution, he shall make one application, and make all the execution creditors and claimants parties. C.R. 1118. *Amended.*

No form is pointed out in which the application should be made *semble* the notice of motion should be entitled in each action in which there are executions in the Sheriff's hands, including any actions in a County or District Court, and it should be seven clear days' notice: see *Rule* 215 (2).

Cases of execution from several Courts—to whom application to be made.

640. Where there is an execution from the Supreme Court the application for interpleader shall be made in the Supreme Court notwithstanding that other executions on the Sheriff's hands have issued from County or Division Courts. C.R. 1113. *Amended.*

The C. R. 1113 on which this *Rule* is professed to be based is now *Rule* 635 *supra*. The present *Rule* seems to be really based on C. R. 1119.

The application is properly made in the Supreme Court, though the first seizure is made in a County Court action: *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1.

Where the writs are all from County Courts, the Sheriff is now to apply in a County Court under *Rule* 644; and the costs will be on the scale of that Court: see formerly *Phipps* v. *Beamer*, 8 P. R. 181; *Masuret* v. *Landville*, 8 P. R. 57. Where one of the writs is in the Supreme Court, the costs of the motion should be on the Supreme Court scale: *Ib.*

The *Rule* refers to executions in Division Courts being in the Sheriff's hands, it may, however, be noted that the executions referred to in the *Rule* are executions against goods, of which only a certificate can be placed in the Sheriff's hands, where the execution issues from a Division Court: see *The Division Courts Act* (R. S. O. c. 63) s. 178; and *The Creditors Relief Act* (R. S. O. c. 81), s. 17.

The only case in which an execution can issue from a Division Court to the Sheriff, is an execution against lands: see *The Division Courts Act*, s. 182. Whether the certificate delivered to the Sheriff under s. 179 is what is intended to be referred to in this *Rule* is doubtful.

Rules 641-643.

When an issue is ordered, the Sheriff's costs to be first lien on property exigible.

641.—(1) Where an issue is directed to be tried, the costs of the Sheriff incurred in consequence of the adverse claim, shall be a first lien or charge upon the moneys or goods which may be found in the issue to be applicable upon the execution.

Sheriff may tax his costs and serve allocatur on each party, etc.

(2) The Sheriff may also tax such costs, and serve a copy of the certificate of taxation upon each of the parties to the issue, and the successful party upon the issue shall tax such costs as part of his costs of the cause, and upon receipt thereof shall pay over the same to the Sheriff.

The successful party liable to the Sheriff for costs.

(3) Where after the service of the certificate the party succeeding upon the issue neglects or refuses to tax such costs, the Sheriff may obtain an order that the successful party shall pay the same.

If case compromised, who to be liable to the Sheriff for his costs.

(4) Where the proceedings are compromised between the parties thereto, the costs of the Sheriff shall be paid by the party by whom the execution was issued. C.R. 1120. *Amended.*

Where the interpleader order was granted to try the right to land, the Sheriff's costs were ordered in the first instance to be paid by the party who put him in motion, without prejudice to the question by whom they should be ultimately borne: *Hall* v. *Bowerman*, 19 P. R. 268.

Where there has been divided success on the trial of an interpleader issue, and costs have not been given to either party, the Sheriff may apply under any reservation in the order: (see Form 82, clause 5), or under *Rule* 643, for such order respecting his costs as may be just: *Ontario Silver Co.* v. *Tasker*, 15 P. R. 180.

If goods seised remain in the Sheriff's custody the Court may award remuneration.

642. Where, after the seizure, an issue is directed, and the property seized remains, pending the trial of the issue, in the custody of the Sheriff who seized the same, the Court may make an order for the payment to the Sheriff of a reasonable sum for his trouble in and about the custody of the property; and the Sheriff shall have a lien upon the property for payment of the same in event of the property being held to be exigible against the claimant. C.R. 1121. *Amended.*

Where the Sheriff remained in possession at the request of the debtor and creditor, he was held to be entitled to possession money as part of the costs of the execution: *Re Beeston*, 1899, 1 Q. B. 626, 79 L. T. 561.

Costs, etc.

643. The Court may make all such orders respecting the satisfaction or payment of any lien or charges of the

pplicant as may he just and reasonahle. C.R. 1122. *Amended.* Rule 644-646.

See Eng. (1883) R. 864.

As to costs of interpleader proceedings: see *supra*, p. 1288.

The present *Rule* makes provision for the satisfaction or payment of any lien of a carrier, or bailee, on an interpleader application by him, or any lien which a stakeholder may have: see also *Rule* 626 (*a*).

Where the applicant claims a lien on the goods in question, *e.g.*, for wharfage, the Judge may order by whom it shall he satisfied: *Re Rothschild* v. *Morrison*, 24 Q. B. D. 750; 63 L. T. 46.

Where the execution creditor was insolvent he was ordered to give security for costs: *Farley* v. *Pedlar*, 1 O. L. R. 570; but see *Rule* 373 (*j*), and see *supra*, p. 1299.

644. Relief by interpleader may he granted in a County Court, Relief by interpleader may be granted in County Courts.

1. (*a*) Where the applicant is sued in the County Court;

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

2. Where the applicant is a Sheriff acting under a writ or writs of execution issued from a County Court or different County Courts the application may he made to the Judge of his own County. C.R. 1123. *Amended.*

The relief referred to in this *Rule* is that referred to in *Rules* 626, *et seq.*; and the procedure will he governed by those *Rules* as far as applicable.

645. All subsequent proceedings shall be had and taken in the County where the application is made; but the Judge to whom the application is made may order that the subsequent proceedings he had and taken in any other County, if that course seems just and more convenient. C.R. 1124. Court in which proceedings to be taken.

646. Where the amount claimed under or by virtue of writs or execution, in the Sheriff's hands, does not exceed the sum of $400, exclusive of interest and Sheriff's costs, or when the goods seized are not, in the opinion of the Judge or other person making the order, of the value of more than $400, the issue may be directed to he tried in a County Court and in such case all subsequent proceedings shall he had and taken in the County Court. When issue may be tried in County Court.

Rules 647, 648.

This *Rule* appears to be based on C. R. 1125. That Rule also provided that, where the issue was tried in the County Court that Court should have jurisdiction in the premises "where any of the executions were issued out of the High Court as fully as though the same had issued out of the County Court."

There is no jurisdiction to make an order for the trial of an issue under this *Rule*, even though by consent, in respect of property which has not in fact been seized or intended to be seized by the Sheriff: *Teskey* v. *Neil*, 15 P. R. 244.

Where to be tried.

Where an interpleader issue is directed by the Supreme Court to be tried at County Court sittings under this *Rule*, the subsequent proceedings, such as, *e.g.*, a motion to postpone the trial, must be taken in the County Court: *London & Can. L. & I. Co.* v. *Morphy*, 11 P. R. 85; and applications against the verdict, or for a new trial, must be by way of appeals to the Appellate Division as in other County Court cases; but it is only where such appeal lies under *The County Courts Act* (R. S. O. c. 59) ss. 39-40, that the Appellate Division has jurisdiction to entertain an appeal from the judgment on an interpleader issue so directed: *Close* v. *Exchange Bank*, 11 P. R. 186, distinguishing *Barker* v. *Leeson*, 9 P. R. 107.

But this *Rule* only applies to issues directed on the application of a Sheriff, and not to issues directed on the application of stakeholders under *Rule* 625 (*a*); in the latter kind of cases it seems doubtful whether under the *Rules* the issue can be directed to be tried in a County Court: see *Clancy* v. *Young*, 15 P. R. 248; *Rule* 27.

Issue when triable in Division Court.

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

This *Rule*, which purports to be based on C. R. 656, is really based on C. R. 1126.

Order for costs to be made by Judge of County or Division Court.

648. When money has been paid into Court and an issue has been directed to be tried in the County or Division Court the money shall be paid out upon the order of the County or Division Court. C.R. 1127. *Amended.*

CHAPTER XXV.

COSTS.

For the jurisdiction of the Court as to costs: see Jud. Act, s. 74; and notes *supra* p. 238 *et seq.*

In Inferior Court actions brought in High Courts.

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

"Tax his costs of suit."—These words in the 8th line mean costs on the scale of the Court in which the action is brought.

The words "taxable costs of defence" in the 9th and 10th lines of the *Rule*, do not mean costs as between solicitor and client: *Talbot* v. *Poole*, 15 P. R. 274.

The *Rule* only applies where the Judge "makes no order to the contrary," but an order for payment of costs *simpliciter* does not preclude an inquiry as to the scale properly applicable: *Re Forster*, 18 P. R. 65.

The commencement of the action is the point of time at which the amount of the plaintiff's claim, for the purpose of determining the scale of costs, is determined. Payments *pendente lite* do not affect the question. Thus, where the amount of the plaintiff's claim is reduced to a sum within the jurisdiction of an inferior Court by payment under garnishee proceedings against the defendant, made after action brought, though the attaching order was made before, such payment does not affect the question of jurisdiction so far as costs are concerned: *Pickard* v. *Tims*, 19 P. R. 109.

Rule 849.

In the absence of an order to the contrary the rights and liabilities of each defendant depend upon the amount of the plaintiff's recovery against him: *Jackson* v. *Hughes*, 2 O. W. N. 15; *Moffat* v. *Link*, *Ib.* 56; and the onus is on the plaintiff to obtain from the Judge at the trial an order preventing the application of this *Rule*; and general words giving costs, without referring to the scale, are not a sufficient order to the contrary: *Ib.*

Though a plaintiff may only be able to recover from the defendant costs on an inferior Court scale under this *Rule*, yet he may be liable to his solicitor for costs on the Supreme Court scale, if the latter had reasonable ground for thinking the action could not be brought in the inferior Court: *Re Jackson*, 18 P. R. 326.

The *Rule* does not apply where the plaintiff recovers a sum beyond the jurisdiction of a County Court, which, however, is reduced by counterclaim of the defendant to a sum within the jurisdiction of an inferior Court: *Caldwell* v. *Hughes*, 4 O. W. N. 1192; *Everly* v. *Dunkley*, 5 O. W. N. 65. But it is otherwise where the amount is reduced by set off, which has been assented to before action: *Ib.*

For the purposes of the scale on which costs are to be taxed the claim and counter-claim are to be treated as separate actions: see *Amon* v. *Bobbett*, 22 Q. B. D. 543, where a plaintiff recovering on his claim an amount within the jurisdiction of a County Court, recovered costs on that footing, but succeeding on the defendant's counter-claim for an amount within the Supreme Court jurisdiction, he recovered costs of his defence to the counter-claim on the Supreme Court scale.

Where the defendant recovers on a counter-claim, the costs should be on the scale of the Court in which the action is brought by the plaintiff, unless the Judge makes a different order; the fact that the recovery is for a sum within the jurisdiction of an inferior Court was formerly not considered "good cause" for such an order: *Foster* v. *Viegel*, 13 P. R. 133.

It does not apply where the plaintiff takes money out of Court under *Rule* 814, in which case he is entitled to costs on the Supreme Court scale, though the amount accepted be within the jurisdiction of an inferior Court, and a Judge has no jurisdiction to make any other order: *Babcock* v. *Standish*, 19 P. R. 195; *McKelvey* v. *Chilman*, 5 O. L. R. 263; *Stephens* v. *Toronto Ry.*, 13 O. L. R. 107, 363; *sed vide Johnson* v. *Mullen*, 1901, 1 Q. B. 76.

A judgment awarding "costs" in the Supreme Court, whether made by consent or otherwise, does not, since this *Rule*, carry costs on the Supreme Court scale unless the case is one which could not have been brought in an inferior Court: see *Brown* v. *Hose*, 14 P. R. 3; and *Steckle* v. *Stokk*, 11 C. L. T. 332; and interlocutory orders awarding costs "in any event of the action" will carry costs according to the scale upon which the costs of the action when awarded at the trial are taxable: *Blake* v. *Toronto Brewing & Malting Co.*, 8 C. L. T. 123.

Before this *Rule*, in a jury case, unless the Judge made an order as to costs, the plaintiff, if he recovered anything, was entitled to costs of the Court in which the action was brought, "the event," which the costs were, under former C. R. 1170, to follow, being in his favour: see *Parsons* v. *Tinling*, 2 C. P. D. 119; *McGarvey* v. *Strathroy*, 11 P. R. 87; *Wilson* v. *Roberts*, 11 P. R. 412, following *Garnett* v. *Bradley*, 3 App. Cas. 944. The principle of these cases may still apply in all

actions where a trifling amount is recovered, but the action could not have been brought in an inferior Court; it will also apply to give to the successful party all costs which are "costs in the cause," and so depending upon the event, unless the Judge otherwise orders: see *Copeland* v. *Blenheim*, 11 P. R. 54, where the costs of a trial at which the jury disagreed were held to be taxable to the successful party. Rule 949.

Now, however, since this *Rule* "the event" in Jud. Act s. 74 (3), includes amongst other things the scale on which costs may be taxable: see also *Hyde* v. *Beardsley*, 18 Q. B. D. 244; *Andrews* v. *City of London*, 12 P. R. 44. The scale on which the plaintiff's costs will be taxable, if no order is made by the Judge, will be that of the lowest Court in which the action was capable of being brought, and the defendant will have the right to set-off the extra costs incurred by him as in the *Rule* mentioned: see *Ireland* v. *Pitcher*, 11 P. R. 403.

The interest which a verdict or judgment bears under Jud. Act, s. 35 (4), is no part of the claim, and therefore is not to be considered in determining the question of scale: *Sproule* v. *Wilson*, 15 P. R. 349.

A plaintiff cannot by claiming larger damages than are recoverable in a County Court get rid of the operation of this *Rule* if he, in fact, only recovers a sum within the jurisdiction of the inferior Court: *Moffatt* v. *Link*, 46 C. L. J. 665.

Where on the dismissal of an action with costs, a defendant claims that the costs should be taxed on the Supreme Court scale, if the matter is in doubt, it is proper practice to obtain a direction of a Judge as to the scale of costs before they are taxed: *Dominion Bank* v. *Heffernon*, 11 P. R. 504; but the taxing officer is to tax according to the lower scale wherever it is applicable without any express direction: see *Brough* v. *Brantford*, 25 Gr. 43.

Where only C. C. costs are awarded at the trial to the plaintiff, and the defendant appeals to the Appellate Division, and his appeal is dismissed with costs, such costs are *primâ facie* taxable on the Supreme Court scale: *Holmes* v. *Bready*, 18 P. R. 79; *McIlhargey* v. *Queen*, 2 O. W. N. 781, 916.

Rule 649 applies only to costs up to the judgment and does not apply to the costs of an appeal. Such costs are taxable *primâ facie* on the Supreme Court scale, but the Appellate Division can mould its order as to costs as it sees fit, but it must do so before its order issues: *Ib.* 916.

Jurisdiction of County Courts:—

The jurisdiction of the County and District Courts is defined by *The County Courts Act* (R. S. O. c. 59), ss. 22-37.

Sections 22-37 are as follows:—

22.—(1) The County and District Courts shall have jurisdiction in:— Jurisdiction.

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

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

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

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

Easements.

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

Recovery of property.

(e) Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed $500;

Mortgages.

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

Partnership.

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

Legacies.

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

Equitable relief.

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

Insolvency.

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

Dispute of jurisdiction by defendant.

(2) Where a defendant intends to dispute the jurisdiction of the Court on the ground that the action, though otherwise within the proper competence of the Court, is not within it because of the amount claimed or of the value of the property in question or of the amount or value of the subject matter involved or, in the cases mentioned in clauses (g) and (h) of sub-section 1, because the joint stock or capital of the partnership exceeds in amount or value $2,000, or the estate of the testator exceeds in value $2,000, he shall in his appearance or in his statement of defence state that he disputes the jurisdiction of the Court, and the ground upon which he relies for disputing it; and in default of his so doing, unless otherwise ordered by the Court or a Judge, the question of jurisdiction shall not afterwards be raised or the jurisdiction be brought in question. 10 Edw. VII. c. 30, s. 22 (2); 3-4 Geo. V. c. 18, s. 15 (1).

Transmission of papers.

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

Transfer to Supreme Court.

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

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At instance of defendant

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

Terms of order of transfer.

(6) Where the Court or a Judge makes an order under the provisions of sub-section 2 allowing the defendant to question the jurisdiction of the Court the Court or Judge may direct the action to be transferred to the Supreme Court, on such terms as to costs and otherwise, as may be deemed just.

Scale of costs in action transferred.

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

When set-off or counter-claim is beyond jurisdiction.

23.—(1) Where the defendant pleads a set-off or counter-claim either party, within six days after the plaintiff has delivered his reply to such defence of set-off, or his defence to the counter-claim, may apply to a Judge of the Supreme Court for an order transferring the action and counter-claim to the Supreme Court on the ground that such set-off or counter-claim involves matter beyond the jurisdiction of the Court.

Judge's order transferring.

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

Jurisdiction established where no order of transfer made.

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

Consequences of transfer.

24.—Where an action has been transferred to the Supreme Court or to another County or District Court, under any provision of this Act, it shall be in the same plight and condition as it was in at the time of the transfer, and thereafter may be proceeded with as if it had been commenced in the Court into which it has been so transferred. 10 Edw. VII. c. 30, s. 24.

Transfer of action to County or District Court having jurisdiction.

25. Where it appears in an action brought in a County or District Court that such Court has not cognizance thereof, but that the Court of some other County or District has jurisdiction to try the same, the Judge before whom the action is pending may, at any time before or during the trial thereof, order the action to be transferred to such other County or District Court upon such terms as to costs and otherwise as he may deem just. 10 Edw. VII. c. 30, s. 25.

Prohibition not to lie when case transferred.

26. Prohibition shall not lie in respect of an action or counter-claim which may be transferred under the provisions of this Act to

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the Supreme Court, or from one County or District Court into another County or District Court. 10 Edw. VII. c. 30, s. 26.

Abandonment of so much of claim as is in excess of jurisdiction.

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

Idem.

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

Relief which may be granted by Courts.

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

Rev. Stat. c. 121.

In what cases and on what conditions causes shall be removable.

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

Venue for certain actions.

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

Actions for the recovery of real property.

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

Where action against Judge of Court may be brought.

31. An action by or against a Judge shall not be brought in the Court of which he is a Judge, but shall be brought in the Court of a County or District adjoining that in which such Judge resides. 10 Edw. VII. c. 30, s. 31.

Procedure. Rev. Stat. c. 56.

32. Subject to the provisions of *The Judicature Act* and to Rules of Court, the practice and procedure of the Supreme Court shall apply to the County and District Courts. 10 Edw. VII. c. 30, s. 32.

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COSTS WHERE NO JURISDICTION.

Costs where action fails for want of jurisdiction

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

ENFORCING JUDGMENTS AND ORDERS.

Power to enforce judgments and orders

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

PUNISHMENT FOR CONTEMPT OF COURT.

Power to fine and imprison

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

ACCOUNTS AND INQUIRIES.

References generally

36.—(1) Where it is proper to direct a reference, the same may be made to any officer to whom a reference may be directed by the Supreme Court or to the Clerk of the Court.

To Judge

(2) Where the Judge of the Court is Local Master, the reference may be made to himself, but no fees shall be charged by him on such reference.

Scale of costs

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

Powers of Court

37.—(1) In an action in a County or District Court the Judge shall have the same powers with regard to the making of an order of reference as may be exercised by a Judge of the Supreme Court in action therein.

Appeal from referee

(2) An appeal, in like manner and within the same time as in like cases in actions in the Supreme Court shall lie from the report on the reference to the Judge of the County or District Court in Chambers, who shall, upon such appeal, have the same power as may be exercised by a Judge in like cases in the Supreme Court.

Appeal to High Court Division

(3) An appeal shall lie from any order, judgment or decision of the Judge of a County or District Court, and from the report upon a reference made under sub-section 2 of section 36 to a Divisional Court, and the proceedings and practice on the appeal as to staying proceedings and otherwise shall be similar to the proceedings and practice relating to an appeal from a judgment under the provisions of section 39.

Except where the Crown is a party

(4) Nothing in this section shall empower the Judge of a County or District Court to refer any proceeding to which His Majesty is a

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party, or any question or issue in any such proceeding, to an Official Referee, without the consent of His Majesty. 10 Edw. VII. c. 30, s. 37 (1-4).

Scope of s. 22 of C. C. Act.

County Court Scale of Costs, when not Applicable.—The effect of section 22, generally speaking, is that the jurisdiction of a County Court is ousted, and (where no special order as to costs is made) costs are therefore payable on the Supreme Court scale in the case of:—

(1) Particular classes of actions, *e.g.*, libel, crim. con. etc., sec. 22 (*b*).

(2) Actions where land is in question exceeding in value $500: sec. 22 (c) (d) (e) (f) (g) (h) (i).

(3) Actions where the amount of the debt or damages claimed is above $500: s. 22 (*b*), (*j*).

(4) Actions for equitable relief not falling within sec. 22 (d) (f) (g) (h) (i).

Costs in actions excluded from C. C. jurisdiction.

(1) Particular Classes of Actions.—The *Rule* cannot be applied in actions which are not within the proper competence of a County or Division Court. In an action of libel, or *crim. con.*, which cannot be brought in those Courts, if the plaintiff recovers anything, costs, on the Supreme Court scale, follow, unless the Judge orders otherwise: see *Wilson* v. *Roberts*, 11 P. R. 412; *Wellbanks* v. *Conger* (2), 12 P. R. 447; and *semble*, the Court should not look behind the finding of the jury and deprive the plaintiff of costs on the ground that he was not really entitled to recover: *Ib.*; and see *Wight* v. *Shaw*, 19 Q. B. D. at p. 398.

Where land in question.

(2) Where Land in Question.—Where the action relates to land so as to oust the jurisdiction of a County, or Division, Court under *The County Courts Act* (R. S. O. c. 59), or *The Division Courts Act* (R. S. O. c. 63), though the amount recovered be within the jurisdiction of a County, or Division, Court, the plaintiff is entitled to costs on the Supreme Court scale: *Worman* v. *Brady*, 12 P. R. 618; *Danaher* v. *Little*, 13 P. R. 351; *Whitesell* v. *Reece*, 9 O. L. R. 182.

Neither an action for use and occupation: see *Re Crawford* v. *Seney*, 17 Ont. 74, nor an action for trespass to land, nor for breach of covenant in a farm lease (see *Talbot* v. *Poole*, *infra*), necessarily brought in question the title of land, so as to oust the jurisdiction of the County, or Division Court under the former Acts: *Bailey* v. *Bleecker*, 5 C. L. J. 99; *Richardson* v. *Jenkins*, 10 P. R. 292; see *Graham* v. *Spettigue*, 12 Ont. App. 251; *McNeil* v. *Haines*, 13 P. R. 115; *Talbot* v. *Poole*, 15 P. R. 99. But it is to be noted that it is the value of the land in question, and not the fact that the title is in question, which is now the determining factor, as to the question of jurisdiction of a County Court: see sec. 22 (1) (c), *supra*, p. 1311.

Where an action is brought in respect of an alleged interference with an easement of support, and the plaintiff's land was worth over $200, but the damages recovered were only $140, it was held that the action was properly brought in the High Court: *Moffat* v. *Carmichael*, 14 O. L. R. 495; but see now sec. 22 (1) (d), *supra*, p. 1312.

The pleadings only should be looked at to see what is in question in the action: *Brown* v. *Hose*, 14 P. R. 3.

Where the plaintiff's title is denied on the pleadings, and he is required at the trial to prove it, the title to land is brought in question: *Worman* v. *Brady*, *supra*; *Danaher* v. *Little*, *supra*; *Flett* v. *Way*, 14 P. R. 312; *Tomkins* v. *Jones*, 22 Q. B. D. 599. A defendant having by

his defence contested the plaintiff's title cannot, by obtaining at the trial leave to withdraw it, escape liability for costs on the Supreme Court scale: *Black* v. *Wheeler*, 7 O. L. R. 545. Rule 649.

Where to an action on a promissory note the defendant pleaded that he had been induced to give it on the misrepresentation of the plaintiff that he owned or controlled certain interests in land which he offered to transfer to the defendant, and for which transfer the note was given; it was held that the title to land was not necessarily in question in the action: *Dobner* v *Hodgins*, 1 O. W. N. 12.

(3) Claims for Debt, Damages, etc.—The County Court has jurisdiction to investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act: *Bennett* v. *White*, 13 P. R. 149; where, therefore, a plaintiff claimed $169.72 as a balance on transactions comprehending more than $1,000, and defendant counter-claimed for $1,325.74, it was held that the plaintiff was only entitled to costs on the County Court scale: *Ib.*; and see *Thompson* v. *Pearson*, 18 P. R. 308, 420; *Evans* v. *Chandler*, 19 P. R. 160. As to whether a County Court has jurisdiction to try in the same action any number of causes of action in debt, covenant and contract, so long as each does not exceed $500: see *McLaughlin* v. *Schaefer*, 13 Ont. App. 253. Damages or debt claimed exceeding C. C. jurisdiction.

Where different sums are recovered against different defendants, and as to one of them the amount is within the County Court jurisdiction, that defendant is only liable for costs on the County Court scale, though the amount recovered against other defendants is beyond the County Court jurisdiction: *Duxbury* v. *Barton*, 1901, 2 K. B. 23.

A County Court has no jurisdiction to entertain an action for more than $500, on a guaranty, in general terms, for the payment of the price of goods, there being no liquidation or ascertaining of the debt binding on the guarantor: *Thomson* v. *Eede*, 22 Ont. App. 105.

Where an action was brought to recover damages for wrongfully refusing to deliver up, pursuant to a contract to that effect, a promissory note for $300 to the plaintiff, and the plaintiff recovered $314, the amount of the note and interest, it was held that the action was within the jurisdiction of the County Court; *Johnson* v. *Kenyon*, 13 P. R. 24; but see *Plummer* v. *Coldwell*, *infra*, p. 1319.

Where money is paid into Court in satisfaction, and accepted by the plaintiff, though the amount be within the jurisdiction of a County Court, the plaintiff is nevertheless entitled to costs on the Supreme Court scale: *Stephens* v. *Toronto Ry.*, 13 O. L. R. 107, 363.

Where the plaintiff's claim was on a covenant on which he recovered $262.50 less $69, which was allowed to defendant by way of set-off in respect of moneys paid by the defendant to a third person at the plaintiff's request, the jurisdiction of the Division, then, as now, extending to money claims ascertained by the signature of the defendant, to the amount of $200, it was held that the action could have been properly brought in a County Court and that the plaintiff was therefore entitled to costs on the County Court scale: *Osterhout* v. *Fox*, 14 O. L. R. 599.

Where a plaintiff sued to recover $505 for balance of salary and travelling expenses, and only recovered $152.85, he was held only entitled to County Court costs, although the total amount of the accounts investigated to arrive at that balance exceeded the jurisdiction of a County Court: *Ross* v. *Townsend*, 46 C. L. J. 179.

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Where the plaintiff's claim was allowed at $3,699,25, but was reduced by set off and counter-claim to $685 and it did not appear that the set-off had, prior to action, been assented to, or agreed on, so as to reduce the amount of the plaintiff's claim below $800, the plaintiff was held to be entitled to costs on the Supreme Court scale: *Caldwell* v. *Hughes*, 4 O. W. N. 1192; and see *Osterhout* v. *Fox*, *supra*, p. 1317.

A County Court, however, has no jurisdiction to give a judgment for an amount within its jurisdiction, when it is arrived at, not by any settlement, or statement of account between the parties, but as being the balance due upon a disputed account, the total amount of which was beyond the jurisdiction of the Court: *Sherwood* v. *Cline*, 17 Ont. 30.

Cases sometimes arise in which it is somewhat difficult to determine whether an action is founded on tort, or contract. It has been held that a claim by a passenger against a railway company for damages for injuries occasioned by the misfeasance of one of its servants is an action of tort: *Taylor* v. *Manchester & S. Ry.*, 1895, 1 Q. B. 134; 71 L. T. 596; *Kelly* v. *Metropolitan Ry.*, 72 L. T. 551; so also a claim for damages for negligence in taking care of a horse under a contract for agistment: *Turner* v. *Stallibrass*, 1898, 1 Q. B. 56; 71 L. T. 482; and a claim by a lessee against the lessor for removing fixtures after the agreement to lease: *Sachs* v. *Henderson*, 1902, 1 K. B. 612; 86 L. T. 437; and a claim against a dentist for negligence in pulling out the tooth of the plaintiff; *Edwards* v. *Mallam*, 1908, 1 K. B. 1002; 98 L. T. 824. But an action by a client against his solicitor for neglecting his instructions in which the plaintiff recovered $92.84, was held to be within the jurisdiction of a Division Court: *Burke* v. *Shaver*, 29 O. L. R. 365.

Where a plaintiff sued on a bond for $500 for security for costs, alleging as a breach the non-payment of $318.55, for which he recovered judgment, he was held entitled to Superior Court costs, as the amount recovered was not ascertained by the signature of defendant within *The County Courts Act*, and therefore the action could not have been brought in the County Court: *Hager* v. *Jackson*, 16 P. R. 485.

Mortgage action.

(4) Equitable Relief.—Where the amount due plaintiff as mortgagee is less than $500, if there is a subsequent incumbrancer to whom more than that sum is due, the County Court has no jurisdiction: *Hyman* v. *Roots*, 11 Gr. 202; *Scath* v. *McIlroy*, 2 Chy. Ch. 93; see also *Mitchell* v. *Martin*, 2 C. L. J. 249.

Where mortgagees after exercise of a power of sale claimed that $182.61 was due them, but on accounts being taken $20.07 was found due to the mortgagor, it was held that costs awarded the mortgagor were properly taxable on the higher scale, as $182.61 plus $20.07 was involved, which at that time exceeded the jurisdiction of a County Court: *Morton* v. *Hamilton Prov. & L. Socy.*, 10 P. R. 636; 11 P. R. 82.

"Subject matter involved."

On a bill by a mortgagor for an account, where the mortgagee had exercised his power of sale and realized $350, and on taking the account only $130 was found due to the plaintiff, it was held that "the subject matter involved" was the $350 (which was at that time a sum beyond the jurisdiction of a County Court), and the plaintiff was therefore entitled to costs, on the higher scale: *McGillicuddy* v. *Griffin*, 20 Gr. 81; *Boulton* v. *Rowland*, 4 Ont. 720; *Re Lyons*, 10 P. R. 150; 20 C. L. J. 33; *Morton* v. *Hamilton Provident & L. Society*, 11 P. R. 82; but see *Legarie* v. *Canada Loan & Bg. Soc.*, 11 P. R. 512; *Beatty* v.

O'Connor, 5 Ont. 747; *Reddick* v. *Traders' Bank*, 22 Ont. 449; and Rule 64e. where, heeidee a money demand within tha jurisdiction of the County Court, the plaintiff claimed an injunction, and to have certain fences erected and meintained, ths coste were allowed on the higher scnie (ths County Court at thnt tima not having any equitable jurisdiction): *Brough* v. *Brantford N. & P. B. Ry. Co.*, 25 Gr. 43; and see *McDonell* v. *Building & Loan Assoc.*, 11 P. R. 413; hut these caees were decided befors the County Courts had jurisdiction to grant injunctions: and see *Fitchett* v. *Mellow*, 18 P. R. 161.

Where the equitahie relief claimed hy the plaintiff is heyond the jurisdiction of the County Court to grant, and the defendant hy consent or otherwise, pending the action, satiefiee that claim, and in the result the plaintiff only recovere judgment for a eum within ths jurisdiction of a County Court, the plaintiff ie, nevertheless, entitled to costs on the Supreme Court scale: see *Doherty* v. *Thompson*, 94 L. T. 626.

Injunction.

An action to restrain the negotiation of a note for $230, and to compel ite delivery up to the plaintiff, was formerly heyond the jurisdiction of a County Conrt: *Plummer* v. *Coldwell*, 15 P. R. 144; *Johnson* v. *Kenyon*, *supra*, p. 1317; hut an action for an injunction to restrain a sale under a dietrese under the dietress clause in a mortgegs for $2,300. hy which goode to the vaiue of $112.55 had heen distrained, and for damages, was heid not to he within the former equitable juriediction of a County Court: *McDonell* v. *Building & Loan Assn.*, 11 P. R. 413; hut euch claime would eeem now to be within the jurisdiction of County Courts: ees *The County Courts Act* (R. S. O. c. 59). s. 22 (1) (*i*), *supra*, p. 1312.

Setting aside fraudulent conveyance.

Since *The Creditors' Relief Act*, where, in an action hy a judgmsnt creditor to set aside a frauduient conveyance, the claims of all execution creditore together exceed $500, the action is not within the jurisdiction of a County Court, and the *Rule* does not appiy: *Dominion Bonk* v. *Heffernon*, 11 P. R. 504; hut if there ie hut one judgment creditor and to him ieee than $500 is due, the *Rule* applies, no matter what may be the value of the property frauduientiy conveyed: *Forrest* v. *Laycock*, 18 Gr. 611; *McKay* v. *Magee*, 13 P. R. 106, 146; *Thomson* v. *Stone*, 4 O. L. R. 333, 585.

So also in an action hy simple contract creditore, whose claims amount to $500, to set asids a frauduient conveyance, there heing execution creditors to the amount of $600, and the land heing worth more than $500, the County Court wouid not appear to have jurisdiction: see *Morphy* v. *Fawkes*, 18 P. R. 24.

Specific performance.

In a suit hy a purchaeer for specific performance of a contract for the sale of land for a sum under $150, where, before suit, the plaintiff had entered and improved the land end increased its value to mors thsn $200 (a sum then heyond the jurisdiction of a County Court), it was held that "the subject matter involved" wae over $200, and higher scale costs were allowed: *Kennedy* v. *Brown*, 6 P. R. 318; and sec *Rex* v. *Judge Whithorne*, 1904, 1 K. B. 827.

As to the effect upon the jurisdiction of a County Court of a counter-claim upon which no reiief is given: sea *Fitchett* v. *Mellow*, 18 P. R. 161.

Rule 649. **Division Courts Jurisdiction.**—The jurisdiction of the Division Courts is defined by *The Division Courts Act* (R. S. O. c. 63), ss. 61-65, which are as follows:

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61. The Court shall not have jurisdiction in

Cases in which Court has no jurisdiction.

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

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

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

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

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

Cases in which Court has jurisdiction.

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

(*a*) A personal action where the amount claimed does not exceed $60;

(*b*) A personal action if all the parties consent thereto in writing, and the amount claimed does not exceed $100;

(*c*) An action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100; provided that in the case of an unsettled account the whole account does not exceed $600;

(d) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed $200 and the amount claimed is

(i.) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—

(ii.) The balance of an amount not exceeding $200, which amount is so ascertained or—

(iii.) The balance of an amount so ascertained which did not exceed $400 and the plaintiff abandons the excess over $200.

An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

[See *Renaud* v. *Thibert*, 27 O. L. R. 57; *Re Green* v. *Crawford*, 21 O. L. R. 36; *Osterhout* v. *Fox*, 14 O. L. R. 599.]

The jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor. Rule 649.

(e) An action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the creditor does not exceed $60.

(2) Claims combining—

(a) Causes of action in respect of which the jurisdiction is by sub-section 1 limited to $60, hereinafter referred to as class (a); Combining causes of action.

(b) Causes of action in respect of which the jurisdiction is by sub-section 1 limited to $100, hereinafter referred to as class (b);

(c) Causes of action in respect of which the jurisdiction is by sub-section 1 limited to $200, hereinafter referred to as class (c),

may be joined in one action; provided that the whole amount claimed in respect of class (a) does not exceed $60; and that the whole amount claimed in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), does not exceed $100, and that the whole amount claimed in respect of classes (a) and (c) or (b) and (c) combined, does not exceed $200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) does not exceed $100.

(3) The findings of the Court upon claims so joined shall be separate. Separate findings on combined claims.

(4) The Court shall also have jurisdiction in actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed $60, as provided in *The Replevin Act*. Jurisdiction in replevin. Rev. Stat. c. 69.

(5) The Court shall also have jurisdiction in actions between teachers and school boards as provided by *The High Schools Act*, *The Public Schools Act*, and *The Separate Schools Act*, 10 Edw. VII. c. 32, s. 62. Actions between teachers and school boards. Rev. Stat. cc. 266, 268, 270.

64. Upon a contract for the payment of a certain sum in labour or in any kind of goods or commodities or in any other manner than in money, the Judge may give judgment for the amount in money as if the contract had been so expressed, if the goods and commodities have not been delivered or the labour or other thing performed in accordance with the contract. 10 Edw. VII. c. 32, s. 64. Judge may order payment in money, although contract not for payment in money.

65.—(1) The Court in actions otherwise within its jurisdiction shall have power to grant relief, redress, or remedy, or combination of remedies, either absolute or conditional, including the power to relieve against penalties and forfeitures, in as full and ample a manner as might be done in the like case by the Supreme Court. Powers of Courts. Courts not to grant injunctions or receiver.

(2) Nothing in this section shall confer jurisdiction to grant an injunction or to appoint a receiver. 10 Edw. VII. c. 32, s. 65.

Division Court Jurisdiction.—As to what claims are liquidated, or ascertained by the signature of the party: see note, *supra*, p. 374, and *Slater* v. *Labercc*, 9 O. L. R. 545; *Forfar* v. *Climie*, 10 P. R. 90.

In an action in the High Court for trespass to lands, and removal of fixtures the plaintiff recovered a verdict for $50. It was held that

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the title to land was not in question, notwithstanding the defendant had not expressly admitted the plaintiff's title as set up in the statement of claim; and consequently that the plaintiff was entitled only to Division costs, and the defendant to a set-off of his extra costs under *Rule* 650: *Richardson* v. *Jenkins*, 10 P. R. 292.

A plaintiff entitled only to Division Court costs under this *Rule* can tax as part of such costs his expenses of travelling from abroad to attend as a witness, if he was a material and necessary witness: *Talbot* v. *Poole*, 15 P. R. 274.

What is meant by "personal action" in *The Division Courts Act* ss. 62 (1) (*a*) and (*b*) *supra*, seems somewhat difficult to say—seeing that all the actions mentioned in the section are "personal." Possibly those referred to in clause (*a*) and (*b*) mean "personal actions other than those mentioned in the other clauses of the section." It is sometimes a matter of difficulty to determine whether an action is founded on tort, or contract, and consequently whether it is within clauses (*a*) or (*c*): *Burke* v. *Shaver*, 29 O. L. R. 365.

Set-off of Costs by Defendant.—Where a defendant is entitled to a set-off of costs under this *Rule*, if the plaintiff refuses to enter the judgment, an order may be made in Chambers limiting the time for him to do so, and in default allowing the defendant to enter it: *Sinclair* v. *Barrow*, 3 U. C. L. J. 49.

Costs in actions when judgment entered without trial.

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

This *Rule* materially varies from C. R. 1133, which applied to all cases where judgment was entered "without a trial."

This *Rule* applies only to cases where judgment is entered by default, not to cases where there has been a trial, but no order has been made as to costs: see *Andrews* v. *City of London*, 12 P. R. 44; *Dale* v. *Weston*, 17 P. R. 513. C. R. 1133 was held to apply to a consent order providing that the plaintiff shall get costs, without indicating the scale: *Brown* v. *Hose*, 14 P. R. 3; but see *Steckle* v. *Stakk*, 11 C. L. T. 332; the present *Rule* does not cover such a case, and it does not apply where a plaintiff takes money out of Court paid in with a defence: see *Babcock* v. *Standish*, 19 P. R. 195; *Stephens* v. *Toronto Ry.*, 13 O. L. R. 107, 363.

No set-off of costs (as under *Rule* 649) is contemplated by this *Rule*, where the plaintiff gets only costs according to the County, or Division Court scale: *Andrews* v. *City of London*, 12 P. R. 44.

To determine the proper scale of fees, it is the duty of the Taxing Officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case: *White Sewing Machine Co.* v. *Belfrey*, 10 P. R. 64, and see *Rule* 651.

Where a plaintiff sues for and recovers an amount beyond the jurisdiction of a County Court, a defendant cannot, by admitting his liability for part of the claim, and paying it into Court, deprive the plaintiff of his right to full costs, because the balance in dispute is within the jurisdiction of an inferior Court: *Brown* v. *Hose*, 14 P. R.

3; and see *Pickard* v. *Tims*, 19 P. R. 109; *Doherty* v. *Thompson*, 94 L. T. 626. Rules 651-653.

Where a verdict was taken by consent for $1 to be altered according to the result of a reference agreed on, costs to abide the event, it was held that it was a judgment without a trial and within C. R. 1133: *Andrews* v. *City of London*, 12 P. R. 44; but it would seem that this *Rule* would not apply to such a case, the judgment not being by default.

This *Rule* does not necessarily affect the scale of costs on a taxation between solicitor and client: *Re Jackson*, 18 P. R. 326.

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

652.—(1) A judgment or order may direct payment of a sum in gross in lieu of taxed costs. C.R. 1137. Sum in gross may be allowed.

(2) No sum in excess of $30 shall be allowed, without taxation, save by a Judge. C.R. 1158. Costs exceeding $30 to be taxed.

In administration proceedings it is usual to allow to creditors who are entitled to costs, a sum in gross, as the amount of their costs is generally small.

In an action for the administration of the estate of a deceased person, no costs should be allowed to creditors whose claims are sent in pursuant to an advertisement, except when formal proof is also required, and given; claimants attempting to prove claims as creditors, or as heirs-at-law, or next of kin, who fail to establish their claim, may be ordered to pay the costs occasioned to the opposite party by their claim. In case of a deficiency of assets the costs of creditors proving claims are to be added to their debts and paid proportionately, but the creditors are not entitled to be paid such costs in priority to the debts: *Re Ætna Insurance Co.*, 17 Gr. 160; *Morshead* v. *Reynolds*, 21 Beav. 638; *Canham* v. *Neale*, 26 Beav. 266; Morgan and Wurtzburg, p. 193.

Under this *Rule* the Court may award a lump sum, not only on interlocutory applications, but also for the general costs of the cause, or may award costs according to the County Court scale, even in cases which are beyond the jurisdiction of County Courts: *Palmer* v. *Postle* (Cby.), before full Court, 7th December, 1878: see Lib. Reg. of that date; and see *Schaeffer* v. *Armstrong*, 13 O. L. R. 40, but *semble*, the Court has no power to award a lump sum for costs exceeding what could be taxed: see p. 255 *supra*. But for this *Rule* it would seem that the Court would have no jurisdiction to award a lump sum for costs: *Golding* v. *Smith*, 1910, 1 K. B. 462; 102 L. T. 19. Court may award C. C. costs, in a case not within C. C. jurisdiction.

In an action for dower a lump sum for costs was awarded to the plaintiff: *Ryan* v. *Fish*, 4 Ont. 335, 344.

653. In actions or proceedings for administration, or partition, or administration and partition, unless otherwise ordered by a Judge, instead of the costs being allowed according to the tariff, each person properly Commission to be allowed in lieu of taxed costs in administration and partition.

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represented by a solicitor, and entitled to costs out of the estate—other than creditors not parties to the action or proceeding—shall be entitled to his actual disbursements in the action or proceeding, not including counsel fees, and there shall be allowed for the other costs of the suit payable out of the estate, a commission on the amount realized, or on the value of the property partitioned, which commission shall be apportioned among the persons entitled to costs, as may seem just. Such commission shall be as follows:

On the first $500	20 per cent.
On every additional $100 over $500 and up to $1,500	5 "
On every additional $100 over $1,500 and up to $4,000	3 "
On every additional $1,000 over $4,000 and up to $10,000	2½ "
On every additional $1,000 over $10,000	1 "

and such remuneration shall be in lieu of all fees, whether between party and party or between solicitor and client.

(2) Where an order or judgment in any such action or proceeding by any form of words directs that the costs thereof be taxed, it shall be taken to mean the allowance of commission and disbursements, in accordance with subsection 1, unless it is otherwise expressly provided. C.R. 1146.

Commission in lieu of costs, who entitled to share in.

The commission payable under this *Rule* is divisible only between those who are strictly parties to the action, properly represented by a solicitor, and entitled to costs out of the estate. Persons not originally made parties to the action, but served with a copy of the judgment under *Rules* 79-84, are not thereby made parties to the action, but are merely enabled to attend the proceedings, and are bound thereby as though they were actually parties: *English* v. *English*, 12 Gr. 441. In a suit by a residuary legatee, the plaintiff sufficiently represents the other residuary legatees, and they are not entitled as of course to costs out of the estate occasioned by their appearing by another solicitor in the Master's office: *Gorham* v. *Gorhom*, 17 Gr. 386. Creditors who are neither plaintiffs nor defendants, are also excluded from participation in the commission; their costs are disposed of as formerly. The commission is to cover both the solicitors' fees and the fees to counsel and agents. It is of course not intended to cover costs ordered to be paid by one party to another. It is intended to cover only costs payable out of the estate. Costs are to be apportioned under this *Rule* in proportion to the work done by, and responsibility imposed on, the solicitors engaged: *Dodge* v. *Clapp*, 8 P. R. 388; *Campbell* v. *Campbell*, 8 P. R. 159; 16 C. L. J. 16.

Mode of apportionment.

The work done in the Master's office is not alone to be considered in making the apportionment of the commission: *Cameron* v. *Leroux*, 9 P. R. 304. The Master should also consider the circumstances under which the action is brought, when the judgment has been pronounced by himself, and should not award commission to parties who ought to be depr'ed of, or ordered to pay, costs. Rule 653.

In ascertaining the commission, if the estate has been sold subject to a mortgage, the amount of the mortgage is not to be included as part of the "amount realized": *Re McColl*, *McColl* v. *McColl*, 8 P. R. 480; but in *Re Brown*, *Brown* v. *Brown*, 19 C. L. J. 367, it was held that the commission is to be computed on the total amount accounted for, and not merely on the balance found in the accounting parties' hands; and see *Re Batt*, *Wright* v. *White*, 9 P. R. 447. On what sum to be estimated.

In partition actions extra costs, if any, occasioned by incumbrances on shares, should be borne by such shares: *McDougall* v. *McDougall*, 14 Gr. 267; *Collon* v. *Banks*, 1893, 2 Ch. 221; *sed vide*, *Belcher* v. *Williams*, 45 Ch. D. 510; 83 L. T. 673.

Ordinarily no costs will be allowed in addition to the commission and disbursements: *Re Fleury*, *Fleury* v. *Fleury*, 9 P. R. 87; and the Court refused to give taxed costs where the estate was large, but insolvent: *Re Stuebing*, *Anthes* v. *Dewor*, 10 P. R. 236; 20 C. L. J. 193. Taxed costs were allowed in an administration suit, in *Re Goodfellow*, *Traders' Bank* v. *Goodfellow*, by Ferguson, J., 10th June, 1889, the deceased having committed suicide, and left his estate in such a condition as to cause special trouble, and much work of a difficult nature in administering the same; and see *Wright* v. *Bell*, 32 C. L. J. 362; 16 C. L. T. 193.

The Master has no power to award taxed costs under this *Rule*: a Judge of the Supreme Court alone has that power: *Hendricks* v. *Hendricks*, 13 P. R. 79.

Where the Master finds, in any administration action commenced before himself, that any of the parties to the action should pay the whole, or any part, of the costs of the action, instead of their being borne by the estate, it would seem that he should so direct: *Rule* 611 (2). But in such a case it would be convenient also to apportion the commission, and ascertain the disbursements payable out of the estate, in case the costs ordered to be paid by any of the parties personally, could not be recovered from them.

Where the principal part of the costs of an action are ordered to be paid personally by one or more of the parties, and the costs of only a small proportion of the work done, are chargeable against the estate, it does not appear that in such a case the full amount of the commission here provided would be payable, and the power reserved to the Judge to make other order would probably be exercised. Cases might arise where from special circumstances, the commission here provided would be clearly inadequate, and in such cases too it is possible that the power to make other order as to the costs would be exercised. Where taxed costs allowed in lieu of commission.

An agent employed by a principal solicitor who is paid by commission, is liable to have his bill taxed: *Re Idington & Mickle*, 8 P. R. 566.

Where proceedings have been taken by writ instead of by motion, and the extra costs occasioned thereby have been disallowed to the

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client, they are not taxable against him by his solicitor, on a taxation between solicitor and client: *Re Allenby & Weir*, 13 P. R. 403.

It seems open to question whether, in fixing the commission in respect of estates over $4,000, allowance can be made for any excess over that sum unless it amounts to $1,000, having regard to the wording of the previous part of the *Rule*.

Costs of interlocutory examination

654. The costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines unless, as to the whole or part thereof, it be otherwise directed, in actions in this Court by the Senior Taxing Officer, on his appointment served, and in actions in a County Court by a Judge thereof. In actions in the Supreme Court, if more than $25.00 is claimed, besides the disbursement in procuring the attendance of the person examined, the sum to be allowed for the examination or cross-examination shall be fixed by the Senior Taxing Officer on such appointment. C.R. 1136.

This *Rule* is based on C. R. 1136, as amended by C. R. 1267.

Semble, the costs of examining a party as a witness before trial may be allowed, though the examination was not in fact used, if such costs were reasonably incurred: *Bartlett* v. *Higgins*, 1901, 2 K. B. 230; 84 L. T. 509.

Semble, no appeal lies from the ruling of the Senior Taxing Officer under this *Rule*: but see *Monn* v. *Crittenden*, 11 O. L. R. 46.

Costs of guardian

655. Where the Official Guardian or other guardian of an infant, lunatic, or person of unsound mind, is entitled to costs, the Court may order a successful party to pay such costs and add them to his own. C.R. 1138.

See notes to Jud. Act, s. 74, pp. 250, 251.

An infant may in a proper case be ordered to pay the plaintiff's costs, and also the costs which the plaintiff under this *Rule* is ordered to pay to the Official Guardian; *Lipsett* v. *Perdue*, 18 Ont. 575; *Woolf* v. *Woolf*, 1899, 1 Ch. 343.

Costs, where several actions on bonds, etc.

656. Where several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, or where several actions are brought against the maker and indorser of a note, or against the drawer, acceptor or indorser of a bill of exchange, there shall be collected or recovered the costs taxed in one action only, at the election of the plaintiff, and the actual disbursements only in the other actions, unless the Court

otherwise orders; but this provision shall not extend to any interlocutory costs. C.R. 1176. Rules 657 658

This *Rule* purports to be based on C. R. 1176. It is really based on C. R. 1135.

Where several actions are properly brought in cases not within the provisions of this *Rule*, against different defendants, although involving the same or similar issues, the plaintiff succeeding is entitled to tax a separate set of costs in each action: *Baldwin* v. *Quinn*, 18 P. R. 248.

Party insisting on being represented by a different solicitor to pay costs occasioned thereby

657. Where any one of the persons constituting a class formed by a Master for representation in his office by one solicitor, insists on being represented by a different solicitor, he shall pay the costs of his own solicitor and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated. C.R. 1148.

This *Rule* purports to be based on C. R. 1188 [illegible] really based on C. R. 1148.

A party unnecessarily employing a separate solicitor would not be entitled to participate in the commission referred to in *Rule* 652.

Under *Rule* 406 the Master has power to classify the parties, and require the parties constituting each or any class to be represented by the same solicitor, and where he appoints a solicitor to act for a class, all the members of that class are bound by the acts of the solicitor so appointed, and cannot repudiate them, unless they have refused to be so represented, and have appointed a separate solicitor: *Re McConnell*, 3 Chy. Ch. 423. But where a solicitor was appointed *ex parte* to represent creditors, it was held that the solicitor could not recover costs against creditors who had not proved their claims, and who had no notice of his appointment: *Re Monteith, Merchants' Bank* v. *Monteith*, 12 P. R. 288; 23 C. L. J. 415.

After the appointment of a solicitor to act for a class, the separate costs of any member of that class, subsequently incurred, will not, ordinarily, be allowed against the estate under administration: *Re Ætna Insurance Co.*, 17 Gr. 160.

The Master should not appoint a separate solicitor for a class already sufficiently represented by the plaintiff; and where the plaintiff *primâ facie* represents (see *Rules* 78-85) the class; if the Master appoints a separate solicitor he should state his reason for so doing in his report: *Gorhom* v. *Gorhom*, 17 Gr. 386.

Ex parte order not to contain direction as to costs

658. No *ex parte* order in an action shall contain any direction as to costs, but the costs of any such motion shall be dealt with by the Taxing Officer. *New.*

This is a new provision, and is apparently intended to give the Taxing Officer a discretion as to the allowance, or disallowance, of the costs of *ex parte* motions, according as they may seem to have been reasonably and properly incurred, or rendered necessary or occasioned by the fault of the party incurring them.

Rules 659, 660.

The awarding of costs, however, is a judicial function: see Jud. Act, s. 74, and it may be, perhaps, found that, in the absence of an order for payment, there will be difficulty in issuing execution for the costs of *ex parte* orders: see *Rule* 660 (3), which authorizes an execution to be issued without an order, but there is no similar provision in this *Rule*.

Costs claimed by writ may be taxed.

659. Costs claimed upon a specially indorsed writ may be taxed although paid, and if more than one-sixth be taxed off the plaintiff's solicitor shall bear the cost of taxation. C.P. 139. *Amended.*

See Eng. (1883) R. 17.

Under the former C. RR. the indorsement of the claim for costs was required to state that if the amount were paid within the time allowed for appearance, further proceedings would be stayed; but that is no longer required: see *Rule* 773.

The effect of the indorsement, formerly, was to entitle the defendant to settle the claim by payment within eight days; the plaintiff was not bound by it for any other purpose: *Jacquot* v. *Boura*, 5 M. & W. 155, 156.

Where the defendant paid the amount, but not within the time limited, he was nevertheless held entitled to have the costs taxed under this *Rule*, as the plaintiff, by accepting the amount indorsed, was considered to have waived payment within the limited time: *Hoole* v. *Earnshaw*, 39 L. T. 409.

Abandoning motion.

660.—(1) Unless otherwise ordered, if a party who serves a notice of motion does not set the motion down, he shall be deemed to have abandoned the same, and the opposite party shall thereupon be entitled without an order to the costs of the motion.

Countermanding notice.

(2) A party who serves a notice of motion may countermand the same by notice served on the opposite party, who shall thereupon be entitled to the costs of the motion.

Costs.

(3) In either of such cases the costs may be taxed without an order, upon the production of the notice of motion served, with an affidavit that the motion was not set down, or of the notice of countermand served; and if the costs are not paid within 4 days from taxation, the party entitled thereto may issue an execution therefor. C.R. 790. *Amended.*

Clause (1) of this *Rule* only applies to motions which by the *Rules* are required to be set down, *e.g.*, motions to be heard in the Weekly Court: *Rule* 234 (6) and appeals to the Appellate Division: *Rules* 491, 492.

The former mode of obtaining the costs of a motion not set down was to appear on the return day of the motion, and ask for the costs

of an abandoned motion: *Reg.* v. *Armstrong*, 13 P. R. 306. It would not seem to be now proper to do this in the cases provided for by this *Rule*; but would appear to be still proper, in case of motions not required to be set down, *e.g.*, motions to a Judge in Chambers, or to the Master in Chambers, or other Officers having the like jurisdiction. Rule 661.

Unless the party in default obtains leave to set the case down, the present *Rule* will apply. This *Rule* applies to a County Court appeal: *Re Toronto Ry. Co. and City of Toronto*, 18 P. R. 489.

A motion to dismiss an appeal for want of prosecution has been refused as unnecessary: *Ib.*

On an application to restore an appeal after it had been abandoned, it was held that a *primâ facie* ground of appeal must be made out: *Union Bank* v. *Rideau Lumber Co.*, 19 P. R. 106. See S. C. in note to *Rule* 492, *supra*, p. 1091.

Where costs are sought to be recovered by execution under this *Rule*, the form of execution given in the *Rules* would need to be modified, as the form assumes that the amount to be levied is recoverable under some order, or judgment, whereas under this *Rule* there is to be no order or judgment, and the costs are recoverable simply by virtue of this *Rule*.

661. Where costs are ordered to be paid, they may be taxed either by the Taxing Officer at Toronto or by the proper officer where the proceedings are begun. C.R. 1157. *Amended.* Taxation of costs.

(2) On the signing of default judgment the officer signing judgment may fix and ascertain costs without taxation. (*As amended by Rule of 24th December, 1913*).

C. R. 1157 provided that costs might be taxed without an express reference for that purpose. The omission of that provision is perhaps not intended to alter the practice.

Sub-section (2) is by the official copy of the *Rule* of the 24th December, 1913, made an amendment of *Rule* 66, but it seems obviously intended to be an amendment of *Rule* 661, and is therefore printed here on that assumption.

On the signing of a default judgment the officer signing judgment may fix and ascertain costs without taxation: see *Rule* 66 (2), *supra*, p. 416.

Where the suitor is under no liability to pay costs to his solicitor, as for instance, has an agreement with his solicitor that he is not to pay costs: *Gundry* v. *Sainsbury*, 1910, 1 K. B. 645; 102 L. T. 440; or the suitor is indemnified by a third party against liability for costs: *Meriden, etc.*, v. *Braden*, 16 P. R. 410; 17 P. R. 77; *Walker* v. *Gurney*, 19 P. R. 12, he is not entitled to tax costs against the opposite party, though costs are awarded to him; if he is liable for disbursements, or any other part of the costs of the solicitor, such part may be taxed: *Stevenson* v. *Kingston*, *infra*.

The like rule prevails where the solicitor is working on a salary: *Jarvis* v. *G. W. R. Co.*, 8 C. P. 280; *Stevenson* v. *Kingston*, 31 C. P. 333; *Ottawa Gas Co.* v. *Ottawa*, 4 O. L. R. 656; 5 O. L. R. 246; but see *Henderson* v. *Merthyr Tydvil*, 48 W. R. 332; but it is provided by *The*

Rules 662-664.

Solicitors' Act (R. S. O. c. 159) s. 71: "where the remuneration of a solicitor or counsel employed by a corporation is wholly or partly paid by salary, the corporation employing such solicitor or counsel shall, notwithstanding, have the right to recover and collect lawful costs in all actions and proceedings in the same manner as if the solicitor or counsel were not receiving a salary *where the costs are by the terms of his employment payable to the solicitor or counsel as part of his remuneration in addition to his salary*": and see *The Municipal Act*, 1913, (R. S. O. c. 192). s. 245 (5); and *Ponton* v. *Winnipeg*, 41 S. C. R. 366.

As to costs taxable to suitors appearing in person: see note to Jud. Act, s. 74, *supra* p. 245.

The Master or a Taxing Officer is not justified, without a direction from the Court, in striking a balance between cross claims for costs payable in the action: *Fouchier* v. *St. Louis*, 13 P. R. 318, except where *Rule* 665 applies.

One day's notice of taxation sufficient.

662. Where a notice of taxation is necessary, one day's notice shall be sufficient if served with a copy of the bill of costs and affidavit of disbursements. C.R. 1159.

Where a party proceeds with a taxation without giving notice, the taxation is not void, and an execution issued for the costs will not be set aside, but the opposite party is only entitled to a re-taxation: *Cranston* v. *Blair*, 15 P. R. 167.

Where the solicitor for the party ordered to pay costs attends the taxation thereof, service of the certificate of the Taxing Officer of the amount allowed before issuing execution, is not necessary, though usual: *People's B. & L. Assn.* v. *Stanley*, 4 O. L. R. 644.

Parties to attend taxation.

663. The Taxing Officer may direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and disallow the costs of any person whose attendance he considers unnecessary in consequence of the interest of the party in the fund or estate being small or remote, or sufficiently protected by other parties interested. C.R. 1161.

See Eng. (1883) R. 1002 (27).

Neglect to bring in or tax costs.

664. Where any party entitled to costs refuses or neglects to bring in his bill of costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the Taxing Officer shall certify the costs of the other parties, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect. C.R. 1163.

See Eng. (1883) R. 1002 (28).

665. Where a party entitled to receive costs is liable to pay costs to any other party, the Taxing Officer may adjust the same by way of deduction or set off. C.R. 1164. *Amended.*

Rule 665. Set-off of costs.

See Eng. (1883) R. 1002 (21).

Under this *Rule* a discretion is allowed as to whether or not there shall he a set-off of costs in the same action or proceeding, where costs are awarded to, and against, the parties. Equitable considerations are allowed to enter into the disposal of the contention and there is no strict right in the matter: *McCarthy* v. *Cooper*, 12 P. R. 125 (where a set-off was refused); *Re Clarke*, 15 P. R. 269; 16 P. R. 94.

This *Rule* does not enable the Taxing Officer to set-off costs payable in different actions between the same parties, but only costs incurred in the same action or proceeding: *Bake v. French*, 1907, 1 Ch. 428; 96 L. T. 496; *David* v. *Rees*, 1904, 2 K. B. 435; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Hassell* v. *Stanley*, 1896. 1 Ch. 607, (where a set-off of costs in the High Court against costs in a County Court was refused); *Girardot* v. *Welton*, 19 P. R. 201; *Edwards* v. *Hope*, 14 Q. B. D. 922. Interpleader proceedings (*Barker* v. *Hemming*, *supra*), and garnishee proceedings, (*David* v. *Rees*, *supra*), are separate and distinct proceedings from the original action in which they arise. Nor does the *Rule* extend to judgments on a claim, and counter-claim, where the latter is in the nature of a cross-action, so as to he treated as a distinct judgment: *Link* v. *Bush*, 13 P. R. 425. It applies to enable costs receivable out of a fund by a party to be set-off against costs payable by that party personally in the suit: *Batten* v. *Wedgwood Coal & Iron Co.*, 28 Ch. D. 317; and to enable costs payable by a married woman out of her separate estate to he set off against costs payable to her in the same proceedings: *Hammond* v. *Keachie*, 17 P. R. 565; *Pelton* v. *Harrison*, 1892, 1 Q. B. 118; 65 L. T. 845.

Where judgment is given for the plaintiff on his claim with costs, and for the defendant on his counter-claim with costs, and directing the amounts to be set off, the plaintiff's costs should be taxed as though he had wholly succeeded in the action, and the defendant's costs should be taxed as though he had wholly succeeded in the action: *Summerfeldt* v. *Johnston*, 17 P. R. 6.

This *Rule*, however, does not appear to authorize the Master, or Taxing Officer, to adjust the balance due on cross-claims for costs; where one of the cross claims is in the nature of a claim for contribution for costs paid by a defendant, which the plaintiff was also jointly liable to pay, but of which he has neglected to pay his share: *Fouchier* v. *St. Louis*, 13 P. R. 318.

A set-off of costs awarded but untaxed was refused, but an opportunity was given to have them taxed, and payment of the costs due to the other party was delayed to enable a set-off to be made: *Re Crawshay*, 45 Ch. D. 318; see also *Re Clarke & Holmes*, 16 P. R. 94.

The Taxing Officer should not close the taxation of the costs of the action where interlocutory costs are to he set off, unless the party entitled to them unduly delays bringing in his bill: *Cousineau* v. *Park*, 15 P. R. 37.

A change of solicitor is immaterial if the costs are in the same proceeding: *Roberts* v. *Buée*, 8 Ch. D. 198.

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The set-off which is authorized by this *Rule* may be made irrespective of the lien of the solicitor of either party: see *Wright* v. *Calvert*, 34 C. L. J. 355; 18 C. L. T. 218. But the ultimate balance found due by one of the partners in a partnership action cannot be set off against costs previously ordered to be paid to him in the action, to the prejudice of his solicitor's lien: *Dawson* v. *Moffatt*, 10 P. R. 336; nor can the costs payable to a beneficiary out of an estate be set off against the costs payable by him to other parties, to the prejudice of his solicitor's lien: *Wright* v. *Bell*, 16 P. R. 335; 24 S. C. R. 656; and see *Hieron* v. *Hobson*, 47 L. J. Chy. 574; see, however, *Brigham* v. *Smith*, 17 Gr. 512; but in this case no question of lien appears to have been raised. In the case of costs not within this *Rule*, by reason of their not being in the same action or proceeding, the solicitor's lien may prevent a set-off: see notes to *Rule* 666.

In the following cases a set-off of costs in the same action was allowed without regard to the solicitor's lien: *Pringle* v. *Gloag*, 10 Ch. D. 676; 40 L. T. 512; *Cameron* v. *Campbell*, 12 U. C. Q. B. 159; 1 P. R. 170; *Young* v. *Hobson*, 8 P. R. 253; *Maxwell* v. *Maxwell*, 7 P. R. 63; *Rawlings* v. *Smith*, 7 Sc. 231; and see *Blumenstiel* v. *Edwards*, 11 O. L. R. 30.

Interlocutory costs incurred before judgment may be set-off by the Taxing Officer, without any order: *Rule* 666; but if incurred after judgment an order is necessary: *Elgie* v. *Butt*, 18 P. R. 469.

Where a set-off of interlocutory costs is ordered, the set-off should be made before execution is issued, and the execution should be issued only for the balance: *People's P. & L. Assn.* v. *Stanley*, 4 O. L. R. 644.

Where the Judicial Committee of the Privy Council orders a new trial and directs the respondent to pay the costs of the appeal forthwith, such costs are not the subject of set-off, and execution therefor cannot be stayed by the Court below to enable a set-off to be made: *Metallic Roofing Co.* v. *Jose*, 17 O. L. R. 237.

Set-off of damages and costs not to prejudice solicitor's lien.

666. A set off of damages or costs between parties shall not be allowed to the prejudice of the solicitor's lien for costs in the particular action in which the set-off is sought; but interlocutory costs in the same action awarded to the adverse party may be set off notwithstanding any lien. C.R. 1165.

This *Rule* adopts the former Equity rule, as to which: see *Pringle* v. *Gloag*, 10 Ch. D. 76.

See Eng. (1883) R. 989, which is as follows:—

"989. A set-off for damages or costs between parties *may be allowed* notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

The concluding clause in this *Rule* appears to be already covered by the provision of *Rule* 665. As to what are "interlocutory costs:" see *Clarke* v. *Creighton*, 14 P. R. 100; *Re Clarke*, 15 P. R. 269; 16 P. R. 94; *Flett* v. *Way*, 14 P. R. at p. 316; *Elgie* v. *Butt*, 18 P. R. 469; *Girardot* v. *Welton*, 19 P. R. 162, 201.

This *Rule* does not interfere with the power of the Judge at the trial when disposing of the costs of an action and counter-claim therein, to direct a set-off without regard to any claim of lien on the part of the solicitors: *Blumenstiel* v. *Edwards*, 11 O. L. R. 30.

The Common Law Rule 52, from which this *Rule* is taken, was in similar terms to the English Rule 63 H. T. 1853. The words "damages and costs" in this *Rule* apply to damages and costs payable in separate actions; and it is only where a set-off of damages and costs in separate actions is sought that the lien of the solicitor is to be protected: *George* v. *Elston*, 1 Sc. 518; *Dunn* v. *West*, 10 C. B. 420; *Scott* v. *Richebourg*, 11 C. B. 447; *Blumenstiel* v. *Edwards*, *supra*, p. 1332: *sed vide contra Conadion Pacific Ry.* v. *Grant*, *infra*. Rule 666.

Under this *Rule* a set-off of damages and costs between the same parties in different actions cannot be ordered to the prejudice of the lien of the solicitor of either of the parties: *Turner* v. *Drew*, 17 P. R. 475; see further as to the application of the *Rule*: *Little* v. *Philpotts*, 8 Jur. N. S. 1175; *Young* v. *Hobson*, 8 P. R. 253; *Re Harrald*, *Wilde* v. *Walford*, 48 L. T. 352; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Cuthbert* v. *Commercial Travellers' Association*, 7 P. R. 255; *Molsons Bank* v. *Cooper*, 18 P. R. 396; *David* v. *Rees*, 1904, 2 K. B. 435; *Meynell* v. *Morris*, 104 L. T. 667; 55 Sol. Jour. 480.

On the application of defendants who had employed the same solicitor, a set-off has been allowed of costs due by the plaintiff to one of the defendants as to whom he had failed, against damages and costs due to the plaintiff by the other defendants as to whom he had succeeded, without regard to the plaintiff's solicitor's lien: *Rawlings* v. *Sewell*, 7 Sc. 231; *George* v. *Elston*, 1 Sc. 518; *Fortune* v. *Hickson*, 1 U. C. Q. B. 408; *Scoville* v. *Noble*, 1 H. Bl. 23; *Bank of Upper Canada* v. *Thomas*, 10 Gr. 356; *Wright* v. *Chard*, 1 L. T. 182; 4 Drew 702; but see *Wilson* v. *Switzer*, 1 Chy. Ch. 160; and this, even though the defendants appeared by different solicitors: *Lees* v. *Kendall*, 3 A. & E. 707; 5 N. & M. 340; in *Flett* v. *Way*, 14 P. R. 312, a set-off in such circumstances, to the prejudice of the solicitor's lien, was refused.

Claims for contribution cannot be allowed by the Master, or Taxing Officer, by way of set-off: see *Fouchier* v. *St. Louis*, 13 P. R. 318; the application must be made to a Judge: *Ib.*

The lien of the solicitor only holds as against the opposite party, to the extent of the costs between solicitor and client of the cause only, he cannot claim a general lien for all costs due him: *Stephens* v. *Weston*, 3 B. & C. 535; *Watson* v. *Moskell*, 1 Bing. N. C. 727.

In *Jenner* v. *Morris*, 11 W. R. 943, the lien of the solicitor was declared to be always subject to the equities between the parties; and see *Mercer* v. *Graves*, L. R. 7 Q. B. 499; but this view has not always been maintained by the Courts: see *Re Cleland*, L. R. 2 Chy. 808; *Wright* v. *Bell*, *supra*, p. 1332.

To the ordinary rule that a set-off of dsmages and costs in separate actions, will not be allowed to the prejudice of the solicitor's lien, costs payable to a trustee out of the trust estate form an exception; snd when costs are ordered to be paid out of trust fund, the lien of the solicitor of the person entitled to receive the costs will not be allowed to interfere with the set-off, against the costs so payable, of any moneys payable by the client to the trust estate, though the latter may be payable under a judgment recovered in a separate action: *Re Harrold*, *Wilde* v. *Walford*, 51 L. T. 441.

Set-of of claim and counter-claim.

For the purposes of this *Rule*, the weight of authority would seem to establish that a claim and counterclaim are to be treated as one action: *Blumenstiel* v. *Edwards*, 11 O. L. R. 30. In *Brown* v. *Nelson*, 11 P. R. 121, where the claim and counter-claim arose out of the same

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transaction, the set-off was allowed without providing for the solicitor's lien: see also *Westacott* v. *Bevan*, 1891, 1 Q. B. 774: but in *Canadian Pacific Ry. Co.* v. *Grant*, 11 P. R. 208, the claim and counter-claim, though arising out of the same transaction, were held to be separate actions, and a set-off, to the prejudice of the solicitor's lien, was refused. In *Flett* v. *Woy*, 29 C. L. J. 192, a set-off of damages was allowed; but not a set-off of costs: S. C., 14 P. R. 312; and see *Westacott* v. *Bevan*, 1891, 1 Q. B. 774.

Solicitor's lien.

In the following cases a set-off of costs payable in separate actions to the prejudice of the solicitor's lien was refused: *Webb* v. *McArthur*, 4 Chy. Ch. 63; *Edwards* v. *Hope*, 14 Q. B. D. 922; 53 L. T. 69; *Cuthbert* v. *Commercial Travellers' Assocn.*, 7 P. R. 255; and see *Ross* v. *McLay*, 7 P. R. 97; *Wardell* v. *Trenouth*, 8 P. R. 142; *Barker* v. *Hemming*, 5 Q. B. D. 609; *Blakey* v. *Latham*, 41 Ch. D. 518.

The solicitor's lien attaches to money payable to the plaintiff by way of compromise where such money is in substance the fruit of the action, and if a solicitor having notice of the lien procures the money to be paid to the plaintiff, he becomes personally liable to satisfy the lien: *Ross* v. *Buxton*, 42 Ch. D. 190; 60 L. T. 630.

The possibility of a solicitor being able to recover his costs out of some other fund was held not to be a sufficient ground for allowing a set-off to the prejudice of his lien: *Molsons Bank* v. *Cooper*, 18 P. R. 396.

A set-off of judgments was allowed, notwithstanding an assignment of one of the judgments for the benefit of creditors: *Moody* v. *Can. Bank of Commerce*, 14 P. R. 258, and see *The Assignments and Preferences Act* (R. S. O. c. 134), s. 31.

Costs due by a party individually cannot be ordered to be set-off against a fund due to him in a fiduciary character, or even against his beneficial interest therein: *Phillips* v. *Howell*, 1901, 2 Ch. 773.

Taxations between party and party.

Costs of unnecessary proceedings not to be allowed.

667. Between party and party the Taxing Officer shall not allow the costs of proceedings:

(*a*) Unneeessarily taken;

(*b*) Not calculated to advance the interests of the party on whose behalf the same were taken;

(*c*) Incurred through over-caution, negligence or mistake;

or (*d*) Which do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party. C.R. 1175 and 1176.

This *Rule* is based on C. RR. 1175 and 1176 (1). C. R. 1176 (2) is now covered by *Rule* 668.

See Eng. (1883) R. 1002 (29): see notes to *Rules* 656, 670.

As to the general rule that the costs taxable between party and party are only those necessary to enable the party to conduct the litigation: see *Smith* v. *Buller*, L. R. 19 Eq. 473.

Where, under an order directing an account of what was due to a party in respect of costs of proceedings taken to enforce a judgment

in the Exchequer Division, the Taxing Master disallowed the costs of certain abortive garnishee summonses, it was held that the Master was not precluded by the form of order from disallowing any costs he thought proper, and that, under this *Rule*, he was bound to do so: *Simmons* v. *Storer*, 14 Ch. D. 154. Rule 667.

Charges not strictly under the tariff of costs, but for work done which saves the greater expense of proceeding in the regular way, may be allowed whether done between the solicitors, or by one party alone: *Torrance* v. *Torrance*, 18 C. L. J. 223; 2 C. L. T. 311; 9 P. R. 271.

Copies of pleadings, where necessary for an interlocutory motion, will be allowed: *Warner* v. *Mosses*, W. N. 1881, 135; 45 L. T. 359; 17 C. L. J. 479; 17 Ch. D. 72.

Where an action is dismissed with costs it means the costs of all defendants, and in all capacities in which they are defendants: *Woolley* v. *Coleman*, W. N. 1886, 6, 36; 30 L. T. Jour. 320.

Where an action is brought against a solicitor who defends it in person, and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly renders unnecessary: *London Scottish Benefit Society* v. *Chorley*, 12 Q. B. D. 452. Where he nominally appeared by a solicitor, but did the work himself, the same costs were held to be taxable: *King* v. *Moyer*, 9 P. R. 514; see *Banks* v. *Burroughs*, 12 S. C. R. 184. Solicitor suitor acting in person.

Costs incurred after the death of the client were disallowed, though the solicitor was not aware of the death: *Pool* v. *Pool*, 61 L. T. 401. Death of client.

As to when defendants should appear by the same solicitor, or may appear by separate solicitors: see Morgan & Wurtzburg on Costs, p. 124; *Barrett* v. *Campbell*, 7 P. R. 150; *Connolly* v. *Hill*, *Ib.*, 441; *Born* v. *Turner*, 1900, 2 Ch. 211, and notes to *Rule* 669. Severing in defence.

In *Re Lyall*, 29 Sol. Jour. 290, trustees, viz., the widow of the testator, who was also tenant for life, and three others, were allowed two sets of costs, they having severed, on the ground that the rule was that a trustee, who is also a tenant for life, might appear separately from his co-trustees.

Defendants joining in a statement of defence may sometimes properly separate at the trial, and be represented by different counsel, where their cases are distinct: see *Ager* v. *Blocklock*, 56 L. T. 890; see also *Petrie* v. *Guelph*, *etc.*, 10 P. R. 600.

A defendant in person may be made an allowance for his time and trouble in arguing the case: *Millar* v. *Macdonald*, 14 P. R. 499.

Where by an order allowing the plaintiff to make an amendment the costs were made costs in the cause, it was held that the Taxing Officer had no discretion under this *Rule* to disallow these costs in taxing the plaintiff's costs of the cause: *Edwards* v. *Pearson*, 20 C. L. J. 93; 3 C. L. T. 504. Taxing officer cannot alter disposition of interlocutory costs.

But a clause in an order for a commission directing that costs of the order, commission and depositions to be taken thereunder, should be costs in the cause, was held not to preclude the Taxing Officer from disallowing the costs where the evidence had not been used: *Dominion*, *etc.*, v. *Stinson*, 9 P. R. 177; see *Deloroque* v. *Oxenholme & Co.*, W. N. 1893, 227; *Re McMillan*, 8 C. L. J. 285.

Rule 687.

Immaterial witnesses

In *Christopher* v. *Noxon*, 10 P. R. 149, a trial was postponed owing to defendant not having obeyed an order to produce, defendant to pay the costs rendered nugatory by the postponement. The plaintiff subpœnaed seventeen witnesses, who were examined at the adjourned trial upon matters which the Judge held could not be interfered with by the Court. It was held that the Taxing Officer in refusing the plaintiff the costs of these witnesses did not erroneously exercise the discretion given him by this *Rule*.

See also *Goodfellow* v. *Shuttleworth*, 3 C. L. T. 105; *Trotter* v. *Maclean*, 13 Ch. D. 574; *Carlisle* v. *Roblin*, 16 P. R. 328.

Costs "as between solicitor and client."

Where solicitor and client costs are to be paid between party and party, the proper form of order is to direct the costs to be taxed "as between solicitor and client," but in such a case where the costs are ordered to be taxed "between solicitor and client" no greater costs can be taxed; *Heaslip* v. *Heaslip*, 14 P. R. 165. A retaining fee agreed to be paid by a party cannot be allowed on a taxation "as between solicitor and client": *McKee* v. *Hamlin*, 16 P. R. 207. As to retainer between solicitor and client: see *infra*, p. 1412.

Unnecessary proceedings.

The costs of unnecessary affidavits, going into the merits, filed on a motion for leave to appeal from a Master's report: *Nash* v. *Glover*, 6 P. R. 267; and on a motion to vacate a decree: *Redford* v. *Todd*, 6 P. R. 154, and on production of documents: *Baldwin* v. *Quinn*, 16 P. R. 248, were disallowed. Costs rendered unnecessary by a slip of the solicitor cannot be recovered, even by the solicitor from his client: *Re Massey*, 76 L. T. Jour. 361; and see *Re Allenby & Weir*, *infra*, and *Baldwin* v. *Quinn*, *infra*, p. 1237.

Costs of unnecessary proceedings by writ for administration, instead of proceeding by motion, are not taxable, even between solicitor and client: *Re Allenby & Weir*, 14 P. R. 235. Where a solicitor is consulted it is an important part of his duty to advise the adoption of a comparatively cheap remedy, in preference to one far more costly, and not more efficacious: *Ib.*, *per* Hagarty, C.J.O.

Costs occasioned by unnecessarily adding a number of sub-tenants as parties defendant, in an action by a landlord to recover possession, were disallowed: *Green* v. *Herring*, 1905, 1 K. B. 152; 92 L. T. 37.

Costs out of estate.

The Court does not allow out of an estate costs of proceedings which were of no benefit to it. See notes to *Rule* 608, *supra*, p. 1243, and *Re Ormston*, 58 L. T. 74; 59 L. T. 594; 36 W. R. 216; *Re Allenby & Weir* 14 P. R. 227.

The amount allowed between solicitor and client is not conclusive as to the amount to be allowed out of an estate: *Brown* v. *Burdett*, 37 Ch. D. 207; 40 Ch. D. 214.

Costs taxable between solicitor and client not necessarily taxable against estate.

Notwithstanding this *Rule*, charges and allowances, which might very properly be allowed on a taxation between solicitor and client, when the costs come out of the plaintiff's fund, or one in which he is interested, may nevertheless be disallowed out of a fund in which he has no interest: *Re Robertson*, *R.* v. *R.*, *infra*, p. 1337; *Ford* v. *Mason*, 16 P. R. 25.

Where, in an administration suit, the plaintiffs, who were next of kin, had incurred the expense of several journeys to examine the books of the estate, and make inquiries, etc.; and also of other proceedings in the Master's office, without the consent of the creditors, who were

alone beneficially interested, and after they knew that the estate was insolvent, such costs were disallowed: *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555. Rule 667.

An objection that a person examined for discovery was not liable to be so examined, is not open on taxation: *Logan* v. *Kirk*, 14 P. R. 130.

The costs of preparing and tendering a conveyance before suit are not taxable as costs in a cause subsequently brought: *Pringle* v. *McDonald*, 7 P. R. 152. Costs ante litem.

Costs incurred in anticipation of a threatened suit were, however, allowed, *e.g.*, where a defendant was threatened with an action in respect to fraud disclosed in another action in which he was not a party, and therefore obtained a transcript of the speeches, evidence and judgment in the latter case, he was allowed on taxation so much of the transcript of the evidence and judgment as related to the question whether the defendant was a party or privy to the fraud: *Bright* v. *Sellar*, 1904, 1 Ch. 369; 90 L. T. 155.

In some cases it may be necessary to have a direction in the judgment, in regard to costs incurred in consequence of an unreasonable course pursued by the other party, to enable the Taxing Officer to allow such costs: *Garrard* v. *Edge*, 44 Ch. D. 224; 62 L. T. 510. Where unreasonable course taken

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, so that the costs of them should be disallowed under this *Rule*, unless the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he did not do so merely to put further costs into his pocket, without regard to the interest of his client: *Re O'Donohoe*, 12 P. R. 612.

Actions by two plaintiffs by the same solicitor against the same defendants, though supported mainly by the same evidence, are upon taxation of plaintiffs' costs to be taxed as two actions (in the absence of special order as to the conduct of the actions), except as regards attendances, or other matters, which were, or ought to have been, done at the same time in both cases: *Re Metropolitan Coal Consumers' Assoc., Grieb's Case*, 45 Ch. D. 606; *Baldwin* v. *Quinn*, 16 P. R. 248; but it was subsequently held that the Taxing Officer has no discretion, except as provided in the tariff, to reduce the fees allowed by the tariff for specific service; and therefore, where several actions are pending against the same defendant, and appearances are entered in all of them at the same time, the Taxing Officer cannot properly reduce the fee allowed for such services: *Price* v. *Clinton*, 1906, 21 Ch. 487; 95 L. T. 710; and see *Rule* 676. Several similar actions. Discretion of Taxing Officer.

With regard to the Taxing Officer's discretion as to the allowance of witness fees of witnesses called as to the same question: see *Latour* v. *Smith*, in note to *Rule* 670, *infra*, p. 1340.

Costs of Ex parte Motions.—Orders made *ex parte* are not to contain any direction as to costs: *Rule* 658, the intention apparently being that the Taxing Officer shall have full discretion as to the costs of such motions: but if such an order in violation of *Rule* 658, contains a direction as to costs, it is doubtful whether the Taxing Officer would be justified in disregarding it. Where costs of *ex parte* motions are Costs of ex parte motions.

Rules 668, 669.

taxed as costs in the cause or matter, they would be recoverable under the order or judgment awarding the costs of the action; but there might be difficulty in issuing an execution for costs of an *ex parte* order for which there was no order for payment; even though the Taxing Officer should allow them: see note to *Rule* 658, *supra*, p. 1337.

Between solicitor and client, costs incurred at client's request after notice that proceeding unnecessary may be allowed.

668. Upon a taxation between a solicitor and his client, the Taxing Officer may allow the costs of proceedings taken which were in fact unnecessary where he is of the opinion that such proceedings were taken by the solicitor because, in his judgment, reasonably exercised, they were conducive to the interests of his client, and may allow the costs of proceedings which were not calculated to advance the interest of the client where the same were taken by the desire of the client after being informed by his solicitor that they were unnecessary and not calculated to advance his interests. This rule shall not apply to solicitor and client costs payable out of a fund not wholly belonging to the client, or, by a third party. C.R. 1176. *Amended.*

This *Rule* is based on C. R. 1176 (2) and C. R. 1176 (1) is covered by *Rule* 667.

See notes to *Rule* 667.

Defendants improperly severing are to be allowed but one set of costs without special order.

669. Where two or more defendants defend by different solicitors under circumstances entitling them to but one set of costs, the Taxing Officer shall allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their defences, or otherwise, the Taxing Officer shall allow but one defence and set of costs. C.R. 1162.

As to the circumstances entitling defendants to sever in their defence: see *Melbourne* v. *Toronto*, 13 P. R. 346.

Where defendants are charged with matters of a criminal nature involving serious charges to their characters, each defendant is justified in defending by a solicitor of his own choosing: *Devaney* v. *The World*, 2 O. W. N. 880 (a charge of libel and conspiracy).

Where an action is tried against two or more defendants, and the judgment is against all defendants, a defendant who has put in a separate defence is alone liable for the costs occasioned by it: the other defendants are not liable for those costs: *Stumm* v. *Dixon*, 22 Q. B. D. 99, 529.

As to the right to contribution amongst co-defendants made jointly liable for plaintiff's costs: see *Fouchier* v. *St. Louis*, 13 P. R. 318 (fraudulent conveyance); and *Till* v. *Oakville*, 31 O. L. R. 405 (joint negligence).

Rule 889.

Where two or more defendants defend by the same solicitor, and the action is dismissed as to one with costs, and succeeds as to others, the plaintiff is liable to pay such proportion of the costs of the joint defence as the successful defendants are liable for; this, in the absence of any special agreement would be an equal share: *Beaumont* v. *Senior*, 1903, 1 K. B. 282; 88 L. T. 234.

Rule as to defendants joining in defence, to whom it applies.

The rule which requires defendants in the same interest to join in their defence, appears only to apply to defendants standing in a fiduciary position, either as trustees: *Farr* v. *Sheriffe*, 4 Hare, 528; or *cestuis que trustent*: *Peillon* v. *Brooking*, 4 L. T. 731; *Martin* v. *Sampson*, 33 C. L. J. 200; Sm. Pr., 837-8; but see *Crawford* v. *Lundy*, 23 Gr. 251. Thus in a suit for specific performance by a vendee against the vendor, and a subsequent vendee of the same property, it was held that the defendants might properly sever in their defence, and employ separate solicitors: *Barrett* v. *Compbell*, 7 P. R. 150. But when husband and wife severed in a partition suit, the costs were ordered to be borne by the wife's share: *Mildmoy* v. *Quicke*, 46 L. J. Chy. 867. Members of a firm which had been dissolved were held entitled to sever in their defence: see *Melbourne* v. *Toronto*, *supra*. So also in an action by a municipality against a contractor and one of his sureties, and the representatives of a deceased surety, the defendants were held to be entitled to sever: *Logan* v. *Kirk*, 14 P. R. 130.

One defendant improperly severing.

Where one of several defendants is charged with fraud, the others are justified in severing, even though they stand in a fiduciary position: see *Connolly* v. *Hill*, 7 P. R. 441.

A trustee who is also a tenant for life of the trust estate, is entitled to sever from his co-trustees: see *Re Lyall*, *supra*, p. 1335.

Where defendants have severed under circumstances which, if the severance were improper, would disentitle one of them to costs *in toto*, the Master cannot act under this *Rule*, if the judgment award the defendants costs generally. The *Rule* applies only where all the defendants are to blame for the severance, and one set of costs is consequently apportionable between them: *Reid* v. *Stephens*, 3 Chy. Ch. 372.

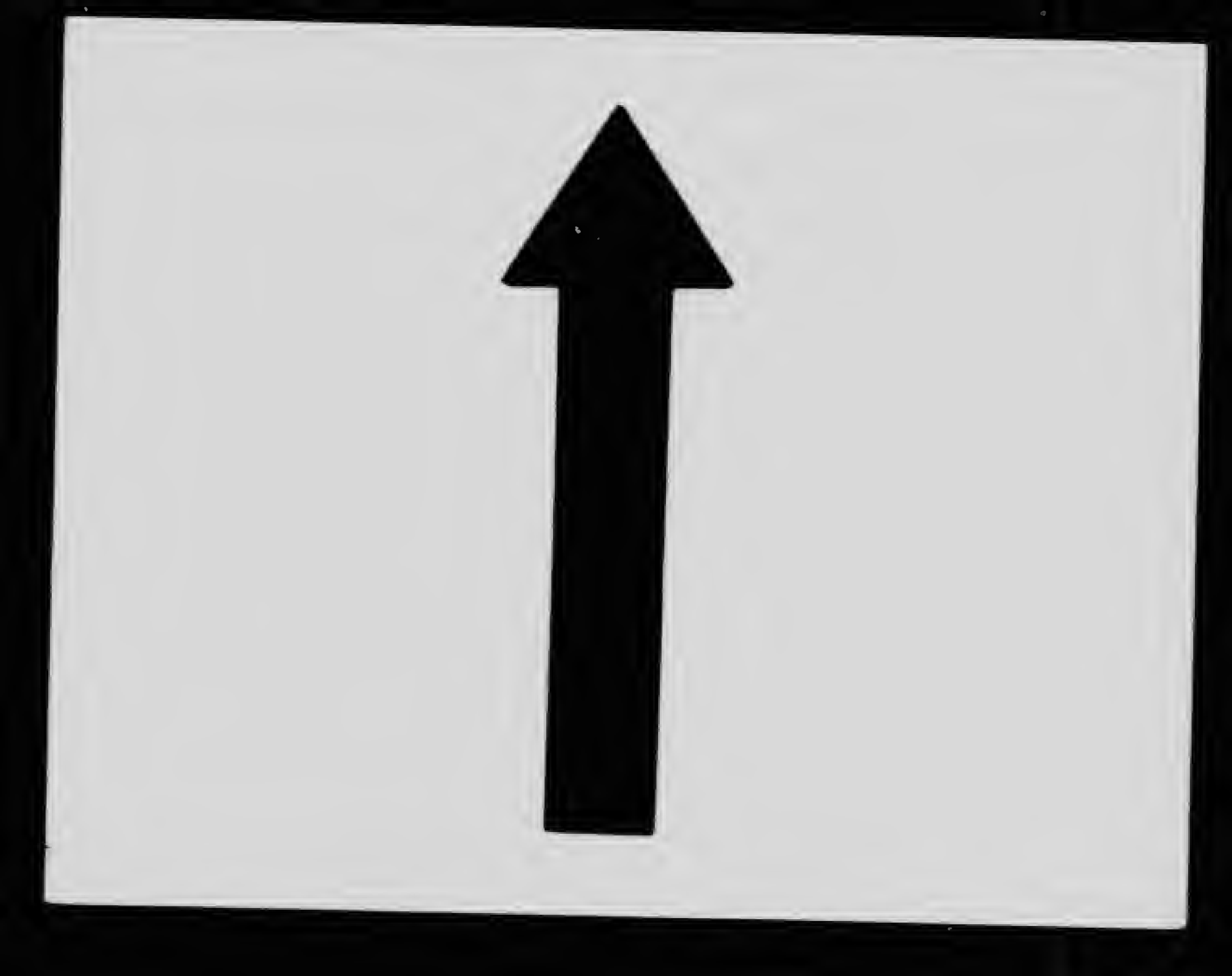
Discretion of Taxing Officer.

The Taxing Officer has a discretion to allow to defendants who appear separately separate sets of costs, except in the cases referred to in this *Rules* see *Boswell* v. *Coaks*, *infra*; and also to disallow more than one set of costs where separate defences have been improperly made: *Meriden* v. *Broden*, 16 P. R. 346, 410; 17 P. R. 77; and see *Re Isaac*, 1897, 1 Ch. 251; 75 L. T. 638.

For the cases in which it is improper for defendants to sever: see Morgan & Wurtzburg on Costs, p. 124.

Appeal

On appeal from a Taxing Officer as to whether defendants were entitled to separate costs, where it was not shewn that he had not exercised his discretion at all, or that he had done so on a wrong principle, it was held that as the House of Lords had in that case delegated to the Taxing Officer the decision of how many sets of costs should be allowed, an appeal from his decision could not be entertained: *Boswell* v. *Coaks*, 36 Ch. D. 444. But it has been held that the discretion of the Taxing Officer under a similar English Rule (Ord. 65, r. 27 (8).), is subject to review by the Court: *Spolding* v. *Gommoge*, 1914, 2 Ch. 405.



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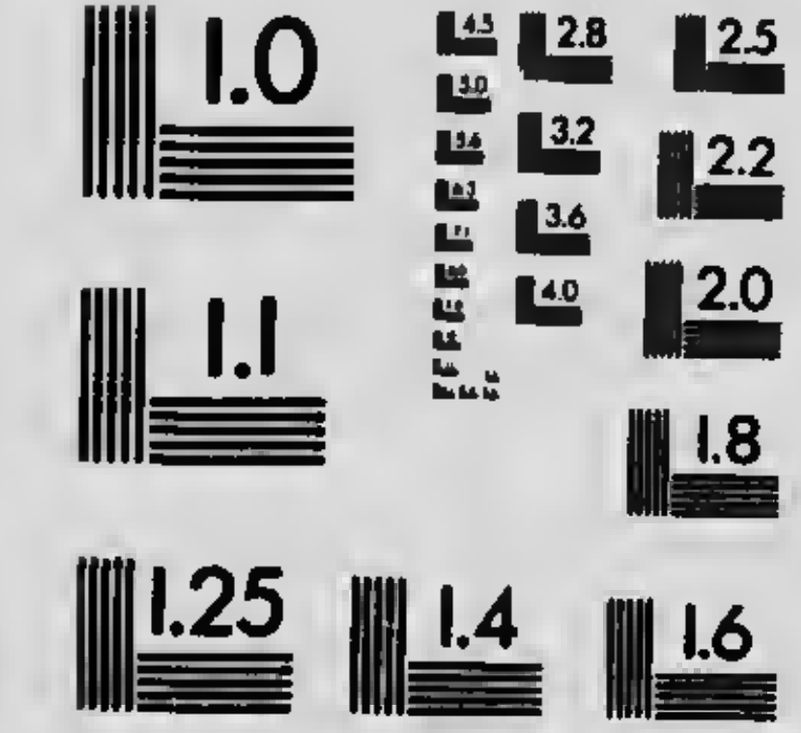

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Rule 670.

As to the mode of taxation where two or more defendants defend by the same solicitor, one of whom succeeds, and the other f see *Clark* v. *Virgo*, 17 P. R. 260; and see *Beaumont* v. *Senior*, s p. 1339.

Where one of several defendants is ordered to pay the plain costs of the action, in the absence of any express direction to the trary, the Taxing Officer should allow the plaintiff the costs incu against other defendants as to whom the action failed: *Kell Directories* v. *Gavin*, 1901, 2 Ch. 763.

Where a plaintiff succeeds on some issues, and a defeadant others, and the costs are to be taxed to the successful party in s issues: see *Lockard* v. *Waugh*, 17 P. R. 269; *Brown* v. *Houston*, 1 2 K. B. 855.

Independently of this *Rule* the Court may allow only one set costs to several parties appearing by separate counsel: *Harbin Masterman*, 1896, 1 Ch. 351.

Disallowance of costs of unnecessary proceedings.

670. It shall be the duty of the Taxing Officer, witho any direction, to disallow in whole or in part the costs any writ, pleading, petition, affidavit, evidence, accoun statement, or other proceeding, which is improper, u necessary or contains unnecessary matter, or is of u neeessary length. Affidavits and evidence may be dis allowed, although the same may be entered as read in an judgmen. or order. C.R. 1154. *Amended.*

See Eng. (1883) R. 1002 (20).

C. R. 1154 enabled the Court or a Judge to direct that the costs o unnecessary proceedings should be disallowed. This *Rule* empowers the Taxing Officer without any direction to disallow the costs of un necessary or improper proceedings. But the *Rule* probably does not preclude the Court or a Judge from making such direction: see *Brown* v. *Burdett*, 37 Ch. D. 207.

Duty of Taxing Officer.

The Master must inquire on taxation into the propriety of proceedings in an action, though not specially directed to do so; and he can not refuse to do so where an order is made to stay proceedings on payment of costs: *Baines* v. *Wormsley*, 47 L. J. Chy. 844; 39 L. T. 85. Costs of affidavits in opposition to a motion were not allowed where the motion was dismissed on a preliminary objection: *Whitewood* v. *Whitewood*, 19 P. R. 183.

Apportionment of costs.

Where costs are given as to one cause of action, and not as to another, the Taxing Officer is to apportion the costs; see *Vanzant* v. *Markham*, 15 P. R. 412.

Witnesses.

The number of witnesses to prove a point is a matter in the discretion of the Taxing Officer; and so as to witnesses called to establish something on which the party calling them fails: *Latour* v. *Smith*, 13 P. R. 214; and see notes to *Rule* 672 *infra*.

In an administration action, where the defendsnt had not admitted the plaintiff's right to an account, and had set up a release, and had not objected that the plaintiff should have proceeded under *Rule* 608, although the plaintiff was disallowed the extra costs so occasioned, yet

the defendsnt was held not entitled to he allowed his extra costs as against the plaintiff: *Moon* v. *Caldwell*, 15 P. R. 159. Rule 671.

The case stated for the purpose of an sppeal should only contain so much of the proceedings as is necessary to raise the questions involved in the appeal: see *Parsons* v. *Standard Insurance Co.*, 4 Ont. App. at p. 330, per Burton, J. A.

An order for n commission in the common form: that the costs are to he costs in the cause, does not preclude the Taxing Officer from disallowing the costs on the ground that tbe evidence has not heen used: *Dominion, etc.*, v. *Stinson*, 9 P. R. 177; hut the non-user of the evidence is not necessarily a ground for dissliowing the costs of it: *Rondot* v. *Monetary Times*, 18 P. R. 141; snd see *Bartlett* v. *Higgins*, 1901, 2 K. B. 230; 84 L. T. 509.

A defendant's costs of affidavits in answer to a motion for an injunction, prepared pending a stay of proceedings, until the plaintiff should give security for costs, were allowed on the dismissal of the action for not giving security: *Whiteley Exerciser* v. *Gamage*, 1898, 2 Ch. 405; 79 L. T. 20.

Where the costs of a Sheriff in an interpleader matter had heen ordered to he paid hy the claimant, and the cisimant nppealed, contending that the execution creditor should pay them, and both were ahle to pay, the Sheriff was not allowed costs of appearing on the sppenl: *Ex* p. *Webster*, *Re Morris*, 22 Ch. D. 136.

In *O'Brien* v. *Bull*, 19 C. L. J. 211, a Sheriff unnecessarily served with notice of motion for final order in an interpleader matter was sllowed costs of appearing: see also *Robertson* v. *Grant*, 3 Chy. Ch. 331.

Costs of a person appearing to ohject thst there is no jurisdiction: *Great Northern* v. *Inett*, 2 Q. B. D. 284, or *quia timet* that hy mistake sn order msy he made against him: *Lucas* v. *Fraser*, 9 P. R. 319, will be given; hut not of a person not interested, nnd appearing merely to ask costs: *Campbell* v. *Holyland*, 7 Ch. D. 175; *Re Arden*, 33 W. R. 460; *Waller* v. *Claris*, 11 P. R. 130.

The Court cannot prevent the appearance of persons entitled to appear, hut may eometimes protect sn estate hy nilowing only one set of costs to several parties: *Lees* v. *Stanley*, 28 Sol. Jour. 415. In *Re English's Settlement*, 60 L. T. 44, the costs of a trustee were allowed, he heing properly served.

A solicitor wss hy direction of the Court called on to shew cause why he should not he personally ordered to pay the costs of sn appesl prosecuted by him for an ulterior ohject, and not for the benefit of his client the appellant; and an order was made directing him to indemnify his client against the costs: *Harbin* v. *Masterman*, 1896, 1 Ch. 351.

671. When anything in the course of an action or reference which ought to have been admitted, has not been admitted, the party who neglected or refused to make the admission may be ordered to pay the costs occasioned by his neglect or refusal. C.R. 1149. Costs of not admitting.

See Eng. (1883) R. 242.

Rule 672.

A Master, or other judicial officer has jurisdiction to make th order as regards proceedings pending before him: see Jud. Act s. 7 (4).

Rule 142 requires each party to admit such of the material alleg tions in the pleading of the opposite party as are true.

As to admissions at the trial: see *supra*, p. 735.

Affidavit of disbursements to be made by solicitor, or his clerk having management of cause, or the client.

672.--(1) An affidavit of disbursements shall be mad by the solicitor in the cause or matter or some clerk having the management thereof, or by the client, setting forth the sums paid to counsel, the names of witnesses their places of abode, the places at which they were sub pœnaed, and the distance which each such witness was necessarily obliged to travel in order to attend the trial and the sums paid to them, and shall state that all such witnesses were necessary and material for the client in the cause, or matter, that they did attend, and that they did not attend as witnesses in any other cause (or otherwise, as the case may be) and the number of days which each witness was necessarily absent from home in order to attend such trial.

(2) If a solicitor attends as a witness it shall be stated whether or not he attended at the place of trial as solicitor or witness in any other cause, and whether or not he had any other business there. The day on which the trial took place shall be stated. C.R. 1173.

(3) The necessity for maps and plans used at the trial, the sum paid for them, and that they were prepared or procured with a view to the trial of the cause, shall be shewn by the affidavit of disbursements. C.R. 1174.

Costs of witness rejected not allowed.

Witness fees for attendance, how allowed.

Where a witness is rejected at *Nisi Prius*, and the ruling of the Judge is acquiesced in by the parties, and upheld by the Court, the expenses of his attendance are not allowed on taxation as between party and party: *Galloway* v. *Keyworth*, 15 C. B. 228. So, where a witness is rejected by an arbitrator, whether upon a sufficient, or an insufficient ground: *Ib.* And where witnesses were subpœnaed by the plaintiff to attend at a trial which was postponed in consequence of the defendant's default, and the defendant was ordered to pay the costs of the day, and at a subsequent trial the witnesses in question were examined and their evidence proved to be immaterial, the costs of their attendance at the abortive trial were disallowed as against the defendant: *Christopher* v. *Noxon*, 10 P. R. 149. The costs of a commission to take evidence abroad, when the evidence so taken is not actually used at the trial, may be disallowed: *Dominion, etc.* v. *Stinson*, 9 P. R. 177; but the fact of its not being used, is not alone a sufficient ground for disallowing the costs: *Rondot* v. *Monetary*

Times, 18 P. R. 141; *Bortlett* v. *Higgins*, 1901, 2 K. B. 230, 84 L. T. 509. Thus, where a defendant in a libel action gave notice under *Rule* 158, of his intention to give evidence in mitigation of damages, but at the trial the evidence was rejected, the plaintiff was, nevertheless, allowed costs of his witnesses subpœnaed to give evidence in reply, though they were not called: *Ludlow* v. *Irwin*, 12 O. L. R. 48. Rule 672.

When a cause at the Assizes is over at three o'clock in the afternoon, witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening: *Fryer* v. *Sturt*, 16 C. B. 218. It is not a general rule that parties, if witnesses, are to have an allowance for their attendance: *Dowdell* v. *Australian Royal Mail Steam Navigation Company*, 3 El. & Bl. 902.

Witness fees may be paid by setting off, with the consent of the witness, the sum payable against a sum due to the party subpœnaing the witness, and an affidavit of disbursements describing such a transaction as a payment of the witness fees was held to be true: *Re Solicitor*, 9 C. L. T. 35.

Witness fees actually paid are taxable though the witness may have travelled by rail on a free pass: *Kerr* v. *Canadian Construction Co.*, 5 O. W. R. 168.

Witnesses are not, in general, allowed for attendance before the day appointed for the opening of the Court: see *Harvey* v. *Divers*, 16 C. B. 497. But when a material witness is going abroad, but is detained on *subpœna*, his subsistence for the whole time he is detained may be allowed: *Potter* v. *Rankin*, L. R. 5 C. P. 518; and the necessary expenses of procuring the attendance of a witness residing out of the jurisdiction may be allowed: *Boll* v. *Crompton Corset Co.*, 11 P. R. 256.

Under the English Rule 1002 (9), which authorizes the allowance of such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, the expense of surveys by surveyors to qualify themselves to give evidence was allowed: *Mackley* v. *Chillingworth*, 2 C. P. D. 273; and see *In re Laffitte*, L. R. 20 Eq. 650; but there is no corresponding provision in Ontario. In *McGannon* v. *Clarke*, 9 P. R. 555, it was held that surveys and plans made to enable witnesses to give evidence, are not taxable between party and party; and costs of a preliminary examination of accounts by an accountant to qualify himself to give evidence were disallowed between party and party: *Nolan* v. *Coleman*, L. R. 8 Q. B. 84. Surveys, plans, etc.

The costs of plans, models, etc., useful to aid the Court and jury in coming to the right conclusion may be allowed: *Pilgrim* v. *Southampton & Dorchester C. W. Co.*, 8 C. B. 25; *Batley* v. *Kynoch*, L. R. 20 Eq. 632; *McGannon* v. *Clarke*, 9 P. R. 555. But the necessity, therefor, and that they were prepared for the trial must be shown in the affidavit of disbursements.

The costs of sending a special commissioner abroad to take evidence in a case of a complicated and important character were allowed: *Ysiesias* v. *Royal Exchange Assurance Corporation*, L. R. 5. C. P. 141. Costs of special commissioner.

A counsel fee to counsel in British Columbia for attending at an examination of witnesses was held to be taxable between party and party: *Logan* v. *Kirk*, 14 P. R. 130.

Rules 673, 674.

Taxing Officer may inquire into truth of affidavits.

The Taxing Officer may exnmine into the truth of affidavits of crense: *Boulton* v. *Switzer*, 1 C. L. Cham. 83. The omission of Christian name of n witness in the affidnvit is immaterial: *Han Lasher*, 24 U. C. Q. B. 357. All witnesses should be paid be taxation. and only the sums actually paid aro taxable. *Ib.*; and a witness fees allowed to a suitor: see *Harbin* v. *Gordon*, 1914, 2 K 577.

Where witnesses are subpœnaed and paid by both parties, the cessful pnrty is entitled to recover the costs of such witnesses f the other party: *McLean* v. *Evans*, 3 P. R. 154. The costs o witness called to prove fncts sdmitted by the defendant in his ex lnation for discovery mny be allowed: *Alexander* v. *Gloucester*, P. R. 157; and see *Rondot* v. *Monetary Times*, 18 P. R. 141.

$350 costs of unsuccessful search for lost documents were sllow *Toronto* v. *Grand Trunk Ry.*, 13 O. L. R. 12.

Where it is discovered that fees have been sllowed on s fa affidnvit. nnd nothing has been paid, on motion to the Court th may he dissllowed: hut there is no jurisdiction in Chambers to ent tain such an application: *Ha ding* v. *Knust*, 15 P. R. 80, and *Horni* v. *Romney*, 11 C. L. T. 329. In the lntter case counsel fees not ps at the time of the making of the nffidavit, which stated that they h been paid, were dissllowed, though psid before the taxation was clos

Taxing Officer to allow reasonable sum for shorthand writer in cases not provided for.

673. In eases not otherwise provided for, the Taxi Officer may allow a reasonable sum for the expense of shorthand writer, on the certifieate of the Judge befo whom the examination of any witness or witnesses i any sueh eause, matte: or other proeeeding takes place and also on the certifieate of a Local Master in refe enees before him when the parties agree to the emplo ment of a shorthand wrlter. C.R. 1143 and 1270.

Official stenographers are now provided for all the ordinary sitting of the Courts. snd In the office of the Master in Ordinary. This *Rul* applies when it becomes necessary for the parties specially to engag a stenogrspher.

The *Rule* would seem to apply merely to proceedings before a Judge or Local Master; hut not proceedings hefore other judicial officers *e.g.*, the Master In Chambers, or s Referee whether Speclnl, or Official *sed vide Rule* 400.

Costs may be taxed on an award, though time for moving not elapsed.

674. Costs may be taxed on an award, although the time for appealing from or moving against the awar has not elapsed. C.R. 1166.

Arhltrators who have power under n statute to award costs. can not, unless expressly authorized so to do, awnrd them "ss between solicitor and client": *Re Beaty & Toronto*, 13 P. R. 316; neithe could they do so on a reference at Law. but it was otherwise in Equity: see *Mordul* v. *Palmer*, L. R. 6 Chy. 22, *per* McIlish, L.J., and *Andrews* v. *Barnes*, 58 L. T., *per* Fry, L.J., at p. 759. This excess of jurisdiction may be objected to on taxstion. when the objection appears on the fsce of the awsrd: *Re Beaty & Toronto*, *supra*.

The arbitrators should state the scale on which the costs awarded are to be taxed: see *Re Preston*, 16 P. R. 318. Rules 675, 676.

As to the costs of arbitration generally: see *The Arbitration Act* (R. S. O. c. 65), ss. 18-27.

675. The costs of removing a bond or other security from the files of the Court for the purpose of bringing an action thereon, may be taxed as costs in the cause in the action brought thereon. C.R. 1156. Costs of taking bond off files.

676.—(1) Costs shall be allowed and taxed according to Tariff A appended to these Rules, and no other fees, costs or charges than are therein set forth shall be allowed in respect of the matters thereby provided for. Tariff of costs.

(2) The fees and disbursements payable upon proceedings in the Supreme Court and in the County Courts shall be those enumerated in the Tariff B appended to these Rules. Tariff of disbursements.

(3) The fees and allowances to be taken and received by Sheriffs other than those provided for by any statute shall be the fees and allowances set forth in the Tariff C appended to these Rules. Sheriffs' fees.

(4) When the costs incurred in Canada of an appeal to His Majesty in his Privy Council have been awarded and the same have not been taxed by the Registrar of the Privy Council the same may be taxed by the Senior Taxing Officer, and the taxation shall be according to the scale of Tariff D. Costs in Canada of appeal to P. C.

(5) Costs payable out of the proceeds of land sold under The Devolution of Estates Act shall be allowed and taxed according to Tariff "E" to these rules. (*Added by Rule of 19th June, 1914*).

This *Rule* is based on C. RR. 1157a, 1178, 1179, 1189.

Costs of appeals to the Court of Appeal under the Drainage Act from the Drainage Referee are taxable on the Supreme Court scale: *Metcalf* v. *Colchester*, 2 O. L. R. 103.

It was formerly held that costs are taxable according to the Tariff in force at the time they are incurred, notwithstanding the subsequent repeal of such Tariff: *Delap* v. *Charlebois*, 18 P. R. 417; *Earle* v. *Burland*, 8 O. L. R. 174; 9 O. L. R. 663; but the Tariffs in force under these *Rules* are held to be retrospective, and applicable to all costs not previously taxed: *Re Solicitors*, 6 O W. N. 625.

Rules 677, 678.

A Sheriff is entitled to demand from a person delivering to him an execution to be executed, the fees allowed by the Tariff, for receiving warrant, and return; and the fees so paid, if collected from the debtor are to be refunded by the Sheriff to the person who issued the writ. see *The Sheriffs' Act* (R. S. O. c. 16) s. 31.

As to the fees of a Sheriff acting under an order of the Court in matters for which no fee is provided: see *The Sheriffs' Act* (R. S. O. c. 16) s. 30.

Costs in sales under Dev. Est. Act.

677. Costs payable out of the proceeds of lands sold under the Devolution of Estates Act, with the approval of the Official Guardian, shall be taxed by the Senior Taxing Officer, C. R. 1258.

(1) Where the amount realized is small, the Taxing Officer may fix a lesser sum than would be allowed upon taxation. (*As amended by Rule of 1st December, 1913.*)

The first part of this *Rule* is based on C. R. 972 (c), being an amendment made to C. R. 972 by C. R. 1258. The sub-section (1) is new, and was added by amendment.

Revision of taxation of certain costs.

678. All bills of costs or disbursements in proceedings for the administration or partition, or for the foreclosure, redemption or sale of mortgaged premises in which an infant, lunatic, or person of unsound mind is interested, and all bills in other actions where the amount is to be paid out of an estate or out of a fund in Court, or in which any infant, lunatic or person of unsound mind is interested, shall be revised by one of the Taxing Officers at Toronto, before the amount thereof is inserted in any certificate, report, judgment, or order; but in case of urgency leave may be granted to issue a writ of execution, subject to the future revision by the Taxing Officer, and if the amount taxed is reduced on revision, the party entitled to the costs shall forthwith give credit upon the execution for the amount struck off. C.R. 1167, 1168 and 1169. *Amended.*

Revision of costs payable out of "a fund in Court" is not confined to cases where the Court has judicial control over, or has to exercise some judicial function in regard to the fund. The expression "a fund in Court" has no technical signification which makes it mean anything different from "a sum of money in Court": *Cousineau v. City of London Fire Ins. Co.*, 13 P. R. 42.

The Court will not permit costs occasioned by improper litigation, or negligent conduct of proceedings, to be paid out of an estate under its care; and the amount of costs allowed between solicitor and client

is not conclusive as to the amount which will be allowed out of an estate: *Brown* v. *Burdett*, 40 Ch. D. 152. Rules 679, 680.

Where costs are payable out of a fund in which infants, or lunatics are interested, a taxation cannot be waived by agreement between the solicitors: see *In re Coster*, 1898, W. N. 8 (12). The *Rule* applies not only to actions *inter partes*, but also to *ex parte* matters: see *Re Norris*, 5 O. L. R. 99.

679. The local officer shall forthwith, after taxing any such bill of costs, transmit the same by mail to the Senior Taxing Officer, and he shall allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and shall allow in the bill the sum of one dollar as a fee for the revision of the bill; and a law stamp for that sum, with postage stamps for return postage, shall be paid at the time of taxation by the party procuring the bill to be taxed, and be transmitted therewith. C.R. 1170. Revision of taxations by local officers.

A revision of taxation is now necessary to be had only in the class of actions mentioned in *Rule* 678 where infants or persons of unsound mind are interested, or the costs are to be paid out of an estate, or a fund in Court. Review of taxation.

A review of taxation may now be had as provided by *Rules* 681, 1183; and an appeal therefrom to a Judge, as provided by *Rules* 508-509. These *Rules* supply no machinery for carrying a taxation from a Local Officer before the Taxing Officer in Toronto, except in the cases mentioned in *Rule* 678. Appeal from taxation by local officers, how brought.

680. The Taxing Officer at Toronto, upon receiving the bill of costs shall revise the taxation either *ex parte* or upon notice to the Toronto agent of the solicitor whose bill is in question, as he may see fit, giving notice in all cases where the taxation is not clearly erroneous, or where the amount in question is large. Notice may be by appointment mailed to the address of the solicitor or his agent. The Taxing Officer shall re-transmit the bill when revised to the local officer. C.R. 1171. Duty of Taxing Officer on receipt of bill for revision.

The Taxing Officer, on revision, may restore items improperly disallowed by a Local Master; as well as strike out, or reduce, any which may have been improperly allowed, even though in the discretion of the local officer: *Keim* v. *Yeagley*, 6 P. R. 60; *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555. Powers of Taxing Officer on revision.

But the Taxing Officer cannot receive evidence to shew that costs are payable otherwise than the order awarding them, construed by the ordinary rules of construction, directs: *Keim* v. *Yeagley*, 6 P. R. 60; and see *Edwards* v. *Pearson*, 3 C. L. T. 504.

Rule 681.

Objection to taxation.

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

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

See the Eng. (1883) R. 1002 (39).

C. R. 1182 applied only to taxations between party and party, and this *Rule* is also held not to apply to taxations between solicitor and client: *Re Solicitors*, 6 O. W. N. 625.

Clause 2 affirms what was decided in *Cousineau* v. *Park*, 15 P. R. 37.

Where objection is to the principle of taxation.

Where the question is as to the principle of the whole taxation, and not as to particular items: *Sparrow* v. *Hill*, 7 Q. B. D. 362; 9 Q. B. D. 479; *Clark* v. *Virgo*, 17 P. R. 260; *Re Fletcher & Dyson*, 52 W. R. 27; or where the objection is to the finding of the Taxing Officer on a preliminary question, and the bill is not taxed at all, as for instance where the Taxing Officer finds that a settlement has been made which, under the terms of the order for taxation, is not to be disturbed: *Re Geo. Castle*, 36 Ch. D. 194; it is not necessary to specify objections under this *Rule;* but see *Cruske* v. *Wade*, 80 L. T. 380, where it was held that the *Rule* applied notwithstanding those cases, where the Taxing Officer refused to tax the plaintiff's costs of meeting a counter-claim on the merits, on the ground that such costs were unnecessarily incurred.

When a party carries in an objection in writing to an allowance or disallowance under this *Rule*, he is only bound to state the items to which he objects, not the reasons of his objection: *Simmons* v. *Storer*, 14 Ch. D. 154.

A Sheriff, as an officer of the Court claiming fees by virtue of its process, is so far within its jurisdiction that his bill may be taxed, and this *Rule* will therefore apply to prevent an appeal as to items not brought before the Taxing Officer for review: *Morrison* v. *Taylor*, 9 P. R. 390.

No appeal unless objections brought in.

Except therefore, as above mentioned, an appeal does not lie, unless objections are carried before the officer, as required by this *Rule*: see *Rule* 509, and *Snowden* v. *Huntington*, 12 P. R. 248; nor will an appeal be allowed as to any item not included in such objections: *Platt* v. *Grand Trunk Ry. Co.*, 12 P. R. 273; *Campbell* v. *Baker*, 9 O. L. R. 291. Any objections to the taxation must be carried in in writing before the signature of the officer is affixed to his certificate: *Guerrier* v. *White*, 12 P. R. 571; but see clause (2). It is a sufficient certificate if the officer ascertains the correct amount payable at the foot of

the bill, and notes the bill of costs as taxed at such sum, with the date, and verifies the whole by his signature: *Ib.* After having so acted, the Taxing Officer has no power to alter what has been allowed, or disallowed, except mere clerical errors: *Ib.*; *Langtry* v. *Dumoulin*, 10 P. R. 444. Rules 682, 683.

Where a party has by mistake omitted to put in written objections, the certificate may, in a proper case, be set aside to enable objections to be carried in: see *Robinson* v. *Engl...* 11 O. L. R. 385.

A person who is not a party to the taking of an order for the taxation of costs, and who desires to have the taxation reviewed, ought to apply to set aside the order for taxation, and not apply to review the taxation: *Charlton* v. *Charlton*, W. N. 1882, 183; 31 W. R. 237.

For form of stating objections: see H. & L. Forms, No. 1696.

See also *Turnbull* v. *Janson*, 3 C. P. D. 264, for examples of objections.

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

See Eng. (1883) R. 1002 (40).

A notice served at 4.30 p.m. to consider objections at 1 p.m. on the following day, was considered sufficient: *Re Hill*, 33 Ch. D. 266.

The officer should include in his certificate of the result the points of objection to his taxation. After giving a certificate of the result he is *functus officio*: *Langtry* v. *Dumoulin*, 10 P. R. 444. Certificates of ruling on any points pending the taxation may be given, from which an appeal may be had: *Ib.*

Appeals from taxation are governed by the practice on appeals from Chamber orders; *Rule* 509, and should therefore, under *Rule* 505, be brought on within ten days from the date of the certificate on a notice served within four days: *Stark* v. *Fisher*, 11 P. R. 235.

Upon an appeal the Judge has no power to review, or revise, the taxation of any items not objected to as provided by *Rule* 681, nor refer them for review, or revision, to any officer: *Campbell* v. *Baker*, 9 O. L. R. 291, and *semble*, he has no power to refer the bill or the items objected to to any officer, but should himself decide the question raised by the objection.

683.—(1) A Sheriff claiming any fees, poundage, expenses or remuneration, which have not been taxed, shall, upon being required by either party, and ... payment of 25 cents for a copy of his bill in detail, which Taxing Sheriff's costs.

Rules 684-686.

he shall be bound to render) have his fees, poundage, expenses or remuneration, as the case may be, taxed by the proper Taxing Officer of his county. C.R. 1193.

Costs not to be collected till taxed.

(2) A Sheriff shall not, without taxation, collect any fees, costs, poundage or expenses, after he has been required to have the same taxed. C.R. 1195.

The Execution creditor is not liable for Sheriff's fees when a sale under the execution is stayed: see *Montague* v. *Davies*, 1911, 2 K. B. 595; 104 L. T. 645. A Taxing Officer would be bound by the Tariff and would have no jurisdiction to reduce the Sheriff's fees below what he is entitled to by the Tariff: but the Court may do so: see *Rule* 688.

Duty of Taxing Officer.

684. The Sheriff or the party requiring taxation may obtain an appointment for taxation, and the Taxing Officer, upon proof of service of such appointment or upon the parties attending before him, shall examine the bill, and satisfy himself that the items charged in such bill are correct and legal, and strike out items charged for unnecessary services, and give, when requested, a certificate of the taxation. C.R. 1196 and 1194, *amended*.

Appeal from taxation of Sheriff's fees.

685. A party dissatisfied with the taxation may appeal therefrom as in ordinary cases of taxation between party and party. C.R. 1197.

See *supra*, p. 1125, for practice on appeals from taxation in ordinary cases.

Sheriff's poundage, where goods seized but not sold.

686.—(1) Where part only is made by the Sheriff on or by force of an execution against goods and chattels, the Sheriff shall be entitled, besides his fees and expenses of execution, to poundage only upon the amount so made by him, whatever be the sum indorsed upon the writ; and where the personal estate, except chattels real, of the judgment debtor is seized or advertised on or under an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money is actually made by the Sheriff on or by force of such execution, the Sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized not exceeding the amount indorsed on the writ, or such less sum as the Court may deem reasonable.

Sheriff's poundage where land or chattels real seized, but not sold.

(2) Where land or chattels real of the judgment debtor have been advertised under an execution, but not sold by reason of payment or satisfaction having been otherwise

obtained on, or within one month before, the day on which the property has been advertised to be sold, or any day to which the sale may be adjourned, the Sheriff shall be entitled to the fees and expenses of the execution, and the poundage only on the value of the debtor's interest in the property not exceeding the amount indorsed on the writ, or such less sum as the Court may deem reasonable. C.R. 1190. Rule 686.

Poundage.—The mere delivery of the writ, without an actual or virtual seizure, does not entitle the Sheriff to poundage: *Nash* v. *Dickenson*, L. R. 2 C. P. 252; *Morris* v. *Boulton*, 2 C. L. Cham. 60; but the receipt of money by the Sheriff under a writ is a virtual execution of the writ, though there is no actual seizure or sale: *Consolidated Bank* v. *Bickford*, 7 P. R. 172; *Blasicks* v. *Bath Colliery Co.*, 2 Ex. D. 459; *Ex p. Lithgow*, 10 Ch. D. 169. Where there has been a seizure, the Sheriff is entitled to poundage, though there be no sale, if by compulsion of the writ the debt is recovered directly through the Sheriff: *Mortimore* v. *Cragg*, 3 C. P. D. 216, overruling *Roe* v. *Hammond*, 2 C. P. D. 300, or indirectly by means of some compromise which is the consequence of the seizure, subject to *Rule* 686; *Mortimore* v. *Cragg*, *supra*; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100; *McRoberts* v. *Hamilton*, 7 P. R. 95; but not where the writ is withdrawn by direction of law: *Mortimore* v. *Cragg*, *supra*; *Walker* v. *Fairfield*, 8 C. P. 95; or where, before sale, an order is made for delivery of the goods to a receiver: *Re Ludford*, 33 W. R. 152; 51 L. T. 240; *Re Ludmore*, 13 Q. B. D. 415; or to an official receiver in bankruptcy: *In re Thomas*, 1899, 1 Q. B. 460. Poundage on fi. fa goods.

Where after seizure, but before sale, the execution creditor becomes disentitled to enforce the judgment, the Sheriff cannot sell for the purpose of realizing his fees, charges and expenses: *Sneary* v. *Abdy*, 7 Ex. D. 299; but the execution creditor is liable therefor: see *Montague* v. *Davies*, 1911, 2 K. B. 595; 104 L. T. 645.

Where the money levied has to be restored to defendant in consequence of some act of the plaintiff, the Sheriff may recover poundage from the latter: *Henry* v. *Commercial Bank*, 17 U. C. Q. B. 104; see *Morrison* v. *Taylor*, 9 P. R. 390.

A Sheriff upon arresting a judgment debtor under *ca. sa.* thereby becomes at once entitled, as against execution creditors, to full poundage on the amount of the execution: *McNab* v. *Oppenheimer*, 11 P. R. 348.

The Sheriff is only entitled to poundage on the sum paid over, not on what he retains for himself: *Michie* v. *Reynolds*, 24 U. C. Q. B. 303. If he makes part only by force of the execution, the poundage is only on such part; and if a seizure is not followed by a sale by reason of satisfaction having been otherwise obtained, and no money is actually made by the Sheriff on or by force of the execution, the poundage is only on the goods seized, and a Judge may, on application, under this *Rule*, award such less sum as may be reasonable: see *Wadsworth* v. *Bell*, 8 P. R. 478; *Bowman* v. *Masson*, 1 C. L. T. 109; *Morrison* v. *Taylor*, 9 P. R. 390; *Hamilton, etc.*, v. *Gore Bank*, 20 Gr. 202; *Re Ludford*, 51 L. T. 240. If no such application is made, the Sheriff would seem to ha

Rule 685.

entitled to full poundage on the goods seized: see *Brockville, etc., v. Canada Central*, 7 P. R. 372, 376.

The Sheriff was held entitled to poundage, on three several writs issued by the same solicitor, and placed in his hands at the same time: *Grant* v. *Grant*, 10 P. R. 40; but see now *The Creditors Relief Act* (R. S. O. c. 81), s. 29.

For the proper mode of computing poundage: see *Fleming* v. *Hall*, 9 P. R. 310.

Poundage on fi. fa. lands.

The Sheriff was formerly not entitled to poundage upon an execution against lands, unless there had been an actual sale: *Merchants Bank* v. *Campbell*, 32 C. P. 170; *French* v. *Lake Superior Mineral Co.*, 14 P. R. 541; *Rule* 686 (2) now makes provision on that subject.

The plaintiff's solicitors are not liable to the Sheriff for his fees in the absence of any contract, and no contract is implied from lodging the writ in the Sheriff's office: *Royle* v. *Busby*, 6 Q. B. D. 171.

Allowance where full poundage not recoverable.

Allowance where Poundage or Full Poundage not Recoverable.—A Sheriff was formerly only entitled to poundage for money actually passing through his hands, and he was not entitled to charge poundage on moneys paid by the execution debtor direct to the execution creditor, or his solicitor: *Hamilton & P. D. Ry. Co.* v. *Gore Bank*, 20 Gr. 190; but now where the payment is made, or the claim is settled, after seizure of the debtor's goods, the Sheriff, though not entitled to poundage on the whole amount recovered, is under this *Rule* entitled to poundage on the value of the goods seized, not exceeding the amount indorsed on the writ, unless an order for a less sum is made under clause (1): and see *McRoberts* v. *Hamilton*, 7 P. R. 95. Where the money is paid direct to the Sheriff without any seizure he is entitled to his poundage and fees; *Consolidated Bank* v. *Bickford*, 7 P. R. 172; and where the full amount to be levied is paid to the Sheriff after seizure, but before sale, he is entitled to poundage on the amount received, and not merely on the value of the property seized: see *Re Black Eagle Gold Co.*, 6 O. L. R. 512. *Rules* 686-688 do not apply in such a case; the money so made is made under the execution. Where to avoid a sale judgment debtors agreed with the Sheriff to pay a proportion of the daily taking, money so paid to the Sheriff was held to be made under the execution: *Robinson* v. *Burnell's Vienna Baking Co.*, 1904, 4 K. B. 624.

The original *Rule* did not authorize a Sheriff to collect poundage under an execution against lands where the lands had been advertised but not sold: see *Merchants Bank* v. *Campbell*, 32 C. P. 170; *French* v. *Lake Superior, etc.*, 14 P. R. 541: clause (2) now makes provision in that respect.

The Sheriff is not entitled to poundage where the goods seized are upon an interpleader issue determined not to be the goods of the execution debtor, even though they have been sold under the interpleader order: *Turner* v. *Crozier*, 14 P. R. 272.

Where, in consequence of an appeal by the execution debtor, the Sheriff, after seizure, withdrew of his own motion, to save expense to parties, and the execution was subsequently superseded, he was held entitled to compensation. The principle of the *Rule* is that where the Sheriff has made a seizure, and his proceedings are interrupted before the execution is executed, he is entitled to his pound-

age. or a sum in lieu thereof, and that the mesns by which the interruption takes place is of no consequence: *Weegar* v. *Grand Trunk Ry. Co.*, 16 P. R. 371. Rules 687, 688.

Where by reason of the making of a winding-up order under the Dominion Winding-up Act, an execution becomes intercepted before sale, this *Rule* does not apply so as to entitle the Sheriff to compensation in lieu of poundage: *Re Polmerston Packing Co., Allan's Claim*, 4 O. W. R. 339.

Poundage covers the risk and responsibility cast upon the Sheriff in seizing, retaiuing, selling, and returning the money. If his action be intercepted so that he does not make the money, it is for the Court to say what allownnce shall be made to him in lieu of poundage: *Wadsworth* v. *Bell*, 8 P. R. 478. See also *Morrison* v. *Taylor*, 9 P .R. 390.

687. Where there are writs of execution upon the same judgment to several counties or districts and the personal estatc of the judgment debtor has been seized or advertised, in one or in one or more or all of such counties, but not sold, by reason of satisfaction having becn obtained under and by virtue of a writ in any of the counties, and no money has been actually madc on the execution, the Sheriff sball not be entitlcd to poundage, but to mileage and fees only for the services actually rendered and performed by him, and the Taxing Officer may allow him a reasonable charge for such services, in casc no special fce therefor is assigned in any tariff of costs. C.R. 1191. When Sheriff entitled to mileage and fees only.

See *Lee* v. *Dangar*, 1892. 1 Q. B. 231; 2 Q. B. 337; *Re Wells*, 68 L. T. 231.

Where concurrent writs of *fifa* (goods) were issued to two Sheriffs who each seized sufficient to satisfy the execution, and the parties then settled, and the Sheriffs were ordered to withdraw, it was held that the Sheriff who first received the writ was entitled to poundage, but that the other Sheriff was entitled only to the other fees, and to an allowance in respect of any other servlces which a Judge might think reasonable: *Brown* v. *Johnson*, 5 U. C. L. J. 17.

688. Where a person liable on an execution is dissatisfied with the amount of poundage fees or expenses of execution claimed by a Sheriff, the Court may, before or after payment thereof, upon the application of such person, upon notice to the Sheriff, if the amount appears to be unreasonable, notwithstanding that it is according to the tariff, reduce the same or order the same to bc refunded upon such terms as may seem just. C.R. 1192. If party dissatisfied he may apply to the Court, who may reduce the amount.

See *Rule* 683 which provides for a taxation of a Sheriff's fees, poundage, etc., hy a Taxing Officer. This *Rule* is apparently intended

Rule 689. to meet cases where a taxation would not be a sufficient remedy, and enables the Court to allow a less sum than the Tariff charges by which a Taxing Officer would be bound.

Order for charge in favour of solicitor on property recovered or preserved.

689.—(1) Where a solicitor has been employed to prosecute or defend any cause or matter, the Court may, upon a summary application, declare such a solicitor, or his personal representatives to be entitled to a charge upon the property recovered or preserved through the instrumentality of such solicitor, for his costs, charges and expenses of or in reference to such cause, matter or proceeding; and all conveyances and acts done to defeat, or which may operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge.

Enforcement of charge.

(2) The Court may make an order for taxation of such costs, charges and expenses and for the raising and payment of the same out of the property. C.R. 1129.

This *Rule* is based upon Imp. Act, 23 & 24 V. c. 127, s. 28, which was enacted in consequence of the decision in *Shaw* v. *Neale*, 27 L. J. Ch. 444; 6 H. L. C. 581, that a solicitor has no lien on real estate recovered for the client. The charge authorized by this *Rule* may extend to either real or personal property.

Nature of charge.

The charge authorized to be declared is more extensive and more beneficial than the ordinary lien of a solicitor; the latter, besides being limited to the document and funds of a client, cannot as regards documents be actively enforced, and as to them is a mere right of retainer, and may be lost by giving up possession; whereas a charge under this *Rule* may extend to almost any kind of property, and will entitle the chargee to apply for a sale of the property subject thereto, in order to raise the amount of the charge.

Registration of charge.

A charge under this *Rule* is in the nature of a statutory mortgage, and, as against purchasers and other incumbrancers, the same precautions may be necessary to preserve priority, as in the case of an ordinary mortgage; where the charge is on land, in order to retain priority it would seem to be advisable to register the order creating the charge in the proper Registry Office. The registration should be effected by means of a certificate under the hand of the proper officer, and his seal of office or the seal of the Court.

Where a solicitor brought an action to recover his bill of costs of a redemption action, and claimed a lien on the land, the subject of the redemption action, he was held entitled to register a certificate of *lis pendens* against the land: *O'Flynn* v. *Middleton*, 5 O. L. R. 621.

The *Rule* gives the solicitor an ancillary right—one not intended to displace the liability of the client to pay the solicitor out of his own pocket—but one ancillary to his right to be paid on his retainer: *Nevills* v. *Ballard*, 18 P. R. 134. See also *Re Born*, 1900, 2 Ch. 433; 83 L. T. 51.

Rule 689. Property recovered or preserved.

The *Rule* authorizes the Court to interfere in regard to any property, real or personal, for the protection of the solicitor, in the same way as, upon equitable grounds, it previously interfered in the case of a judgment: *Barker* v. *St. Quentin*, 12 M. & W. 441; or a fund in Court: *Haymes* v. *Cooper* 33 Beav. 431; *Re Born*, 1900, 2 Ch. 433; 83 L. T. 51, recovered through the services of the solicitor.

The construction placed upon the Imp. Act is that it gives a discretionary power to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court in the exercise of its discretion to make the charge: *Nevills* v. *Bollord*, 18 P. R. 134; *Harrison* v. *Harrison*, 13 P. D. 180; *Pierson* v. *Knutsford Estates Co.*, 13 Q. B. D. 666; *Re Humphreys*, 1898, 1 Q. B. 526, and see *Re Born*, *supra*.

In the case, therefore, of a judgment recovered by an infant suing by his next friend, though the next friend and not the infant was liable to the solicitor, a charge was declared in favour of the solicitor upon the judgment to the extent only of the costs taxed against the defendant, and the Court refused to order a sale of the judgment to enforce the charge: *Nevills* v. *Bollord*, 18 P. R. 134.

What property has been "recovered or preserved" is a question of fact in each case: *Rowlands* v. *Williams*, W. N. 1885, 194; *Ross* v. *Buxton*, 42 Ch. D. 198.

Under the Imp. Act property has been held to have been recovered or preserved, by recovery of a judgment for money: *Bircholl* v. *Pugin*, L. R. 10 C. P. 397; *Orford* v. *Fleming*, 18 C. L. T. 142; 34 C. L. J. 238, 413; or costs: *Dollow* v. *Gorrold*, 14 Q. B. D. 543; 52 L. T. 240; by a judgment, in a foreclosure action: *Wilson* v. *Round*, 4 Giff. 416; 10 Jur. N. S. 34; in a redemption action: *Scholefield* v. *Lockwood* (1868), L. R. 7 Eq. 83; *O'Flynn* v. *Middleton*, *supra*, p. 1354; in an action to establish the validity of a will: *Ex p. Tweed*, 1899, 2 Q. B. 167; or a mortgage: *Keenon* v. *Armstrong*, 27 L. R. Ir. 371; in a partition action: *Pritchard* v. *Roberts*, L. R. 17 Eq. 222; in an action of detinue: *Cotlow* v. *Cotlow*, 2 C. P. D. 362; in an action to remove a cloud on the title to land: *Jones* v. *Frost*, L. R. 7 Chy. 773; or by means of a compromise: *In re Meter Cobs*, 1911, 2 Ch. 557.

Proceeds of property realized under a sale under an order of the Court is "property recovered"; but where the client of the solicitor who has conducted the sale is a debtor to the estate of which the property sold formed part, and his costs have been ordered to be set off against his indebtedness, his solicitor cannot also obtain a charging order in respect of such costs, even though the client be insolvent and unable to pay the costs: *Re Cockrell*, *Pinkey* v. *Cockrell*, 1912, 1 Ch. 23; 105 L. T. 662.

Proceeds of property realized by plaintiff in a debenture holders action through a receiver is property on which the solicitor for the plaintiff and receiver is entitled to a charge: *In re Horne*, *Horne* v. *Horne*, 1906, 1 Ch. 271. Property in respect of which a receiver has been appointed is "property preserved" notwithstanding in the result, the appointment may not prove beneficial for the beneficiaries: *Re Turner*, *Wood* v. *Turner*, 1907, 2 Ch. 126; 95 L. T. 861; 96 L. T. 798.

So money paid into Court as a condition of obtaining leave to defend is "recovered or preserved": *Moxon* v. *Sheppard*, 24 Q. B. D. 627; and money paid into Court with a defence, if the plaintiff becomes entitled to take it out: see *Emden* v. *Carte*, 19 Ch. D. 311;

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so where the fund consists of rents paid into Court by a receiver in the action: *Re Knight*, 1892, 2 Ch. 368.

A solicitor for the liquidator of a company which had been reconstructed, was allowed a charge on the assets of the company, for costs of proceedings in Court incurred in reconstruction: *Re Clayton*, 118 L. T. Jour. 315.

A defendant's solicitor may be entitled, as where a defendant successfully resisted claims of a mortgagee in a foreclosure action: *Scholefield* v. *Lockwood*, L. R. 7 Eq. 83; and where an action to set aside a settlement (*Re Keane*, L. R. 12 Eq. 115), or to attach a vessel (*The Heinrich*, L. R. 3 A. & E. 505) was dismissed; see also *Smith* v. *Winter*, 18 W. R. 447.

Property not subject to charging order.

Property was held to be not recovered or preserved where a winding-up petition was successfully opposed: *Re United Shepherd's Wheal Rose Co.*, W. N. 1885, 15; nor where in an administration action new trustees were appointed, but further proceedings were stayed: *Pinkerton* v. *Easton*, L. R. 16 Eq. 490; nor where an easement is the subject of the action and its existence is affirmed: *Foxon* v. *Gascoigne*, L. R. 9 Chy. 654.

Money paid into Court by a plaintiff as security for costs, is not "money recovered or preserved" by the plaintiff's solicitor within the meaning of this *Rule*: *Gibson* v. *Le Temps P. Co.*, 10 O. L. R. 434; not even where the plaintiff succeeds in the action: *Re Wadsworth, Rhodes* v. *Sugden*, 29 Ch. D. 517; but see *Parry* v. *Parry*, 30 Sol. Jour. 386; *Hall* v. *Hall*, 1891, P. 302; but where an appeal is successful the costs paid under the judgment and ordered on the appeal to be refunded are property recovered: *Guy* v. *Churchill*, 35 Ch. D. 489.

The "cause, matter or proceeding," mentioned in the *Rule*, must be some civil cause, matter or proceeding in a Court of Justice: money recovered by means of criminal proceedings: *Re Humphries*, 1898, 1 Q. B. 520; or in an arbitration: *Macfarlane* v. *Lister*, 37 Ch. D. 88, are not within the *Rule*; nor is alimony decreed in divorce proceedings: *Leete* v. *Leete*, 48 L. J. P. 61; *Cross* v. *Cross*, 43 L. T. 532; nor an allowance made by the Court for the maintenance of a lunatic's wife, out of the lunatic's estate: *Re Robinson*, 27 Ch. D. 160. The jurisdiction to declare a charge is discretionary, and, it is said, should be rarely exercised in bankruptcy proceedings: *Re Humphreys*, 1896, 1 Q. B. 520.

A claim and counter-claim, where both are successful, must be considered as one action for the purpose of determining the solicitor's right to a charging order: *Westacott* v. *Bevan*, 1891, 1 Q. B. 774; *The Philippine*, L. R. 1 A. & E. 309.

The charge may affect not merely the client's interest but the interests of others, the solicitor's services being in the nature of salvage: *Greer* v. *Young*, 24 Ch. D. 545. See also *Ex p. Digby*, 53 L. J. Ch. 972; *Berrie* v. *Howitt*, L. R. 9 Eq. 1 (where a charge was refused); *Nevills* v. *Ballard*, *supra*, p. 1355; and *Bulley* v. *Bulley*, 8 Ch. D. 479.

The right to a charge is not affected by a subsequent compromise: *Twyman* v. *Porter*, L. R. 11 Eq. 181; *Moxon* v. *Shepherd* 24 Q. B. D. 627.

Costs recoverable under charging order.

The charge is limited to the costs of the cause, matter or proceeding: see *Wilson* v. *Round*, 4 Giff. 416; *Re Hill*, 33 Ch. D. 266. The order should direct taxation of the costs, if not already taxed: *Emden* v. *Carte*, 19 Ch. D. 311, 318.

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The solicitor is entitled, though discharged by the client, where the property was recovered while he was solicitor: *Clover* v. *Adams*, 6 Q. B. D. 622; *Re Wadsworth, Rhodes* v. *Sugden*, 29 Ch. D. 517; in such case his charge will be subject to the lien for costs of the client's solicitor for the time being: *Ib.* Discharged solicitor.

Assignee of solicitor.

The assignee of a solicitor is entitled to apply: *Briscoe* v. *Briscoe*, 1892; 3 Ch. 543; or his personal representatives: *Baile* v. *Baile*, L. R. 13 Eq. 497; but the agents of a solicitor are not entitled to a charge for their costs, they not having been employed by the client: *Macfarlane* v. *Lister*, 37 Ch. D. 88.

The solicitor for an infant may apply for a charging order on the infant's share of the subject of litigation: *In re Wright*, 1901, 1 Ch. 317; even though the litigation may have been unsuccessful, provided it was taken on the reasonable advice of counsel: see *Steeden* v. *Walden*, 1910, 2 Ch. 393; 103 L. T. 135.

Delay in applying.

The lapse of time may justify a refusal to interfere, where, in the meantime, the rights and interests of the persons entitled to the property have been changed: *Roche* v. *Roche*, 29 L. R. Ir. 339; but mere delay, where no intervening rights have arisen, is not sufficient to deprive the solicitor of his right to an order: *Re Born*, 1900, 2 Ch. 433; 83 L. T. 51.

Taking security.

The solicitor is not entitled to a charging order where he has accepted from his client a mortgage or other security, *e.g.*, where an assignment of the property has been made in trust in the first place for the payment of the solicitor's costs: *Groom* v. *Cheesewright*, 1895, 1 Ch. 730; 72 L. T. 555.

Priority of charge.

The plaintiff's solicitor was held to have a first charge on the assets of a partnership in an action for dissolution, in which a receiver had been appointed, and certain assets recovered: *Ridd* v. *Thorne*, 1902, 2 Ch. 344; and to have priority over a mortgage made by the plaintiff before the action, where the mortgagee adopted the benefits obtained thereby: *Scholey* v. *Peck*, 1893, 1 Ch. 709; 3 R. 245; 68 L. T. 118; see also *Dennis* v. *Addy*, 1894, 1 Ir. R. 511.

The assignee of a judgment debt (or a creditor garnishing the same: *Dallow* v. *Garrold*, 14 Q. B. D. 543, and see *Hamer* v. *Giles*, 11 Ch. D. 942), takes subject to any existing right of lien upon the judgment, and, as against such right, the assignee or attaching creditor is not a purchaser for value without notice, and a charging order, subsequently obtained by a solicitor having such lien, takes priority over the assignment, or attaching order: *Faithful* v. *Ewen*, 7 Ch. D. 495; *Cole* v. *Eley*, 1894, 2 Q. B. 350; 9 R. 552; 70 L. T. 892.

As to notice: see also *The Paris*, 1896, P. 77; 73 L. T. 736; *Orford* v. *Fleming*, 18 C. L. T. 142; 34 C. L. J. 238, 413.

Application for charging order.

Application for Charging Order.—No procedure is laid down for obtaining a declaration of the charge, nor is any time prescribed, when the same may be made. It would seem from the words "is pending," that the *Rule* contemplates the making of such applications before, as well as after, final judgment in the action. All parties to the action to be affected by the declaration ought, it would seem, to have notice of the application: see *Brown* v. *Trotman*, 12 Ch. D. 880; and where the action is defective by reason of death, or transmission of interest, an order to continue proceedings under *Rule* 301

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should be first obtained: *Stewart* v. *Rhodes*, 1900, 1 Ch. 386; 82 L. T. 337; but see *O'Flynn* v. *Middleton*, 5 O. L. R. 621.

The application may be made notwithstanding that the action is no longer pending, or has not been brought to a hearing, or that the property preserved has been sold: *Jones* v. *Frost*, L. R. 7 Chy. 773.

Where the application is made by the solicitor of a trustee, the order should not be made to the prejudice of the trustee's right to indemnity out of the fund for sums for which he had incurred liability: *Re Turner, Wood* v. *Turner*, 1907, 2 Ch. 126; 95 L. T. 861; 96 L. T. 798.

The application should as a rule be made on notice to all parties interested in the property sought to be charged, and the charge can only extend to the client's interest therein: *The Birnam Wood*, 1907, P. 1; 96 L. T. 140; unless the proceedings, for the costs of which the charge is claimed, are in the nature of salvage proceedings for the benefit of the client, and others having a common interest. Such an order may be made in an administration action, even though in the result the proceedings having not been beneficial to the beneficiaries: *In re Turner, Wood* v. *Turner, supra*.

In some cases it may be that the object of the application would be defeated if the parties were notified in the first place, and, in such cases, it is possible the application might be entertained *ex parte* in the first instance; but wherever a charging order is granted on an *ex parte* application, it would seem desirable that the order should be in the nature of an order *nisi*, *i.e.*, declaring the charge upon service on the (*parties interested*) unless they, within a specified time thereafter, on notice to the chargee in that behalf, shew to the Court good cause to the contrary.

The order may be intituled in the action only, and not in the matter of the Act, or of the solicitor, and may be made upon notice of motion: *Hamer* v. *Giles*, 11 Ch. D. 942; *Brown* v. *Trotman*, 12 Ch. D. 880. See H. & L. Forms, No. 1362.

As to the form of the order: see *Orford* v. *Fleming*, 34 C. L. J. 413; H. & L. Forms, Nos. 1364, 1365.

Costs.

Costs of Application.—The Solicitor is entitled to his costs as between solicitor and client: *Waterland* v. *Serle*, 1897, W. N. 163 (9).

Effect of charging order.

Effect of Order.—The charging order gives no higher claim than the ordinary solicitor's lien: see *Goodfellow* v. *Gray*, 1899, 2 Q. B. 498; 81 L. T. 314; and is subject to any claims, prior to the client's, on the property: *Taylor* v. *Robinson*, 19 P. R. 31; but a valid charge may be given on property of an estate of a deceased person recovered or preserved, by a solicitor on the retainer of the personal representatives, which will be binding on the shares of the beneficiaries therein: *Ex p. Tweed*, 1899, 2 Q. B. 167; and the charging order will take priority over the claims of creditors, though they may have obtained prior charging orders against the assets: *Ridd* v. *Thorne*, 1902, 2 Ch. 344.

Enforcing charge.

Enforcing Charge.—Where the charge is sought to be enforced, a subsequent application may be made by notice of motion, in the action in which the charging order is made, and not by a new action: see *Orford* v. *Fleming*, 34 C. L. J. 238, 413; 18 C. L. T. 142; but,

if asked for, there would seem to be no reason why, where feasible, such relief should not be given by the order declaring the charge. Rule 689.

Where a charge was declared in favour of a solicitor upon a judgment recovered in an action by an infant by his next friend, the Court refused to enforce the charge by sale of the judgment, as that might destroy the value of the whole to the infant, but leave was given to the solicitor to enforce the judgment by execution, and to receive to his own use the amount of his charge: *Nevills* v. *Ballard*, 18 P. R. 134.

The charge may be enforced by a stop order: *Smith* v. *Winter*, 18 W. R. 447.

It would appear that the granting of a charging order is not intended to have the effect of a judgment, so as to prevent the running of the Statute of Limitations in respect of the costs intended to be secured thereby; and the charging order must therefore be enforced within the period within which the costs can be recovered by action.

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CHAPTER XXVI.

DEVOLUTION OF ESTATES.

Notice to Official Guardian. Rev. Stat. c. 119

690. Before an executor or administrator takes proceedings under *The Devolution of Estates Act*, for the sale of real estate in which an infant is concerned, he shall give to the Official Guardian or Local Guardian appointed under that Act notice of the intention to sell, and shall not be entitled to any expenses incurred before giving such notice. C.R. 971.

See *The Devolution of Estates Act* (R. S. O. c. 119), s. 19; *Belanger* v. *Belanger*, 24 O. L. R. 439; *Re Booth*, 16 Ont. 429; *Re Gardner*, 7 C. L. T. 139.

Notice is only required to be given to the Official Guardian, or Local Guardian, where infants are interested, and the sale is to be made simply for the purpose of distribution. Where the approval of the Official Guardian, or Local Guardian, is not requisite to the carrying out of the sale, notice to him is not necessary: *Re Fletcher*, 26 Ont. 499.

Application to Judge.

691. The Official Guardian or other officer aforesaid, or any person interested in the land or in the proceeds of the sale thereof, may apply to a Judge, upon notice to all parties concerned or to such parties as the Judge may direct, for such direction or order touching the real estate and the proceeds thereof or the costs of the proceedings as to the Judge may seem meet. C.R. 972.

The other officer referred to in this *Rule* is the Local Guardian if any appointed under *The Devolution of Estates Act*, s. 19 (2).

Upon an application under this *Rule* lands to which infants were entitled, but which were charged with the payment of a legacy, were authorized to be sold for the purpose of paying the legacy: see *Re Eddie*, 22 Ont. 556.

CHAPTER XXVII.

QUIETING TITLES.

692. A petition for an investigation of titles, under *The Quieting Titles Act*, shall not include two or more properties dependent on separate and distinct titles, but may include any number of lots or parcels belonging to the same person, and dependent on one and the same chain of title. C.R. 991.

Two or more properties held by separate titles not to be included in the same petition.

The Act referred to in this *Rule* is *The Quieting Titles Act* (R. S. O. c. 123).

Where the provisions of this *Rule* are violated, the Referee may refuse to proceed with the investigation of the title. This may lead to delay and expense, as the objection can only appear before the Referee, after the proceedings necessary to show the title have been taken. The object of the *Rule* is to prevent the proceedings becoming unnecessarily intricate.

Expense and delay may be saved by attention to what is said in the notes to this, and the following *Rules*, and an adherence to established forms.

Who May File Petition.—Any owner of an estate in fee simple in land, or any trustee for the sale of the fee simple, may file a petition without leave: *The Quieting Titles Act* (R. S. O. c. 123), s. 2. Any other person who has any estate, or interest, legal or equitable, in or out of land in Ontario, may also file a petition: *Ib.*, s. 3; but under *Rule* 693, the petition in the latter case, must first receive the sanction of a Judge, before it can be referred to a Referee for investigation. A vendee before conveyance, is within sec. 3, and his petition will not be entertained without the consent of his vendor: *Re Brown*, 3 Chy. Ch. 158; and a petitioner who is only a tenant in fee in remainder must first obtain the consent of the tenant for life to the filing of the petition: *Re Pelten*, 8 P. R. 470.

Who may file petition under Quieting Titles Act.

Formerly it was necessary that the petitioner should be in possession by himself, or tenant: *Re Bell*, 3 Chy. Ch. 239; *Re Mulholland*, 18 Gr. 528; *Re Mono*, 6 P. R. 150; but that is no longer necessary; and a petitioner, who is out of possession, may, on obtaining a certificate of title, obtain an order for the delivery of possession to him of the land in question, which may be enforced by the same process as a judgment for the recovery of land: see *The Quieting Titles Act* (R. S. O. c. 123), s. 39; *Re McDonald*, before Boyd, C., 16th May, 1881.

Not necessary that petitioner should be in possession.

A petition may be filed by a devisee claiming under a will, where the property intended to be devised has been erroneously described: *Re Lyons*, 2 Chy. Ch. 357; *Re Callaghan*, 8 P. R. 474; but a grantee cannot by this means rectify an erroneous description in a deed under which he claims: *Ib.* As to cases in which property intended to be

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devised, may pass under a will, notwithstanding a mis-description in it in the will, see *Re Shaver*, 6 Ont. 312; *Hickey v. Storer*, 11 Gr. 106; *Young v. Purvis*, 11 Ont. 597; *Summers v. Summers*, 5 Ont. 116; *Wright v. Collins*, 16 Ont. 182; *Re Ham & Leslie*, 25 Ont. 136; *Fayden v. McFayden*, 27 Ont. 598; *Re Mayell, Foley v. Ward*, 1913, 2 Ch. 488; 109 L. T. 40.

Filing a petition will not save the rights of a contestant otherwise barred by Statute of Limitations.

Effect of Filing Petition.—The filing of a petition is not such a proceeding as will save the rights of a party *contestant*, otherwise barred by the Statute of Limitations: *Laing v. Avery*, 14 Gr. 33; nor it would seem, will it have the effect of stopping the running of the Statute in favour of a contestant in adverse possession, until such contestant is notified, or has filed a claim, or otherwise become a party to the proceedings, nor even then, unless the petitioner ultimately obtains a certificate of title. Where a contestant claiming title under a tax sale was barred, but the petition was also ultimately dismissed, it was held that the filing of the petition and the proceedings had on the claim of the contestant, were not an effectual questioning of the latter's title, so as to preclude him from the benefit of the Act 37 Vict. c. 15 (O.), curing the defect in the tax sale, under which he claimed, if not questioned within two years: *McNab v. Peer*, 32 C. P. 545.

A petition to quiet the title of a person out of possession, is now, in effect, an action to recover possession: see *The Quieting Titles Act* (R. S. O. c. 123) s. 39.

Description of land in petition.

Description of Land.—The description of the land in the heading of the petition should be sufficient to enable the land in question to be identified, but usually it is unnecessary to set out in it the metes and bounds. The description of the lands in the body of the petition should be given in the form in which the petitioner desires the land to be described in the certificate of title. Where there is any plan of the property registered, the description of the land in the petition must be in accordance with the plan: *Re Morse*, 8 P. R. 475; *The Registry Act* (R. S. O. c. 124), s. 81 (10); and where pending the petition, the land was laid out into building lots according to a registered plan, the description was required to be amended according to the registered plan: *Re Morse, supra*.

Referee may insert more specific description of land in the notices to be served or published

Where the description of the land in the heading of the petition appears to the Referee of Titles, not to be sufficiently explicit, he should require a sufficient and proper description to be inserted in all notices by him directed to be published, or served; and where it appears that there is no sufficiently definite description of the lands contained in either the heading, or the body of the petition, or that the description given is misleading, the Referee may require the petition to be amended in that respect, before proceeding with the investigation.

Estate claimed must be correctly stated in petition.

Estate, or Interest, Claimed.—The estate, or interest, claimed by the petitioner, should also be accurately stated in the petition, and also the estates and interests of all other persons in the land, which are intended to be admitted by the petitioner, otherwise the petitioner may be ordered to pay the costs of such other persons who may come in to prove claims, not admitted in the petition. The petitioner should not allege in his petition that the estate which he claims is *subject* to any rights or claims which he intends to dispute.

Rule 692. Petition

Form of Petition.—Tha form of petition given in the Schedule to the Act, R. S. O. c. 123, p. 1320, H. & L. Forms, Nos. 1472*a*, 1473, should be followed as nearly as may be. It is neither necessary, nor desirable, to set out in detail, in the petition, the facts and circumstances affecting the title; but a concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents, is to be delivered to the Referee, with the other documents required to be furnished under *The Quieting Titles Act* (R. S. O. c. 123), s. 6.

Filing

Filing the Petition.—Under *The Quieting Titles Act* (R. S. O. c. 123), s. 5, the application is required to be made to the Supreme Court or a Judge thereof. The petition is filed in the Central office: *Rule* 694.

Where the investigation of title is to be proceeded with before a Local Referee, the petition before being filed, must be entered with the Inspector of Titles at Toronto: see *Rule* 698.

Indorsement.

Indorsement of Petition.—The petition should be indorsed with the usual notice of the name and address of the solicitor by whom it is filed, or of the principal and agent, where it is filed by an agent: see *Rules* 3*j*, 11 (2); or when filed by a petitioner in person, there must be indorsed his place of residence and occupation, and an address for service within 2 miles of the office where the proceedings are to be carried on: see *Rules* 3*j*, 12.

Where it is desired that the petition should be referred for investigation to a Local Master, the memorandum required by *Rule* 696 must be also indorsed.

Affidavit of petitioner.

Proofs Required on Investigation of Titles.—The following are the papers which it is necessary to deliver to the Referee of Titles, to whom the petition is referred, in all ordinary cases, and the proofs 1 to 15 should be delivered at one time, not piece-meal.

1. The affidavit of the petitioner, under the 7th section of *The Quieting Titles Act*. If the affidavit is not made by the petitioner, some valid reason should be given why it is not: *Re Rundell*, 4 Chy. Ch. 71. For form of affidavit and schedule see H. & L. Forms Nos. 1474, 1475. The schedule of documents must be marked, as an exhibit, by the commissioner before whom the affidavit is sworn: *Re Dickson*, 3 Chy. Ch. 352.

Voluntary affidavits.

N.B.—None of the affidavits in support of the petition should be sworn until the petition has been filed, until then, there is no cause in Court and the affidavits so sworn are voluntary, and the deponents might not be liable to prosecution for perjury. And as the proceedings are *ex parte* this requirement cannot be waived.

Certificate of counsel.

2. The certificate of counsel, or solicitor, under the 8th section of *The Quieting Titles Act*; see Form, H. & L. Forms, No. 1476. This certificate should not be dated prior to the swearing of the petitioner's affidavit to which it relates. The certificate should follow the language of section 8. A certificate of counsel that he had corresponded with the petitioner was held insufficient: *Re Dickson*, 3 Chy. Ch. 352.

County Registrar's certificate.

3. The County Registrar's certificate of all registrations upon the land in question, up to, and including, the date of filing of the petition: *Re Hill*, 2 Chy. Ch. 348; see H. & L. Forms, No. 1477. It is

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advisable that no further registrations should be made upon the lot by the petitioner pending the investigation. If any transfer by way of mortgage, or otherwise, be made by the petitioner pending the investigation, the Referee of Titles should be immediately notified thereof: see *Re Cummings*, 8 P. R. 473; *Re Morse*, 8 P. R. 475.

When there are a great many registrations recorded against the lot, but not affecting the particular parcel in question, and the registrar cannot certify those that do affect the land in question without including in his certificate those that do not, his certificate may be dispensed with, on production of a proper affidavit of search by a Provincial Land Surveyor: *Re Morse*, 8 P. R. 475.

The abstract will have to be subsequently continued to the date of the certificate of title: *Re Cummings*, 8 P. R. 473.

Deeds.

4. All deeds and evidences of title in the petitioner's possession or power: see *The Quieting Titles Act*, s. 6 (*a*).

5. If the petitioner cannot produce all the deeds relating to the land, under which he derives title, or shown on the registrar's abstract, he must procure and produce:—

(*a*) Certified copies of all registered instruments affecting the title of which the originals are not produced, including discharged mortgages, and certified copies of all certificates of discharge of mortgages, and of the affidavits of execution thereof: *The Quieting Titles Act*, s. 6 (*b*).

A certificate of discharge of mortgage has not the effect of reconveying the estate until it is registered: *Re Morse*, 8 P. R. 475; *Re Luckhardt*, 29 Ont. 111.

Affidavits of search for lost deeds.

(*b*) Affidavits of diligent search for the originals of all deeds which are not produced, and which ought to be in the custody of the petitioner.

Proof of bar of dower

6. If there is no release of dower by the wife of a former owner, show that he was unmarried when he conveyed, or that his wife is dead, or that her dower is barred, or that the land is not subject to her dower: see *The Dower Act* (R. S. O. c. 70), ss. 6, 7, 8, 9; otherwise the certificate of title must be subject to her dower.

Affidavits as to possession.

7. Affidavits are required, showing that possession has always accompanied the title under which the petitioner claims: see *Rule* 702. Also affidavits showing who is, at the time of making such affidavits, in occupation, and under what title, or claim of title. These affidavits should show how the possession has been held, and should be made by disinterested persons: see H. & L. Forms, No. 1480. See further as to evidence of possession requisite: *Id.* 702, note.

Consents required.

8. Consent of the person in actual possession (wherever any person other than petitioner is in occupation), duly verified by affidavit. For form of consent: see H. & L. Forms, No. 1486.

9. Consent of any mortgagee, or person entitled, to any outstanding charge, or estate, duly verified by affidavit. For form of consent: see H. & L. Forms, No. 1486; and see *Re Caverhill*, 8 C. L. J. 50.

N.B.—The consents mentioned in clauses 8 and 9 must be produced even though the petitioner admits that his title is subject to the rights of such tenant, mortgagee, etc. In some cases the consent must be filed before the petition will be referred for examination: *e.g.*, where

the petitioner is a purchaser who has not obtained his conveyance, the consent of his vendor must be filed: *Re Brown*, 3 Chy. Ch. 158; or where he is tenant in remainder expectant on a life estate, the consent of the tenant for life must be filed: *Re Pelton*, 8 P. R. 470. Rule 663.

10. Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. For form: see H. & L. Forms, No. 1479. This certificate should include the names of all persons who have owned the land at any time within 20 years past; see *Re Harding*, 3 Chy. Ch. 232; *Re Rundell*, 4 Chy. Ch. 71; *Ex parte Lyons*, 3 Chy. Ch. 357; and *The Statute of Limitations* (R. S. O. c. 75), s. 24 (2), which seems to render ineffective the former decisions of *Neil* v. *Almond*, 29 Ont. 63, and *Re Woodall*, 8 O. L. R. 288. Sheriff's certificate as to executions.

11. County Treasurer's certificate that there are no taxes in arrear, and that there has been no sale for taxes, and stating the year for which the last roll of taxes in arrear has been returned to him. For form: see H. & L. Forms, No. 1487. Proof must be given of payment of all taxes, except those for the year in which the certificate issues. If the certificate first produced does not cover all such taxes an additional certificate will be required: see *Re Harding*, 3 Chy. Ch. 232; *Re Chamberlain*, 2 Chy. Ch. 352. County Treasurer's certificate as to taxes.

N.B.—Certificates of title are always granted subject to the taxes for the current year in which the certificate bears date: see *The Quieting Titles Act* (R. S. O. c. 123), ss. 10, 23 (*b*). Whenever the roll of taxes in arrear for any preceding year has not been returned to the County Treasurer, his certificate must be supplemented by the collector's, or township treasurer's receipt for all taxes not covered by the Treasurer's certificate, other than those for the current year: see *The Assessment Act* (R. S. O. c. 195), s. 125.

12. A concise statement of any other facts necessary to make out the title; and affidavits or other evidence to prove the same: *The Quieting Titles Act* (R. S. O. c. 123), s. 6 (d). Statement of facts.

N.B.—All affidavits to prove facts material to the petitioner's title should, as far as possible, be made by disinterested persons: *Re Chamberlain*, 2 Chy. Ch. 352.

13. Schedule of the particulars so produced to be marked as an exhibit to the petitioner's affidavit: *Re Dickson*, 3 Chy. Ch. 352; *The Quieting Titles Act*, s. 6 (d); see Form, H. & L. Forms, No. 1475. Schedule of particulars.

Crown bonds registered in the former Queen's Bench office no longer bind lands, unless also registered in the Registry office: *Re Franklin*, 8 P. R. 470; R. S. C. c. 103.

Affidavits proving the publication, and posting of the advertisement required under *The Quieting Titles Act*, s. 12, should show that the deponent has examined issues of the papers in which the advertisement has been published; and also that the notices have remained posted at the Court House, and Post Office, continuously for one month: *Re Chamberlain*, 2 Chy. Ch. 352; *Re Hill*, *Ib.*, 348. For forms of affidavits: see H. & L. Forms, Nos. 1483, 1484. Affidavits of publication of advertisement.

693. Where an application is made under section 3 of the said Act, the proper officer in the Central Office shall attend one of the Judges with the petition, for directions, before the same is referred for investigation. C.R. 992. Petitions to be referred to Judge in certain cases before being referred for investigation.

Rules 694-697.

Where petitioner has only a partial interest, consent of other parties interested required.

Where the petitioner has merely a partial interest, the Cou usually requires the consent of the other persons interested in t estate, to be filed, before authorizing the petition to be referred for i vestigation. Thus, where a purchaser before conveyance filed a pe tion, the consent of his vendor was required: *Re Brown*, 3 Chy. C 158; and where the petitioner was a tenant in remainder, the conse of the tenant of the particular estate was required: *Re Pelten*, P. R. 470.

The consent duly verified by affidavit should be attached to t petition, when brought to be filed.

Petitions, to whom to be referred.

694. All petitions under the said Act shall be filed i the Central Office, and may, at the option of the pet tioner, be referred to the Referee in Toronto or to an Local Master. C.R. 993.

Where the petitioner desires to have the petition referred to a Local Master as Referee of Titles, he must designate the officer whom he desires the referenee, by indorsement on the petition: s *Rule* 696. If there be no such indorsement the petition will be r ferred to the Referee of Titles at Toronto: *Rule* 697.

Senior Registrar to be Inspector.

695. The Senior Registrar shall be the sole Inspecto of Titles, in respect of petitions filed under *The Quietin Titles Act*, and the sole Referee in Toronto. C.R. 994.

The Senior Registrar is the Senior Registrar of the High Cou Division: see Jud. Act, s. 76 (*c*).

The Inspector of Titles supervises the work of all Local Referee of Titles, and as Referee of Titles at Toronto he investigates title referred to him for investigation: see *Rules* 708, 709.

The fees payable to the Inspector of Titles are regulated b Tariff B.

Petitions, how to be indorsed.

696. Petitions to be referred to any Local Referee shal be indorsed thus: 'To be referred to the Referee a ———— and to Mr. ———————— Inspector of Titles. C.R. 995.

At preseat there is only one Inspector of Titles, and this officer i also the sole Referee of Titles at Toronto: see *Rule* 695.

If there be no indorsement of the name of a Local Master, the peti tion is to be referred to the Referee of Titles at Toronto: *Rule* 697.

Where the petition is required to be referred to a Local Master, a Referee, it must, before being filed, be entered with the Inspector o Titles, and a fee of $8 in stamps must be paid thereon: see *Rule* 69 Tariff B.

Petitions, when to be referred to Toronto Referee.

697. Petitions filed unindorsed shall, without order stand referred to the Referee in Toronto, but a petitio indorsed with the name of any Local Referee shall stand referred to him. C.R. 996.

Rules 698-702.

698. Petitions to be referred to a Local Referee shall be entered with the Inspector of Titles before being filed. C.R. 997. Petitions to be referred to Local Referees, to be entered with Inspector.

C. R. 997 provided that the entry with the Inspector of Titles was to be made before filing the petition, and that the Inspector of Titles was to note thereon the date of entry and initial the same. The omission of these provisions is, probably, not intended to make any change in the practice.

699. A Local Referee shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Rules. C.R. 998. Local Masters may confer with Inspector.

700. Upon the filing of the petition it shall be delivered or mailed by the proper officer to the Referee. C.R. 999 and 1276. Petition to be sent to Referee.

The Clerk of Records and Writs is the "proper officer" to forward the petition to the Referee to whom it is to be referred.

701. The particulars necessary, under section 7 of the Act, to support the petition shall be delivered or sent by the petitioner, or his solicitor, to the Referee, and shall be forthwith examined and considered by him. C.R. 1000. Papers in support of application to be delivered to Referee and examined by him.

At the time these *Rules* were passed *The Quieting Titles Act* was 10 Edw. 7, c. 59, and the particulars intended to be referred to in this *Rule* are probably those required under s. 6 of that Act which is also s. 6 of *The Quieting Titles Act* (R. S. O. c. 123), not s. 7 as stated in the *Rule*. The section was numbered 7 in a prior Quieting Titles Act (R. S. O. 1897, c. 135).

On delivering the papers to the Referee a fee of fifty cents is to be paid on each deed in the chain of title, other than satisfied mortgages; and ten cents on each other paper filed: see Tariff B.

Patents from the Crown and wills are regarded as absolute deeds, and so are mortgages where the equity of redemption has been released, or a power of sale exercised under which the petitioner claims title.

The petitioner is not, however, required to stamp with 50c., absolute deeds, under which he does not claim title: see The Tariff B.

Where the reference is to the Referee at Toronto the additional fee of $4 on the certificate of title is also payable: *Ib.*; but this fee is not payable where the reference is to be a Local Master as Referee: see Tariff B.

702. In every case of an investigation of the title to property under the said Act, the petitioner shall shew Evidence required as to possession.

Rule 702.

by affidavit or otherwise, whether possession has alway accompanied the title under which he claims the prop erty, or how otherwise, or shall shew some sufficient rea son for dispensing with such proof either wholly or i part. C.R. 1001.

The question of possession is always a very important one, and is necessary that the affidavits should shew how the possession ha been held, *e.g.*: whether by residence, or by cultivation, and by whom If by tenants, giving their names and the periods during which the occupied. Proof as to possession is indispensable: *Re Wright*, 2 Ch Ch. 355. For form of affidavit: see H. & L. Forms, No. 1480.

Petitioner originally entering as a trespasser.

Where the petitioner is a mere trespasser claiming to have acquire title by possession, the evidence as to possession must be very clea and conclusive, and it must be shewn to have actually extended t the whole of the land claimed, and should negative the existence o the exceptions which prevent the statute from running: *Chapman* v *Bunbury*, 31 C. L. J. 103; 15 C. L. T. 57. The actual possession o some part of a lot, or parcel, of land by a mere trespasser, will b insufficient to confer a title by possession as to any other part o which there has been no actual possession, even though the lot be wild lot: *Harris* v. *Mudie*, 7 Ont. App. 414; *Reynolds* v. *Trivett*, 7 O. L R. 623. In order to confer a title under the Statute of Limitation there must be an actual and visible possession; mere payment o taxes on a vacant lot confers no title: *Re Jarvis* v. *Cooke*, 29 Gr. 303 *Walton* v. *The Woodstock Gas Co.*, 1 Ont. 630; but see *Steers* v. *Shaw* 1 Ont. 26; *Kirby* v. *Cowderoy*, 1912, A. C. 599; 107 L. T. 74. Even clear ing and fencing, without actual possession or putting the land to any use, is not a sufficient possession to bar the rightful ower: *Stovel* v *Gregory*, 21 Ont. App. 137.

Possession of part is not constructive possession of rest of lot.

In order to defeat a rightful owner's title, by adverse possession the possession must have been continuous for the required number of yesrs: whenever the possession is vacant, the rightful owner is in possession in contemplation of law: see *Trustees Agency Co.* v. *Short* 13 App. Cas. 793; *Reynolds* v. *Trivett*, 7 O. L. R. 623.

Evidence where title claimed solely by possession.

Where the petitioner claims title by possession, he should prove the possession for the requisite time, by the clear and positive evidence of at least two independent witnesses. In such a case a notice, pre pared by the Referee, should be served upon the person having the paper title, if he can be found, but if not, evidence of search for him or his representative should be put in, and in such a case the possession should be shewn to have been long enough to bar him, even though he had no notice of the possession: *Re Caverhill*, 8 C. L. J. 50; *Re Chamberlain*, 2 Chy. Ch. 352. Where the petitioner claims title as against the patentee, or his heirs, or assigns, of land of which they have not taken actual possession by residing on, or cultivating some portion thereof, he must shew either knowledge of his possession by the patentee, or his heirs, or assigns, or else establish a possession for at least twenty years as against the patentee and those claiming under him: *The Statute of Limitations* (R. S. O. c. 75) s. 6 (4); *Re Linet*, 3 Chy. Ch. 230; *Bingle* v. *Dake*, 42 U. C. Q. B. 250; *Van Velsor* v. *Hughson*, 45 U. C. Q. B. 252; *Hicks* v. *Williams*, 15 Ont. 228; *Stovel* v. *Gregory*, 21 Ont. App. 137; but this is not necessary as to other

Rules 703-705.

ersons becoming interested in the lands, as to whom ten years' possession may be sufficient, *e.g.*, a purchaser at a tax sale: *Brooke* v. *Gibson*, 7 Ont. 218, but see *Donelly* v. *Ames*, 1h., 271; proof of notice to the husband of the owner is sufficient: *Harris* v. *Prentiss*, 30 C. P. 484; S. C., on Appeal, 7 Ont. App. 414. A decree for redemption not prosecuted by the mortgagor for upwards of 21 years was held to constitute no bar to the mortgagee's obtaining a title by possession, notwithstanding that the mortgagor was a lunatic: *Re Leslie*, 23 Ont. 143.

When actual possession of part may confer title to residue of lot.

It is not clear that it is necessary to establish so strict, and actual, a possession of all the land claimed, where the petitioner has been in possession under a claim of title which was originally defective. In such a case the doctrine of constructive possession might, and would probably, be held to apply even as against the owner of the paper title: see *Dundas* v. *Johnston*, 24 U. C. Q. B. 550; *Davis* v. *Henderson*, 29 U. C. Q. B. 344; per Burton, J., *Harris* v. *Mudie*, 7 Ont. App. p. 425; *Steers* v. *Shaw*, 1 Ont. 26.

A person who has been in possession under a fraudulent grantee, but who has not acquired any title as against the latter, cannot set up a title by possession as against a purchaser of the land from the assignee in bankruptcy of the fraudulent grantor, made after the fraudulent conveyance has been set aside in proceedings instituted against both the fraudulent grantor and grantee: *Donovan* v. *Herbert*, 4 Ont. 635.

Where there is no contest, attendance of petitioner's solicitor dispensed with.

703. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, shall not be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. C.R. 1002.

Referee to deliver requisitions and objections.

704. If, on such examination as aforesaid, the Referee finds the proof of title defective, he shall deliver or mail to the petitioner, or his solicitor, a memorandum of such finding, stating shortly therein what the defects are, and he shall therein state as far as possible all the objections to the title. C.R. 1003.

Advertisements to be published in Gazette and other newspapers.

705. When the Referee finds that a good title is shewn he shall prepare the necessary advertisement, and, unless the publication thereof is dispensed with under section 14 of the said Act, the same shall be published in the *Ontario Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted; and a copy of the advertisement shall also be put up on the door of the court house of the county where the land lies, and, unless the nearest post office is in a city, in some conspicuous place in the post office which is situate nearest to the property, the title of

Notices to be posted at Court House and Post Office.

Rule 705.

which is under investigation; and the Referee shall indorse on the advertisement so prepared by him, the name of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the court house and post office respectively. C.R. 1004.

At the time these *Rules* were passed *The Quieting Titles Act* in force was 10 Edw. 7, c. 59, and the section authorizing the advertisement to be dispensed with was s. 12 (2), which is also s. 12 (2) of *The Quieting Titles Act* (R. S. O. c. 123), not s. 16, as mentioned in this *Rule*. The section was numbered 14 in a prior Quieting Titles Act (R. S. O. 1897, c. 135.)

The notice is not to be published until the Referee finds that a good title is shewn.

Advertisement, how published.

The notice is, ordinarily, required to be published once in the Ontario *Gazette*, and at least once a week for two weeks in some local newspaper published in the county town, or other place near where the lands in question are situated; but in some cases it may be found advisable to publish the advertisement more frequently. At least a month should be given from the date of the publication of the first advertisement, for sending in claims.

For form of advertisement: see H. & L. Forms, No. 1481.

The advertisement is principally intended for persons, if any, whose rights are not disclosed on the proceedings. Persons who are known to have, or appear to have, some adverse claim, should generally be required to be served with notice of the proceedings: see *The Quieting Titles Act* (R. S. O. c. 123), ss. 14-18; and see note to *Rule* 706.

Notice, how published.

The notices required to be posted at the Court House, and Post Office, should be kept up continuously for the period directed, and the person intending to prove the posting up, should take care to see that such notices are kept up continuously for the requisite period: *Re Hill*, 2 Chy. Ch. 348; *Re Chamberlain*, 2 Chy. Ch. 352. For form of affidavits of posting, and of publication of advertisement: see H. & L. Forms, No. 1483, 1484.

Affidavits proving publication.

Where the lands are situate in a city, posting of a notice at the Post Office is not required.

Where an advertisement was posted at the Court House nearest the lands, which was not the Court House of the County in which the lands were situate, the irregularity was waived by the Judge: *Re Harris*, 12 P. R. 430; and see *The Quieting Titles Act*, s. 41.

Dispensing with advertisement.

Where the property in question is proved to be of the value of no more than $3,000, the publication of an advertisement may be dispensed with: see *The Quieting Titles Act*, s. 12 (2). The affidavit proving the value of the land should follow the wording of that section, and should show explicitly that it is worth "no more than $3,000": see Form H. & L. Forms, No. 1485. Where a Local Referee dispenses with an advertisement, it would be convenient for him so to state in his certificate required by *Rule* 780, *e.g.*, by adding thereto

and it having been proved to my satisfnction that the land in ques- Rule 706.
ion is of no more value than $3,000, I dispensed with the publication
f any advertisements of this application."

Although publication of the notice in the *Gazette*, and local paper, is dispensed with, the notice (printed, or type written), must, nevertheless, be affixed in the Post Office, and Court House, as required by this *Rule*, and also in a conspicuous place, or places, on the land in question: see s. 12 (2).

706. Any notice of the application to be served or mailed under section 16 of the Act, shall be prepared by the Reference; and directions shall in like manner be given by him as to the persons to be served with the notice, and as to the mode of serving the same. C.R. 1005. Notices required to be served.

The section of *The Quieting Titles Act* probably intended to be referred to in this *Rule*, is s. 14 of the present Act, which was s. 16 in the prior Act (R. S. O. 1897, c. 135).

The 14th section of the present Act is as follows:—

"14. Where it appears that there is any person who may have a claim adverse to, or inconsistent with, that of the petitioner to, or in respect of, any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to, or served on such person, his agent or solicitor, 10 Edw. 7, c. 59, s. 14." Notice to adverse claimant.

By s. 22 the Referee of Titles, to whom any petition is referred, is to proceed as the Judge should do under the Act, had the reference not been made, and he is to have the same powers.

Notice should be required to be served on every person known to have a claim adverse to the petitioner, whether the claim be admitted by the petitioner or not, unless the consent of such person be filed, duly verified, consenting to a certificate of title being granted to the petitioner, free from, or subject to, the claim, if any, of such consenting party, and if subject to his claim, setting forth with clearness what his claim is. The notice to be served should contain explicit information why it is served: *Ex porte Hill*, 2 Chy. Ch. 348.

Notice is also often required to be served for the sake of precaution, thus, where an application was made before *The Devolution of Estates Act* by devisees within a year of the death of their testator, notice was required to be served on the heirs-at-law, as the petition was, in effect, a proceeding to establish the will: *Ex porte Hill*, 2 Chy. Ch. 348; and see *Re Dougherty*, 4 Chy. Ch. 80.

Where the Crown appears to have a possible interest, notice may be required to be served on the Attorney-General, and, if no claim is filed, the Crown may be barred, or if a claim is filed it may be adjudicated in the same manner, and with the same effect as that of any other claimant: *The Quieting Titles Act*, s. 32 (3); *Re Roycroft*, 20 O. L. R. 437.

When title is claimed by possession notice should ordinarily be served upon the persons who, but for such possession, would be the owners: *Re Chamberlain*, 2 Chy. Ch. 352. So also where the petitioner claimed the north-east part of the lot under a will devising the north-west part, alleging that the word "west" was a clerical error. When title claimed by possession, owner of paper title to be served.

Rule 706.

all persons interest in maintaining the opposite view were required to be notified: *Ex parte Lyons*, 2 Chy. Ch. 357.

Claim under will which misdescribes property.

Where a petitioner claims title under a will in which the land has been misdescribed, his title may be quieted in any case in which the Court would, in an action for the construction of the will, determine that the land in question passed by the will as claimed by the petitioner, notwithstanding the erroneous description: see *Re Callaghan*, 8 P. R. 474; *Re Shaver*, 6 Ont. 312; but where the defect is in a deed *inter partes* the petitioner must bring an action to reform the deed; he cannot get the defect cured under *The Quieting Titles Act*: see *Re Callaghan*, 8 P. R. 474.

Parol evidence was held to be admissible to shew that "Lot 16, Con. 7, N. H." in a will meant "North half of Lot 16, 7th Concession, Township of Morris": *Young* v. *Purvis*, 11 Ont. 597; but where a description in a will is free from any patent ambiguity, it would seem that parol evidence is inadmissible to shew that it means anything else than what is expressed: *Summers* v. *Summers*, 5 Ont. 110; *Hickey* v. *Stover*, 11 Ont. 106; *Re Bain & Leslie*, 25 Ont. 136, and see *Asten* v. *Asten*, 1894, 3 Ch. 260; 71 L. T. 228. Under a devise of "19 and 20 Thomas St.," not owned by the testator, "19 and 20 Castle St." which were owned by him, were held to pass: *Re Mayell, Foley v. Ward*, 109 L. T. 40. And where there is a general devise of all the testator's land, followed by a particular erroneous description, the latter may be rejected: *Wright* v. *Collins*, 16 Ont. 182; and see *McFayden* v. *McFayden*, 27 Ont. 598; *Smith* v. *Smith*, 22 O. L. R. 127.

A devise of the S. W. ¼ of a lot not owned by the testator was held not to pass the S. ½ of the N. ½ of the same lot, which he did own: *Re Clement*, 22 O. L. R. 121.

Petitioner may be required to give negative evidence.

Proceedings under *The Quieting Titles Act* being for the most part *ex parte*, it is often necessary to require the petitioner to negative the existence of facts, of which, in the case of a contest between the petitioner and any third person, the onus of proving would be on such third person: *Re Caverhill*, 8 C. L. J. 50.

Or explain circumstances creating suspicion.

Where any transfer of the property has taken place, in circumstances of an unusual nature, it is necessary to require the petitioner to adduce evidence to negative the existence of any fraud, or want of *bona fides*: *Re Dougherty*, 4 Chy. Ch. 80. Where, for instance, the property is claimed by, or on behalf of, a wife, under a conveyance made to her during coverture, an explanation of the transaction should be given on oath, to shew that it was *bonâ fide*, and was such that the husband's creditors could have no claim to the property, and the affidavit of the petitioner should be corroborated by disinterested persons of credibility: *Ex parte Lyons*, 2 Chy. Ch. 357. So where the former owner, a person of the same name as the petitioner, had conveyed the land to the petitioner a few days before the filing of the petition, and the title appeared simple, explanations were required to be given: *Re Wright*, 2 Chy. Ch. 355.

And, in addition, notice must also be required to be served on persons who may appear to have a possible interest in disputing the *bona fides* of any conveyance under which the petitioner claims, wherever there are any circumstances calculated to arouse suspicion: *Re Dougherty*, 4 Chy. Ch. 80.

Service of notices, how effected.

Notices required by the Referee, to be served, are to be prepared and issued by him. Where service is directed to be effected by mailing the Referee may direct the letter enclosing the notice, to be pre-

paid and regietered, and a notico to be indorsed on the envelope to the effect that if the letter be not called for within eight days thnt it is to be returned to the Referee of Titles, by whom the notice is issued. Directione to return letters, if not called for, are required by the Post Office authorities, to be printed, in order to secure due attention. Rule 707.

Where a notice, served in this way, is returned to the Referee of Titles, he should require further service. Where service is authorized on the attorney, solicitor, or agent of the party to he notified, there should be evidence produced that the person served was in fect the attorney, solicitor, or agent of the party required to he notified.

Where the person to be notified is an infant, the Official Guardien *ad litem* may be served for him, and no order nppointing him guardian is necessary: *Re Murray*, 13 P. R. 367. Notice to infants.

For form of notice to a pereon eppearing to have en adverse interest: see H. & L. Forms, No. 1445.

Strict proof is required to be given of the due service of nil notices required to be served. The entries of service in a deceased solicitor's docket were held insufficient proof: *Ex parte Palmer*, 2 Chy. Ch. 351. Where a certificate was granted on a false affidavit of the due service of a notice, the certificate was set aside on the application of the perty directed to he notified, with costs; the Court refusing to enter into the question whether he was properly entitled to notice or not: *Re Ashford*, 3 Chy. Ch. 77. Proof of service.

Where there is a conteet, the Referee may, by consent, report on the contestant's claim before disposing of the petitioner'e title; but he should not do so, without consent. In generai, the petitioner is bound, in the first piace, to make out his own title before he can cieim to have adjudication upon the claim of a contestant: *Re Cameron*, 14 Gr. 612. And a contestant is at liberty to point out defects in the petitioner's titie, before proceeding to prove his own: *Armour v. Smith*, 16 Gr. 380. Adjudication on claim of contestant.

The Referee of Titles may award costs to, or against, a petitioner, or contestant: *The Quieting Titles Act*, ss. 20, 22; Jud. Act, s. 74 (4): *Anon.*, 2 Chy. Ch. 22. Where a petitioner claims title by possession, end the holder of the paper title on heing notified appeare and contests the metter, costs will not he nwarded against him ss a matter of course, even though the petitioner succeeds in estahliehing his title: *Low v. Morrison*, 14 Gr. 192. Referee may award costs.

The order or certificate of the Referee should be drawn up in similiar ierme to a report—*e.g.*, "I find and certify," nnd not "adjudge and determine": *Anon.*, 2 Chy. Ch. 22. Form of report.

The Referee's certificate, nliowing or disaliowing, the claim of any contestant, requires confirmation in the samc manner as a Master's report made in an action.

707. The Inspector, or Toronto Referee, shall from time to time confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there may be occasion. C.R. 1006. Inspector and Toronto Referee to confer with Judges.

Rule 708.

When title made out before Local Referee, he is to certify same, and forward papers to Inspector.

708. When any person has shown himself, in the opinion of a local Referee, to be entitled to a certificate of conveyance under the Act, and has published and given all the notices required, the Referee shall write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (or conveyance) as prayed (*or* subject to the following incumbrances, etc., *as the case may be*);" and shall transmit the petition (charges prepaid,) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles, who shall examine the same carefully, and if he finds any defect in the evidence of title, or in the proceedings, he shall, by correspondence or otherwise, point the same out to the petitioner, or his solicitor, or to the Referee, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. C.R. 1007.

Duty of Inspector.

Finding of Local Referees not conclusive.

It will be seen from this *Rule* that the finding of a Local Referee of Titles is not conclusive, but that it is the duty of the Inspector of Titles to examine the proceedings, and to require any defects in the proofs to be supplied. Where the Inspector finds the proceedings defective, he either transmits the papers to the Referee, with a note of the defects, or, where they are few, and of a trifling character, he communicates directly with the solicitor of the petitioner.

Where the advertisement is dispensed with: see notes to *Rule* 705.

Contestant's claim.

Where there has been any contest before a Referee of Titles, he should, before certifying in favour of the petitioner, and transmitting the papers to the Inspector, dispose of the claim of the contestant. The order, or report, of the Referee on the claim of a contestant should be filed and confirmed, in the same manner as a Master's report in an action, before a certificate of title is granted to the petitioner: *Rules* 428, 502. As all proceedings in Quieting Title matters are commenced in Toronto, all reports must be filed in the Central Office: *Rule* 428.

Appeal from Inspector, or Referee of Titles.

An appeal will lie from the order, report, or certificate, of a Referee of Titles, or Inspector of Titles, to a Judge in Court in the same manner as an appeal from a report made in an action: *Rule* 714; seven clear days' notice of appeal must be given to the respondent: see *Rules* 502, 503.

A contestant who succeeds in establishing an adverse claim, cannot obtain a certificate of title in the proceedings in which he is contestant, but he may himself file a petition, and on such petition, he would be entitled to use the evidence taken in the matter in which he was contestant: *Re Dunham*, 8 P. R. 472.

709. Where the Inspector, or Referee at Toronto, finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, he shall write at the foot of the petition, and sign, a memorandum to the same effect as is required from a Local Referee, and shall prepare the certificate of title, or conveyance, and shall engross the same in duplicate, one being on parchment or parchment paper; and shall sign the same respectively at the foot or in the margin thereof; and shall attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and, on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, shall deliver or transmit the same to the Central Office, to be sealed and registered, and the proper officer in the Central Office shall deliver or transmit the same when so sealed and registered, to the petitioner, his solicitor, or agent, for registration. C.R. 1008.

Rule 709.

When title is made out to satisfaction of Inspector, or Toronto Referee, he is to certify same; and to prepare Certificate of Title.

Certificate to be engrossed in duplicate.

Signed by Judge and sealed.

It is not any part of the duty of a Local Referee to whom a petition is referred, to prepare the certificate of title.

Certificate of Title, by whom prepared.

The Inspector of Titles—or the Referee of Titles, at Toronto where the petition is referred to him—are the only officers authorized to prepare certificates of title, issued under the Act.

This *Rule* requires the certificate to be engrossed by the officer preparing it; the object of the *Rule* being, to insure the certificate being engrossed in a proper manner, but for some time past, the practice has been for the petitioner, or his solicitor, to procure the engrossments to be made on printed headings, supplied for the purpose by the law stationers.

Engrossment of certificate.

The engrossment should be well and carefully made, without using figures or abbreviations, as the Judges refuse to sign certificates engrossed in a careless and slovenly manner. Type writing on parchment should be avoided.

Where the petition is referred to a Local Referee, no fee is payable on the certificate of title, except the fees for entry; the fee of $8, payable to the Inspector, being in full of all fees payable to him except the fees on papers filed in answer to his requisitions: Tariff B. Where the petition is referred to the Referee of Titles at Toronto, a fee of $4 is payable on the certificate of title, in addition to the fees for entry in the Central Office: see Tariff B.

Fees on.

Rules 710-713.

After certificate of title granted, title deeds may be delivered up without order or receipt being given.

710. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and shall take his receipt therefor. C.R. 1009.

Original deeds only returned to petitioner.

Under this *Rule* it has been the practice to return only original deeds and documents of title, but not certified copies, these are retained by the Inspector of Titles, with the other papers in the matter.

Papers filed in Quieting Titles proceedings are not open to general inspection; but it has been usual to require the person desiring to search them to shew that he has an interest in the proceedings, or to produce the consent of the petitioner or his solicitor: see *Reg. v. Bank of England*, 64 L. T. 468; *and Re Strachan*, 1895, 1 Ch. 439, 72 L. T. 175; *Re Avory*, before Meredith, C.J.C.P., 11th March, 1896.

Inspector or Toronto Referee to keep copies of all letters.

711. The Inspector and Referee shall keep a book and preserve therein a copy of all his letters under these Rules. C.R. 1010.

Applicant to pay all postage, etc.

712. The applicant shall pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers. C.R. 1011.

Proceedings under s. 33, how conducted, and fees therefor.

713. Petitions under section 33 of the Act shall be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title. C.R. 1012.

The section probably intended to be referred to in this *Rule* is not s. 33, but s. 31 of *The Quieting Titles Act* (10 Edw. VII. c. 59), which was the Act in force when the *Rules* were passed. It is now s. 31 of the present Act. (R. S. O. c. 123). That section was formerly s. 33 in the prior Quieting Titles Act (R. S. O. 1897, c. 135).

The 31st section of the present Act, above referred to, is as follows:

Declaration of legitimacy, etc.

"**31.** Where a person domiciled or claiming land in Ontario, desires to establish that he is the legitimate child of his parents, or that the marriage of his father or mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the heirs of any person deceased, or that he is a natural born subject of His Majesty, he may, if the Court thinks fit, have any of such matters judicially investigated and declared, 10 Edw. 7, c. 59, s. 31."

Under the Imperial Statutes, 21 & 22 Vict. c. 93, it has been held that a petitioner cannot obtain a declaration of the legitimacy of his grandfather: *Dodds v. Attorney-General*, 42 L. T. 402 nor of the

illegitimacy of some other person: *Mansell* v. *Attorney-General*, 2 P. D. 265, and see *S. C.*, 4 P. D. 232. Rule 714.

A person who appears, and unsuccessfully opposes the claim of the petitioners, may be ordered to pay the costs occasioned by his contestation: see Jud. Act, s. 74 (4); *Bain* v. *Attorney-General*, 1892, P. 261.

714. The certificate of the Inspector or of a Referee upon any contest before him shall be filed and an appeal shall lie from such certificate in the same way as from a Master's Report. C.R. 1013, *amended*. Appeals from Referee and Local Masters.

Appeals from Master's reports, are governed by *Rules* 502, 503.

The *Rule* only applies to certificates given in respect of contested claims. The certificate given under *Rule* 708, needs no confirmation as a report before being acted on.

CHAPTER XXVIII.

ACCOUNTANT'S OFFICE.

Books to be kept by Accountant

715. All such books and records shall be kept as may be directed by the Judges of the Supreme Court or the Finance Committee, and the forms used for directions and cheques shall be subject to its approval. *New.*

The Accountant is the officer of the Court in whom all moneys and securities in Court are vested: Jud. Act, s. 107 (2); *Rule* 720. He is a corporation sole, and his corporate name is "The Accountant of the Supreme Court of Ontario": see Jud. Act, ss. 76 (*g*) and 105. As to the Finance Committee: see Jud. Act, s. 106.

Salaries and expenses of office

716. In the month of January in each year the Accountant shall present to the Finance Committee a statement of the amounts paid for salaries and expenses of the Accountant's office during the previous year, and the names of the persons to whom such amounts were paid, and also an estimate of the salaries and expenses of his office for the current year; and such estimates shall be examined by the Finance Committee, who shall be at liberty to make such variations therein as may be deemed proper, and when approved a fiat shall be indorsed thereon or appended thereto which shall authorize the payment of the sums mentioned and cheques may issue accordingly. C.R. 69.

The expenses of the Accountant's office, including the salaries, are a first charge on the income arising from the funds in Court: Jud. Act, s. 105 (4).

As to the Finance Committee: see Jud. Act, s. 106.

Audit of Accounts.

717. An auditor shall be appointed whose duty it shall be to see that books and records are kept as required by the Finance Committee and to examine and verify the accounts, books and securities in the Accountant's office and to compare the balances with the Bank Account, and to make such further and other examination of the said books and securities as he may think necessary for the proper audit thereof, and to report forthwith, after making such examination, the result thereof to the said Committee, and from time to time to make such suggestions

as may appear to be desirable for the efficient keeping of the accounts. C.R. 67. Rules 718-721.

718. The Auditor's remuneration, which is fixed at the sum of $500 per annum, shall be payable in monthly instalments, as part of the expenses of the Accountant's office. C.R. 68. Auditors' remuneration.

719.—(1) It shall be the duty of the Official Guardian to see that moneys payable on mortgages held by the Accountant, in which persons for whom the Guardian has acted are interested, are promptly paid, and that the mortgaged premises are kept properly insured, and that the taxes thereon are duly paid. Official Guardian's duty as to mortgages.

(2) There shall be paid to the Official Guardian for services rendered by him under this Rule the sum of $200 per annum, and the same shall be deemed part of the expenses of the Accountant's office. C.R. 19. Remuneration of Guardian

This *Rule* purports to be based on C. R. 19, it is really based on C. R. 79.

720.—(1) All mortgages and other securities taken under an order or judgment of the Court, and all bonds and other instruments required by the practice of the Court for the purpose of security, save security for costs, shall, unless otherwise ordered, be taken in the name of the Accountant, and shall be deposited in his office. Securities to be taken in name of Accountant.

(2) Mortgages and other securities made to, or vested in the Accountant, in any action or matter, are to be held by him subject to the order of the Court; but no duty or liability save as custodian of the instrument shall by reason of such mortgage or other security being made, given to or vested in him, be imposed on the Accountant in respect of such mortgage or security or any property thereby vested in him. C.R. 66.

721.—(1) Any person entitled to the discharge of a mortgage made to or vested in the Accountant or other officer, may leave with the Accountant the required discharge with a request that the same be executed. Discharge of mortgages held by Accountant.

(2) The Accountant shall thereupon certify as to the payment of the money secured by the mortgage, and the matter shall in such case be considered by the officers

Rule 722.

whose duty it is to sign and countersign cheques for payment of money out of Court, and if they find that the mortgage has been satisfied in full and that the proposed discharge is in due form they shall indorse upon such certificate and discharge a direction for the execution of the said discharge by the Accountant or other officer in whom the mortgage may be vested.

(3) Thereupon the Accountant or such other officer may execute such discharge and may on a receipt being given therefor, deliver up all deeds and documents relating to such mortgage in his hands and may assign any policy of insurance held by him as collateral security for such mortgage to the person entitled to such discharge or as he may by writing direct. C.R. 80. *Amended.*

Interest on moneys in Court.

722.—(1) Interest shall not be credited in any action or matter in respect of money paid into Court

(*a*) With a defence;

(*b*) As security for costs of an action or appeal;

(*c*) As security for debt or costs, to stay execution;

(*d*) As a deposit for sale in mortgage actions;

(*e*) As a condition imposed by any injunction order;

(*f*) As proceeds of sale in, or to abide the result of, interpleader proceedings; or

(*g*) For any other merely temporary purpose;

unless or until after the same shall have been in Court for six months and then only at the rate of 2 per cent. per annum not compounded in any case; but the Finance committee may for special reasons order that in any particular case interest shall be allowed on such money at any higher rate not exceeding 3 per cent. per annum.

(2) Interest shall be credited upon the Assurance fund at the rate of 2½ per cent. per annum.

The Assurance Fund here referred to is that provided for by *The Land Titles Act* (R. S. O. c. 126), s. 123.

(3) Interest shall be credited to suitors' accounts other than as above provided at the rate of 4½ per cent. per annum until otherwise ordered by the Finance Committee. C.R. 56.

(4) Interest shall be credited upon money paid into Court only after the same has been in Court for fifteen days. Rules 723, 724.

(5) Compound interest shall not be credited to any action or matter or allowed or paid to any suitor in respect of any fund which has not been in Court for at least five years. C.R. 57. Compound interest.

This *Rule* purports to be based on C. RR. 56, 57, it is in part based on C. R. 56 (2) as enacted by C. RR. 1222, 1223.

Where compound interest is allowed the practice of the Accountant's office is to compound it half-yearly. Money paid in for purposes mentioned in clause (1) is in no case to bear compound interest: see cl. (1).

The interest which accrues on funds in Court is apportioned among the parties beneficially interested in the funds; sums payable thereon for costs do not bear interest, but the interest which accrues on money applicable to the payment of the costs is, with the other interest, apportioned among the suitors in proportion to their respective interests in the principal money.

Where in an administration action costs are directed to be paid out of the estate, and a direction is made for the division of the fund after such payment among the parties beneficially entitled, in the absence of a special direction to that effect, the costs do not bear interest: *In re Marsden; Withington* v. *Newmann*, 40 Ch. D. 375; even though the payment of the costs has been delayed owing to there being no funds available: *Archer* v. *Severn*, 12 P. R. 648.

723.—(1) All sums less than $10 standing to the credit of an adult and unclaimed for two years, shall be transferred to a Suspense account. Balances under $10 standing for 2 years carried to Suspense Account.

(2) All sums which are not claimed within ten years from the time when the same became payable out of Court, shall be transferred to the Suspense account.

(3) Money transferred to the Suspense account shall cease to bear interest, but shall at any time be paid to the person entitled. C.R. 58. *Amended.*

724. Where money or securities in Court are to be paid out of Court or transferred to the legal personal representative of any person, the same may, upon proof to the satisfaction of the Accountant of the death of any of them whether before, on, or after the day of the date of the order, be paid to the survivors or survivor of them C.R. 71. Transfer of stock to representative of person entitled.

Rule 725.

Money, etc., payable to representatives may be paid to survivor of them.

725. Where money or securities in Court are to be paid out or transferred to any person named in the order or judgment, or named or to be named in any report, the same or any portion thereof for the time being remaining unpaid or untransferred, may, on proof to the satisfaction of the Accountant of the death of such person whether before, on, or after the date of the order or judgment and that his legal personal representatives are entitled thereto, be paid or transferred to such legal personal representatives or the survivors or survivor of them. C.R. 72.

Where no letters of administration have been taken out to the estate of a person who has died entitled to money in Court, and the amount is so small as not to warrant the expense of procuring letters of administration, the Court may direct the money to be paid out on the undertaking of the solicitor for the applicant to see to its due administration: *Ross* v. *Ross*, 4 Chy. Ch. 27; *Callender* v. *Teasdale*, 3 W. R. 289; *King* v. *Isaacson*, 9 W. R. 369; *Hinings* v. *Hinings*, 2 H. & M. 32; *Re Cable*, 3 W. R. 84; but see *Re Cabel*, 3 W. R. 280; *Mulock* v. *Cawthra*, 13 P. R. 453.

In *Frogley* v. *Phillips*, 1901, W. N. 243; 50 W. R. 184, it was held that where a person entitled to a fund in Court has died intestate, the Court will not allow the fund to be paid out to the person who is entitled to take out letters of administration, but has not done so, even although the fund is under £20, and it is there said that the Judges had agreed that letters of administration must be taken out in all cases.

Payment has been ordered to be made of moneys in Court to an official assignee in bankruptcy of a deceased person entitled to the same, without requiring him to take out letters of administration: *In re Lawson*, 1896, 1 Ch. 175; 73 L. T. 571. And where persons claiming to be the next of kin of a person entitled to money in Court applied in 1897 for payment, on the ground that the person entitled had in 1889 escaped from a prison in the United States where he was serving a life sentence, and had never since been heard of, the application was granted, and the taking out of administration to the estate of the person originally entitled was dispensed with: *In re Dunn*, 33 C. L. J. 434; 17 C. L. T. 197.

An administrator is entitled to have money in Court, to which he is entitled as administrator, paid out to him, notwithstanding there may be infants who may be entitled to a share of it as next of kin: *In re Parsons, Jones* v. *Kelland*, 14 P. R. 144; *Stewart* v. *Whitney*, *Ib.*, 147; *Hanrahan* v. *Hanrahan*, 19 Ont. 396. Where the money in Court was the property of a person domiciled out of the Province, on his death it would seem that the money would not ordinarily be ordered to be paid out, except to a personal representative duly appointed by the Court of this Province: *Stewart* v. *Whitney*, *supra*. See *The Surrogate Courts Act* (R. S. O. c. 62) s. 74, as to the power to grant ancillary probate, or letters of administration, to personal representatives appointed in another Province, or other parts of the British Empire.

Where money was paid into Court under The Trustee Relief Act, under the erroneous supposition that a deceased person, of whose estate the fund was part, had died intestate, on the subsequent discovery and proof of a will, it was ordered to be paid out to the executors named therein, on petition presented by them, on proof that certain legacies bequeathed to infants were properly secured: *Re Hood*, 1896, 1 Ch. 270; 74 L. T. 77. Rule 726.

Where money is standing in Court to the credit of two or more persons as joint tenants, an application for payment out of a share to one of the parties, on which no order is actually made prior to the death of the applicant, will not amount to a severance of the joint tenancy: *In re Wilks; Child* v. *Bulmer*, 1891, 3 Ch. 59.

Where a beneficiary named in a will had disappeared and there was no evidence that he had survived the testator, and a sufficient time had elapsed, the Court presumed him to be dead, and made an order for the trustees to distribute the fund on the basis of the beneficiary not having survived the testator: see *Re Benjamin*, 1902, 1 Ch. 723; 86 L. T. 387.

C. RR. 73, 74 limited the operation of this *Rule*, by providing that payments were not to be made under letters probate, or letters of administration, granted more than six years after the order or judgment directing payment, or after the last payment of interest under such order or judgment but C. RR. 73, 74 have not been continued.

726. Any person claiming to be interested in, or to have a lien or charge upon, or an assignment of, any money or securities in Court, or invested in the name of the Accountant or other officer of the Court, or any portion thereof, or claiming to have the same applied towards the satisfaction of any judgment or execution against the person to whose credit such moneys or securities stand, or for whose benefit the same are held by the said Accountant or other officer, may, upon an affidavit verifying his claim, apply *ex parte* for an order directing that such money or securities shall not be paid out or dealt with except upon notice to him. C.R. 82. Stop orders, how and when obtained.

The power to grant stop orders was formerly part of the jurisdiction of the Court of Chancery, and now, under *The Judicature Act*, is vested in the Supreme Court. Jurisdiction to grant stop orders.

This *Rule*, therefore, applies to the moneys and investments in Court, in any action in the Supreme Court, which are vested in the Accountant of the Supreme Court.

The object of the *Rule* is to define the cases in which a stop order may be granted, and prevent injustice being done by the granting of stop orders *ex parte*. The applicant for a stop order was always required to submit to be bound by the terms of C. R. 82 as a condition of getting the stop order. See Form of order Form 72; H. & L. Forms No. 543. The submission in the latter form should be made to accord with that in Form 72.

Rule 726.

An affidavit verifying the applicant's claim, *i.e.*, shewing his title, is all that is required in support of an application: see *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133; but *semble*, the certificate of the Accountant, as to the money in Court, should also be produced.

Object of stop order

The effect of a stop order is simply to prevent the payment out of money, or the transfer of securities in Court, to the person appearing on the books of the Accountant to be entitled thereto, without notice being first given to the person who obtains the stop order. Nothing is decided thereby as to the rights of the parties: *Lucas* v. *Peacock*, 9 Beav. 177. A stop order has no effect until delivered to the Accountant, but the payment out may be stayed for twenty-four hours, on lodging a cavent with that officer.

When granted.

Stop orders may be granted agninst a fund in Court, on the application of an execution creditor of the party entitled to the fund: *Wilson* v. *McCarthy*, 7 P. R. 132; *Courtoy* v. *Vincent*, 15 Beav. 486. A motion by a judgment creditor who had not obtained execution was refused: *Brooke* v. *Brooke*, before Ferguson, J., 28th May, 1884; but granted in *Steckle* v. *Byers*, 10 C. L. T. 41, and by Boyd, C., in *Tweed* v. *Lorocque* (2nd June, 1890), where it was also held to be unnecessary to issue executions where the assets to be reached consisted of money in Court, and the costs of stop orders instead were allowed: see also *Stuart* v. *Grough*, 15 Ont. App. 309. A stop order may be obtained on a fund ordered to be paid into Court, though it has not been actually paid in: *Shaw* v. *Hudson*, 48 L. J. Chy. 689; but not against a fund which is neither in Court, nor ordered to be paid in: *Wellesley* v. *Mornington*, 11 W. R. 17.

Where a fund in Court has been assigned, but no stop order is lodged by the assignee with the Accountant, that officer is not liable if he pay the money out on a fraudulent application by the assignor: *Bath* v. *Bath*, 1901, 1 Ch. 460.

Payments made by the Accountant to a second assignee before notice of a prior assignment will not be disturbed: *Cottingham* v. *Cottinghom*, 11 Ont. 294.

Application to pay out.

Sometimes the stop order is followed by an application for payment to the party obtaining it; such a motion is of course made on notice to all parties interested in the fund: *Re Gilchrist, Bohn* v. *Fife*, 7 P. R. 430, including any other persons who have obtained stop orders against the fund: see *Hulkes* v. *Day*, 10 Sim. 41.

Where the party obtaining the stop order does not move for an order for payment to him of the fund, the opposite party may move for payment out notwithstanding the stop order, or may move to discharge the stop order; such motions must, of course, be made on notice to the person who has obtained the stop order.

An order for payment out to a party entitled was made, notwithstanding a stop order had been lodged by a mortgagee of a person who had a contingent interest in the fund, but whose interest never actually vested, and without notice to the mortgagee: *Vernon* v. *Croft*, 58 L. T. 919; 36 W. R. 778. This, however, seems like adjudicating upon a man's rights in his absence, and is a precedent that will no doubt be very cautiously followed: see *Rule* 213.

A mortgagee of a fund in Court is not entitled to have the whole fund paid out where it exceeds the amount due under his mortgage.

but only sufficient to satisfy his debt: see *Re Bell*, 1896, 1 Ch. 1; 76 L. T. 391; *Hockey* v. *Western*, 1898, 1 Ch. 350. Rule 726.

Priorities.—As between specific charges on a fund, a subsequent chargee having at the time of his advance notice of the prior charge, cannot obtain priority over it by first obtaining a stop order against the fund: *Livesey* v. *Harding*, 23 Beav. 141; *Brearcliff* v. *Dorrington*, 4 D. G. & S. 122; *Swayne* v. *Swayne*, 11 Beav. 463; *Re Holmes*, 29 Ch. D. 786: but if he had no notice of the prior charge when making his own advances, he may gain priority over it by first obtaining a stop order, even though he do so after notice of the prior charge: *Ib.*, *Greening* v. *Beckford*, 5 Sim. 195; and see *Stephens* v. *Green*, 1895, 2 Ch. 148; 72 L. T. 83, 574; and an assignee for value of a fund claiming under an assignor who had no legal title, and obtaining a stop order without actual notice of a prior equitable assignment, will be entitled to priority as against the prior equitable assignees: *Montefiore* v. *Guedella*, 1903, 2 Ch. 26; 88 L. T. 496; but as between parties having no specific charge against the fund; *e.g.*, execution creditors, he who first obtained a stop order formerly gained priority: *Thomas* v. *Cross*, 2 Dr. & S. 423; but now the fund will be distributed among all creditors rateably according to the principle of *The Creditors' Relief Act*, (R. S. O. c. 81; *Dawson* v. *Moffatt*, 11 Ont. 484; 22 C. L. J. 31; and see *In re Bokstal*, 17 P. R. 201; but an execution creditor cannot by obtaining a stop order acquire priority over a prior charge, legal, or equitable: *Re Bell*, *Carter* v. *Stadden*, 54 L. T. 370; see also *Cottingham* v. *Cottingham*, 11 Ont. 294, nor against a creditor who has obtained the prior appointment of a receiver of the fund: *Re Anglesey*, *De Galve* v. *Gardner*, 1903, 2 Ch. 727; 89 L. T. 584; although the appointment of a receiver creates no lien or charge upon the fund: see *supra*, *p.* 87. Effect of stop order on priorities.

Where a fund had been directed to be carried over to another account, and it was subsequently discovered that the person entitled to the fund was a debtor to the estate from which the fund was carried over, it was, nevertheless, held that specific chargees on the fund after it had been carried over were entitled in priority to the claims of the parties in the original suit: *Re Eyton*, *Bartlett* v. *Charles*, 45 Ch. D. 458; 63 L. T. 336.

Where a trust is being administered by the Court, the trustees cease to have any power over it, and a notice to them of an incumbrance will not give the party giving the notice priority over a prior incumbrancer who has not given notice; a stop order in such a case is the most effectual notice: *Pinnock* v. *Bailey*, 23 Ch. D. 497; 48 L. T. 811; *Mutual Life Assurance Company* v. *Langley*, 26 Ch. D. 686; 51 L. T. 284; *Mack* v. *Postle*, 1894, 2 Ch. 449; 71 L. T. 153; *Cottingham* v. *Cottingham*, 11 Ont. 294; but see *Stephens* v. *Green*, 1895, 2 Ch. 148, 72 L. T. 83, 574.

The priority acquired by a stop order extends only to the charge in respect of which it was obtained: *MacLeod* v. *Buchanan*, 33 Beav. 234; 4 D. J. & S. 265.

To ascertain the effect of a stop order the Court may look not merely at the ordering part, but also at anything else appearing on the face of the order: *Mack* v. *Postle*, 1894, 2 Ch. 449.

The stop order cannot defeat the rights of third parties to the fund: thus, the lien of a solicitor on the fund cannot be defeated by Stop order cannot defeat lien of solicitor.

Rules 727, 728.

obtaining a stop order against his client, even under an assignment: *Haymes* v. *Cooper*, 33 Beav. 431.

Costs.

Costs of obtaining a stop order are not given as of course: *Grimsby* v. *Webster*, 8 W. R. 755; *Hoole* v. *Roberts*, 12 Jur. 108; *Waddilove* v. *Taylor*, 6 Ha. 307; the applicant may be ordered to pay the costs of parties unnecessarily notified: *Glazebrook* v. *Gillatt*, 6 Beav. 611.

Mode of payment into Court.

727. Money to be paid into Court shall be paid into the Canadian Bank of Commerce at Toronto, or in some branch of it or into a chartered bank being its agent in Ontario, and in no other way. C.R. 405.

The accountant is the only proper person to receive payment into Court: *Leroux* v. *Lanthier*, 2 C. L. T. 481.

Where payment into Court was ordered, payment to the solicitor of the party entitled to the money was held not to be a ground for dispensing with its payment into Court: *Blackburn* v. *Sheriff*, 1 Chy. Ch. 208.

Directions to pay in.

728.—(1) The person paying money into Court shall obtain a direction to the Bank to receive the money.

Papers necessary to obtain direction.

(2) The person applying for a direction or cheque shall leave a *præcipe* therefor, and the judgment or order under which the money is payable, together with a copy thereof and of the report where necessary, which is to be on good paper of foolscap size, folded lengthwise, and is to be verified by an officer in the Accountant's office, and to be retained by the Accountant.

Outside towns.

(3) If the direction is obtained elsewhere than in Toronto, these papers, with the necessary postage for their retransmission, shall be sent to the Accountant forthwith.

(4) The copy so verified shall be marked with a number corresponding with that of the account, and shall be bound and kept for reference in a book to be called the "Order Book."

Assurance Fund.

(5) When money is required to be paid into Court to the credit of the Assurance Fund established under the Land Titles Act, the direction to receive the money, if the same is payable into a Bank in Toronto, shall be obtained from the Master of Titles, and if payable into a Bank outside of Toronto the direction shall be obtained from the proper Local Master of Titles. C.R. 406, 407 and 408.

A direction to the Bank to receive money, except where it is to be paid in under the Land Titles Act for the Assurance Fund, may be obtained from the Accountant, in Toronto, or from a Local Registrar.

or Deputy Registrar in the outer counties; and the moneys may be deposited in any of the branches of the Canadian Bank of Commerce, or at the principal office in Toronto, and in places where there is no branch of that bank, into the branch of any other chartered bank in such place. Rules 729-731.

729. The person paying money into Court shall be entitled to credit therefor as of the date on which the same was deposited in the Bank. C.R. 409. Date of crediting money.

730. The Bank, on receiving the money, shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Accountant. C.R. 410. Receipt to be given in duplicate by bank.

731.—(1) Money shall be paid out of Court upon the cheque of the Accountant, countersigned by an officer of the Court designated by the Finance Committee, and every cheque shall first be initialed by the Assistant Accountant or Chief Clerk. C.R. 412. Payment out of Court.

(2) The person entitled to a cheque shall produce and leave with the Accountant a *præcipe* therefor, together with the orders and reports entitling such person to the money. C.R. 416. On application for payment out, orders and reports to be produced.

Clause (1).—This *Rule* purports to be based on C. R. 412, but C. R. 412 was repealed by C. R. 1302, and this *Rule* seems therefore to be really based on C. R. 1302. Payment out of Court.

A Committee of Judges charged with the supervision of the financial affairs of the Court, gave the following directions (dated 18th Sept., 1899), to the officers of the Court:—

1. As a general rule all orders affecting money in Court, ought to be entitled in the cause or matter to the credit of which the said money is standing in Court where there is any such cause or matter; and in cases where money has been, by mistake, paid into Court to the credit of some non-existing cause or matter, the order correcting the mistake should be entitled in the cause or matter to the credit of which the money was intended to be paid into Court, and should recite the mistake; and— Judge's directions as to orders dealing with money in Court.

2. All orders affecting the moneys in Court of infants or other persons under disability, ought to be made on the application of such persons, by their guardians, next friends, or committees, as the case may be; or, if made on the application of any other person, it should appear by the order that the person under disability whose money is sought to be affected, had due notice of, and, if so, was properly represented on the application.

For form of *præcipe* for cheque: see H. & L. Forms, No. 391.

Moneys in Court are considered to be *in custodiâ legis*: see *Allstadt* v. *Gortner*, 31 Ont. 495; and if improperly paid out may, on a summary application, be ordered to be refunded: *Ib.* Where the mistake

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has not been induced by any fraud or improper dealing by the payee or his solicitor, or agent, interest will not be charged: *Ib.*, but where he obtains an order for payment without any colour of right, he may be ordered to refund the amount with interest at the rate allowed by the Court: see *Hogaboom* v. *Receiver-General*, 23 S. C. R. 192.

Liability of solicitor for improperly procuring money to be paid out of Court.

Where one member of a firm of solicitors was cognizant of a fraudulent application to the Court, whereby money was improperly paid out to a party not entitled, it was held that each member of the firm was liable to refund it, including those who were ignorant of the fraud: *Brydges* v. *Branfill*, 12 Sim. 389, and see *Atkinson* v. *Markreth*, L. R. 2 Eq. 570; *St. Aubyn* v. *Smart*, L. R. 3 Chy. 646; *Dundonald* v. *Masterman*, L. R. 7 Eq. 504; *Plumer* v. *Gregory*, L. R. 18 Eq. 621; *Cleather* v. *Twisden*, 24 Ch. D. 731; 49 L. T. 633; 28 Ch. D. 340; 52 L. T. 330; *Rhodes* v. *Moules*, 1895, 1 Ch. 236; 71 L. T. 599; *Marsh* v. *Joseph*, 1897, 1 Ch. 213; 74 L. T. 412; 75 L. T. 555; *Thompson* v. *Robinson*, 15 Ont. 662; 16 Ont. App. 175; *Bath* v. *Bath*, 1901, 1 Ch. 460; 84 L. T. 107; but see *Re McCaughey & Walsh*, 3 Ont. 425.

Where a solicitor allowed his name to be used in an application for payment by a third person, who, by forged affidavits, and powers of attorney, succeeded in getting the fund into his hands, out of which he paid the solicitor a portion, and absconded with the balance, the solicitor was held liable for the whole fund, both what he actually received, and what he did not, though ignorant of the fraud: *Slater* v. *Slater*, 1897, 1 Ch. 222, note; 58 L. T. 149; and see *Re Spencer*, 21 L. T. 808; and *Marsh* v. *Joseph*, *supra*.

Where money is improperly ordered to be paid out of Court to parties not entitled, without fraud, but through the negligence of a solicitor, he is liable to the parties injured thereby for the consequences: *Re Dangar*, 60 L. T. 491; 41 Ch. D. 178.

Refunding of money paid out by mistake.

Where money has been ordered to be paid out of Court upon a mistake of facts: *Fisken* v. *Wride*, 13 Gr. 419, or to persons having no title: *Hogaboom* v. *Receiver-General*, 28 S. C. R. 192; it will upon summary application be ordered to be refunded, and the Statutes of Limitations do not apply in such a case: *Allstadt* v. *Gortner*, 31 Ont. 495; and where a solicitor was directed to refund money which he had obtained out of Court, under an order which was subsequently rescinded, he was held to be liable to attachment for contempt in disobeying the order: *Pritchard* v. *Pritchard*, 18 Ont. 173.

Where an order for payment out of money in Court has been made inadvertently in error, the Court has inherent jurisdiction on the fact being brought to its notice, to rescind such order, and to order repayment into Court of the money so paid out: *Hogaboom* v. *Receiver-General*, *supra*; see *per* Gwynne, J., 28 S. C. R., at p. 205; and see *per* Burton, C.J., in *Re Central Bank*, 24 Ont. App., at p. 473; affirmed in Sup. Ct., 28 S. C. R. 192.

But the remedy of the suitor would appear to be against the party who has improperly obtained payment: *Ib.*, the Crown in such a case is not liable to make good the money even though it be not recoverable from the payee: see *Re Williams*, 1910, 2 Ch. 481; 103 L. T. 390.

Where a sum of money was paid out of Court under an erroneous order, and was subsequently recovered, but without interest, it was

held that a proportion of the amount recovered should be between the tenant for life and remainderman, be treated as income and *Re Leveland Estate*, 1895, 2 Ch. 542. Rule 731.

Where money paid into Court with a defence, which was misleading in its terms, was *bonâ fide* taken out of Court by the solicitor, and, with his client's consent, applied partly in payment of his costs, and the residue paid to the client, it was held that the solicitor was not personally liable to refund it: *Davis* v. *Richardson*, 21 Q. B. D. 202.

So long as there is money in Court in an action, the Court will take care that any adjustment shall be made, which can properly be made, in order to effectuate the rights of the parties in the fund: see per Farwell, L.J., *In re Calgary & Medicine Hat Land Co.*, 1908, 2 Ch., at pp. 661-2.

Where in an administration action a fund had not been dealt with for a long period after the judgment declaring that the funds in the hands of trustees ought to be returned to, and divided between, the holders of certificates for ratcable proportions in respect of bonds held by them; and some of the bond holders had omitted to establish their claims. it was held that the Court had jurisdiction on the application of some of the parties interested to limit a time within which those entitled should prove their claims, and in default excluding them from participation in the fund: *Wilson* v. *Church*, 106 L. T. 31.

Purchase money is not paid out except either on proof being given to the Accountant of the purchaser having received a conveyance or vesting order, or upon the production of the written consent of the purchaser, or his solicitor: *Rule* 456; and see Daniel Pr., 6th ed., 1100. Consent of purchaser to payment out.

A party declared by a foreign Court to be a prodigal, and for whom a council has been appointed, cannot be prevented by such council from obtaining money in Court to which he is entitled: *Re Schot*, 1902, 1 Ch. 488.

Payment to Married Women.—C. R. 70 provided: "Where money, stock, or securities in Court are directed by an order to be paid or transferred to an unmarried woman, and she marries before payment of the money or transfer of such stock or securities, the Accountant may pay out the money or execute a transfer of the stock or securities, in favour of such woman, upon an affidavit of herself and husband that no settlement or agreement for a settlement has been made or entered into before, upon or since their marriage; or in case any settlement or agreement for a settlement has been entered into, then upon an affidavit by the woman and her husband, identifying the settlement, or agreement for a settlement, and stating that no other settlement or agreement for a settlement has been made or entered into as aforesaid, and an affidavit of the solicitor of the woman and her husband that such solicitor has carefully perused such settlement or agreement for a settlement, and that according to the best of his judgment, such money, stock or securities are not, nor is any part thereof, subject to the trusts of the settlement or agreement for a settlement, or in any manner comprised therein or affected thereby." Money and stock, how paid, or transferred to a married woman.

That Rule has not been continued, but whether the practice laid down thereby should still be observed in order that the Court may

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be assured that the money or securities get to the right hand, is doubtful. It may be that the intention of the present *Rule* is that no such inquiry should be made, and that where there is a settlement affecting moneys or securities of a married woman, the trustees must protect themselves by obtaining a stop order, or otherwise bring their claim to the attention of the Court. If the former practice on this point is still to be observed, the decisions thereunder would be still applicable.

In England the affidavit of a solicitor alone that the settlement does not affect the fund in Court is not considered sufficient, but a certificate of counsel to that effect is also required: *Re Smith, Smith v. New*, 123 L. T. Jour. 298.

Where a married woman had assigned her interest in a fund in Court, and both she and her husband refused to make an affidavit of no settlement to enable the assignee to obtain payment of the fund, the Court made an order for payment, on the affidavit of a third party who knew the facts and was able to swear that there was no settlement: *Timothy* v. *Crown*, 1900, W. N. 51; 82 L. T. 142; following *Rowland* v. *Oakley*, 14 Jur. N. S. 845.

Affidavit, when dispensed with.

Where the fund was under £10, an affidavit was dispensed with *Veal* v. *Veal*, L. R. 4 Eq. 125; *Guest* v. *Newmes*, 78 L. T. Jour. 96, and where the husband was permanently resident out of the jurisdiction, the affidavit of the wife alone was accepted and acted on: *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423; and in another case an affidavit by a solicitor disclosing facts, from which it appeared that it was unlikely that there was any settlement, was accepted as sufficient: *Woodward* v. *Pratt*, L. R. 16 Eq. 127; and see *Timothy* v. *Crown*, *supra*.

Ordinarily a married woman, if an infant, is not entitled to get money out of Court to which she is entitled, before attaining her majority; but when the infant is married and domiciled abroad, and by the law of such foreign country is entitled to give a valid receipt for moneys due to her, notwithstanding her infancy, a fund in Court may be ordered to be paid to her notwithstanding her infancy: *Kavanagh* v. *Lennon*, 16 P. R. 229. So also where a legacy is bequeathed to an infant and is expressly directed to be paid to her at a certain age before attaining majority, if such legacy is in Court, the Court will direct it to be paid in conformity with the will: *Re Deneckin*, 72 L. T. 220.

Where the applicant for the money is a female infant, it is probable that the Court might, in some cases, direct it to be settled. It was formerly held that a female infant had no power to waive her equity to a settlement: *Shipway* v. *Ball*, 16 Ch. D. 376; 44 L. T. 49. If not settled, doubtless the money will be held for the infant in Court, till she becomes of age, as in the case of any other infant, to be then paid to her, or to her trustees, under any settlement, as circumstances may require.

Woman past age of Child Bearing.—Where a fund in Court, in the event of a spinster lady, aged 51, having children who should attain twenty-one years would belong to them; but otherwise would belong to such spinster and others; it was ordered to be paid out, on the presumption that the spinster would have no children, upon security of a policy at a single premium, for the return of the fund in the event of the lady having a child: *Carr* v. *Carr*, 106 L. T. 753.

Infants, and Persons Non Compotes Mentis.—Money in Court belonging to an infant will not, as a matter of right, be paid out to the Surrogate Guardian of the infant: *Re Harrison*, 18 P. R. 303; nor to a foreign guardian, or official custodian, of a lunatic: *Re Thompson, Thompson* v. *Thompson*, 19 P. R. 304, though in either case such allowance for maintenance as may be shown to be proper and necessary for an infant, or person of unsound mind, may be allowed and paid to the guardian, etc., *Ib.* See also *Re Chatham's Settlement*, 1899, 1 Ch. 712; *Thiery* v. *Chalmers, Guthrie & Co.*, 1899, W. N. 235; and *Re Lloyd*, 31 O. L. R. 476. Rule 731. Infants, lunatics, etc

Where an infant is found entitled to moneys in Court in an administration suit, or moneys of an infant or person of unsound mind are otherwise in Court: *Re Thompson, T.* v. *T.*, *supra*; the Court takes charge of the fund, and will not suffer it to go into the hands of a trustee for the infant: *Kingsmill* v. *Miller*, 15 Gr. 171; *Mitchell* v. *Richey*, 13 Gr. 445; nor to his guardian appointed by the Surrogate Court, where the amount is large: *Re Carter*, 20 O. L. R. 127; and where it is in the hands of a personal representative it may be ordered to be paid into Court: *Re Humphries*, 18 P. R. 289; *Whitewood* v. *Whitewood*, 19 P. R. 183. But where a married woman died entitled to a fund in Court which she bequeathed to her executor to be invested and the income applied for maintenance of her children, the fund was ordered to be paid out to the executor: *Re McDougall*, 11 P. R. 494.

The Court has refused to pay money out of Court to the tutrix of an infant residing in Quebec, although by the law of that Province the tutrix is entitled to the possession of all the infant's property, where the fund in question was insurance money to which the infant was entitled under *The Insurance Act* (R. S. O. c. 183): *In re Berryman*, 17 P. R. 573; but she may under s. 175, s.-s. 1, apply to be appointed trustee of the fund, and obtain an order for payment on giving security.

Money to which a lunatic was entitled was ordered to be paid to a foreign Court, of which she had been made a ward, and within whose jurisdiction she resided: *In re DeLinden*, 1897, 1 Ch. 453.

In *Re Knight*, 1898, 1 Ch. 257; 77 L. T. 773, the Court refused to transfer to the curator of the person and property of a lunatic (appointed according to the law of Jersey, where the lunatic resided), stock of the lunatic in England, without proof of the need of the property for the maintenance of the lunatic, or other sufficient reason; and see *In re De Lorragoiti*, 1907, 2 Ch. 14; 96 L. T. 862. In *Re Brown*, 1895, 2 Ch. 666, stocks in England were transferred to a Master in Lunacy of a Colony appointed by the Courts of the Colony to manage the lunatic's property.

Ordinarily, money of an infant will not be ordered to be paid out to the infant personally until he has attained his majority; but where an infant is entitled to a legacy payable by the terms of the will on his attaining 18, the Court may, if it see fit, order payment to be made to the infant with the privity of the Official Guardian, on his attaining that age: *Re Roberton*, 17 O. L. R. 568; and when a female infant was married and domiciled in a foreign country, and was 19 years of age, and by the law of that country was entitled to receive moneys due to her, an order was made for payment to her of a fund in Court to which she was entitled, notwithstanding her infancy: *Kavanagh* v. *Lennon*, 16 P. R. 229. Money when paid out to infant.

Rules 732, 733.

Orders for maintenance of Infants:

Applications for payment out of the money of an infant for support or maintenance should be made in the name of the in and not of the guardian to whom the money is to be paid: see p. 1387, *supra*.

Orders for payment out of Court to be approved by Judge

732. Where an order for payment of money out Court is made otherwise than by a Judge of the Supre Court, the Accountant before acting thereon shall ap to a Judge for his approval. C.R. 414.

Orders dispensing with payment into Court to be approved by Judge

(2) An order dispensing with the payment of mon into Court unless it is made by a Judge of the Supre Court shall not be acted on unless or until a Jud approves thereof.

(3) An order dispensing with payment of money i Court, or a certified copy thereof, shall be left with Accountant forthwith after entry thereof. C.R. 417.

Statement of distribution of proceeds of land sold under Dev. of Est. Act to be deposited with Accountant.

733.—(1) The Official Guardian shall deposit in Accountant's Office a statement showing the distributi of the proceeds of lands sold or mortgaged with approval under *The Devolution of Estates Act*, a proof of the dates of births of the infants interested.

Moneys received by Official Guardian to be paid into Court.

(2) All money received by the Official Guardian behalf of infants, lunatics, absentees, or other persons f whom he acts, shall, without order, be paid into Court the credit of the person entitled.

Money of infants

(3) Money paid into Court under this rule to the cred of infants, shall be paid out to them when they atta their majority.

Money of non-concurring parties

(4) Money paid into Court to the credit of non-concu ring heirs and devisees shall be paid out to them upo application to the Accountant, without order.

Money of absentees.

(5) Money paid into Court to the credit of an absente shall be paid out to him upon the fiat of a Judge, to b obtained upon proof of identity after notice to the Off cial Guardian. C.R. 972 and 1325.

Costs payable out of the proceeds of land sold under *The Devolutio of Estates Act* (R. S. O. c. 119), must be taxed by the Senior Taxin Officer: see *Rule* 677. It would seem that this *Rule* is intended t apply solely to the proceeds of lands sold under *The Devolution o Estates Act* with the concurrence of the Official Guardian.

Rules 734-737.

Costs, payment to solicitor authorized

734. When costs are directed to be paid out of money in Court, the Solicitor of the party entitled to receive the same shall be entitled to have the cheque drawn in his favor upon filing with the Accountant an affidavit stating:

Affidavit required

(*a*) That he is entitled to receive such costs, and

(*b*) That he has not been paid his costs or any part thereof, and that the costs, payment of which is sought, are justly due to him.

If the Solicitor has been changed in the course of the litigation, that fact shall be shown in the affidavit, and the consent of both Solicitors shall be filed. C.R. 1314.

Where the solicitor has been paid part of his costs, it is only the part unpaid which can be paid to him under this *Rule*, the client is entitled to the residue.

Moneys of infants or lunatics paid into C. Ct. or Sur. Ct. to be transmitted to Accountant

735. When money to which an infant or lunatic is entitled is paid into a Surrogate or County Court, the Registrar or Clerk of that Court shall forthwith cause the same to be transmitted to the Accountant with a statement showing when the money was so paid in, and a copy (certified by the Registrar or Clerk) of all judgments or orders affecting the same, and the money shall thereupon be placed to the credit of the said infant or lunatic. C.R. 1315. *Amended.*

C. R. 1315 only applied to moneys paid into County Courts. This *Rule* it will be noted extends also to moneys paid into Surrogate Courts to which infants, or lunatics, are entitled.

Money to be paid out without order.

736. When money is paid into Court to the credit of an infant it shall be paid out of Court to him with accrued interest without further order upon his attaining his majority, unless otherwise ordered. C.R. 1316.

C. R. 1316 applied to money paid into Court under the order of a Surrogate Judge. The present *Rule* appears to apply to all moneys paid in to the credit of an infant. It appears to be somewhat inconsistent with *Rule* 737, which requires a *fiat* for payment.

Fiat for payment out of infant or lunatic's money.

737.—(1) When money is in Court to the credit of an infant or lunatic it may be paid out upon the fiat of a Judge in Chambers without formal order.

Official Guardian to prepare fiat.

(2) Such fiat shall be prepared by the Official Guardian and may be signed either by the Judge or the Clerk in

Rule 737.

Chambers, and shall be entered at length in the order book of the Clerk in Chambers, and the fiat or a copy to be verified by the Accountant shall be deposited with the Accountant, and no law stamp shall be required upon such fiat.

Costs of application.

(3) The Judge may in his discretion fix and direct payment of the costs of the application to the Solicitor and dispense with the affidavit required by Rule 734.

Cheques for maintenance of infants.

(4) When an order has been made for payment of maintenance out of money in Court to which an infant is entitled the cheque shall, upon application to the official Guardian, be obtained and forwarded by him without expense to the applicant, and no law stamp shall be required upon any such cheque. C.R. 1324.

Rule 737.

CHAPTER XXIX.

PETITIONS OF RIGHT.

Petition of right.

The Sovereign cannot be sued in the Courts of Law as an ordinary defendant. It has been said that prior to the reign of Edward I. the Sovereign might have been sued as an ordinary defendant, and that by statute of Edward I., it was enacted that all claims against the Crown should thereafter be brought by petition, and this is said to have been the origin of the petition of right; but no such statute has been discovered and the evidence for its existence is by no means conclusive: see Clode, c. 1. However that may be, it is certain that the method of procedure by petition of right is of very ancient date, and seems to have been evolved from the practice of petitioning the King in Parliament.

The procedure in England upon petitions of right is now regulated by Imp. Stat. 23 & 24 Vict. c. 34, followed in Ont. by 35 Vict. c. 13, which was subsequently dropped from the statute book, and Rules of Court substituted therefor.

Rules, how far applicable.

The following *Rules* 738-750, of course, only apply to petitions presented in respect of claims against the Government of Ontario; claims against the Government of any other Province must be prosecuted in the Courts of such Province; and claims against the Dominion Government must be prosecuted in the Exchequer Court of Canada; as to which see R. S. C. c. 142.

Nature of petition.

A petition of right is a petition presented by a subject to the Crown stating an infringement of the suppliant's legal rights by the Crown or its officer, and praying redress therefor: see Clode, c. 11.

Equitable claims have been preferred by petition of right, but some question has been raised whether such claims can properly form the subject of such a petition: see Clode, c. 11.

When it may be filed.

As a matter of fact the following classes of claims have been prosecuted by petition of right, viz.: (1) claims for the restitution of property wrongfully taken, and detained, by the Crown or its officers; (2) claims arising out of some contract made between the Crown and a subject: (3) equitable claims; (4) claims made enforceable by this means by statute: see Clode, 66-7.

Whether an alien may present a petition of right does not appear to have been decided: see Clode, c. 5.

Where under an Act of Parliament a railway company was entitled to a grant of the Provincial Crown Lands on completion of its road, and to a grant of a proportionate part thereof on the completion of 20 miles of the line, a petition of right was held to be the proper mode of enforcing the claim against the Government of the Province: *Canada Central Ry. Co.* v. *The Queen*, 20 Gr. 273; but where a discretion is vested in the Crown as to making the grant, it would seem that a petition of right will not lie: see *Hereford Ry.* v. *The Queen*, 24 S. C. R. 1.

Rule 738.

A petition cannot be maintained against the Provincial Govern ment af Ontario in respect of any contract made with the Govern ment of Canada before Confederation: see *Macdonald* v. *The Queen* 44 U. C. R. 239. A contractor may petitian for the price of extr work under a contract: *O'Brien* v. *The Queen*, 4 S. C. R. 529; *Jone* v. *The Queen*, 7 S. C. R. 570; *Isbester* v. *The Queen*, 7 S. C. R. 69 A barrister may thereby claim a *quantum meruit* for his fees: *Th Queen* v. *Doutre*, 6 S. C. R. 342; and a Crown lessee of a fishery ma present n petition for damages far breach of a coveaant for quiet en joyment: *The Queen* v. *Robinson*, 6 S. C. R. 52; and a petition o right may be maintained for unliquidated dsmages resulting from breach af contract by the Crown: *Thomas* v. *The Queen*, L. R. 1 Q. B. 31; *Feather* v. *The Queen*, 6 B. & S. 293; *The Queen* v. *Ma Lean*, 8 S. C. R. 210; nnd it is immaterial whether the breach wa occasioned by tbo acts, or omissions, of the Crown official: *Windso & Annapolis Ry. Co.* v. *The Queen*, 11 App. Cas. 607; hut the contrac must be a binding one, and within the power of the officer of th Crown to make: *Humphrey* v. *The Queen*, 20 S. C. R. 591; *Th Jacques Cartier Bank* v. *The Queen*, 25 S. C. R. 84. In *Starrs* v *The Queen*, 1 Ex. C. R. 301, tbe Crown was held to have waived th right to dispute the validity of a contract, on the ground that it had referred a claim thereunder to arbitration, and had raised no lega objection to the investigation af the claim by the arbitrator, and had not appealed from the award; but as a rule the doctrine of estoppe cannot be invoked against the Crown; nor can laches be imputed t tbe Crown: *Humphrey* v. *The Queen*, 2 Ex C. R. 386; 20 S. C. R. 591; *Peterson* v. *The Queen*, 2 Ex. C. R. 74; yet forfeitures of certain kinds may be waived by the acts of Ministers, and officers of the Crown: *Attorney-General* v. *Ettershank*, L. R. 6 P. C. 354; *Daven port* v. *The Queen*, 3 App. Cas. 115; *Peterson* v. *The Queen*, 2 Ex. C. R. 67. The general rule is that the Crown is not liable to a subject for the tortiona acts of its officers: see *Muskoka Mills Co.* v. *The Queen*, 28 Gr. 563; *Raleigh* v. *Goschen*, 1898, 1 Ch. 73; nor for their negligence: see *Regina* v. *McFarlane*, 7 S. C. R. 216; *Burroughs* v *The Queen*, 2 Ex. C. R. 293; nor for their misfeasance, or non-feas ance: *Regina* v. *McLeod*, 8 S. C. R. 1; *Corse* v. *The Queen*, 3 Ex. C. R. 13; *Quebec* v. *The Queen*, 2 Ex. C. R. 252; 3 Ex. C. R. 164; 24 S. C. R. 420; but auch liabiiity may be imposed by statute: see 50 & 51 Vict. c. 16, s. 16 (D); *Brady* v. *The Queen*, 2 Ex. C. R. 273; *Lavoie* v. *The Queen*, 3 Ex. C. R. 96; *The Queen* v. *Martin*, 20 S. C. R. 240.

Where the acts complained of are authorized by a statute which prescribea a remedy for any person aggrieved, the claimant cannot maintain a petition of right, but must pursue the statutory remedy: *Halifax* v. *The Queen*, 2 Ex. C. R. 433.

The Statute of Limitations cannot be set up by the Crown as a bar to a claim by petition of right: see *per* Blackburn, J., *Rustomjee* v. *The Queen*, 1 Q. B. D. 487, at p. 491; *sed vide Martin* v. *The Queen*, 20 S. C. R. 240; and it would seem that a third party notified under *Rule* 741 would not be able to set it up against the petitioner: see Clode 175.

Form of petition of right.

738. A petition of right shall be according to Form No. 125, and shall be signed by the suppliant, his counsel or solicitor. C.R. 922.

Theee *Rules* do not expressly state that the petition shall be filed. The practice usually pursued is first to obtain ths *fiat* of the Lieutenant-Govsrnor under *Rule* 739, and then file the original petition, with such *fiat* indoreed, in the proper office where the proceedings are to be carried on: and see *Rules* 744, 140. Rules 739-741.

739. The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done; and no fee or sum of money shall be payable by the suppliant therefor. C.R. 923. Petition to be submitted to Lieutenant-Governor for his fiat.

For form of petition see Form No. 125; H. & L. Forme No. 1650.

The granting of the *fiat* mentioned in this *Rule* is an act of grace, and it would seem cannot be enforced by mandamus or any other method: see Clode, 165; *scd vide Ryves* v. *The Duke of Wellington*, 9 Beav. 579. The petition cannot be proceeded witb until the *fiat* bas been granted.

A Provincial Secretary neglecting or refusing to submit a petition of right to the Lieutenant-Governor is liable to an action: *Fulton* v. *Norton*, 30 S. C. R. 202; 1908, A. C. 451; 99 L. T. 455.

740. Where a fiat is granted a copy of the petition and fiat shall be left at the office of the Attorney-General, with an indorsement thereon, praying for an answer on behalf of His Majesty within 28 days. C.R. 924. Proceedings after fiat is obtained.

For form of indorsement: see Form No. 125; H. & L. Forms No. 1651.

741. Where the petition is presented for the recovery of real or personal property, or any right in or to the same, which has been granted or disposed of by or on behalf of His Majesty or his predecessors, a copy of the petition and fiat shall be served upon or left at the last or usual or last known place of abode of the person in possession, occupation or enjoyment of the property or right, indorsed with a notice according to Form No. 126. C.R. 925. Service on person in possession of real property.

The persons in posseesion of the property in question, referred to in thia *Rule*, are not to be made parties to tbe petition as respondents, but ths petition is presumahly to set out the facts relating to tbeir possession, and tbey are to he served with the petition and notice as required hy thie *Rule*, and they are to be at liberty to appear and enter a defence and defend as if tbey were named ss parties respondent to the petition: eee *Rule* 742.

Semble, a euhject cannot properly bs namsd ae a respondent in a petition of right: see per Wickens, V. C.: *Kirk* v. *The Queen*. L. R. 14 Eq. 558 at p. 563; *scd vide. Kinlock* v. *The Queen*, W. N. 1882, 164; *Ib.*. 1884. 80. No provision le made hy the *Rules* for bringing any

Rules 742-744.

third party before the Court in a petition of right except the present *Rule.*

Appearance.

742. The person so served shall appear and file his defence to the petition, as required by such notice. C.R. 926.

For form of appearance: see H. & L. Forms, No. 1653.

Formerly, in England, where land had been granted by the Crown to a third party, and it was sought to rescind the patent, as soon as a petition of right was presented a writ of *scire facias* issued from the Chancery, by which the Sheriff was required to give notice to the grantee to appear and shew cause why the letters patent should not be cancelled, and the grantee so summoned was entitled to make his defence, and the judgment of the Court in the *sci. fa.* proceedings virtually determined the petition of right, and when the letters patent were rescinded a writ of *amovcas manus* was awarded to put the applicant in possession: see Clode, p. 171.

Proceedings to rescind patents in Ontario may be brought by action in the nature of an information in the name of the Attorney-General against the grantee, and persons claiming under him: see Jud. Act sec. 3, *supra*, p. 3; see *Fonseca* v. *Atty.-General*, 17 S. C. R. 612. But an action for that purpose may be entertained in certain cases, without joining the Attorney-General either as plaintiff or defendant. *Martyn* v. *Kennedy*, 4 Gr. 61; *Zock* v. *Clayton*, 28 O. L. R. 447; and see *O'Grady* v. *McCaffray*, 2 Ont. 309, and *supra*, p. 18.

The notice to be indorsed on the petition requires the defence of the Crown to be filed within twenty-eight days after *the date thereof.* The *Rules* prescribe no time within which the petition is to be filed and served, and it may happen that the twenty-eight days from its date may have elapsed before the petition is served. This appears to be a defect in the form which existed also in the form heretofore in use, but the mistake was corrected by C. R. 927 which, however, has not been continued in these *Rules.*

The notice to be given to a third party (Form 126) requires him to appear within eight days, and file his defence within fourteen days after the date of service of the petition and notice.

The consequence of default in either case is, that the petitioner may apply for an order that the petition may be taken as confessed: see *Rules* 354, 744.

Pleadings in answer to petition.

743. The petition may be answered by statement of defence by or in the name of His Majesty's Attorney-General, on behalf of His Majesty, and by any other person who may be called upon as aforesaid, in the same manner as in an action. C.R. 928.

Rules to apply.

744. When no other provision is made and so far as the same are applicable, these Rules shall apply to petitions of right. C.R. 929.

Special Cases.—As to special cases: see *supra*, *Rule* 126.

Pleadings.—If no defence is filed within the time limited therefor, the pleadings cannot be noted closed under *Rule* 121, but the petitioner may apply for an order that the petition may be taken as confessed: see *Rule* 745. Rule 745.

Amendment.—The petition may be amended at the trial: *Smylie* v. *The Queen*, 27 Ont. App. 172; but it has been held that a petition of right cannot be amended without the consent of the Crown: *Coates* v. *The King*, 43 C. L. J. 701.

Security for Costs.—The Crown may under this *Rule* apply for security for costs upon the same grounds as such applications may be made in ordinary actions: see *Rules* 373 *et seq.* Where, however, the Crown had offered the suppliant, by its responsible Minister, $3,950 in settlement of his claim, which was declined, an application by the Crown for security for costs was refused: *Wood* v. *The Queen*, 7 S. C. R. 631; 13 C. L. J. 16. The Crown, however, cannot be required to give security for costs: per Bramwell, L.J., *Tomline* v. *The Queen*, 4 Ex. D. 252, at p. 254.

Discovery.—Nothing is expressly said in this *Rule* as to discovery, but the concluding part of the *Rule* seems to imply that the ordinary procedure in an action, except where expressly varied, may be followed. The English Act expressly provides that nothing in the Act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the Act: see Imp. St. 23 & 24 Vict. c. 34, s. 7. In England it is held that a suppliant is not entitled to discovery as against the Crown: *Thomas* v. *The Queen*, L. R. 10 Q. B. 44, and the same rule would seem to apply in Ontario: see Clode, 179. But the Crown is entitled to obtain discovery against the petitioner: *Tomline* v. *The Queen*, 4 Ex. D. 252; 40 L. T. 542. See also note *supra* p. 796, and see *Rule* 750.

Hearing.—The petition may be set down to be heard on motion for judgment: see *Rules* 205, 356, 745. If, however, a defence is put in, the petition may have to be entered for trial as an ordinary action, but the petition must be tried by a Judge without a jury: see *Rule* 746. Where, however, a party notified under *Rule* 741 makes no defence, although the petitioner is entitled to have the petition heard *pro confesso* as against him, still if the petitioner fails to establish his case against the Crown, the petition must be dismissed altogether: see *McDermott* v. *McDermott*, 3 Chy. Ch. 38; *Kinloch* v. *Secretary of State for India*, W. N. 1884, 80.

745. In case of a failure on the behalf of His Majesty, or of any other person duly called upon, to defend in due time, at any stage of the proceedings, the suppliant may apply to the Court for an order that the petition may be taken as confessed; and the Court may order that such petition may be taken as confessed, as against His Majesty or other party so making default, and judgment may be given by the Court in favour of the suppliant. C.R. 930. In default of defence, etc., suppliant may take petition pro confesso.

Rules 746, 747.

Although a subject making default in appearance is not entitled to further notice of the subsequent proceedings: see *Rule* 35, yet it would seem that if he appears, but makes default in defence, he is still entitled to notice of motion for judgment: *Rule* 213; and it would seem that the Crown ought to be notified of a motion for judgment, even though no appearance for the Crown has been filed: Clode, 193.

Issues to be tried by a Judge without a jury.

746. A petition of right shall be tried by a Judge without a jury. C.R. 931.

It would seem that the Crown may, if it pleases, claim a trial at bar: see Clode, 170.

The judgment

747. The judgment of the Court shall be that the suppliant is or is not entitled either to the whole or to some portion of the relief sought by his petition, or that such other relief may be given, and upon such terms and conditions (if any) as to the Court seem just. C.R. 932.

No execution can issue against the Crown upon any such judgment, but it would seem that any judgment for the payment of any money is to be certified to the Provincial Treasurer, as provided in the case of costs: see *Rule* 749.

When judgment to be equivalent to amoveas manus.

C. R. 933 provided that in cases in which the judgment, commonly called a judgment of *amoveas manus*, was formerly in England pronounced upon a petition of right, a judgment that the suppliant is entitled to relief, as hereinbefore provided, shall have the same effect as a judgment of *amoveas manus*: but that Rule has not been continued: but no doubt judgment to a similar effect may still be pronounced.

A judgment of *amoveas manus* was formerly a judgment to the effect: "that His Majesty's hands be amoved from the possession of the premises mentioned in the petition, and that the suppliant be restored to his possession thereof, together with the rents and profits thereof, which have not yet been answered to His Majesty, and (*in case a lease has been made*), that the said lease be void: see Clode, 184-5; Tidd's Forms, p. 61, s. 42, and upon such judgment the suppliant was also entitled, if the property was in the actual possession of a grantee of the Crown, or Escheator, to a writ of *ouster le maine*, to turn out of possession the Crown's grantee, or officer: see Clode, 185.

It is doubted whether under the English Act, s. 10, a writ of *ouster le maine* could now issue: see Clode, 190, but it would seem that if the judgment is to have the same effect as the former judgment of *amoveas manus*, any remedies which might formerly have been available to a suppliant under such judgment are equally available under a judgment under these *Rules*.

As pointed out in Clode, p. 190, the English Act makes no express provision, neither do these *Rules*, for any mode of executing a judgment as against a third party served with the petition under *Rule* 741.

Neither is there any express provision for obtaining satisfaction of a judgment in favour of the suppliant for any money demand. It is probably assumed that the infallible justice of the Crown will satisfy

such demands, on the judgment of the Court being duly certified to the proper officer: see *infra*, *Rule* 749. Rules 748-750.

In cases of contracts made by the Executive Government, even though Parliament may have made no appropriation to meet the suppliant's claim, if he makes out his claim he is entitled to judgment in his favour *quantum valeat* : *Independent Cordage Co. v. The King*, 13 O. L. R., 619.

748. The costs of a petition of right shall be in the discretion of the Court or a Judge, and shall be recovered in the same way as in ordinary actions, save when costs are ordered to be paid by His Majesty. C.R. 934. Costs against suppliant.

749. Upon any judgment or order for the payment of costs or damages by His Majesty, the Judge may, upon application in behalf of the party entitled after the lapse of 14 days from the making, giving or affirming of the judgment or order, certify to the Provincial Treasurer according to Form No. 127. C.R. 935. If judgment be for costs, etc., Judge to certify to Provincial Treasurer.

750. Nothing in these Rules shall prevent a subject from proceeding by petition of right in any manner in which he might have proceeded before the 23rd day of April, 1887; nor shall anything in these Rules be construed as entitling a subject to proceed by petition of right in any case in which he would not be entitled so to proceed under the Acts passed by the Parliament of the United Kingdom before the said date. C.R. 936. Proceedings under former practice.

The date mentioned in this *Rule* is that of the passing 50 Vict. c. 2 (O.), which provided for the R. S. O. 1887 coming into force.

Rules 751-753.

CHAPTER XXX.

OFFICERS AND OFFICES.

Weekly Court.

751. The Clerk of the Weekly Court at Toronto shal attend the Weekly Sittings at Toronto, settle and sign al orders and settle all judgment pronounced thereat. C.R 32, 33 and 34.

No provision is made by the Jud. Act, s. 76, for any officer entitle "the Clerk of the Weekly Court."

Provision is made for two or more Registrars of the High Cour Division, one of whom acts as Clerk of the Weekly Court. C. R. 34 pro vided that the Officer attending the sittings of the Weekly Court migh settle and sign all judgments and orders made thereat, but that provi sion has not been continued in these *Rules*, though it is still acted on

Local officers.

752.—(1) Local Registrars shall, with respect to al matters in their offices, perform the same duties in the same manner as the like duties are performed in Centra and Registrars' Offices as Toronto.

(2) When there is a Deputy Clerk of the Crown or Deputy Registrar he shall have the like powers and duties with reference to all matters in his office. C. R. 35.

See The Jud. Act, s. 76 (2).

The fees now payable to Deputy Clerks of the Crown, Deputy and Local Registrars, are regulated by Tariff B.: see *Rule* 676 (2).

Officers paid by fees are entitled to receive all fees payable under the Tariff, in cash.

Officers paid by salary are not to take fees for their own use, except where otherwise expressly provided in the Jud. Act: see sec. 78, *supra*, p. 271.

Deputy Clerks of the Crown and Pleas when acting as Special Examiners, or on references to them as Official Referees, may receive fees in cash: *Ib.*

And so may stenographic reporters for copies of their notes: *Ib.* And see the prefatory note to Tariff B. as amended by *Rule* 773.

A certificate of a Local Officer on a post card is no evidence; *semble*, where the fees are payable to such officer in stamps, it is a nullity for want of a proper stamp: *Johnson* v. *Loney*, 6 P. R. 70: and see *The Law Stamps Act* (R. S. O. c. 25) s. 6.

List of judgments entered in outer offices to be forwarded to the Central Office, Toronto.

753. Every Local Officer shall, within 10 days after the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year, transmit to the Central Office, at Toronto, a return of all judgments which have been entered by him in the

High Court of Justice during the three months ending on the above dates respectively; and a general index or list of such judgments shall be kept in the Central Office. A return shall be sent whether any judgments have been entered or not. C.R. 36. Rules 754-757.

C. R. 36 prescribed a form for the return: see H. & L. Forms No. 940. The words "High Court of Justice" are obviously a mistake and should be "The Supreme Court."

The object of the *Rule* is apparently to provide for a complete register in the Central Office of all judgments entered in the Supreme Court throughout the Province.

754. The Clerk of the Process shall prepare and furnish to the officers requiring them, forms of writs and *præcipe* orders to be issued by them. C.R. 24. Clerk of the Process.

755. Every Local Registrar, Local Master, Deputy Registrar and Deputy Clerk of the Crown, shall be a Local Taxing Officer. C.R. 84. Local Taxing Officers.

756. Every Local Taxing Officer shall, subject to the provisions of Rules 677 to 679 in actions begun or pending in his office be entitled to tax all bills of costs, including counsel fees, subject only to appeal to a Judge. This Rule shall not apply to cases in which infants are concerned, unless the Official Guardian is the guardian *ad litem* for the infants. C.R. 85. Powers of Local Taxing Officers.

In lunacy matters all costs should be revised by a Taxing Officer in Toronto: *Re Norris*, 5 O. L. R. 99: *Rule* 678.

This *Rule* must be taken to be subject to the provisions of *Rule* 678 as to the revision of taxation in the cases mentioned in that *Rule*.

757. All Taxing Officers shall, for the purpose of any taxation, have power to administer oaths and take evidence, direct production of books and documents, make certificates, and give general directions for the conduct of taxations before them. C.R. 86. Powers of Taxing Officers.

See Eng. (1883) R. 27 (25).

Taxing officers have power to call for evidence on taxations before them: *Williamson* v. *Town of Aylmer*, 12 P. R. 129.

Where the taxing officer refused to proceed until the plaintiff was produced for examination as to a retainer, and he was out of the jurisdiction, the taxing officer was directed to examine other witnesses, and if unable to decide as to the retainer, then to report to a Judge in Chambers: *Ib.*

Rules 758, 759.

Where solicitor and client contradict one another in affidavits, th taxing officer should allow oral evidence to be taken under this Rul *Re Evans*, 35 W. R. 546.

There is no power to direct shorthand notes of evidence before hi without the consent of the parties: *Re Hilleary* v. *Taylor*, 36 Ch. D 262; unless *Rule* 340 is applicable in such a case, which does not seem to have been contemplated, as that *Rule* deals with an examinatio authorized under other provisions: see *Rule* 338.

Business in Offices.

No business to be transacted except upon attendance of party or his solicitor, or the clerk or agent of solicitor.

758. Except as provided in respect to Quieting Title matters, no business shall be transacted in any of th offices of the Courts, either in procuring or issuing pro cess, or in entering judgments or taking any proceedin whatever in a cause, unless upon the personal attendanc of the party on whose behalf such business is required to be transacted, or of the counsel or solicitor of such party, or the clerk or agent of the solicitor, or the clerk of the agent. C.R. 11.

Putting paper under door of office, or handing same to officer in street irregular.

Putting an appearance under the door of the office of a Deputy Clerk of the Crown during office hours, or handing it to him in the street, was held not to be a due entry of the appearance: *Gray* v *Stacey*, 10 U. C. L. J. 245; and see *Fralick* v. *Huffman*, 1 C. L. Ch 80; *Campbell* v. *Madden*, Dra. 2.

But the Court refused to set aside a *fi. fa.* issued at the officer's house before office hours: *Rolker* v. *Fuller*, 10 U. C. Q. B. 447; and see *Hall* v. *Hunter*, 5 O. S. 705; and an election petition, filed after office hours on the last day for filing, was held to be well filed: *Mun* v. *McNeill*, 27 C. L. J. 538

Defendant's solicitor, when entitled to precedence.

Where a defendant's solicitor is present at the opening of the office to enter an appearance, or file a statement of defence, and the plaintiff's solicitor is present to sign judgment for default, the defendant's solicitor is entitled to precedence: see *Fralick* v. *Huffman*, 1 C. L. Ch 80; and where the plaintiff's solicitor had begun to enter judgment for non-appearance, and before it was completed, the defendant's solicitor arrived to enter an appearance, it was held that the officer should stay the entry of judgment in order to admit the entry of the appearance: *Smith* v. *Logan*, 17 P. R. 213.

Offices of Court not to be opened when appointed to be closed.

The offices of the Court should not be opened for business, on days on which they are appointed by statute, or *Rule* of Court, to be closed, and proceedings taken therein on such days are irregular: *Trust and Loan Co.* .. *Dickson*, 2 C. L. J. 166; *Mumford* v. *Hitchcock*, 9 Jur. N. S. 1200.

Officers to be auxiliary to one another.

759. All officers shall be auxiliary to one another for promoting the correct, convenient, and speedy administration of business. C.R. 12.

What the precise meaning of this *Rule* is, it is hard to say. It does not seem to warrant one officer discharging the duty of another unless ex-

pressly authorized under *Rule* 760 so to do, *e.g.* It would not warrant an inferior officer undertaking to act as Master in Ordinary, or Master in Chambers, unless authorized so to do under the following *Rule*: Rules 760, 761.

760. In case of the absence or illness of any officer to whom any special duty is assigned, [or of the office being vacant], the duty may be performed by such other officer as may be designated for that purpose by the Chief Justice of Ontario. C.R. 13. *Amended.* (*As amended by Rule passed 1st December, 1913*). Absence or illness of officers.

The words in [ ] indicate the amendment.

Under former C. R. 43, any Official Referee might, at the request of the Master in Chambers or of a Judge of the High Court, act as Master in Chambers, but that Rule has not been continued and the Master in Chambers has no longer any power to appoint a deputy, and such a deputy can only be appointed under this *Rule*.

Messrs. Alcorn, Holmested, Lee and Cameron were designated by the Chief Justice of Ontario to discharge the duties of the Master in Chambers from the 2nd day of September, 1913, until the decease of the late Master in Chambers who died on the 12th November, 1913. And by Order in Council dated 13th November, Messrs. Holmested, Lee and Cameron were appointed to perform such duties until a successor to the late Mr. James S. Cartwright, formerly Master in Chambers, was appointed.

761. Where the first document in a cause or matter is required to be filed in Toronto, the Central Office shall be deemed to be the office in which the cause or matter is commenced and in other cases the office of the Deputy Clerk of the Crown, Deputy or Local Registrar of the County or District in which such first document is required to be filed shall be deemed to be the office in which the cause or matter is commenced. C.R. 14. Office in which proceedings commenced.

The first document to be filed in an action commenced by writ is a copy of the writ: *Rule* 6, together with a copy of order for leave to issue it (where leave is required), and these must be filed in the office out of which the writ is to issue.

Most proceedings commenced, otherwise than by writ, are commenced by petition, *e.g.*, under *Quieting Titles Act* to be prosecuted before a Referee of Titles: *Rule* 692; or petition of right: *Rule* 738, to be prosecuted as provided in *Rules* 738-750, or by originating notice of motion: *Rule* 10, to be prosecuted in the Weekly Court, or in Chambers. The first document to be filed in such cases is the petition or notice of motion, or an affidavit in support of the motion.

In Toronto, if the proceeding is in the Weekly Court, the filing must be in the Registrar's Office: *Rule* 234 (2); if in Chambers, the office of the Clerk in Chambers: *Rule* 234 (2). All documents so filed subsequently reach the Central Office: *Rule* 234 (2); and the Central Office is to be deemed to be the office in which the cause or matter is

Rules 762, 763.

commenced, so that subsequent ministerial proceedings must be taken there: *Rule* 761.

In other proceedings in Toronto not commenced by writ, the first document filed should be in the filing branch of the Central Office, viz., in the office of the Clerk of Records and Writs: *Rule* 761.

In other counties, in proceedings not commenced by writ, the office of the Local Registrar, if any, is the office in which to file all documents which have to be filed. Where there is a Deputy Clerk of the Crown his office is the proper office in which to file documents which commence proceedings to be prosecuted at the Local Weekly Sittings, if any: *Rule* 240; and the first document to be filed in other cases may be filed either in his office, or that of the Deputy Registrar: *Rules* 752 (2), 761.

Where an issue is directed to be tried, it is to be filed in the proper office in the county in which it is to be tried, and subsequent proceedings in the issue are to be carried on in that office: *Rule* 125.

The probable object of this and the following *Rule* is, that all papers in an action shall as far as possible be found in the office which is the home of the action or proceeding; but proceedings in the Master's Office except the report, or certificate, usually remain with the Master; and proceedings under *The Quieting Titles Act* remain with the Inspector of Titles.

Proceedings to be there carried on.

762. All proceedings in a cause or matter shall be carried on in the office in which the cause or matter is commenced. C.R. 15. *Amended.*

See Eng. (1883) R. 77.

Proceedings under *The Quieting Titles Act*, and proceedings upon references to Masters, or Referees, are exceptions to this *Rule*.

Barristers' Roll.

Solicitors' Roll.

763. All persons called to the Bar of Ontario or admitted as Solicitors of the Supreme Court of Judicature for Ontario, shall sign the rolls provided upon taking the prescribed oaths. C.R. 87 and 88.

By the term "Supreme Court of Judicature for Ontario," "the Supreme Court of Ontario" is probably meant: see pp. 3, 34 *supra*.

Solicitors.—Solicitors are officers of the Court, and *The Solicitors Act* (R. S. O. c. 159) does not interfere with the inherent jurisdiction of the Court over solicitors as officers of the Court: see Jud. Act, s. 72; *Re McBrady & O'Connor*, 19 P. R. 37.

Answering affidavits.

Answering Affidavits.—This is usually a preliminary measure to see whether a motion to strike a solicitor off the roll need be resorted to.

Striking solicitor off roll.

In a case appearing to justify investigation, it is competent for the Court to issue an order calling upon a solicitor to answer the matters appearing on affidavit or otherwise: see C. R. 89; and, if the case demands it, may strike a solicitor off the rolls: *Re Whitehead*, 28 Ch. D. 615.

Where the employment of a solicitor is so connected with his professional character as to afford the presumption that that character

formed the ground of his employment by the client, the Court will exercise its summary jurisdiction over him: *Re McBrody & O'Connor*, *supra*. Rule 763.

The Law Society has a disciplinary jurisdiction over solicitors, and barristers, and students at law: see *The Law Society Act* (R. S. O. c. 157) s. 46; *Honda* v. *Law Society*, 16 Ont. 625; 17 Ont. App. 41; and where, on complaint to the Law Society, the Society has acquitted the solicitor, any application to the Court to strike the solicitor or barrister off the rolls for such alleged misconduct cannot be made by a suitor in person, but must be made by counsel: see *Re Solicitor*, 1903, 2 K. B. 205; 89 L. T. 118.

Where in the course of a cause, evidence of fraudulent conduct on the part of a solicitor is brought to light, the Court may *suo sponte* direct proceedings to be taken against the offending solicitor: *Goodwin* v. *Gosnell*, 2 Coll. 457, 462; *Wheatley* v. *Boston*, *Re Collins*, 7 D. M. & G. 261, 588; *Re Toms*, 3 Chy. Ch. 204, 215; *Re Currie*, 25 Gr. 338; *Re Solicitor*, 27 Gr. 77; *Thorndyke* v. *Hunt*, 5 Jur. N. S. 878, or upon the application of any party interested: *Cove* v. *Cove*, 43 L. T. 158.

The Court may also exercise summary jurisdiction over a person who, though not a solicitor, has held himself out to be one, in the matter in which he has so misrepresented himself: *Re Hulme & Lewis*, 1892, 2 Q. B. 361; 66 L. T. 683; but not in any matter in which he has not so misrepresented himself: *Re Hurst*, 1912, 2 Ch. 520; 107 L. T. 502.

In *Burton* v. *Earl of Chesterfield*, 8 Jur. 373, it was said that the motion could not be made, calling on an attorney to answer the affidavits, and at the same time to show cause why he should not be struck off the rolls; and in that case the rule was confined to calling on him to answer the affidavits. In a later case, however, the rule *nisi* was granted in the double form: *Re Bloke*, 3 E. & E. 34; and see *Re Grueber*, 63 L. T. Jour. 637.

Where the motion is confined to calling on the solicitor to answer affidavits simply, and the Court is of opinion that his answer is insufficient, the practice at law has been to enlarge the motion to a future day, intimating to the solicitor that he may be further heard on that day, why he should not be struck off: *Re Wright*, 12 C. B. N. S. 705; *Re H.*, 31 L. T. 730.

In order to give the Court jurisdiction to entertain an application for a solicitor to answer matters contained in an affidavit, or to strike him off the rolls, it is not necessary that the misconduct of which he is accused should arise strictly between solicitor and client: *Re Aitken*, 4 B. & Ald. 47; *Re Attorney*, 38 U. C. Q. B. 171; *Re Knight*, 1 Bing. 91; *Re Bloke*, 3 E. & E. 34; *Re Hill*, L. R. 3 Q. B. 543; *Re Chandler*, 22 Beav. 353; and see *Re Cutts*, 16 L. T. 715; *Re Keays*, 13 C. P. 282; *Re Solicitor*, 80 L. T. Jour. 103; *Re Strong*, 53 L. T. 694; 55 L. T. 3; 31 Ch. D. 273.

Restitution, etc., in case of negligence or other breach of duty.

Restitution, etc., on Summary Application.—Where negligence, or other breach of duty, is committed by a solicitor in a matter of which the Court has seisin, the Court can summarily order the solicitor, as its officer, to make good the loss actually occasioned thereby, but cannot mulct him in damages for his misconduct: *Morsh* v. *Joseph*, 1897, 1 Ch. 213.

Rule 763.

A solicitor may, on a summary application, be compelled to make good moneys improperly obtained out of Court, through negligence on his part; thus, a solicitor who, at the request of a third person, applied as solicitor for a person entitled to money in Court for payment out of the money, and by reason of the fraud of the third person, and on forged affidavits, improperly obtained payment of the money, without ever having had any direct communication with the person for whom he acted; he was ordered on a summary application to refund the money so obtained: *Slater* v. *Slater*, 1897, 1 Ch. 222, note. And where it is brought to the attention of the Court that money has been improperly obtained out of Court by a solicitor, the Court may *sua sponte* direct proceedings to be taken to compel him to refund it: see *Re Central Bank*, *per* Burton, C.J., 24 Ont. App. at p. 473.

Where in the course of an action it appears that a solicitor for one of the parties has in breach of trust got possession of a trust fund, he may be directed to pay it into Court by order made on a summary application in the action, and in the matter of the solicitor: *Re Carroll*, 1902, 2 Ch. 175; 86 L. T. 862.

Costs.

The Court may also, in exercise of its summary jurisdiction over solicitors, order a solicitor to pay the costs of proceedings instituted by him without authority: *Nurse* v. *Durnford*, 13 Ch. D. 764; 41 L. T. 611; *Re Sovoge*, 15 Ch. D. 557, or where by his negligence a cause has been tried as undefended, which was intended to be defended, a new trial may be ordered, and the solicitor ordered to pay costs so occasioned, as between solicitor and client: *Re Resisigny*, 3 Taunt. 484.

Where an action is carried on by a solicitor on an agreement to indemnify his client against costs, the solicitor is personally liable for the costs, if the action fail: *Cockle* v. *Whiting*, 1 R. & M. 43; *Re Jones*, L. R. 6 Chy. 497, and this liability may be summarily enforced: *Ib.*; and where a solicitor agreed to charge no "solicitor's fees," this was held to include fees as counsel, when the solicitor himself acted as counsel: *Re Solicitors*, 33 C. L. J. 245.

Undertakings.

Undertaking of Solicitor—Enforcing.—A solicitor, being an officer of the Court, his undertaking, given in his professional capacity, whether in an action or not, will be enforced on a summary application to the Court: *Woodfin* v. *Wray*, 51 L. J. Chy. 427; 97 L. T. Jour. 41; *Swyny* v. *Harland*, 1894, 1 Q. B. 707; *In re Coolgardie Gold Fields*, 1900, 1 Ch. 475; *D.* v. *A. & Co.*, 1900, 1 Ch. 484; *Re Solicitor*, 1907, 2 K. B. 539; 97 L. T. 212; *Re Launder*, *Launder* v. *Richards*, 98 L. T. 554; *United Mining & Finance Corp.* v. *Becher*, 1910, 2 K. B. 296; 103 L. T. 65.

Suspension.

Suspension from Practice.—Instead of striking a solicitor off the roll for misconduct, the Court may, if it sees fit, suspend him from practice for a specified period: thus, for antedating a marriage settlement in order to make it appear to have been executed before marriage, a solicitor was suspended from practice for five years: *Re Parry*, 98 L. T. Jour. 404; and see *Erskine* v. *Adeane*, 18 Sol. Jour. 573; *Re Hill*, L. R. 3 Q. B. 543; *Re Bloke*, 3 E. & E. 34; *Re Officer*, 95 L. T. Jour. 299; *Re Russell*, 95 L. T. Jour. 300; *Re Solicitor*, 1894, 1 Q. B. 254; 70 L. T. 27; *Re Solicitor*, 61 L. T. 842; *Re Lewis*, 95 L. T. Jour. 85, where the solicitor was suspended until restitution should be made to the client. In some cases, though the solicitor has been exonerated from fraud, he has nevertheless been ordered to pay the costs

of proceedings against him, where the circumstances were such as to call for investigation: *Re Holland*, 95 L. T. Jour. 160. Rule 763.

Where a solicitor has been suspended for misappropriating the moneys of his clients, he will not necessarily be struck off the rolls on being subsequently convicted of embezzlement in reference to the same transaction: *Re Solicitor*, 61 L. T. 842.

A solicitor was suspended for twelve months for being a party to the organization of a debt collecting agency, of which he was to be solicitor, and paid by a commission on debts collected; such proceeding being held to amount to champerty: *Re Solicitor*, 1912, 1 K. B. 302; 105 L. T. 874.

The Law Society has also power to inquire into charges of misconduct preferred against a solicitor, and may resolve that he is unworthy to practise as a solicitor, but the Society has no power to suspend him, or strike him off the rolls, that must be done by the order of the Court: see *The Law Society Act* (R. S. O. c. 157) ss. 46, 48; and see *Re Solicitor*, 1912, 1 K. B. 302. But the Society may disbar, or suspend from practice, a barrister: see s. 46, *supra*.

Striking off Roll.—A solicitor may be struck off the rolls for fraudulent conduct as a trustee: *Re Chandler*, *supra*, p. 1407, where the application was made by the *cestui que trust*; and see *Thorndyke* v. *Hunt*, *supra*, p. 1407; *Re Holl and Dolland* v. *Johnson*, 2 Jur. N. S. 633; or for fraudulently abusing the confidence of a client: *Re Mortin*, 6 Benv. 337; *Re J. C. M. & J. M.*, 24 W. R. 111; or for obtaining a client's money to discharge alleged liabilities of the client which did not exist: *Re H.*, 31 L. T. 730; *Re Strong*, 31 Ch. D. 273; 55 L. T. 3; or for getting a false affidavit sworn, and, without authority, instructing counsel to consent to payment of money out of Court: *Wheatley* v. *Bastow*, 7 D. M. & G. 261, 558; or for falsely representing an injunction to have been granted: *Kimpton* v. *Eve*, 2 V. & B. 352; or for making an interlineation in an affidavit after it had been sworn: *Erskine* v. *Adeane*, 18 Sol. Jour. 573; 10 C. L. J. 209; or for committing perjury, Seton 652; or for revealing the secrets of a client: *Re Cutts*, 16 L. T. 715; *Cholmondeley* v. *Clinton*, 19 Ves. 261; or for persuading his client to give him money to be used for bribing a jury before whom the client was to be tried for a criminal offence: *Re Titus*, 5 Ont. 87; or where he has been convicted of crime and sentenced to imprisonment, as, *e.g.*, for being a party to the use of premises as a disorderly house: *Re Solicitor*, 69 L. T. 148, 522, *S. C.*, *sub nom Re Weare*, 1893, 2 Q. B. 439; or for misappropriating fees paid to him to be paid to counsel: *Re Lewis*, 95 L. T. Jour. 85; or borrowing large sums of money from a client, who has just attained his majority, without giving proper security: *Re Solicitor*, 1894, 1 Q. B. 254; 70 L. T. 27. Striking off the Roll.

Under *The Solicitors' Act* (R. S. O. c. 159) s. 29, a solicitor may be struck off the rolls for default of payment of money received by him as a solicitor: *Anon*, 12 C. L. J. 204; *Re Knowles*, 16 P. R. 408. Where considerable sums had got into the hands of a solicitor who made default in payment, but the client issued execution upon the order directing payment, it was held that he had treated the claim as a debt, and a subsequent motion to strike the solicitor off the rolls for non-payment was therefore refused: *Re Fletcher*, 28 Gr. 413; see also *Ex p. White Sewing Machine Co.*, 12 C. L. T. 256; but the English cases on which Non-payment of money.

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these decisions were based have been since overruled: *In re Grey*, 1892, 2 Q. B. 440. But where the client had sued the solicitor for the money and failed on the ground that his claim was barred by the Statute of Limitations, it was held that he could not afterwards resort to summary proceedings against the solicitor without any allegation of misconduct: *Sittingbourne & S. Ry. Co.* v. *Lawson*, 80 L. T. Jour. 448. The Court will not exercise its summary jurisdiction over a solicitor to compel repayment of a loan: *Re Bryant*, 50 L. T. 450; unless the loan has been fraudulently obtained by the solicitor from his client: see *Re Strong*, *supra*, p. 1408.

Where the application is to strike a solicitor off the roll for non-payment of money, it should be made in Court, and if the order is granted it may direct payment by the solicitor within a specified time, or in default that he be struck off. Upon default no further order is necessary, but the applicant must move, on notice to the solicitor, to have the roll brought into Court for the purpose of having the name struck off: *Re Bridgman*, 16 P. R. 232; *Re Advocates*, 18 C. L. T. 159; and see *Re W.*, 72 L. T. 679. On the roll being brought into Court, the officer of the Court will, in open Court, on the direction of the Court, strike the name off the roll.

The order to strike off the roll for non-payment of money, issues in respect both of the specific moneys ordered to be paid, and also the costs of the application; *In re Knowles*, 16 P. R. 408; and see *In re Solicitor*, 1895, 2 Ch. 66.

The Court will not on a summary application against a solicitor for payment of money alleged to be in his hands, make it a term of an order for the delivery and taxation of his bill that on non-payment of what shall be found due he be struck off the roll, where there appears to be a *bonâ fide* dispute as to whether there is anything in the solicitor's hands at all, such a provision being regarded as an unnecessary slur on the solicitor's professional character: *Re Ross*, 16 P. R. 482.

A summary application for payment of money will not be entertained against a solicitor, as against whom no professional misconduct can be alleged, even though he may be liable to an action: *Ib.*

Repayment, pending a motion to strike off the rolls, of money fraudulently obtained, is no purgation of the offence: *Re H.*, 31 L. T. 730; nor is it, where the money was properly obtained, but misappropriated: *Re Solicitor*, 62 L. T. Jour. 446.

Where a solicitor is struck off the rolls for misappropriating the moneys of his client, the order directing him to be struck off may properly contain a reference to ascertain the amount for which he is liable and direct him to pay the amount so to be ascertained, and payment may be enforced against him even after he has been struck off: *Re Strong*, 31 Ch. D. 273; 55 L. T. 3.

Where the solicitors engaged in any action or matter in court represent conflicting interests, if there is any undisclosed arrangement or practice between them whereby a share of profit, whether by way of agency or otherwise, is paid to any of them, for introducing the litigation, that is professional misconduct: *Re Four Solicitors*, 1901, 1 K. B. 187; 83 L. T. 484.

Where the application against a solicitor is made on the ground of fraud, the fraud must be clearly proved; the Court will not infer an

equivocal action to have been fraudulent: *Re Stewart*, L. R. 2 P. C. 88; *Re S—*, 14 C. P. 323. Rule 763.

Tha Court refused to maka an order on the production marely of a certificata that the solicitor had heen struck off the roll of a Colonial Court: *Re Solicitor*, 1898, 1 Q. B. 331; 77 L. T. 661.

Restoration to Roll.—A solicitor who has heen struck off tha roll, after conviction of a criminal offence, may he restored to the roll, if thara are circumstances justifying it: *Re Brandreth*, 64 L. T. 739; and see *Re Poole*, L. R. 4 C. P. 350; *Ex. p. Pyke*, 6 B. & S. 703; *Re Solicitor*, 19 C. L. J. 234. Restoration to Roll.

Whera a solicitor has been struck off tha rolls for non-paymant of money, it is a condition precedent to restoration that ha shall hava made full restitution, or made tha hest efforta in his power thareto, snd shall satisfy tha Court as to the propriety of his conduct in tha meantime: *Re Poole*, L. R. 4 C. P. 350; *Ex parte Pyke*, 6 B. & S. 703. And the Law Society must he notified of nny application to restore to tha roila a solicitor who has been struck off for misconduct: *Re Solicitor*. 19 C. L. J. 234.

Appeal.—An order striking a solicitor off the roils is not a criminal proceeding and is appealahle: *Re Hardwick*, 49 L. T. 584. Appeal.

Leave to appeal to Har Majesty in Council from an order atriking a barrister off the roll of a Colonial Court was given, and the order was reversed hy tha Judicial Committea of the Privy Council, on tha ground that the facts did not warrant the order: *In re Renner*, 1897, A. C. 218.

Barristers.—The Law Society has power to inquire into charges of misconduct preferred against a harrister at law, and may suspend him from practice or disbar him: see *The Law Society Act* (R. S. O. c. 157), ss. 46, 47; and see *Hands* v. *Law Society*, 17 Ont. App. 41; *Bar of Montreal* v. *Honon*, 8 Que. Q. B. 26.

Counsel Fees.—Counsel may sue the client for his fees. No preliminary delivery of a signed bill is necessary, as in tha case of a solicitor suing for hia costs. Solicitors who employ counsel hava implied authority to pledge the client's credit for payment, and legal privity exisis hetween the counsel and the client. The solicitor is not liable to the counsel uniess it is so ngreed expressly or by implication from tha coursa of dealing: *Armour* v. *Kilmer*, 28 Ont. 618: *Wells* v. *Wells*, *sed vide*, p. 1213.

Studonts at Law who are memhers of Tha Law Society, and articled clerks are also suhject to discipline by the Law Society: *Ib.*, s. 48.

Rocovery of Costs Botweon Solicitor and Client.—The right of solicitors to recover their costs as against their clients, is governed by *Thc Solicitors' Act* (R. S. O. c. 159), which also reguiates tho rights of their clients, and third persons liahle to pay their costs, to compel a delivery of their bills, and to have the same taxed.

Tha relation between country solicitor nnd town agent is that of client and solicitor: *Reid* v. *Burrows*, 1892, 2 Ch. 413; 40 W. R. 620.

Aa to whether a solicitor can recover costs for services performed while he had not taken out his annunl certificate: see *The Solicitors'*

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Act (R. S. O. c. 159), ss. 4, 20, 25; *Re Sweeting*, 1898, 1 Ch. 768; *Macdougall* v. *Law Society*, 18 S. C. R. 203.

Retainer.—It is always advisable for the solicitor to take a written retainer from his client; see H. & L. Forms, Nos. 1, 3, 4, 5, 6.

The retainer of a solicitor by a corporation should be under the corporate seal, or be authorized by by-law: *Barrie* v. *Barrie*, 19 P. R. 33; but a retainer of a solicitor by a corporation, sealed after the work has been done, is valid and binding: *Brooks* v. *Torquay*, 1902, 1 K. B. 601.

Notwithstanding that a retainer of a solicitor by two persons is in form a joint one, the Court will look into the facts of the case to discern the real nature of the transaction, and will determine the rights of the solicitor and clients accordingly; such a retainer does not necessarily make the persons signing it joint debtors: *Re Cameron*, 19 P. R. 176.

Delivery of Bill.—*The Solicitor's Act* (R. S. O. c. 159), s. 34 (1), provides as follows:

Solicitors to deliver their bill one month before bringing action for costs.

34.—(1) No action shall be brought for the recovery of fees, charges or disbursements, for business done by a Solicitor as such, until one month after a bill thereof, subscribed with the proper hand of such Solicitor, his executor, administrator or assignee, or, in the case of a partnership, by one of the partners, either with his own name, or with the name of such partnership, has been delivered to the person to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

Even where a statute was passed fixing the client's costs of certain litigation at a specified amount, it was held that the solicitors who had conducted the litigation could not recover from the client the amount of the costs so fixed, but must render a bill to him as required by this section: *Gundy* v. *Johnston*, 28 O. L. R. 121; 48 S. C. R. 516.

The delivery of the bill of costs must be made in one or other of the modes mentioned in this section.

The month referred to in this section is a calendar month: see *The Interpretation Act* (R. S. O. c. 1, s. 29 (*u*)). It must be computed exclusive of the day of delivery, and of the commencement of the action: see *Blunt* v. *Heslop*, 8 Ad. & E. 577; *Re Morphy*, 2 Ch. Ch. 56; and if sent by post, the month begins from the day, the bill in ordinary course would be delivered: *Browne* v. *Black*, 1911, 1 K. B. 975; 1912, 1 K. B. 316; 105 L. T. 982.

Form of bill.

The bill must be drawn in proper form, and should set out the items of the fees, and disbursements, in detail, or an action on it cannot be maintained: *Wilkinson* v. *Smart*, 33 L. T. 573; *Gould* v. *Ferguson*, 2 O. L. R. 161; and see *Re Mowat*, 17 P. R. 180; but where a bill is delivered in which some of the items are properly set out, and others are not, it was held that those properly set out were recoverable: *Blake* v. *Hummell*, 51 L. T. 431.

Where a solicitor seeks to recover his extra costs over and above party and party costs, he should include in the bill delivered to his

client the whole of the costs including those taxed between party and party: *Cobbett* v. *Wood*, 1908, 2 K. B. 420; 99 L. T. 482; *Re Osborn*, 1913, 3 K. B. 862. Rule 763.

"Disbursements" in the above s. 34, means actual payments made by the solicitor before the delivery of the bill. Any sums, *e.g.*, fees to counsel, which have not been paid must be disallowed: *Sadd* v. *Griffin*, 1908, 2 K. B. 510; 99 L. T. 502; *Re Massey*, 101 L. T. 517. Disbursements.

A payment of the amount of an account in which no items are set out, and which is not a bill of costs, does not prevent the client from obtaining delivery of a proper bill, and the ordinary order for its taxation: *Re Callis*, 49 W. R. 316. See also *Re McBrady & O'Connor*, 19 P. R. 37.

A payment for succession duty made by a solicitor on behalf of his client is not a "disbursement," and should not be included in his bill of costs: *Re Kingdon* v. *Wilson*, 1902, 2 Ch. 242; 50 W. R. 533; *semble*, that the same is the case in regard to counsel fees paid by the solicitor for the client: see *per* Boyd, C., in *Cobban Manufg. Co.* v. *Lake Simcoe Hotel Co.*, 5 O. L. R. 447.

Agency charges cannot be lumped: *Re Pomeroy*, 1897, 1 Ch. 284; nor the solicitor's own charges: *Gould* v. *Ferguson*, 29 O. L. R. 161. Bill required only if strictly professional services.

The bill should contain only charges for strictly professional services, for which items should be given. A lump sum for charges for services rendered in other capacities, such as an agent for collection of rents due to the client, should not be inserted in a bill of costs: *Re Shilson*, 90 L. T. 641; but see *Re Solicitors*, 3 O. W. N. 197; and *Re Solicitors*, 27 O. L. R. 147.

Section 34, p. 1412, *supra*, only applies to services rendered as a solicitor of the Supreme Court, the bill of which is properly the subject of a taxation: *Re Shilson*, *supra*; thus it was held not to be applicable to services rendered by a solicitor as a notary in procuring a pension from the United States Government, for which the solicitor was held entitled to sue without previously rendering any bill: *Ostrom* v. *Benjamin*, 20 Ont. App. 336; but see *O'Connor* v. *Gemmill*, 29 Ont. 47, 36 Ont. App. 27, the case of a solicitor acting in the Exchequer Court of Canada; and see *Re McBrady & O'Connor*, 19 P. R. 37, where services were rendered in reference to a claim upon an estate in England: *Re Boker* v. *Lees & Co.*, 1903, 1 K. B. 189, a bill for services before Parliamentary Committees.

Where the services rendered are not in reference to actual litigation, *e.g.*, for negotiation out of Court, the charges authorized by the tariff do not apply, and a *quantum meruit* for such services may be allowed in a lump sum, having regard to the difficulty, or importance, of the services rendered, and the amount affected: see *Re Johnston*, 3 O. L. R. 1; *In re Attorneys*, 26 C. P. R. 495; *Re Solicitors*, 2 O. W. N. 596; and see *Re McBrady & O'Connor*, 19 P. R. 37.

The contract of a solicitor retained to conduct an ordinary action of a Common Law nature is to carry it on to a conclusion, and if he refuses to continue the act before the conclusion of the case, except for some reasonable cause, and upon reasonable notice to his client, he cannot maintain an action for his costs: *Underwood* v. *Lewis*, 1894, 2 Q. B. 306; 70 L. T. 833; but the rule seems to be otherwise where the action is one for equitable relief: see *In re Hall*, 9 Ch. D. 538. Nature of contract between solicitor and client.

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No action on bill till after month from delivery.

Although no action can be brought by a solicitor to recover his bill of costs until a month has expired from the delivery of his bill to his Client: still that is a provision merely affecting procedure, and the Statute of Limitations runs against the solicitor from the date when the last service included in the bill was rendered, even though the client was out of the jurisdiction when the bill was delivered, and did not return within the jurisdiction until within six years prior to the commencement of an action on the bill: *Coburn* v. *Colledge*, 1897, 1 Q. B. 702; 76 L. T. 608; *Re Boswell*, 120 L. T. Jour. 314; but the solicitor may sue to set aside a fraudulent conveyance by his client before the expiration of a month: *Scane* v. *Duckett*, 3 Ont. 370; and in case his client is about to abscond, he may by leave of a Judge of the Supreme Court, or of a County Court, be authorized to commence an action, although the month has not expired: s. 39, *infra*; and he may also, notwithstanding that a bill has not been delivered, set up his claim by way of counter-claim or set-off in an action brought against him by his client: *Taylor* v. *Robinson*, 31 S. C. R. 615; or, where, by agreement with a client who has a cross-claim against him, an account of both has been stated, shewing a balance in the solicitor's favour, he may maintain an action for that balance: *Turner* v. *Willis*, 1905, 1 K. B. 468; 92 L. T. 412.

Exception.

Bill must be signed.

To entitle the solicitor to sue, his bill delivered must be signed, or accompanied by a letter referring to the bill signed by the solicitor, but this provision may be waived by the client: *Re Gedye*, 14 Beav. 56; and see *Re Jones*, *infra*; and, *semble*, is not necessary where the services charged for were not rendered as a solicitor of the Supreme Court of Judicature, *e.g.*, where they were performed in the Exchequer Court of Canada: see *O'Connor* v. *Gemmill*, 29 Ont. 47; but see *S. C.* in appeal, 26 Ont. App. 27.

Assignee of solicitor.

The assignee of a solicitor may deliver a bill signed by himself, and at the expiration of a month may sue for its recovery: *Ingle* v. *McCutcheon*, 12 Q. B. D. 518; but see *Re Ward*, 28 Ch. D. 719.

Delivery, and constructive delivery, to the third parties liable to pay, were discussed in *Re Robertson*, 42 Ch. D. 553.

Adding to bill rendered.

Where, as formerly, the costs of the taxation depended on whether or not one-sixth was struck off, it was held that after a bill was delivered the solicitor could not, without leave of the Court or Judge, withdraw it, and substitute a new one, even though the bill delivered was not signed: *Re Jones*, 54 L. T. 648; and see *Re Kellock*, 56 L. T. 887; nor could a supplemental bill be delivered as of course, but might be allowed on a special application: *Re O'Donohoe*, 14 P. R. 571; 15 P. R. 93.

A bill once unconditionally rendered could not be added to, or deducted from, by the solicitor, without leave: *Re Davy*, 1 C. L. J. 213; and special circumstances must be shewn: see *Re O'Donohoe*, *supra*; nor could an item omitted, be substituted for an item admittedly not chargeable: *Re Grant*, 1906, 1 Ch. 124. A substituted bill was allowed to be delivered in *Re B. & S.*, 6 P. R. 18. But where an unsigned bill has been delivered, which the client treats as a nullity, and applies for, and obtains an order for the delivery and taxation of a bill, the solicitor may, in that case, deliver an entirely new bill, and increase his charges: *Re Walsh*, 7 O. L. R. 41.

Where a bill was delivered indorsed as follows:—"In the event of taxation, we reserve to ourselves the right to deliver another and

more complete bill," this was held to be an absolute delivery: *Re Spencer & McDonald*, 19 G. R. 467; *Re Thompson*, 30 Ch. D. 441; but *semble*, a bill delivered accompanied by a statement that it contained items which could not be taxed, and reserving the right to deliver another bill in its place if taxation were insisted on, might be withdrawn, and a new one substituted: see *per* Cotton, L.J., in *Re Thompson*, 30 Ch. D. 441; 53 L. T. 479. Rule 763.

Where a client has lost the right to a taxation as of right, the Taxing Officer, if called on to moderate the bill, may have regard to added or substituted items: see *Lumsden* v. *Shipcote Land Co.*, 1906, 2 K. B. 433; 95 L. T. 17.

Prior to 58 Vict. c. 13, the costs of the reference were not in the discretion of the Court, but if the client attended the taxation, or obtained the order, and less than a sixth was struck off the bill he was liable to pay them and if a sixth or more was struck off, the solicitor was liable to pay them. Costs of taxation.

Since the costs of the taxation no longer depend upon the amount taxed off, there seems to be no good reason why amendments should not be allowed, as in other cases, where justice so requires, upon proper terms.

After taxation under an order obtained after action brought, the litigation is ended, except to enforce payment. If the order does not reserve questions of retainer and negligence, it is not open to the client to take a double chance of defeating the solicitor's claim by proceeding to defend the action after the conclusion of the taxation: *Re Millar, Millar* v. *Cline*, 12 P. R. 155; where *Re Clarke*, 9 P. R. 337, and *Macdonald* v. *Piper*, 10 P. R. 586, were distinguished. But see *Re Washington*, 12 P. R. 386. Enforcing order.

Under this clause no further order for payment of the balance found due to either party appears to be necessary, whether the order is obtained by the client or solicitor; but the solicitor or client is entitled to enforce payment by execution, on the confirmation of the report. The report must be filed, and unless appealed from, is confirmed at the expiration of fourteen days from the service of notice of the filing on the opposite party: *Rule* 502.

Where the result of the taxation is that the solicitor has been overpaid, and that money of the client is in his hands, an order may be made that the solicitor be struck off the Roll, unless by a named day he pay the amount due the client, with any costs of the taxation payable by him, and costs of the motion: *Re Knowles*, 16 P. R. 408; *Re Solicitor*, 1895, 2 Ch. 66.

If, however, the order for taxation is obtained by a third party, he does not thereby admit his liability to pay the solicitor: *Re Gray*, 1901, 1 Ch. 239; 84 L. T. 24, and unless the party primarily liable to pay is also a party to the proceedings for taxation, the solicitor would not be in a position to enforce payment of the balance, except by action.

Upon the order, and certificate of the result of taxation, an execution may issue in favour of the party to whom any sum may be found due: see *Rules* 3 (*g*), 533 *et seq.*

Delivery of Bill, when Unnecessary.—Where the amount sought to be recovered as the balance due in respect of costs was sued for as the subject of an express agreement by which the defendant had promised to pay the sum sued for, the agreement being a fair one between solicitor and client, it was held to be no defence that a bill Delivery of a bill, when not necessary.

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had not been delivered: *Belcourt* v. *Crain*, 22 O. L. R. 351; but see now *The Solicitors Act* (R. S. O. c. 159), s. 56 under which all such agreements are to be enforced by application to the Court and not by action.

Statute of Limitations.

Statute of Limitations.—The Statute of Limitations begins to run against the solicitor from the date when the work included in the bill was completed: *Coburn* v. *Colledge*, 1897, 1 Q. B. 702; 76 L. T. 608.

Where a client obtains an order to tax a bill some of the items of which are barred by the Statute, he is held to waive the Statute, and is bound to pay whatever is found due: *Re Margetts*, 1896, 2 Ch. 263; *Re Brockman*, 1909, 1 Ch. 354; 2 Ch. 170; 100 L. T. 821. The solicitor cannot set off statute-barred items of costs against moneys due by him to his client: *Smith* v. *Betty*, 1903, 2 K. B. 317; 89 L. T. 258.

An acknowledgment of a statute barred bill, obtained by a solicitor from his client, without independent advice, is nugatory: *Lloyd* v. *Cook*, 136 L. T. Jour. 36.

Interest on Bill.—*The Solicitors Act* provides that a solicitor may charge interest at the rate of five per centum per annum on his disbursements and costs, whether by scale, or otherwise, from the expiration of one month from demand from the client, and where the same are payable by an infant or out of a fund presently available, the demand may be made on the parent, or guardian, or the trustee, or other person liable.

Prior to this enactment in the absence of special agreement to the contrary, interest could not be recovered on an untaxed bill: *Cameron* v. *Heighs*, 14 P. R. 56. Interest on costs recovered from an opposite party, cannot be retained by the solicitor as against his client to whom he has not delivered any bill: *Re Bentwick*, 108 L. T. Jour. 105; and where costs are ordered to be paid out of an estate, but delay arises in payment owing to funds not being available, interest on such costs cannot be recovered out of the estate: *Archer* v. *Severn*, 12 P. R. 648; but under the above provision if the solicitor makes a demand for payment, interest would now seem to be recoverable. The Taxing Officer has been held to have no power to allow interest unless that matter has been expressly referred to him: *Re McClive & Gilleland*, 18 C. L. J. 98; see in England under the *Solicitors' Remuneration Act*, *Blair* v. *Cordner*, 19 Q. B. D. 516; *Re Marsden, Withington & Newmann*, 40 Ch. D. 475.

Delivery of bill.

Compelling Delivery of Bill.—Where the client desires to have his solicitor's costs taxed, or to recover documents in his possession on which he claims a lien for costs, it is necessary for him first to obtain a delivery of the solicitor's bill, and a taxation thereof, if the amount is disputed. If the solicitor neglects, or refuses, to deliver his bill, an order for its delivery may be obtained: see *The Solicitors' Act*, s. 35, *infra*, p. 1419.

If the client elect to treat as a nullity an unsigned bill delivered to him, and applies for the delivery and taxation of a bill, the solicitor may deliver an entirely new bill, and may increase or alter his charges: *Re Walsh*, 7 O. L. R. 41.

Where the retainer is admitted, and there are no special circumstances, the order for delivery, and taxation of the bill, may be obtained at any time, on *præcipe*: see *The Solicitors Act* (R. S. O. c. 159), s. 35; where the retainer is disputed, or there are any other special circumstances, the application for the order should be made on notice to the solicitor.

A solicitor cannot set up that the contract between himself and his client was illegal for champerty, as an answer to an application for the delivery of his bill: *Re Thomas*, 1894, 1 Q. B. 747; 70 L. T. 567; nor can he retain money received under a champertous agreement: *Re Solicitor*, 14 O. L. R. 464. Rule 783.

There is power to order the delivery of a bill whether it has been paid or not, and whether or not it is one which the Court would have power to refer to taxation: *Re McBrady & O'Connor*, 19 P. R. 37; and a verbal agreement between a solicitor and his client, as to the remuneration of the solicitor for professional services being void, cannot be an answer to an application for the delivery of a bill or for its taxation: *Ib.*

As to items which may properly be included in a bill: see notes on p. 1412.

It has been held that delivery can be compelled under *The Solicitors Act* (R. S. O. c. 159), of a bill for services performed in the Exchequer Court of Canada: *O'Connor* v. *Oemmill*, 29 Ont. 47; 26 Ont. App. 27, and for services rendered in reference to a claim on an estate out of the jurisdiction: *Re McBrady & O'Connor*, 19 P. R. 37; but not for services performed as a notary: *Ostram* v. *Benjamin*, 20 Ont. App. 336; and see *Re Baker*, 1903, 1 K. B. 189; 87 L. T. 662.

If the solicitor refuse to comply with an order for the delivery of his bill, he is liable to attachment: *Re Seal*, 1903, 1 Ch. 87; *Re Landor*, *infra*; but if on the return of a motion to attach him, he disclaims all intention of making any charge for costs, and shews by affidavit that he has not deducted any money for costs from moneys of his client which have come to his hands, the motion will be refused: *Re Landor*, 1899, 1 Ch. 818; 80 L. T. 643.

Bill to be Taxed.—The bill is one entire matter even though separate bills be rendered in respect of distinct transactions: *Re Romer*, 1893, 2 Q. B. 381; 69 L. T. 547; *Stokes* v. *Trumper*, 2 K. & J. 232; *Re Peach*, 2 D. & L. 33; and the client cannot select certain charges for taxation and ask that they only be referred: *Re Davy*, 1 C. L. J. 213. What bills may be taxed.

Although the general rule is that one of several bills or a part of a bill, cannot be taxed: *Storer* v. *Johnston & Wetherall*, 15 App. Cas. 203; 62 L. T. 710; yet where the solicitor admitted that there was nothing due to him, and it was simply a question whether he had been overpaid, an order to tax one only of several bills delivered was upheld: *In re Ward*, 1896, 2 Ch. 31.

The Court has power under its general jurisdiction to order the taxation of any bill relating to Court business, whether the bill be of the solicitor or his agent, or any part of such bill: *Storer* v. *Johnson & Wetherall*, 37 Ch. D. 433; 15 App. Cas. 203; though the principal received payment by a commission: *Re Idington & Mickle*, 8 P. R. 566; and upon such taxation a Master should, without specific directions, regard any settlement with the solicitors: *Ib.*

A bill for counsel fees exclusively may be referred: *Re C. K. & C.*, 6. P. R. 226; and see also *Armour* v. *Kilmer*, 23 Ont. 618; and *Re Ashbaugh*, 10 C. L. T. 30, where the services were respecting the defence of a prisoner; but where solicitors had agreed not to charge "solicitor's fees," these words were held to preclude charges for services rendered by them as counsel: *Re Solicitors*, 33 C. L. J. 245.

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Conveyancing charges.

Conveyancing Charges.—A bill for conveyancing could not formerly be referred: *Re Glass*, 3 P. R. 138, 140; *Re Lemon & Peterson*, 5 U. C. L. J. 185; and per Hagarty, C.J., *Ostrom* v. *Benjamin*, 20 Ont. App. at p. 339, although in these cases orders for taxation of bills for such services were made, apparently without question: see also *Re O'Donohoe & Warmoll*, 4 P. R. 266; and *Re Richardson*, 3 Chy. Ch. 144. But see now *The Solicitors Act* (R. S. O. c. 159), s. 44, *infra*, and *Ib.*, ss. 47-59; *Re Pollard*, 20 Q. B. D. 160; *Gould* v. *Ferguson*, 29 O. L. R. 161.

Services not covered by Tariff.

Services not Covered by Tariff.—Where services charged for are not regulated by the Tariff, the remuneration can only be based on the value of such services, a question of fact to be determined by the Taxing Officer on proper evidence: *Re Solicitors*, 27 O. L. R. 147; *e.g.*, solicitors employed to do the work of brokers may be entitled to be paid in the same way as brokers are usually paid, *e.g.*, by a commission: see *Re Solicitor*, 12 O. W. R. 1074; *Re Solicitors*, 3 O. W. N. 194; but there is no hard and fast rule as to the remuneration for such services, it may be on a percentage basis, or a lump sum: *Ib.*

Action on bill.

Action on Bill.—After the expiry of the month from the delivery of his bill, the solicitor may, if no order for taxation has been obtained by the client, either himself obtain an order for its taxation, and for payment of what may be found due: see *The Solicitors' Act*, s. 35, and notes *infra*, p. 1419, or he may bring an action for its recovery.

The claim may be specially indorsed, and judgment may be obtained therefor, under *Rule* 57, where there is no defence: *Smith* v. *Edwardes*, 22 Q. B. D. 10; 60 L. T. 10; but where the retainer is admitted, but the amount is disputed, judgment may be awarded subject to a taxation of the bill: *Ib.*; and see *Re Pork*, 41 Ch. D. 326.

The omission of an allegation of the delivery of the bill in the statement of claim, does not render the latter bad in law: see *Scane* v. *Duckett*, 3 Ont. 370; and it is a defence only open to the actual client, and not to a third person liable to pay: *Greening* v. *Reeder*, 67 L. T. 28; 40 W. R. 623. As to the evidence required to shew compliance with this section, see sec. 43, p. 1430, *infra*.

Action Against Absconding Client.—*The Solicitors' Act*, s. 39 provides:—

When actions for costs within the month may be allowed.

39. A Judge of the Supreme Court or of a County or District Court, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to depart from Ontario, may authorize a Solicitor to commence an action for the recovery of his fees, charges or disbursements, against the party chargeable therewith, although one month has not expired since the delivery of the bill. 2 Geo. V. c. 28, s. 39.

Proof of Delivery of Bill.—*The Solicitors' Act*, s. 34 (2), provides:

Not necessary in first instance in action on bill to prove contents of bill delivered.

34 (2). In proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed as required by s.-s. 1, or enclosed in or accompanied by such letter, was so delivered, sent or left; but the other party may shew that the bill so delivered, sent or left, was not such a bill as constituted a compliance with this Act. 2 Geo. V., c. 28, s. 34.

Summary Orders for Taxation of Costs.—Without any action being brought, where the retainer is not disputed and no special circumstances exist, a summary application may be made to the Court either by the solicitor, or the client, for the taxation of the bill, and in such proceedings, if anything is found due to the solicitor after giving the client all proper credits, payment may be enforced, thus rendering an action unnecessary. *The Solicitors' Act*, s. 35, provides as follows: Rule 763.

35. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on *præcipe* from the proper officer in the county in which the Solicitor resides: Order for taxation on præcipe.

(*a*) **By the Client**, for the delivery and taxation of the Solicitor's bill:

(*b*) **By the Client**, for the taxation of a bill already delivered, within one month from its delivery;

(*c*) **By the Solicitor**, for the taxation of a bill already delivered, at any time after the expiration of one month from its delivery, provided no order for its taxation has been previously made. 2 Geo. V. c. 28, s. 35.

This section provides for a *præcipe* order being issued on the application of the client or the solicitor, but does not appear to enable a third party chargeable with the bill to obtain such an order.

Section 45 of *The Solicitors' Act* is as follows:—

45. Every application to refer a bill for taxation, or for the delivery of a bill, or for the delivering up of deeds, documents and papers, shall be made *In the matter of* (*the Solicitor*); and upon the taxation of any such bill, the certificate of the officer by whom the bill is taxed, unless set aside or varied, shall be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the practice of the Court in which the reference was made. 2 Geo. V. c. 28, s. 45. How applications against solicitor to be intituled.

The month is a calendar month, and if the bill is sent by post a calendar month must expire from the time when, in ordinary course, the bill would be delivered, before an action could be brought, or the solicitor could obtain an order under this section: *Browne* v. *Block*, 1911, 1 K. B. 975; 104 L. T. 392; 105 L. T. 982.

The Solicitors Act formerly provided that:

"In case no application is made within the month, then the Court or Judge upon the application of either party may order a reference with such directions and conditions as he may deem proper; and may upon such terms as may be thought just restrain any action for such demand pending the reference." (R. S. O. 1897, c. 174, s. 36). Application to Court.

But that section has been omitted from the new *Solicitors' Act* (R. S. O. c. 159).

It is probable, however, that the practice there laid down is still to be followed: see s. 36 of the present Act, *infra*, p. 1420; and *Lumsden* v. *Shipcote Land Co.*, 1906, 2 K. B. 433; 95 L. T. 17.

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The Solicitors' Act, s. 36, provides as follows:—

No reference on application of party chargeable after verdict, or after 12 months from delivery.

36.—(1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made.

Direction as to costs.

(2) Where the reference is made under sub-section 1 the Court or Judge in making the same, may give any special directions relative to the costs of such reference. 2 Geo. V. c. 28, s. 36.

Scope of Solicitors' Act as to delivery and taxation of bills.

It is to be noted that while section 35 is confined to solicitor and client, this section uses the words "party chargeable" which would include any third party liable to pay the bill in question; and although the section does not expressly authorize the Court to direct a reference as did the former sect. 36, yet it seems to imply that a reference may be directed, where no special circumstances exist, provided the application therefor be made at any time before verdict or judgment, or before the lapse of twelve months from the delivery of the bill. In short, the scheme of *The Solicitors' Act* as now framed on this point seems to be this:

Where the retainer is admitted by the client he may obtain on *præcipe* an order for the delivery and taxation of his solicitor's bill—or where a bill has been delivered he may obtain an order for its taxation at any time within a month from its delivery. And where the client admits or does not dispute the retainer the solicitor may after a month from the delivery of his bill obtain on *præcipe* an order for its taxation, if the client has not in the meantime obtained such an order.

Special application, when necessary.

Special Application for Taxation, when Necessary.—If, on the other hand, the client disputes the retainer a special application for delivery and taxation, or for taxation alone, must be made whether the application be by client or solicitor.

A special application is also in all cases necessary where any "party chargeable" other than the client desires to obtain delivery and taxation, or taxation alone, of a solicitor's bill, and a special application tax is also necessary if the client suffers more than a month to elapse after the delivery of the bill without having obtained a *præcipe* order.

Where a special application is necessary it must be made before verdict or judgment, or the lapse of twelve months from the delivery of the bill. If made afterwards, whether by client, or third party, "special circumstances" must be shown. Within the month the client has an absolute right to taxation without any money being brought into Court, after the month it is in the discretion of the Court: *Re Brockman*, 1909, 2 Ch. 170; 100 L. T. 821.

Where, therefore, the order is not obtainable on *præcipe* under s. 35, *supra*, p. 1419, it may be made on application to a Judge, or judicial officer, in Chambers, on notice to the opposite party.

"Special circumstances."

Special Circumstances.—Orders for taxation are not made, except on special circumstances being shewn, after the expiration of twelve months from delivery of a bill, or after verdict or judgment for the amount of the bill: *Re Cameron*, 2 Chy. Ch. 311; *Re Thompson*, 2 Chy. Ch. 100; *Re Gildersleeve & Walkem*, 6 P. R. 117; *Read*

v. *Cotton*, 3 P. R. 118; *Pattullo* v. *Church*, 8 P. R. 363; *Re Norman*, 16 Q. B. D. 673; *Re Nelson*, 30 Ch. D. 1; *Re Park*, 61 L. T. 173; see *Fletcher* v. *Field*, 10 P. R. 608; *Snider* v. *Snider*, 11 P. R. 130; or after payment: *Re Walker*, 10 P. R. 400; *Schragg* v. *Schragg*, 11 P. R. 218; *Re Boycott*, 29 Ch. D. 571; *Re Jackson*, 40 Ch. D. 495; *Re Fairbanks*, 1 Chy. Ch. 222; *Re Chisholm*, 16 P. R. 162; but see s. 42, *infra*, p. 1434, or after, with the knowledge of the client, the costs have been deducted from moneys collected: *Re Beaty*, 19 P. R. 271; or after a settled account: *Re Webb*, 70 L. T. 318; but the delivery of a cash account without items is not sufficient to preclude taxation by the client even after the lapse of 12 months: *Re Baylis*, 1896, 2 Ch. 107; 74 L. T. 337, 506. Rule 765.

Where the special circumstances were that the solicitor was paid on the understanding that the bill might be taxed at any time, an order was made for taxation after his death, against his representatives: *Re Baker*, 13 P. R. 227.

Special circumstances signify generally "pressure and imposition or some overcharge" or "gross overcharges or errors great as to amount to fraud": *Re Strother*, 3 K. & J. 515; *Re Cameron*, 2 Chy Ch. 311; *Re Walker*, 10 P. R. 400; *Re Griffin*, [illegible] not confined to such cases: *Re Butterfield*, 14 [illegible] include any circumstances of an exceptional nature which a Judge in the exercise of a judicial discretion, may consider to justify such taxation: *Re Hirst*, 1908, 1 K. B. 982; S. C. *sub. nom. Hirst* v. *Fox*, 1908, A. C. 416. The bringing of three separate actions, where one would have been sufficient, constitutes "special circumstances": *Re Butterfield*, *supra*.

Where alleged overcharges constitute the special circumstances, they must be specified on the application to tax: *Re Gidd[illegible]sleeve & Walkem*, *supra*, p. 1420; a general allegation of overcharge is not enough: *Re Boycott*, 29 Ch. D. 571; and they must be on their face excessive: *Re Bethune & Co.*, 4 C. L. T. 251. Trifling items will not be sufficient: *Re Drake*, 8 Beav. 123; overcharge by mutual mistake was held not to be a special circumstance: *Re Glascodine*, 52 L. T. 781.

Where a taxation is ordered after the twelve months, it may be restricted within certain limits: *Re Nicholson*, 3 D. F. & J. 93.

Where bills are delivered from time to time before the litigation is closed, the client has twelve months from the delivery of the final bill after the close of the litigation in which to apply to tax them all: *Re Butterfield*, 14 P. R. 149; *Re Romer & Haslam*, 1893, 2 Q. B. 286; 69 L. T. 547.

The fact that the solicitor of executors did not inform them that if administration proceedings should be commenced, the executors might be disallowed what might be struck off on moderation, does not constitute "special circumstances": *Re Layton, Steele & Co.*, W. N. 1890, 112; 38 W. R. 652.

No rigid rule exists as to what kind of circumstances must be shewn: *Re Cheeseman*, 1891, 2 Ch. 289; *Re Ward*, 102 L. T. 527, 881.

The fact that an action was brought on a number of bills delivered during several years, during which defendant was plaintiff's client, is not a special circumstance: *Read* v. *Cotton*, 5 U. C. L. J. 114; nor the existence of a controversy as to the terms on which the business was done, nor the continuance of employment after the delivery of the first bill: *Arnoldi* v. *O'Donohoe*, 2 Ont. 322; see *Gillespie* v. *Shaw*, 10 U. C. L. J. 100. Where judgment had been signed against the client in

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an action, during the pendency of negotiations for a settlement, this was held to be a special circumstance: *Pattullo* v. *Church*, 8 P. R. 363. So conjunction of the following (1) that the relationship of solicitor and client continued after the delivery of the bill, (2) that the solicitor had offered to make a substantial deduction, and (3) that there were items of apparent overcharge of which no explanation was offered: *Re Walker*, 12 P. R. 400.

A lump sum retained for costs out of the proceeds of a sale, and no bill delivered, were held to constitute "special circumstances": *Re Molcolmson & Wade*, 9 P. R. 242; and the retainer of costs out of the proceeds of loans obtained for the client is not a payment under s. 42, *infra*, p. 1434, so as to preclude the right of the client to a taxation: *Re Baylis*, 1896, 2 Ch. 107.

The retaining of an amount agreed upon in full of costs out of moneys in the solicitor's hands without delivering a bill is not payment unless there is a settlement of accounts: *Re West*, 1892, 2 Q. B. 102; 67 L. T. 57; where there is no special agreement under *The Solicitors' Act* (R. S. O. c. 159), s. 48 *et seq.*, there can be no binding settlement without the delivery of a bill: *Re Solicitor*, 21 O. L. R. 235; 22 O. L. R. 30; the taking of bills of exchange, subsequently dishonoured, does not amount to payment, unless the solicitor agrees to accept the bills as payment in any event: *Re Romer & Haslam*, 1893, 2 Q. B. 286; 69 L. T. 547.

Where the costs were due from a company in liquidation a taxation was ordered on the application of the liquidator, though more than twelve months had elapsed since the delivery of the bill to the company: *Re Foss*, 1912, 2 Ch. 161, 106 L. T. 825; and see *Re Van Laun*, 1907, 2 K. B. 23.

Where no special circumstances are shown, and a taxation cannot be claimed as of right, the Court has still an inherent jurisdiction to refer a solicitor's bill for moderation if it sees fit: *Lumsden* v. *Shipcote Land Co.*, 1906, 2 K. B. 433; 95 L. T. 17.

Delivery of bill and reference to taxation

Order for Taxation, or Delivery and Taxation.—*The Solicitors' Act* (R. S. O. c. 159), s. 38, provides:

38.—(1) When a client or other person obtains an order for the delivery and taxation of a Solicitor's bill of fees, charges and disbursements, or a copy thereof, the bill shall be delivered within fourteen days from the service of the order.

(*a*) The bill delivered shall stand referred to the proper officer for taxation, and on the reference the Solicitor shall give credit for, and an account shall be taken of all sums of money by him received from or on account of the client, and the Solicitor shall refund what, if anything, he may on such taxation appear to have been overpaid;

(*b*) The costs of the reference shall unless otherwise directed be in the discretion of the officer, subject to appeal, and shall be taxed by him when and as allowed.

(*c*) The Solicitor shall not commence or prosecute any action in respect to the matters referred pending the reference without leave of the Court or a Judge;

(*d*) The amount certified to be due shall be paid forthwith after confirmation of the certificate by filing, as in the case of a Master's report, by the party liable to pay the same;

(*e*) Upon payment by the client or other person of what, if anything, may appear to be due to the Solicitor, or if nothing is found to be due to the Solicitor, the Solicitor, if required, shall deliver to the client or other person, or as he may direct, all deeds, books, and writings in the Solicitor's possession, custody, or power, belonging to the client; Rule 763.

(*f*) The order shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variation therefrom, and any other directions which the Court or Judge shall see fit to make.

(2) An order for reference of a Solicitor's bill for taxation shall be presumed to contain the above clauses (*a*) to (*e*) of sub-section (1) whether obtained on *præcipe* or otherwise, and by the Solicitor, client or other person liable to pay the bill. Order presumed to contain clauses a to e.

(3) The reference for taxation shall unless otherwise ordered be to the proper taxing officer for the county in which the Solicitor resides. 2 Geo. V. c. 28, s. 38. Reference to be to local taxing officer.

This section is based, to some extent, on C. RR. 1185, 1186, 1187, and contains, with some changes, the provisions which previously thereto it was usual to insert in an order for the taxation of a Solicitor's bill. It will not now be proper to insert them, and the order will be read as if it contained them; but it may contain any variations, or additional directions. Forms Nos. 64, 65, 66; H. & L. Forms, Nos. 1698, 1699, 1701, 1702, are the forms of orders to be used in such cases, and should be adhered to: *Re Solicitors*, 9 P. R. 90, is not to be followed.

This section regulates the practice where a client or other person obtains an order for delivery and taxation, or for taxation only, of a solicitor's bill of costs. The words "other person" are intended to include persons who are not directly liable to the solicitor as his client, but who are nevertheless liable to pay his costs: see *The Solicitors' Act* (R. S. O. c. 159), s. 40, *infra*, p. 1431.

Section 35 regulates by whom and the time and conditions within, and upon which the order may be obtained on *præcipe*. In cases not coming within that *Rule* the application for the order must be made on notice to the solicitor.

An application for taxation, or delivery and taxation, of a solicitor's bill of costs must be made "In the matter of (*the solicitor*)": see *The Solicitors' Act*, s. 45, *supra*, p. 1419.

Under the first clause of section 38 a bill must be delivered by the solicitor within fourteen days after the service of an order for its delivery. In case the solicitor make default he is liable to attachment for disobedience: *Dent* v. *Basham*, 9 Ex. 467; 23 L. J. Ex. 161; but where the solicitor declines to make any charge for his services, the delivery of a bill will not be enforced: *Re Griffith*, 7 T. L. R. 268; and see *Re Kerr*, 12 Beav. 390.

As to the delivery of the bill, see notes to *The Solicitors' Act* (R. S. O. c. 159), s. 34 (1), *supra*, p. 1412; and s. 34 (2), *supra*, p. 1418.

As to place of reference: see *The Solicitors' Act*, s. 38 (3), *supra*.

Account.—The account authorized to be taken by s. 38 (1), clause (*a*), is confined to moneys received by the solicitor in the transaction of Account.

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the business to which the bill refers, and does not authorize a general account of all dealings between the client and the solicitor; thus where a barrister obtained an order for taxation against his solicitor it was held that he was not entitled to call for an account of counsel fees received by the solicitor in other matters in which he had retained the applicant as counsel: *Re Le Brasseur*, 74 L. T. 526, and see *Jones* v. *James*, 1 Beav. 307; *Re Smith*, 4 Beav. 309; 9 Beav. 182; *Cooper* v. *Ewart*, 2 Ph. 362. The account is incident to the taxation of the solicitor's bill, and where the solicitor disclaims any right to costs, an account of the moneys in his hands cannot be taken under a *præcipe* order, but a special application is necessary: *Re Landor*, 1899 1 Ch. 818; 80 L. T. 643.

In an action by a firm of solicitors for the recovery of costs, it was held that the client was not entitled to set off against the costs, an amount paid by him to one of the firm, in respect of certain special services rendered by him, and not charged for in the costs sued for: *McDougall* v. *Cameron*, 21 S. C. R. 379.

In taking the account under this clause the Taxing Officer may inquire into an alleged agreement in the nature of a compromise, as to prior bills of costs not referred to taxation, the amount of which the solicitor claims to deduct from the moneys of his client in his hands: *Re O'Donohoe*, 14 P. R. 317; 19 S. C. R. 356.

Where, with the knowledge of his client, a solicitor has bargained for, and received a commission from the vendor in a transaction in which his client is vendee, his client cannot claim such commission: *Re Hoslam*, 1902. 1 Ch. 765; 86 L. T. 663.

A solicitor must account and pay over, if required, moneys retained by him out of the proceeds of litigation in pursuance of a champertous agreement between himself and his client: *Re Solicitor*, 14 O. L. R. 464.

The Taxing Officer has no authority to charge the solicitor with interest upon money in his hands belonging to his client: *Re O'Donohoe*, 12 P. R. 612; 28 C. L. J. 19, in Supreme Court.

Only those payments are allowed which are made by the solicitor in his professional capacity: *Re Remnant*, 11 Beav. 603, and not payments in proceedings where he was not professionally concerned: *Hemming* v. *Wilton*, 4 Car. & P. 318; *Re Lees*, 5 Beav. 410.

Client's application on præcipe.

Client's Application.—A client applying on *præcipe* for an order for the delivery and taxation of a solicitor's bill, or for the taxation of a bill delivered, is required to submit to pay what may be found due to the solicitor: see Forms of order, Nos. 64, 66; H. & L. Forms, Nos. 1698, 1701. An order, therefore, should not be issued on *præcipe* by the client unless he admits the retainer.

Wherever a client obtains an order to tax a solicitor's bill, unless the right to dispute the retainer is reserved, it is taken to be admitted: *In re Frape*, 1894, 2 Ch. 90; *Re Herbert*, 34 Ch. D. 501, but where the solicitor obtains the common order for taxation *ex parte*, the client is entitled to dispute the retainer as to the whole bill: *In re Macdonald*, 16 P. R. 498.

A country principal may, under section 35, obtain an order to tax the bill of his Toronto agents: *In re Wilde*, 1910, 1 Ch. 100; 101 L. T. 734.

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On the client's application it was held that the right to dispute the retainer cannot be reserved except by consent: *Re Totten*, 27 U. C. Q. B. 449.

An unqualified person acting as a solicitor, and receiving papers and money as such, is subject to the summary jurisdiction of the Court: *Re Hulme & Lewis*, *supra*, p. 1407, but *semble*, an order should not be taken against such a person on *præcipe*, or *ex parte*.

Notwithstanding that the retainer of a solicitor by two persons is in form a joint one, the Court will look into the facts of the case to discover the real nature of the transaction: *Re Comeron & Lee*, 18 P. R. 176.

An order obtained on præcipe where a special application should have been made, may be set aside or varied: *In re Webster*, 1891, 2 Ch. 102; *In re McCarthy*, 15 P. R. 261; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 181.

Where the order is obtained on *præcipe* in ignorance of the fact of the existence of circumstances which, if known to the client, would have made a special application proper, the order may nevertheless be upheld: *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, 3 Chy. Ch. 204; and, if set aside, the applicant may not be ordered to pay costs, if he acted in good faith: see *Re Armstrong*, 1896, 1 Ch. 536.

The time for making the application runs from the date of the delivery of the last of a series of bills relating to the same business: *Re Romer*, 1893, 2 Q. B. 286; 69 L. T. 547; *Re Butterfield*, 14 P. R. 149.

Where no bill has been delivered no time is limited within which the client is to apply under section 35. The order for delivery and taxation, where no bill has been delivered, may, therefore, be obtained by the client on *præcipe* at any time.

A *præcipe* order for taxation is made at the client's instance, on his submission to pay what may be found due. Where the client obtains an order to tax a bill, some of the items of which are barred by the Statute of Limitations, he is deemed to waive the Statute: *Re Margetts*, 1898, 2 Ch. 263.

Where an order of course lapses, or becomes ineffective, it is irregular to issue a second order on *præcipe*: *Re Webster*, 1891, 2 Ch. 102; 64 L. T. 250; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 161.

A *præcipe* order is issuable by "the proper officer in the County where the solicitor resides"; in Toronto it must be obtained at the Central Office, in outer counties from the Local Registrar, if any, or from the Deputy Clerk of the Crown, or Deputy Registrar.

Where special application necessary.

Special Application by Client, when Necessary.—Wherever the retainer is disputed a special application is necessary, on notice to the solicitor: *Re Thurgood*, 19 Beav. 541; and on such an application the order for taxation will be modified so as to enable the question of retainer to be tried, either in an action to be brought upon the bill, or in some other way to be determined by the Judge, or judicial officer, granting the order.

A special application is, also necessary wherever there are any special circumstances in the case, or some special order is required:

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Re Atkinson, 1 Chy. Ch. 187; *e.g.*, where there is some special agre-
ment as to costs: *Re Thurgood*, 19 Beav. 541; *Re C. & L.*, 15 C. L. J
139, or as to the solicitor's lien: *Re Moss*, 17 Beav. 59, or taxation o
only part of the bill is desired: *Re Byrch*, 8 Beav. 124; *Re Yetts*, 3
Beav. 412; *Re Johnson & Weathcrall*, 37 Ch. D. 133; or only some o
several parties jointly liable, are applying: *Re Ilderton*, 33 Beav. 20
see *Re Lewin*, 16 Beav. 608; *Re Becher*, etc., 2 Chy. Ch. 216; or af
an action has been brought by solicitor or client, or after an ord
obtained by the client as of course has become effete: *Re Webst*
1891, 2 Ch. 102; *Re Taylor*, 1894, 1 Ch. 503; 70 L. T. 161; w re th
client claims an account of moneys in the solicitor's hands, and th
solicitor renounces all claim to costs: *Re Landor*, 1899, 1 Ch 9
80 L. T. 643.

Where a bill has been delivered more than a month, the client ca
not obtain a *præcipe* order, but must apply in Chambers: *Re Boulto*
2 Chy. Ch. 58; and so also where the costs in question have been pa
to the solicitor by a third party: *Re Solicitors*, 35 Sol. Jour. 127, or
the client himself: see *supra*, p. 1421.

One of several clients who have given separate retainers to t
some solicitor in respect of the same action or matter may app
specially for a taxation of his bill, but, where practicable, the othe
should be notified so that they may be bound by the taxation: *In
Salaman*, 1894, 2 Ch. 201; and see *Re Macdonald*, 16 P. R. 495;
Cameron & Lee, 18 P. R. 176.

Where a solicitor has funds or papers of a client in his possess
and claims a lien, an order for taxation will be made, though t
services for which the solicitor claims have been wholly in Cou
Court proceedings: *Re Prince*, 3 Chy. Ch. 282; and see *Re M.
Cameron*, 1 Chy. Ch. 356.

Where a solicitor is employed to perform services not necessar
within the scope of his duty as a solicitor, *e.g.*, the procuring a pens
from a foreign government, he may make a bargain for the amount
he allowed him for such services, and the client can neither claim
bill nor have a taxation in respect of such services: *Ostrom* v. *B
jamin*, 20 Ont. App. 336; but see *O'Connor* v. *Gemmill*, 29 Ont. 47;
Ont. App. 27; *Re McBrady & O'Connor*, 19 P. R. 37.

A client who is merely a nominal plaintiff, his name being used
convenience, and who is not responsible to the solicitor, is not
titled to an order for taxation: *Re Attorneys*, 6 P. R. 319.

The Court has jurisdiction to order the delivery of a bill, whet
there has been payment or not, and whether the Court has jurisdict
to order the taxation of the bill or not: *Re Baylis*, 1896, 2 Ch. 1
44 W. R. 404; 74 L. T. 337; *The Solicitors' Act* (R. S. O. c. 159), s.
p. 1434, *infra*. In such a case a special application would appear t
necessary.

On præcipe.

Solicitor's Application for Taxation.—A solicitor cannot a
for an order for taxation until a month has elapsed from the deli
of his bill, as provided by *The Solicitors' Act* (R. S. O. c. 159), ss. 34
see *supra*, pp. 1418, 1419; and not then if an order has been previo
made on the application of the client: see s. 35 (c), *supra*, p. 1419.

The month is a calendar month: see *The Interpretation Act* (R
O. c. 1) s. 29 *u*, and is to be computed exclusively of the day on wh

the bill is delivered, and the day on which the order was applied for: see *Re Morphy & Kerr*, 2 Chy. Ch. 56. Rule 763.

The order should only be obtained on *præcipe* in simple cases. Wherever there are special circumstances, or a special order is required, a special application, on notice to the client, should be made: *Re Atkinson*, 1 Chy. Ch. 187.

The common order only can be obtained on *præcipe*: *Ib.*

Where for any reason an order of course lapses, or becomes ineffective, a second order of course is irregular: *Re Webster*, 1891, 2 Ch. 102; 64 L. T. 250; *Re Taylor*, 70 L. T. 161; 1894, 1 Ch. 503.

Where an order is obtained on *præcipe*, or on motion *ex parte*, where notice should have been given, it may be set aside on application of the client with costs; but if the order was obtained *bonâ fide* in ignorance of the existence of the circumstances making it proper to apply specially, the order may be upheld: *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, 3 Chy. Ch. 204; or if set aside the solicitor may not be ordered to pay costs.

Where a solicitor obtained *ex parte* an order against his client, pending an application to have the client declared a lunatic, the order was set aside on the declaration of lunacy being subsequently made, but without costs, as the solicitor appeared to have acted in the *bonâ fide* belief that the client was sane: *Re Armstrong*, 1896, 1 Ch. 536.

Special Application by Solicitor, when Necessary.—The order should be issued on *præcipe* only in simple cases, wherever special circumstances exist a special application for the order should be made in Chambers, *e.g.*, where there is a special agreement as to retainer: *Re Thurgood*, 19 Beav. 541; or as to the costs: *Ib.*; or as to the solicitor's lien: *Re Moss*, 17 Beav. 59; or where there are any special circumstances whatever affecting the costs, or the liability of the alleged client: *Re Fitch*, 2 Chy. Ch. 288; *Re C. & L.*, 15 C. L. J. 139; or where the solicitor knows that his retainer is disputed. Where taxation to be had.

If no special order is required notice must be given: *Re Atkinson*, 1 Chy. Ch. 187; *Rule* 213.

Where there are some alleged clients who dispute, and others who admit the retainer, the solicitor may, on special application, obtain the usual order as to the unresisting clients, and the taxation should be ordered on notice to the others who dispute the retainer, with liberty to them to attend the taxation, which should be conclusive as to them only as to the *quantum* in the event of their being ultimately found liable: *In re Macdonald*, 16 P. R. 498.

The order to tax, if made on a special application, may reserve questions of retainer, and negligence, or other matters of defence, in a proper case: *Re Millar, Millar* v. *Cline*, 12 P. R. 155; or refer them to the Taxing Officer: *Re Bacon*, 3 Chy. Ch. 79; *Re Toms*, *Ib.*, 204; *Re Lewis*, 9 U. C. L. J. 81; *Re Green*, 7 P. R. 89.

Effect of Præcipe Order for Taxation.—The form of order when obtained by a client: (see Form Nos. 64, 66; H. & L. Forms, Nos. 1698, 1701), contains a submission on the part of the applicant to pay what is found due, this is inserted for the purpose of giving the Court jurisdiction to order payment by the applicant, instead of leaving the solicitor to bring an action: see *In re Battams*, 1897, 1 Ch. 699; 76 Common order, effect of

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L. T. 385, and under such an order the client cannot dispute the r tainer: *Re Herbert*, 34 Ch. D. 504; and he is bound to accept th Taxing Officer's decision as to the *quantum* of costs payable, subje to the right of appeal, and cannot thereafter claim to have the amou assessed in an action: *Re Johnston*, 3 O. L. R. 1.

The solicitor is entitled to an unconditional submission without a exception of charges or items barred by the Statute of Limitation *Re Hughes*, W. N. 1899, 125.

Where the client, while asking for a taxation, at the same ti wishes to dispute the retainer, he should move in Chambers for t order on notice to the solicitor, and the order should either omit t submission to pay, or it should be qualified and made subject to t question of retainer being found against him, and the right to d pute the retainer should be reserved to the applicant by the orde but this can only be done by consent: see *Re Totten*, 27 U. C. Q. 449.

So also the common order where obtained by the client will deemed to be a waiver of the defence of the Statute of Limitatio as to any statute-barred items in the bill: *Re Margetts*, 1896, 2 C 263; *Re Brockman*, *supra*, p. 1420.

Where the common order is obtained by the client, the solicit would appear to have the right to dispute the alleged retainer: *Re Toms*, 3 Chy. Ch. 204; and it is held in England that under common order obtained by the solicitor, the client may object every item on the ground of want of retainer: *Re Jones*, 33 Ch. 105; *Re Herbert*, 34 Ch. D. 504; but under an order obtained on pract by the client himself, he cannot object to the whole bill on that groun *Ib.*, and see *The Solicitors' Act* (R. S. O. c. 159), s. 35, *supra*, p. 1421

Where there is no retainer in writing, and it is disputed, weig is given to the denial of the client: *Re Eccles & Carroll*, 1 Chy. C 263; *Bird* v. *Harris*, 43 L. T. 434; W. N. 1881, 5.

A contract to pay a retaining fee will not be enforced: *Ford* *Mason*, 16 P. R. 25; *Re Solicitor*, 21 O. L. R. 255; 22 O. L. R. 30.

The common order for taxation is now under *The Solicitors A* (R. S. O. c. 159), s. 38 (1) (f) *supra*, p. 1423, to be read as if it contain an order for payment of the amount to be found due upon the ref ence: whether the order be made on the application of solicitor, cli or third party liable to pay, it is not necessary to bring an action: *Peace and Waller*, 24 Ch. D. 405; 49 L. T. 637. Formerly when order had been obtained by the solicitor, he was not entitled to s summary order for payment: *Re Washington*, 12 P. R. 386.

Under the common order the Taxing Officer has power to inv tigate and dispose of questions of carelessness, impropriety, and ne gence, in the conduct of the business to which the bill relates, so as they affect the solicitor's right to recover the costs in questi and the officer's certificate, unless appealed against in proper time conclusive as to all matters within his jurisdiction: *Re Millar*, Mi v. *Cline*, 12 P. R. 155; *Re Kerr*, 29 Gr. 188; *Thompson* v. *Milliken*, Gr. 197; *Re Massey*, 26 Ch. D. 459; 51 L. T. 390; and *The Solicitors'* (R. S. O. c. 159), s. 45; but the Taxing Officer cannot, under the c mon order, inquire as to the damages sustained by the client by alleged negligence of the solicitor: *Thompson* v. *Milliken*, 15 Gr. 19

Where the solicitor renounces all claim to costs, an account of moneys in his hands cannot be taken under the *præcipe* order: Re Lindor, 1899, 1 Ch. 818; 80 L. T. 643. Rule 763.

The form of the common order when obtained by the client or person chargeable, or the solicitor, is regulated by *The Solicitors Act* (R. S. O. c. 159), s. 38, *supra*, p. 1422.

Special Order.—Where the order is made on the special application of the solicitor, or client, it may contain any special provisions which the peculiar circumstances of the case may require; it may reserve the question of retainer, or any other defence, to be disposed of either in an action to be brought on the bill, or it may refer any such defences to the Taxing Officer: see *supra*, note p. 1427. Special order.

Place of Reference:—

A solicitors bill is to be taxed, unless otherwise ordered, by the proper Taxing Officer for the County in which the solicitor resides: *The Solicitors' Act* (R. S. O. c. 159), s. 38 (3), *supra*, p. 1423. Where taxation to be had.

Formerly the place of reference was depending on where the business or some part of it was done: R. S. O. 1887, c. 147, s. 32; but, under that Act, where the principal part of the work had been done in the country, and there had also been agency work done in Toronto, although the Court had in such a case a discretion to refer the bill to Toronto, yet on a special application, it was held that the discretion should not be exercised in favour of Toronto except under special circumstances: *Re Skinner*, 13 P. R. 276, 447.

It would seem that the opposite party may apply to change the place of reference where the order has been issued on *præcipe*: *Re Solicitor*, 7 P. R. 263.

Where the Deputy Registrar to whom a bill was referred fell ill, and was unable to proceed with it, the reference was changed to the Deputy Clerk of the Crown: *Re Solicitor*, 10 O. L. R. 393.

Scope of Reference.—Besides taxing the costs, the Taxing Officer is also required to take an account between the parties: see *The Solicitors' Act*, s. 38 (1) *a*, *supra*, p. 1422. Reference.

As to the power to inquire into negligence, etc.: see *supra*, p. 1428.

The Taxation.—*The Solicitors' Act*, s. 37, provides:—

37. In case either party to a reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made may tax the bill *ex parte*. 2 Geo. V. c. 28, s. 37. If either party does not attend, officer may tax bill ex parte.

It was formerly held that the taxation must be made according to the tariff in force when the services were rendered, even though it had been subsequently repealed: *Delap* v. *Charlebois*, 18 P. R. 417; *Earle* v. *Burland*, 8 O. L. R. 174; 9 O. L. R. 663; but it has been held that the Tariff prescribed by these *Rules* is retrospective in its operation and applies to all costs not taxed when it came into force: *Re Solicitors*, 6 O. W. N. 625.

Costs incurred by special instructions of the clients (a municipality) were held to be recoverable, although not recoverable by the municipality against tax payers: *Re Porter*, 1912, 2 Ch. 98; 107 L. T. 40.

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A taxing officer may require the assistance of the officer of any other Court

The Solicitors' Act (R. S. O. c. 159), s. 43, further provides:—

43. Where a bill is referred for taxation, the officer to whom reference is made may request the proper officer of any other Court assist him in taxing any part of such bill, and the officer, so request shall thereupon tax the same, and shall have the same powers, and receive the same fees in respect thereof, as upon a reference to him the Court of which he is an officer, and he shall return the bill, his opinion thereon, to the officer who so requests him to tax same: 2 Geo. V., c. 28, s. 43.

Conveyancing Charges.—*The Solicitors Act* (R. S. O. c. 1 s. 44, provides:—

Skill, etc., and not length to be considered in taxation of certain deeds.

44. In the absence of any general rule, and so far any such gene rules do not apply, the Taxing Officer in taxing a bill for preparing executing any instrument, shall consider not the length but the s and labour employed and responsibility incurred in the preparat thereof: 2 Geo. V., c. 28, s. 44.

Charges for Services not Covered by Tariff.—See *supra*, p. 1

Retaining Fee.—A contract to pay a retaining fee will not enforced: *Ford* v. *Mason*, 16 P. R. 25. A retaining fee is in the nat of a gift: *Re Solicitor*, 21 O. L. R. 255, 22 O. L. R. 30; and it cann without the consent of the client, be deducted by the solicitor fr the moneys of the client coming to the hands of the solicitor: *Ib.*, a agreement between solicitor and client for payment of more th taxable costs is void: *Re Solicitor*, 11 O. L. R. 464; *Re Solicitor*, 21 O. R. 255; 22 O. L. R. 30.

A retaining fee actually paid by a client was held to be taxa between solicitor and client: *Re Fraser*, 13 P. R. 409; *Ford* v. Mas 16 P. R. 25; but a retaining fee agreed to be paid, but not actua paid, cannot be taxed "as between solicitor and client"; *McKe Hamlin*, 16 P. R. 207; nor against the client *Ford* v. *Mason*, supr nor can any other bargain to pay more than taxable costs be enforc against the client: *Re Geddes*, 2 Chy. Ch. 44. "The client may p more if he likes, and the payment may not, under the circumstanc be liable to be recalled; but if he only promise to pay the promise is *nudum pactum*," *per* Mowat, V.C.; *Ib.*, p. 450.

Scale.

Scale of Costs.—Where the costs being taxed were incurred fr action, the scale on which they are to be taxed between solicitor a client will usually be that on which the costs in the action are taxa between party and party: *Scanlan* v. *M'Donough*, 10 C. P. 104; *Re licitors*, 33 C. L. J. 466; but where the solicitor had reasonable grou for bringing the action in a higher Court than that in which it mig have been brought, the costs as against his client may be allowed the scale of the Court in which the action was brought, though t costs between party and party are taxable on the scale of an infer Court: *Re Jackson*, 18 P. R. 326.

Where the proceedings for which the services are charged were n taken in any Court, the Taxing Officer may allow a lump sum the for, having regard to the nature and importance of the business do and the amount involved: *Re Johnston*, 3 O. L. R. 1; and see *Shilson*, 90 L. T. 641; *Re Solicitor*, 37 C. L. J. 323.

Formerly the tariff in force at the time the business was done go erned, although it may have been subsequently repealed: *Delap*

Charlebois, 18 P. R. 417; *Earle* v. *Burland*, 8 O. L. R. 174; but the tariff prescribed by these *Rules* has been held to be retrospective: *Re Solicitors*, 6 O. W. N. 625. Rule 783.

Where the services rendered are not provided for by the Tariff, they must be allowed for according to their value which is a question of fact, to be determined, in case of dispute, by the Taxing Officer whose decision is reviewable by the Court: *Re Solicitors*, 27 O. L. R. 147.

Where the charges in the bill exceed the charges made in the solicitor's docket, the latter is *primâ facie* evidence of what the charges should be, but the variance is open to explanation: *Ib.*

Appeal from Taxing Officer's Report.—The Taxing Officer's certificate is appealable as provided by *Rule* 508: *Re Crothers*, 15 P. R. 92; *Ford* v. *Mason*, 16 P. R. 25; and *Re Robinson*, 17 P. R. 137. Appeal.

Costs of Taxation.—The costs of the taxation under the common order are in the discretion of the Taxing Officer: *The Solicitors Act* (R. S. O. c. 159), s. 38 (*b*), *supra*, p. 1422. As to special circumstances entitling the solicitor to costs, see *Re Mackenzie*, 69 L. T. 751. Costs of taxation.

Security for Costs.—The fact of a client applying for taxation living out of the jurisdiction is not sufficient ground for an order for security for costs, without special circumstances being shown: *Re A. B.*, 6 P. R. 210. But see *Re Cornwall*, in note to *Rule* 373, *supra*, p. 888. Security for costs.

Applications for Delivery and Taxation of Bills of Costs by Third Parties.—Third parties liable to pay or to be charged, with costs are in certain cases entitled to have them taxed. Application by third parties.

By *The Solicitors' Act*, section 40, it is provided:

40 (1).—Where any person not being chargeable as the principal party is liable to pay or has paid any bill either to the Solicitor, his assignee or personal representative, or to the principal party entitled thereto, the person so liable to pay or paying, his assignee or personal representative, may apply to the Court or a Judge for an order referring to taxation as the party chargeable therewith might himself have done, and the same proceeding shall be had thereupon as if the application had been made by the party so chargeable. Taxation where a party, not being the principal, pays a bill of costs.

(2) If such application is made where, under the provisions hereinbefore contained, a reference is not authorized to be made except under special circumstances, the Court or Judge to whom the application is made may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the bill, if he was the party making the application. What special circumstances may be considered in such case.

(3) For the purpose of such reference the Court or Judge may order the Solicitor, his assignee or representative, to deliver to the party making the application a copy of the bill upon payment of the costs of the copy. Court or Judge may order the delivery of a copy of the bill.

(4) When a person, other than the client, applies for taxation of a bill delivered or for the delivery of a copy thereof for the purpose of taxation, and it appears that by reason of the conduct of the client the applicant is precluded from taxing the same, but is nevertheless entitled Taxation at instance of third person

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to an account from the client, it shall not be necessary for the applic to bring an action for an account, but the Court or a Judge may i summary manner refer u bill already delivered, or order delivery o copy of the bill and refer the same for taxation as between the ap cant and the client, and may add such parties not already notified may be necessary.

Application of s. 38.

(5) The provisions of section 38, so far as they are applicable, sh apply to such taxation: 2 Geo. V., c. 28, s. 40.

This section is based to some extent on C. R. 1188

A taxation obtained and made under this section would not app to be binding an the client unless he was also a party to the proce ing. Where a third party applies alone, it would seem that he can obtain an order on *praecipe* under Section 35, because by sub-sect. is evidently contemplated that the solicitor shall be notified of the ap cation, and have an opportunity of showing that by reason of the duct of his client, the applicant is precluded from taxing the which he could not do if the order were issuable on *praecipe*; and provision for payment for the copy of the bill as mentioned in sub- 3, *supra*, is not provided for by a *praecipe* order. It therefore se reasonably plain that wherever a third party desires the delivery taxation, of a solicitor's bill a special application is necessary. S an application may be made in Chambers an notice to the solic If it should turn out that by reason of the conduct of the client, latter is not entitled to a taxation of the bill in question, then in or to entitle the applicant to an account, and taxation, as between him and the client, it will be necessary that the client should also be n fied.

Where an order is made on the application of a third party he be deemed to submit to pay the bill as taxed: see sub-sec. 5 *supra*, *The Solicitors' Act*, s. 38; *supra*, p. 1422; *sed vide*; *Re Gray*, 1901, 1 239; 84 L. T. 24; but *semble* payment by the client, unless he was an applicant, could not be enforced under such an order.

A party chargeable who can tax, includes the next friend of infant: *Re Flower*, 19 W. R. 578.

The mere fact that the agreement by which the third party agreed to pay the costs in question will have to be construed is bar to the application: *Re Hirst*, 1908, 1 K. B. 982; S. C. *sub nom. H* v. *Fox*, 1908, A. C. 416; and payment of the bill by the client was to be no bar to an application by a third party: *Ib.*

A mere volunteer, under no previous liability to pay the bill, no right to obtain a taxation under section 40, *supra*: *Re Becke*, 5 B 406; nor a merely nominal plaintiff who is not liable to the solic for the costs: *Re Attorneys*, 6 P. R. 319.

Any one of several *cestuis que trustent* may, in the discretion the Court, obtain an order under section 40 for taxation of of costs of a solicitor employed by executors or trustees in connec with the business of the trust estate: *Sandford* v. *Porter*, 16 App. 565; *Re Skinner*, 13 P. R. 276; but where the trustee has the costs, the application by a *cestui que trust* for taxation mus made within twelve calendar months thereafter: *Re Wellborne*, 1 Ch. 312; 83 L. T. 611. The costs must be taxed as between trustee and his solicitor, irrespective of any question as to their mate incidence amongst the beneficiaries: *Re Miles*, 1903, 2 Ch. 5

Where the client makes an assignment for the benefit of creditors the assignee is not bound by the client's agreement to a bill of his solicitor previously delivered, and is entitled to have it taxed: *In re Lown*, 1907, 2 K. B. 23. Rule 783.

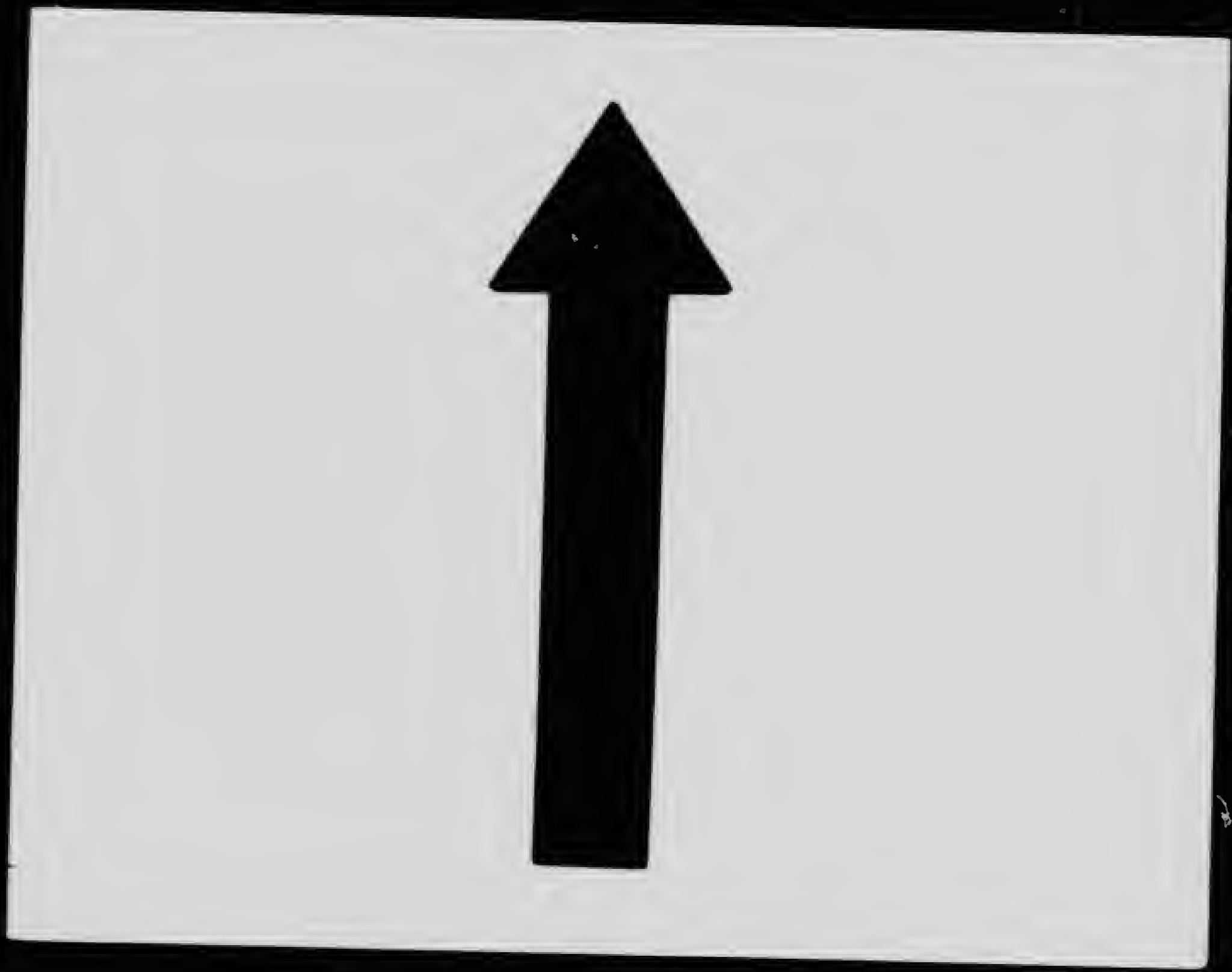
The bill of a mortgagee's solicitor in regard to the mortgaged estate may be taxed on the application of the mortgagor: *Re Lees*, 5 Beav. 30; *Ex parte Glass, Re Macdonald*, 3 P. R. 138; see also *Re Massey*, 34 Beav. 463; or of a subsequent incumbrancer: *Re Taylor*, 18 Beav. 165; *Re Jessop*, 32 Beav. 406. So on a sale by mortgagees under a power of sale, the mortgagor, or a subsequent incumbrancer, is entitled to taxation of the solicitor's bill: *Re Crerar & Muir*, 8 P. R. 56; and under *The Mortgages Act* (R. S. O. c. 112), s. 30, the taxation may be had without an order, and that clause is retrospective: *Ferguson* v. *E. & S. Invest. Co.*, 8 P. R. 404. So also an assignee for creditors is entitled to tax the costs incurred by a prior assignee of the same estate: *Re A. & B.*, 6 P. R. 68; and one of the parties to an arbitration has been held entitled to a taxation of the costs of the solicitor of the umpire for drawing the award: *Crossley* v. *Lowestoft W. W. Co.*, 85 L. T. 208; *C., sub nom. Re Collyer*, 1901, 2 K. B. 839; but a ratepayer of a school section has been held not entitled to a taxation of the costs incurred by the trustees of the section: *McGugon* v. *McGugon*, 19 Ont. App. 56; 21 S. C. R. 267; nor can a shareholder tax costs incurred by the company: *Re Stephen*, 17 L. J. Ch. 219, *Ib.* 372.

A creditor of an estate has no right under sec. 40, as between himself and the personal representative, to a taxation of the costs incurred by the latter in collateral proceedings affecting the estate, but he is entitled to have the bill "moderated": *Re Hogue, Traders' Bank* v. *Murray*, 12 P. R. 119; and see *Beatty* v. *Holden*, 4 Ont. App. 89; *Re Jackson*, 40 Ch. D. 495; 60 L. T. 589; but see *Re Jones & Everett*, 1904, 2 Ch. 363; where it was held that a creditor who had obtained judgment for administration is a "party interested," and is therefore entitled to delivery and taxation of a bill of costs paid by the deceased person's executor.

After payment by a mortgagee of his solicitor's bill, the mortgagor's only remedy is for an account: *Re Macdonald, Macdonald & Morsh*, 8 P. R. 88; *Re Cronyn, etc., Ib.* 372; *Re Massey*, 34 Beav. 463; *Re Forsyth*, 34 Beav. 140; 13 W. R. 932; but see *The Solicitors Act*, section 42, *infra*, p. 1434; and see *Re Hirst, supra*, p. 1432. An account may be had in a summary way under section 40, *supra*.

Where on the application of a mortgagor the mortgagee's solicitor was ordered under sec. 40 to deliver to a third party a copy of the bill of costs of a sale, it was held that, though the delivery was, under this section, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy had not necessarily the right to tax the bill: *Re Moffatt*, 12 P. R. 240.

And where the parties to an action compromise on the terms that one of them is to pay the other's costs, the party to pay may, under section 40, *supra*, p. 1431, obtain an order to tax the costs, but the application should be made, "In the matter of (*the solicitor*)": see sec. 45, *supra*, p. 1419; and should be made on notice to him; and where such an order was obtained *ex parte* by a third party in the name of the client, and omitted to direct the account between the solicitor and his client, as provided by sec. 38 (1) (*a*), *supra*, p. 1422, it was set aside with costs: *Re McCarthy*, 15 P. R. 261; *Re Hurlbert*, 71 L. T. 748;



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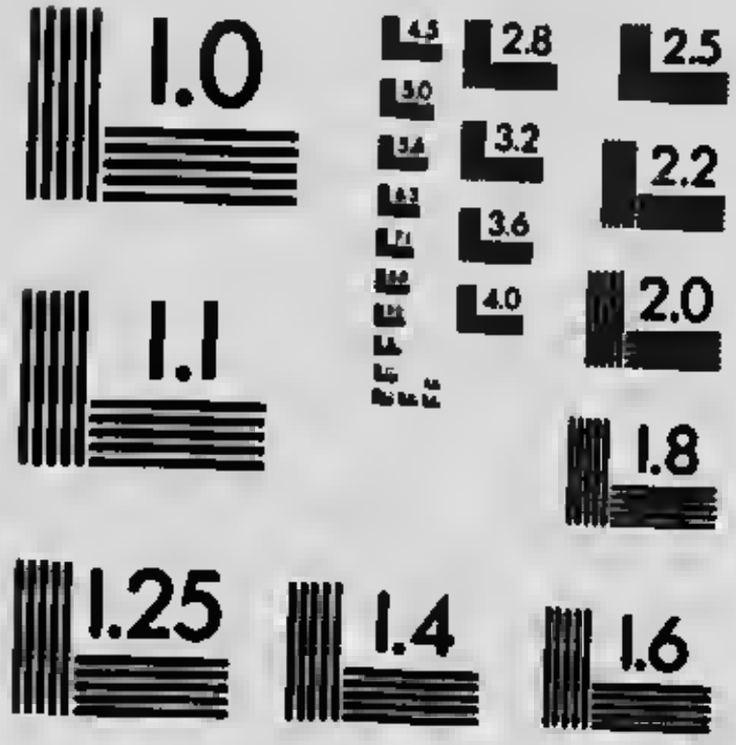

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sed vide, Re Taylor, 1894, 1 Ch. 503, 671; 70 L. T. 161; *Re Green* 10 U. C. L. J. 131.

The parties who institute, or intervene upon, the taxation, be personally liable to pay the costs of taxation, if the same be payable to the solicitor: *Re Rogers & Farewell*, 14 P. R. 38.

A third party by obtaining an order for taxation does not, acco to the English practice, thereby admit his liability to pay the soli the costs charged: *Re Gray*, 1901, 1 Ch. 239; 84 L. T. 24; but in On it would appear that he does: see s. 40 (5), *supra*, p. 1432, a 38 (1) (*d*), *supra*, p. 1422.

Where a taxation is obtained by a third party, items outside scope of the third party's liability must, as against him, be disallo but when the items for which the third party is liable are a tained, the taxation of those items must be as between the soli and the party chargeable in the first instance, and not as between solicitor and the third party: *Re Cohen & Cohen*, 1905, 1 Ch. 91 L. T. 836, affirmed C. A., 1905, 2 Ch. 137; 92 L. T. 782; *Re L bothom*, 1904, 2 Ch. 152; 90 L. T. 538, 801; *Re Gray*, 1901, 1 Ch. and see *Re Miles*, 1903, 2 Ch. 518; *Re Wells*, 8 Beav. 416; *Re Jon* Beav. 479; *Re Fyson*, 9 Beav. 117; *Re Barrow*, 17 Beav. 547.

What special circumstances may be considered in such case.

Special Circumstances:—As to the effect of sec. 40 (2), *supra* 1431: see *Re Vordy*, 20 L. J. Ch. 325; *Re Malcolmson & Wade*, 9 P 242; *Re Norman*, 16 Q. B. D. 673; 54 L. T. 143; *Re Hirst*, 1908, 1 K 982; S. C. *sub. nom. Hirst* v. *Fox*, 1908, A. C. 416; and as to what "special circumstances," see *supra*, pp. 1420, 1421.

Re-Taxation of Bill: — *The Solicitors Act*, s. 41, provides follows:—

When a bill may be re-taxed.

41. No bill previously taxed shall be again referred unless, un the special circumstances of the case, the Court or Judge to wh the application is made thinks fit to direct a re-taxation thereof. Geo. 5, c. 28, s. 41.

A re-taxation will not be ordered unless improper charges specified and proved: *Eastman* v. *Eostman*, 2 Chy. Ch. 325; and *Cameron* v. *Campbell*, 1 P. R. 170. In *Clarke* v. *Manners*, 4 Gr. a taxation was opened after seven years, the previous taxation hav been had by the solicitor without notice to his client.

Payment of Bill, when it does not preclude Taxation:—*The Solicitors Act*, s. 42, provides as follows:—

Payment not to preclude taxation if applied for within a year.

42. The payment of any bill shall not preclude the Court or Jud to whom application is made from referring it for taxation up such terms and subject to such directions as to the Court or Jud may seem just, if the application is made within twelve months af payment, and if the special circumstances of the case, in the opini of the Court or Judge, appear to require the taxation: 2 Geo. 5, c. s. 12.

Payment of the costs by the party primarily liable, was former held to preclude a third party liable to pay from having a taxatio see *Re Macdonald, etc.*, p. 1433. *Sed quare*, if payment can in any ca intercept the right of taxation, if applied for within twelve calend months after payment, and there are special circumstances: see *Bracey*, 8 Beav. 338; *In re Wellborne*, 1901, 1 Ch. 312; 83 L. T. 61 *Re Hirst*, 1908, 1 K. B. 982; S. C. *sub. nom. Hirst* v. *Fox*, 1908, A. C. 41

Section 42 aeems to extend the time iimited by sec. 36 (1), *supra*. Rule 763.
1420, for making the application, wherever payment has been made.
d special circumstances can be shawn.

Whers payment was made under protest, a taxation was ordered: *Re Cheeseman*, 1891, 2 Ch. 289; 64 L. T. 602.

Deduction of costa by the soiicitor from moneya of the client in his hands is not payment within the meaning of section 42: *Re Stogdon*, 56 L. T. 355; *Re West*, 1892, 2 Q. B. 102; 67 L. T. 57; *Re Bayliss*, 1896, 2 Ch. 207; *Re Malcolmson & Wade*, 9 P. R. 242; unless it is mads with ths express consent of the client: *Re Thompson*, 1894, 1 Q. B. 462; and at, or after, the delivery of a signed biil: *Re Boyle*, *supra*.

Ths giving of security is, undsr section 42, equivalsnt to payment: *Re Boyle*, 5 D. M. & G. 540; *Sayer* v. *Wagstaff*, 5 Beav. 415; *Re Currie*, 9 Beav. 602; *Re Harper*, 10 Beav. 284; *Re Fairbanks*, 1 Chy. Ch. 222; but *primâ facie* it ia only a conditional payment: *Re Romer*, 1893, 2 Q. B. 300; 69 L. T. 547.

Payment before ths delivery of the bill is not a payment within section 42: see *Re Street*, L. R. 10 Eq. 165; *Re Baylis*, 1896, 2 Ch. 107; hut ses *Hitchcock* v. *Stretton*, 1892, 2 Ch. 343; 66 L. T. 707; even though ths client has sxamined ths soiicitor's docket: *Re Pinkerton*, 18 P. R. 331; hut payment was hsid to preciude taxation where a number of hiils wers delivered in detail, in connection with the management of an estate, a few only being not rendered in detail but only incluaed in atatementa of account which were not objected to, and paid: *Re Beaty et al.*, 19 P. R. 271.

An application under section 42 must be made on notice, as it is necessary for the applicant to estabiish the existence of special circumstances. As to what are "special circumstancea": see *The Solicitors' Act*, s. 36, *supra*, pp. 1420, 1421; *Re Munns*, 50 L. T. 356.

An agreement, for consideration, not to dispute the biil, is an answer to an application to tax after payment: *Re Eley*, 57 L. T. 253.

Special Agreements between Solicitor and Client as to costs:— Special agreements as to costs.
Special agreements may he made by soiicitors with their clients for remuiisration for non-contentious business, and conveyancing: see *The Solicitors Act* (R. S. C. c. 159), a. 49.

Such agreements must be in writing: *Ib.*, parol agreements of that nature ars void: *Re McBrady & O'Connor*, 19 P. R. 37.

Where the business is to he done in any Court except a Division Court, the agreement is subject to the approval of the taxing officer of the Court having power to enforce the agreement: see sec. 50. Who if he thinks the agreement is not fair may require the opinion of the Court to be taken: see sec. 51. The Court or Judge may reduce the amount ngreed on, or cancei the agreement nitogether, and order taxntion as if no agreement had besn made: see sec. 52.

Such an agreement is not to affect ths amount taxabie between party and party: aee sec. 53.

Whers an agreement has been made it preciudes the solicitor making claims for remuneration beyond ths amount agreed: see sec. 54. Agreements to reiieve solicitor from liability for negligence are void: see sec. 55.

Rule 763.

No action is to be brought on any auch agreement, but all dis arising thereout, and its enforcement, or rescission, are to be effecte summnry application to the Court, not being a Division Cour which the business was done, or if it was not done in any Court the the Supreme Court or a Judge thereof: see sec. 56. This section not seem to provide for the case where the business in question done in a Division Court. Notwithstanding a bill of exchange has given in settlement of the sum agreed on for contentious and non-tentious business; the client is, in an action on the bill, still entitle have an inquiry as to whether the agreement is fair and reasona *Ray* v. *Newton*, 1913, 1 K. B. 249; 108 L. T. 313.

If the agreement is found to be fair and reasonable it may enforced by an order for payment: see sec. 57, or, if not, it may cancelled, and the solicitor may be required to deliver a bill to taxed in the usual way: *Ib.* An application may be made for inqu within 12 months after payment, where special circumstances shown: see sec. 58. As to what are considered "special circumstances see *supra*, pp. 1420, 1421.

Where an agreement of the kind above mentioned is made by guardian, trustee under a deed or will, before any payment is ma thereunder it must be approved by the Senior Taxing Officer Toronto: see sec. 59. A guardian or trustee paying, or a solici receiving payment, before approval by Senior Taxing Officer, are lia to be ordered to refund: see sec. 60.

Solicitors may not purchase an interest in the subject of litigatio or make payment of costs dependent on success of litigation: s sec. 61.

A solicitor is entitled to demand and receive from his client securi for costs to be incurred: see sec. 62.

Death of Solicitor after Agreement.—See section 64.

Changing Solicitor after Agreement.—See Section 65.

Costs of solicitors as mortgagees or directors.

Solicitors as Mortgagees, or Directors.—A Solicitor who is mortgagee alone, or jointly with any other person, may recover fro the mortgagor costs of himself or firm for negotiating the loan, deduc ing and investigating the title to the property, and preparing and com pleting the mortgage, according to the usual scale, as if the mortgag had been made to a person not a solicitor: see sec. 68. He may als recover the usual costs for all business transacted and acts done b himself or his firm "subsequent and in relation to such mortgage o to the security thereby created or the property therein comprised": see sec. 69.

A solicitor who is a director of any company, or his firm, may recover costs for professional business transacted for such company in relation to, or in connection with, any matter in which the company acts as trustee, guardian, or personal representative, or agent: see sec. 70.

Rules 764-766.

CHAPTER XXXI.

COUNTY AND LOCAL COURTS.

All writs to be under the seal of the Courts, and tested, etc.

764. All writs in the County Courts shall he issued hy the Clerk and shall he under the seal of the Court, and shall he tested in the name of the Judge thereof; or in thc case of the death of such Judge, then in the name of the Junior or acting Judge for the time heing. C.R. 1212.

See *Rules* 5 (1), 6, and notes.

Judges of CC. may sit at any time.

765. The Judges of the County Courts shall have power to sit and act at any time for the transaction of any part of the husiness of such Courts, or for the discharge of any duty including the trial of non-jury actions. C.R. 1214.

Costs where action fails for want of jurisdiction.

766. Where the plaintiff fails to recover judgment in an action or other proceeding hrought in a County or Division Court hy reason of such Court having no jurisdiction over the suhject-matter thereof, the Cour' Court or the Jrdge presiding in the Division Court, a ıe case may hc, shall have jurisdiction over the costs of such action, or proceeding, and may order hy and to whom the same shall he paid. C.R. 1215.

But for this *Rule*, the Court, having no jurisdiction over the subject matter of the litigation, would have no power to grant costs to either party: *Brown* v. *Shaw*, 1 Ex. D. 425; see also *Abbott* v. *Feary*, 29 L. J. Ex. 476; *Peacock* v. *Reg.*, 4 C. B. N. S. 268; *Powley* v. *Whitehead*, 16 U. C. Q. B. 589; *Dempster* v. *Parnell*, 3 M. & Gr. 375.

But where a case wa- stated hy Justices nnder a statute, but, in consequence of the app not having compiled with the conditions reqnired hy the Act, t as no jurisdiction to hear the case, and the respondent moved t. strike the case out of the paper, the application was granted with costs: *Great Northern, etc., Committee* v. *Inett*, 2 Q. B. D. 284; *Crowther* v. *Boult*, 33 W. R. 150; not following *Peacock* v. *Reg.*, *supra;* see also *Royal Canadian Bank* v. *Stevenson*, 22 U. C. C. P. 562; *Cote* v. *Halliday*, 33 C. L. J. 159; *Re Isaacs*, 4 My. & Cr. 11; *Watson* v. *Petts* (No. 2), 1899, 1 Q. B. 430.

This *Rule* was heid not to apply to proceedings under the former Ontario Winding-up Act (R. S. O. 1897, c. 222); *Re Cosmopolitan Life Ass.*, 15 P. R. 185. See now *The Companies Act* (R. S. O. c. 178), s. 187.

See also *Sherk* v. *Evans*, 22 Ont. App. 242; *Re Erb*, 16 O. L. R. 594.

Rules 767, 768.

Change of place of trial in County Court.

767. In all actions brought in a County Court the Ju of the County Court where the proceedings were c menced, or the Master in Chambers, (subject to ap in either case as if the case were in the High Court) change the place of trial, and in the event of an order ing obtained for that purpose, the Clerk of the Cou Court in which the action was commenced shall forthw transmit all papers in the action to the Clerk of County Court to which the place of trial is changed, all subsequent proceedings shall be entitled in such l mentioned Court, and carried on in such last-meatio County as if the proceedings had originally been co menced in such last-mentioned Court. C.R. 1210.

This *Rule* which purports to be based on "C. R. 1210," is rea based on C. R. 1219. The expression "High Court" is an obvious er and should be "Supreme Court."

The wording of the *Rule* would seem to indicate that the effect an order to change the place of trial is to transfer the action to County Court of the County where the trial is to take place, and "all subsequent proceedings" are to be entitled in that Court would seem the judgment should be entered there.

The papers in a motion under this *Rule* should be entitled in t County Court, and not in the Supreme Court: *Ferguson* v. *Goldin* 15 P. R. 43.

The costs of an application to the Master in Chambers under th *Rule* are taxable on the County Court scale, but the costs of a appeal to a Judge, or from the Judge, are taxable on the Supreme Cou scale: *Re Hicks* v. *Mills*, 18 P. R. 12?

Rule 245 applies to the County Courts: see note to th *Rule*.

Procedure in County Courts.

768.—(1) These Rules, and the practice and procedur in actions in the Supreme Court shall, so far as the same can be applied, apply and extend to actions in the County Court. C.R. 1216.

(2) The Clerk of a County Court shall, subject to the direction of the Judge of that Court in actions in the County Court discharge all the duties and have all the power of the Master, Registrar, Judgment Clerk, Clerk of the Weekly Court and Clerk in Chambers in Supreme Court actions. *New.*

This *Rule* is intended to refer to the whole body of *Rules* so far as applicable, and not merely to those mentioned in this chapter.

See *Leach* v. *Bruce*, 9 O. L. R. 380, and other cases in note to *Rule* 245, *supra*, p. 701.

Rules 769, 770.

Payment of money into Court.

769.—(1) Money to be paid into the County Court or Surrogate Courts, shall be paid into some incorporated bank designated for that purpose, from time to time, by order of the Lieutenant-Governor ia Council; or where there is no such bank, tben into some incorporated bank in which puhlic money of tbe Province is then heing deposited, and which has heen appointed for that purpose by any General Rule in that behalf; or if no hank has heen appointed, into any hank in whicb puhlic money of the Province is heing deposited.

Procedure.

(2) The money shall be paid in to tbe credit of the cause or matter in which the payment is made, witb tbe privity of the Clerk or Registrar (as the cnse may be) of the Court, and in no other manner; and such money shall be withdrawn only on the order of the Court or a Judge thereof, with the privity of the Clerk or Registrar of the Court.

Withdrawal.

Plea of payment into Court.

(3) Where money is paid in under a plea of payment into Court, the Clerk, on the production of tbe receipt of the hank for the money or other satisfactory proof of snch payment, shall sign a receipt for the amount in the margin of the pleadiag. C.R. 1221.

Where money is paid into s County Court, or Surrogate Court, to which an infsnt or s lunstic is entitled, it is to he forthwith trsns-mitted to the Accountsnt of the Supreme Court with a statement showing when it was so paid in, snd a certified copy of sli judgments or orders sffecting the same: see *Rule* 735, and *Re Mercer*, 26 O. L. R. 427. How this is to be effected is not explicitly stated. Whether the Clerk of the County Court is to pay the money into the Supreme Court ss provided by *Rules* 727, 728, or is to forward a cheque pay-able to the Accountsnt of the Supreme Court iesving him to psy the money in, is not clesr.

Clerk and Registrar to keep books and render statements.

770. The Clerk of a County Court and Registrar of a Surrogate Court shall each keep a book, such containing an account of all money so paid into their respective Courts, and of the withdrawal thereof; and shall prepare in the month of January in every year a statement of all money so paid in and withdrawn, and a statement of the condition of the various accounts upon the thirty-first day of the preceding December, and shall transmit to the Provincial Secretary and to the Judge or each of the Judges of such Courts, a copy of such statement, with a declaration thereto annexed. Form No. 133. C.R. 1222.

The word "such" in the second line appears to be superfluous.

Rule 771.

Books to be open for inspection. Fees for extracts, etc.

771.—(1) The book so to be kept shall be open for i spection during the office hours; and the Clerk or Regi trar shall give a certificate of the state of an account an extract therefrom at the request of any party inte ested or his solicitor on his paying to the Clerk or Regi trar the sum of twenty cents for such inspection or ce tificate and the sum of ten cents per folio for such extra C.R. 1223.

(2) The Official Guardian shall be entitled to make an such search without payment of any fee. *New.*

CHAPTER XXXII.

FORMS.

Forms to be used.

772.—(1) The forms contained in the Appendix hereto shall be used with such variations or modifications as circumstances may require; but any variance therefrom, not being in matter of substance, shall not affect their regularity.

(2) The provisions contained in the form prescribed shall be deemed to be authorized by these Rules. C.R. 1224. *Amended.*

See Eng. R. April, 1880, R. 52.

In *Turquand* v. *Fearon*, 40 L. T. at p. 545, Thesiger, L.J., said, "although the forms given in the Judicature Acts are not absolutely binding, they are still of assistance as illustrating the meaning of the Act." See also *Scott* v. *Creighton*, 9 P. R. 253; *Bolton* v. *Bolton*, 3 Ch. D. 276; *McCready* v. *Hennessy*, 9 P. R. 489, and *Boswell* v. *Coaks*, 36 Ch. D. 444; 36 W. R. 65.

Most of the Forms in the Appendix to the Rules are included in Holmested & Langton's Forms.

Where the forms are defective, the defect should be supplied: *The Isis*, 1883, 8 P. D. 227.

SCHEDULE.

OF RULES AND ORDERS NOT REPEALED.

i. Rules respecting the Trial of Election Petitions (Ontario). 23 December, 1903.

ii. Rules for the Trial of Controverted Elections. 14 December, 1908. (17 O.L.R., Ap. II.)

See Holmested's Edition (1909), of the Dominion Election Rules.

ADDITIONAL RULES.

PASSED SUBSEQUENT TO THE CONSOLIDATED RULES, 191

The ollowing *Rules* have been passed since the for going Consolidated Rules came into force. Many of the additional *Rules* have not been numbered, and can, there fore, only be identified by the date of their being passed

RULE PASSED DECEMBER 13TH, 1912, AND SUBSEQUENTLY APPROVED ON JANUARY 2ND, 1913.

Sittings of Divisional Courts.

"It was recommended that excepting Long Vacation the Sittings of the Divisional Court be held weekly com mencing Monday of each week, except that in the month of January, the first sittings be held on the first Monday after the 6th of the month, and that in the month of September the first sittings be held on the first Monday after the 14th of the month."

This *Rule* has never been officially published. It was in the form of a recommendation because, at the time it was first adopted, *The Law Reform Act*, 9 Edw. 7, c. 28, Part I., had not come into force. It took effect 1st January, 1913. See Ont. Gazette, 1912, p. 976.

RULE PASSED 15TH SEPTEMBER, 1913.

773. It is ordered that the following amendments be made in the Consolidated Rules and Tariff of Costs:

Amendment of Tariff B.

"The prefatory note to tariff B. p. 208, is amended so as to read as follows: 'payable in stamps, except where the officer is not paid by salary, or has not commuted his fees, or unless otherwise expressly provided,' and by adding thereto the following items: 'on renewal of writs, one dollar,' and 'to special examiners, marking exhibits, twenty cents:' these amendments to be retro-active and to be deemed to have been in force since the 1st of September instant;

Amendments Form 5.

"And that the form for the indorsement of specially indorsed writs (No. 5) be amended by adding thereto, following the specific claim, the words "and the plaintiff further claims $ for costs;' and that to the form

Form 10.

for the statement of claim, (No. 10) be added the follow-

iag note ' the dato of the writ should be given at the head of the statement of claim, thus, Writ issued 19 .' Rule 177.

" And that form No. 60 he amended hy striking out the figures 285 to 295 where they occur on page 175, and substituting tho figures 280 to 290; Form 60.

(2) " That Rules 609, aad 61. sub-section 2, be amended hy inserting in each rule afte- the word ' infant ' the words ' or lunatic who has no committee except the Inspector of Prisons and Public Charities,' and hy addiag to each of the said rules the words ' notice of such application shall, unless otnerwise ordered, also he given to such lunatic.' " Amendment of Rules 609, 615.

RULE PASSED 8TH NOVEMBER, 1913.

177 (1) Office hours during vacation shall be from 10 a.m. to 12 noon. This rule to be known as 177 (1), and to take effect immediately.* Office hours.

RULE PASSED 1ST DECEMBER, 1913.

(1) That Rule 494 be amended by inserting in the fourth line, in lieu of the words " a copy " the words " five copies," and in the fifth line, after the word " thereof " the words " and of the reasoas therefor, unless reported." Amendment of Rule 494.

(2) In Rnle 477, line 5, suhstitute the word " directions " for " tions." Rule 477.

(3) In form 3, the last line but one, substitute " defence " for " offence." Form 3.

(4) In the County Court Tariff, page 207, amend item 20 by striking out the word " senior." CC. Tariff.

(5) In the County Court Tariff, page 207, amead item 18 by adding after the word " Judge " the words and figures " not exceeding $15.0. "

(6) In the Tariff of Disbursements (page 210) after the items relating to Commissioners add the words Tariff of disbursements.

* In the official copy no number is given to this *Rule*, nor are the various clauses numbered, consequently the numbering of the clauses is not official, but merely for convenience of reference.

Rules 56, 66, 112. "upon every commission appointing a commissione take affidavits, etc., $5.00."

Rule 677 (7) In Rule 677 add clause 677 (1) as follows:

"Where the amount realized is small the taxing o may fix a lesser sum than would be allowed upon t tion."

Rule 760. (8) In Rule 760 insert after the word "assigned the second line the words "or of the office being vaca

Tariff of Fees. (9) In the Tariff of Fees, add a note following 25, p. 205, "the Judge or officer hearing any motion allow a smaller fee than above provided."

RULES PASSED 24TH DECEMBER, 1913, AND ORDERED TO C INTO FORCE IMMEDIATELY.

Official Guardian need not file affidavit under Rule 56. **56.**—(6) An affidavit shall not be necessary where appearance is entered by the Official Guardian for infant or lunatic.

Taxing costs on default judgment. **66.**—(2) On the signing of default judgment the offi signing judgment may fix and ascertain costs with taxation.

This *Rule* was probably intended to be 661 (2).

Affidavit to stand as defence. **112.**—(3) Where a defendant who has appeared t writ which is specially indorsed and filed the affida required by Rule 56 does not file a statement of defe within the time limited, his affidavit shall stand as defence and notice of trial may be at once served.

Amendment of Tariff of Disbursements. The tariff of disbursements is amended as follows: page 210, item, "fees to witnesses residing over thr miles from the Court House," strike out figures "1.25 and insert "per diem 1.50."

Amend items relating to fees payable to professiona witnesses by striking out the figure "4" where it a pears, and insert after the words "per diem" in ea item, the words and figures "Unless otherwise provid by Statute, $5.00."

Add to the item relating to witnesses the words: " reasonable sum may be allowed for the preparation

any plan, model or photograph, when necessary for the due understanding of the evidence." Rules 492, 676.

RULES PASSED JUNE 19TH, 1914.

Rules 491 and 492 are repealed and the following substituted therefor:— Amendment of Rules 491, 492.

492.—(1) An appeal from a judgment pronounced at a trial or a motion for a new trial shall be by a notice of motion returnable before a Divisional Court seven days after service, and shall be set down to be heard within fifteen days from the date of the judgment. Appeal from judgment at trial.

(2) All other appeals shall be by a notice of motion returnable before a Divisional Court two clear days after service, and shall be set down to be heard within seven days from the date of the judgment or order. Other appeals.

(3) Cases shall be entered on the list for hearing as soon as the papers are completed. Entry for hearing.

(4) If the evidence is not deposited within seven days after notice from the office of the Registrar of the High Court Division that it has been received from the stenographer the appeal shall be deemed to be abandoned and costs may be taxed as provided by Rule 660. Deposit of evidence.

(5) The notice of motion may be according to the following form:— Form of notice of motion.

STYLE OF CAUSE.

Take notice that the appeals to a Divisional Court from the judgment (*or* order) pronounced by on the day of , 191 , on the following grounds (*stating them briefly*)

Dated the day of , 191 .

solicitor for

To , Esq.,

solicitor for

See *supra*, p. 1089 *et seq.*

676.—(5) Costs payable out of the proceeds of land sold under the Devolution of Estates Act shall be allowed and taxed according to Tariff "E" to these Rules. Tariff E.

For Tariff C. referred to in this *Rule*: see *infra*, p. 1558.

REGULATIONS MADE BY THE JUDGES OF TH HIGH COURT OF JUSTICE. (a)

ORDERS RELATING TO MONEYS IN COURT.

September 18th, 1899.

Orders as to money in Court.

1. As a general rule all orders affecting money Court, ought to be entitled in the cause or matter to t credit of which the said money is staading in Cou where there is any such cause or matter; and in cas where money has been, by mistake, paid into Court to t credit of some non-existing cause or matter, the ord correcting the mistake should be entitled in the cause matter to the credit of which the moacy was intended t be paid into Court, and should recite the mistake.

Orders respecting money of infants, etc.

2. All orders affecting the moneys in Court of infant or other persons under disahility, ought to be made o the application of snch persons, by their guardians, nex friends, or committees, as thc case may be; or, if mad on the application of any other persoa, it shoald appea by the order that the person under disability whos money is sought to he affected, had due aotice of, and, i so, was properly represented on tbe application.

Duty of officers of Court.

3. Officers are to be careful to see that all orders and judgments settled or issued by them, are drawn up i conformity with the foregoing Regalations.

PASSING RECORDS AND ENTERING CAUSES FOR TRIAL, OR HEARING.

October 28th, 1899.

Passing records.

4. From and after the first day of January next (1900), all officers passing records are hereby directed, aad required, to see that tlley contain, in addition to a certified copy of the pleadings, a aotc or memoraudum stating the state of the action as against every defendant or defeadants who has, or have, put ia no defence, or as

(a) These Regulations were made for the guidance of the officers of the Court, and are still operative.

against whom the action has been discontinued. No extra charge is to be made for such note or memorandum.

5. All officers and clerks when entering causes for trial, or for hearing on motion for judgment, are required to see that the same are in a proper state for trial, or hearing, and are not otherwise to enter the same; and for that purpose may require either the production of the Record, or a certificate of the state of the action, when the necessary information cannot be obtained from their own books of office (*a*).

REGULATIONS MADE BY THE JUDGES OF THE HIGH COURT OF JUSTICE, ON THE 17TH DECEMBER, 1904.

TRANSMISSION OF DOCUMENTS TO CENTRAL OFFICE.

Transmission of Records, etc., after trial.

6. When the Judge at a trial reserves judgment in any case, elsewhere than at Toronto, the Clerk of the Court shall forthwith forward the Record and Exhibits to the Central Office.

7. All Local Officers of the Court when sending papers or Exhibits to the Central Office shall indorse on the wrapper enclosing such papers or Exhibits, the short style of cause, the title of the Officer sending them, and the purpose for which they are sent,—*e.g.*, "Jones *v.* Smith. From Local Registrar at Brantford, for Appeal to Divisional Court" *or* "For Mr. Justice Magee"—*or as may be.*

SETTING DOWN CAUSES.

Setting down cases in Weekly Court or Chambers.

8. When a case is required to be set down for a Divisional Court (*a*), Weekly Court, or Chambers, the officer shall require the party desiring the case to be set down to indorse on the notice of motion the name of the office in which the action or proceeding was commenced, and the officer shall not set down any case without such indorsement unless otherwise ordered by the Court or a Judge.

(*a*) See further Regulation of 25th June, 1914, *infra*, p. 1449.

The Divisional Court here referred to was a Divisional Court of the former High Court.

REGULATION MADE BY THE JUDGES OF TH SUPREME COURT OF ONTARIO.

January 2nd, 1913.

Settlement of judgment, etc., of Appellate Division.

The Senior Registrar of the former High Court Justice, in addition to the duties hitherto performed him, shall settle all judgments or orders of a Division Court.

Signing of such judgments, etc.

The Registrar of the former Court of Appeal sha perform the duties of Registrar of the Appellate Divisio act as Registrar at the sittings of the First Division Court, and sign all judgments and orders of the Div sional Courts.

Duty of Junior Registrar.

The Junior Registrar, Mr. Best, shall act as Registra of the Second Divisional Court and shall perform suc other duties as from time to time shall be assigned t him by the Judges.

Assistant Registrar, App. Div.

The Assistant Registrar of the former Court of Appea shall, under the supervision of the Registrar of the Ap pellate Division, perform the office duties appertainin to the Appellate Division, including the setting down o appeals, the preparation of Cause Lists, and shall unde such supervision also perform such other duties as fro time to time shall be assigned to him by the Judges.

Usher.

The Usher of the former Court of Appeal shall be th Usher of the Appellate Division, have charge of the Judges' Library, act as messenger for the Judges of the Divisional Courts, and perform such other duties in con nection with the office of the Clerk of the Supreme Court and Registrar of the Appellate Division as from time t time may be assigned to him.

Entry of judgments of App. Div.

All judgments and orders of the Divisional Courts shall be entered in the office of the Registrar of the High Court Division (*a*).

Custody of seal.

The seal of the Supreme Court shall be in the custody of the Clerk of Records and Writs.

(*a*) This regulation is at variance with the *Rules:* see *Rules* 515, 518.

REGULATION MADE BY THE HON. THE CHIEF JUSTICE OF ONTARIO AND THE HON. MR. JUSTICE MIDDLETON AND THE HON. MR. JUSTICE KELLY.

June 25th, 1914.

Records in actions transferred from inferior Courts.

Where an action has been transferred from a County or Surrogate Court to the Supreme Court, a memorandum should be added to the record, showing this fact and the authority of the transfer, *e.g.*:

"This action was brought in the County (*or* Surrogate) Court of the County of , and was transferred to the Supreme Court, under sec. 22, sub-sec. 3, of the County Courts Act—*or*, by order of the Hon. Mr. Justice A. B., under sec. 22, sub-sec. 5, of the County Courts Act—*or as the case may be.*"

Instructions Issued to Officers of the Court by the Inspector of Legal Offices.

April 4th, 1914.

Actions in which validity of marriage is called in question.

Under *The Marriage Act* (being R. S. O. 1914, c. 148), s. 37 (4), it is provided that no trial shall be had until after ten days notice to the Attorney-General, and that he may intervene at any stage of the proceedings.

Actions have been tried recently in which no notice of any kind has been received by the Attorney-General, and he has directed me to advise you to notify his Department,—

1. Whenever a writ is issued in an action to declare a marriage invalid, and also

2. Whenever a case involving the validity of a marriage is set down for trial,

And to inform the solicitors for the parties at the same time of the provisions of *The Marriage Act*, above referred to.

No action should be placed on the peremptory list un proof has been furnished to you that ten days notice trial has been given to the Attorney-General.

See *Reid* v. *Aull*, 32 O. L. R. 68, and *supra*, p. 13.

April 11th, 1914.

Entry of actions for trial.

All actions must be entered for trial not later tha the sixth day before the commencement of the sitting *Rule* 248 (*c*).

Cause list, etc., to be sent to Judge.

Immediately after the list is closed you should send t the Justice who is to take the sittings, addressed to him a Osgoode Hall, Toronto, a list of the actions, civil an criminal (the latter to be obtained from the Crown At torney), to be tried at such sitting, with a statement o the nature of each, and whether it is to be with or withou a jury.

Transmission of papers.

You are also reminded that *Rule* 263 (1) must b strictly complied with, and that when forwarding papers to Toronto, the list of exhibits must accompany them.

FORMS

FORMS OF WRITS OF SUMMONS, AND NOTICE IN LIEU THEREOF.

No. 1.

General Form of Writ of Summons. (*Not specially indorsed*) (*a*).

In the Supreme Court of Ontario (*b*).

Between *A.B.*, Plaintiff,
and
C.D., and *E.F.*, Defendants.

Name and title of Sovereign, e.g., George the fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions Beyond the Seas, King, Defender of the Faith, Emperor of India.

To *C.D.* of in the County of and *E.F.* of

We command you, that within ten days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in this action, and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence on the plaintiff's own shewing and you may be deemed to have admitted the plaintiff's claim and (subject to Rules of Court) will not be entitled to notice of any further proceedings herein.

Witness, the Honourable Chief Justice of Ontario in the year of Our Lord, 19

(*Signature of Officer.*)

(*a*) For form of writ of summons where it is to be specially indorsed: see No. 5.

(*b*) It is to be observed that in none of the forms is there any other title of the Court. The name of the Division is no longer necessary: see Jud. Act, s. 12.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within 12 calendar months from the date thereof, or if renewed, within 12 calendar months from the date of such renewal, including the day of such date, and not afterwards.

Appearance may be entered at the office at

To be inserted in the margin.

Issued from the Central Office, Toronto, (*or* from the office of the Deputy Clerk of the Crown, or Deputy or Local Registrar in the County of .)

(*Signature of Officer.*)

Indorsements to be made on the writ.

The plaintiff's claim is for, &c. (*as in Form No. 4, or as may be.*)

This writ was issued by *E. F.*, of solicitor for the said plaintiff who resides at [*or*, this writ was issued by the plaintiff in person] who resides at [*mention the city, town or township, and also the name of the street and number of the house of the plaintiff's residence, if any, or in case of a township the number of the lot and concession.*]

Indorsement to be made on the writ within three days after service thereof.

This writ was served by *X.Y.* on *C.D.* [the defendant *or* one of the defendants], on , the day of , 19

This memorandum is made this day of 19

(*Signed*) X.Y.
Address.

No. 2.

Writ for service out of Ontario. (Not Specially Endorsed.)

In the Supreme Court of Ontario.

Between *A.B.*, Plaintiff,
and
C.D. and *E.F.*, Defendants.

Name and title of Sovereign, e.g., George the fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions Beyond the Seas, King, Defender of the Faith, Emperor of India.

To *C.D.*, of

We command you, *C.D.* that within [*here insert the number of days directed by the order allowing service*] after the service, on you, of this writ [*or* notice of this writ *as the case may be* (*a*)] and of the plaintiff's statement of claim delivered herewith, inclusive of the day of such service, you cause an appearance to be entered for you in this action, and your defence thereto, if any, to be delivered within 10 days thereafter; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence on the plaintiff's own shewing and you may be deemed to have admitted the plaintiff's claim and (subject to Rules of Court) will not be entitled to notice of any further proceedings herein.

Witness, the Honourable Chief Justice of Ontario at in the year of Our Lord, 19 .

(*Signature of Officer.*)

Additional Indorsement to be made on the writ (*b*).

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of Ontario. When the defendant to be

(*a*) See *Rule* 29.

(*b*) The writ is to bear the other indorsements, and also the marginal note set forth in Form 1.

served is not a British subject, and is not in British do minions, notice of the writ, and not the writ itself, is t be served upon him.

No. 3.

Notice of writ, in lieu of writ, to be given out of Ontario.

In the Supreme Court of Ontario.

Between *A.B.*, Plaintiff,
and
C.D. and *E.F.*, Defendants.

To *G.H.*, of

Take notice that *A. B.*, of has commenced an action against you, *G. H.*, in His Majesty's Supreme Court of Ontario, by writ of that Court, dated the day of A.D. 19 ; which writ is indorsed as follows [*copy in full the indorsements*], [and you are required within days after the receipt of this notice and of the plaintiff's statement of claim, to be served herewith, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action, and your defence thereto, if any, to be delivered within 10 days thereafter;*] and in default of your so doing, the said *A.B.* may proceed therein, and judgment may be given in your absence on the plaintiff's own shewing and you may be deemed to have admitted the plaintiff's claim and (subject to Rules of Court) will not be entitled to notice of any further proceedings therein.

**Where the writ is specially indorsed omit the words in brackets and substitute:*

"And you are required within days after the service of this notice on you, inclusive of the day of such notice, if you desire to defend the said action, to cause an appearance to be entered for you therein and further within the same time to file an affidavit in the office in which your appearance is to be entered, shewing the nature of your defence (if any) to the plaintiff's claim, and to forthwith serve a copy upon the plaintiff's solicitor." (*As amended by Rule, 1st December, 1913*). See *supra*, p. 1443.

Appearance may be entered at the office at

Dated, &c.

X. Y., of &c.
Solicitor for *A.B.*

N.B.—This notice is to be used when the person to be served is not a British subject, and is not in British dominions.

Indorsement to be made on the notice of the writ after service thereof:

This notice was served by *X. Y.*, on *G. H.*, (the defendant or one of the defendants) on the day of 19

This memorandum is made on the day of 19

No. 4. *Indorsements on Writs of Summons.*

Money Claims (where writ is not specially Indorsed.) (*a*)

The plaintiff's claim is $ for the price of goods sold.

The plaintiff's claim is $ for money lent [and interest].

The plaintiff's claim is $ whereof $ is for the price of goods sold, and $ for money lent, and $ for interest.

The plaintiff's claim is $ for arrears of rent.

The plaintiff's claim is $ for arrears of salary as a clerk [*or as the case may be*].

The plaintiff's claim is $ for interest upon money lent.

The plaintiff's claim is $ for penalties under the Statute R. S. O. Ch.

(*a*) Where any of the claims mentioned in this Form are intended to be "specially indorsed" fuller particulars are also required: see *post* Form 5.

The plaintiff's claim is $ for fees for work done [and $ money expended] as a solicitor.

The plaintiff's claim is $ for commission as [*state character as auctioneer, broker, &c*].

The plaintiff's claim is $ for medical attendance.

The plaintiff's claim is $ for the warehousing of goods

The plaintiff's claim is $ for the use and occupation of a house.

The plaintiff's claim is $ for work done.

The plaintiff's claim is $ for board and lodging.

The plaintiff's claim is $ for money received by the defendant as agent of the plaintiff.

The plaintiff's claim is $ for a return of money obtained from the plaintiff by fraud.

The plaintiff's claim is $ for a contribution in respect of money paid by the plaintiff as surety.

The plaintiff's claim is $ upon a policy of insurance upon the life of *X. Y.*, deceased.

The plaintiff's claim is $ upon a bond to secure payment of $1,000 and interest.

The plaintiff's claim is $ *upon* a bill of exchange accepted [*or* drawn *or* indorsed] by the defendant.

The plaintiff's claim is $ upon a promissory note made [*or* indorsed] by the defendant.

The plaintiff's claim is $ against the defendant *A. B.*, as acceptor, and against the defendant *C. D.* as drawer [*or* indorser], of a bill of exchange.

The plaintiff's claim is $ for calls upon shares.

Claims for Damages and other Relief.

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employmeat as traveller [and $ for arrears of wages].

The plaintiff's claim is for damages for the dofendant's wrongfully quittiag tho plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or* &c.] of the plaintiff [and $ for money received as factor, &c.].

The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of *X. Y.* . . the defendant [*or* plaintiff].

The plaintiff's claim is for damages for non-compliance with the award of *X. Y.*

The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution].

The plaintiff's claim is for damages by reason of the defendant's negligence as solicitor of the plaintiff.

The plaintiff's claim is for damages for negligence ia the custody of goods [and for wrongfully detaining the same].

The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining same].

The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or* a carriage lent], [and for wrongfully, &c.].

The plaintiff's claim is upon a bond conditioned not to carry on the trade of a

The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.

The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c., being, &c.

The plaintiff's claim is for damages for libel. The libel complained of was published [*give date and manner of publication*].

The plaintiff's claim is for damages for slander. The slander complained of was the speaking of the words [*quote them*] on the day of

The plaintiff's claim is to recover possession of goods wrongfully distrained, being, &c.

The plaintiff's claim is for damages for improperly distraining.

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or* a business, *or* shares, *or* &c.].

The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of *A. B.*

The plaintiff's claim is for a loss under a policy of fire insurance upon house and furniture.

The plaintiff's claim is for damages for breaches of covenants contained in the lease of a farm.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is as executor of *A. B.* deceased, for damages for the death of the said *A. B.*, from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

The plaintiff's claim is for damages for breach of promise of marriage.

The plaintiff's claim is for damages for the seduction of the plaintiff's daughter.

The plaintiff's claim is for damages for breach of contract to accept pay for goods.

The plaintiff's claim is for damages for breach of warranty of a horse.

The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

The plaintiff's claim is for dower out of lot (*or describing the property otherwise with reasonable certainty*). And take notice that the plaintiff claims damages for the detention of her dower from the day of

The plaintiff's claim is to recover possession of a house, No. in street, in the City of Ottawa; (*or* of the N. E. ¼ of lot 2, in the 3rd concession of the township of in the county of) And for mesne profits. And for an account of rents or arrears of rent.

If an injunction is claimed.

The plaintiff's claim is for an injunction to restrain the defendant from

Claims to equitable relief.

The plaintiff's claim is as creditor of *X. Y.*, of deceased, to have the [real and] personal estate of the said *X. Y.*, administered. The defendant *C. D.*, is sued as the administrator (*or* executor) of the said *X. Y.* [and the defendants *E. F.* and *G. H.* as his co-heirs-at-law].

The plaintiff's claim is as a legatee under the will dated the day of 18 of *X. Y.* deceased, to have the [real and] personal estate of the said *X. Y.* administered. The defendant *C. D.* is sued as the executor of the said *X. Y.* [and the defendants *E. F.* and *G. H. as his* devisees].

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

The plaintiff's claim is to have the trusts of an indenture dated and made between , carried into execution.

The plaintiff's claim is to have a deed dated and made between [*parties*], set aside or rectified.

The plaintiff's claim is for specific performance of an agreement dated the day of , for sale by the plaintiff to the defendant of certain [*freehold* hereditaments at]

The plaintiff's claim is for alimony; and the plaintiff demands as interim alimony until the trial of the action the monthly (*or* weekly) sum of $ to be paid to her on the day of each month (*or* week) at and the interim costs to which she is entitled by the practice in that behalf.

NOTE.—*Where the plaintiff desires to register a certificate of* lis pendens *the indorsement on the writ of summons may contain such short description of the property as may be necessary or proper for that purpose.*

Claims in Mortgage Action.

(*a*) *By Mortgagee for sale and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the day of made between [*or* by deposit of title deeds], and that the mortgage may be enforced by sale, [*where desired add* and payment to the plaintiff by the defendant personally of any balance].

If immediate payment is desired add, And to recover from you the defendant (*naming the defendant against whom the relief is claimed*) payment of the amount due under a covenant by [you] in that behalf contained in said mortgage (*or as the case may be*).

(*If immediate possession is desired add*). And to recover immediate possession of the mortgaged premises.

And take notice that the plaintiff claims that there is now due by you for principal money the sum of $ [*If so add* and for taxes (*or* premiums of insurance *or*

other matters) the sum of $] and for interest the sum of $ and that you are liable to be charged with these sums with subsequent interest to be computed at the rate of per centum per annum and costs in and by the judgment to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the judgment your interest in the property may be sold, unless before the time allowed you for appearance you file in the office within named a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: "I dispute the amount claimed by the plaintiff in this action," in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff.

The following is a description of the mortgaged premises. (*Set out description sufficient for registration*).

And the plaintiff further claims $ for costs. (*a*)

(*b*) *By Mortgagee for foreclosure and for immediate payment and possession.*

The plaintiff's claim is on a mortgage dated the day of made between [*or* by deposit of title deeds], and that the mortgage may be enforced by foreclosure.

If immediate payment is desired add, And to recover from you the defendant, (*naming the defendant against whom the relief is claimed*) payment of the amount due under a covenant by [you] in that behalf contained in said mortgage (*or as the case may be*).

If order for immediate possession is desired add), And take notice further that the plaintiff claims to be entitled to recover immediate possession of the mortgaged premises.

And take notice that the Plaintiff claims that there is now due by you for principal money the sum of $ [*If so add* and for taxes (*or* premiums of insurance *or other matters*) the sum of $] and for interest the sum of $ and that you are liable to be charged with these sums and subsequent interest to

(*a*) See *Rule* 773.

be computed at the rate of per centum per annum and costs, in and by the judgment to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the judgment your interest in the property may be foreclosed unless before the time allowed you for appearance you file in the office within named a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect:—"I dispute the amount claimed by the plaintiff in this action" in which case you will be entitled to four days' notice of the taking of the account of the amount due to the Plaintiff.

If you desire a sale of the mortgaged premises instead of a foreclosure, and do not intend to defend the action, you must within the time allowed for appearance, file in the office within named, a memorandum in writing entitled in this action and signed by yourself or your solicitor, to the following effect:—"I desire a sale of the mortgaged premises in the plaintiff's writ of summons mentioned, or a competent part thereof, instead of a foreclosure," and you must deposit in the Court to the credit of this action the sum of $80 to meet the expenses of such sale and attach to the said memorandum a certificate of the Accountant of the Supreme Court to the effect that such deposit of $80 has been made.

"The following is a description of the mortgaged premises:" (*Set out description sufficient for registration*).

And the plaintiff further claims $ for costs (*a*).

(*c*) *By Mortgagor for Redemption.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

Indorsements of Character of Parties. (*To be introduced into the Indorsement of the Cause of Action.*)

The plaintiff's claim is as executor [*or* administrator] of *C. D.*, deceased, for, &c.

(*a*) See *Rule* 773.

The plaintiff's claim is against the defendant *A. B.*, as executor [*or*, &c.] of *C. D.*, deceased, for, &c.

The plaintiff's claim is against the defendant *A. B.*, as executor of *X. Y.*, deceased, and against the defendant *C. D.*, in his personal capacity, for, &c.

The claim of the plaintiff is against the defendant as executrix of *C. D.*, deceased, for

The plaintiff's claim is as assignee in insolvency of *A. B.*, for

The plaintiff's claim is against the defendant as assignee in insolvency of *A. B.* for

The plaintiff's claim is as [*or* the plaintiff's claim is against the defendant as] trustee under the will of *A. B.* [*or* under the settlement upon the marriage of *A. B.* and *X. Y.*, his wife].

The plaintiff's claim is against the defendant as heir-at-law of *A. B.*, deceased.

The plaintiff's claim is against the defendant *C. D.*, as heir-at-law, and against the defendant *E. F.*, as devisee of lands under the will of *A. B.*

The plaintiff's claim is as well for the King as for himself, for .

No. 5.

Specially Indorsed Writ.

In the Supreme Court of Ontario.

Between *A. B.*, Plaintiff,
and
C. D. and *E. F.*, Defendants.

Name and title of Sovereign, e.g., George the fifth, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To *C. D.*, of the City of , in the County of . 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 this action AND WITHIN THE SAME TIME THAT YOU DO FILE AN AFFIDAVIT IN THE OFFICE IN WHICH YOUR APPEARANCE IS TO BE ENTERED, SHOWING THE NATURE OF YOUR DEFENCE (if any) TO THE PLAINTIFF'S CLAIM, AND THAT YOU DO FORTHWITH THEREAFTER SERVE A COPY OF SUCH AFFIDAVIT UPON THE PLAINTIFF'S SOLICITOR.

And take notice that in default of your so doing, the plaintiff may sign judgment for the relief claimed as indorsed on this writ, and execution will at once issue thereon.

Witness, the Honourable Chief Justice of Ontario at in the year of our Lord 19 .

(*Signature of officer.*)

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within 12 calendar months from the date thereof, or if renewed, within 12 calendar months from the date of such renewal, including the day of such date, and not afterwards.

Appearance may be entered at the office at

To be inserted in the margin.

Issued from the Central Office, Toronto, (*or* from the office of the Deputy Clerk of the Crown, *or* Deputy *or* Local Registrar, in the county of .)

(*Signature of officer.*)

Indorsement to be made on the writ.

The plaintiff's claim is for, &c. (*as in Form No. 4, or as may be*).

This writ was issued by *E. F.*, of solicitor for the said plaintiff who resides at [*or*, this writ was issued by the plaintiff in person] who resides at [*mention the city, town or township, and also the name of the street and number of the house*

of the plaintiff's residence, if any, or in case of a township the number of the lot and concession.]

Indorsement to be made on the writ within three days after service thereof.

This writ was served by *X. Y. on C. D.* [the defendant or one of the defendants], on , the day of , 19 .

This memorandum is made this day of 19 .

(*Signed.*) *X.Y.*
Address.

NOTE.—*When service is intended to be made out of Ontario, make similar modifications in Form No. 2.*

The Claim shall be indorsed in accordance with the following: (*a*)

Money Claims—

1. The plaintiff's claim is for money received by the defendant for the use of the plaintiff. The following are the particulars:—

—2nd January, 19 .—

To amount of rents on No. 5 Smith Street, collected by defendant	$300
To deposit on intended sale of Blythe Cottage .	400
Amount due	$700

and the plaintiff claims $ for costs (*b*).

Place of trial, [*Toronto*].

Following the indorsement there shall be this Warning to Defendant:

This writ being specially indorsed, the defendant is warned that in addition to entering appearance within

(*a*) The following are the forms of "special indorsements" as distinguished from the briefer forms, in Form No. 4, which, however, are also to be used on "specially indorsed writs."

(*b*) See *Rule* 773.

the time limited, he must, within the same time file an affidavit shewing the nature of his defence to the plaintiff's claim, and forthwith thereafter, serve a copy upon the plaintiff's solicitor, and that in default judgment will be entered and execution issued.

Upon appearance being entered and such affidavit being filed the plaintiff may elect to proceed to trial without pleadings.

If you pay the amount of the plaintiff's claim within the time limited for appearance further proceedings will be stayed (*a*). If you deem the amount claimed for costs excessive you may have them taxed.

2. The plaintiff's claim is for the price of goods sold. The following are the particulars:—

18..—31st December.—

Balance of account for butcher's meat to this date	$142
18..—1st January to 31st March.—	
Butcher's meat supplied	297
	$439
18..—1st February.—Paid	180
Balance due	$259

And the plaintiff claims $ for costs (*b*).

Place of trial, Toronto.

(*Warning as above.*) (*c*)

3. The plaintiff's claim is against the defendant *A. B.* as principal, and against the defendant *C. D.* as surety, for the price of goods sold to *A. B.* The following are the particulars:—

(*a*) The official copy has here "sayed," an obvious misprint.

(*b*) See *Rule* 773.

(*c*) See p. 1465.

18. .—2nd Febrnary. Guarantee by *C.D.* of the price of woollen goods to be supplied to *A.B.*

2nd Febrnary—To goods	$225
3rd March—To goods	151
17th March—To goods	27
5th April—To goods	65
	$468

And the plaintiff claims $ for costs (*a*).

Place of trial, Ottawa.

(*Warning as above*) (*a*).

4. The plaintiff's claim is against the defendant, as maker of a promissory note. The following are the particulars:—

Promissory note for $1,000 dated 1st January 18 , made by defendant payable 4 months after date.

Principal	$1,000
Interest	
Notarial charges	

And the plaintiff claims $ for costs (*a*).

Place of trial, London.

(*Warning as above*) (*a*).

5. The plaintiff's claim is against the defendant *A.B.* as acceptor, and against the defendant *C.D.* as drawer of a bill of exchange. The following are the particulars:—

Bill of exchange for $2,000, dated 1st January, 18 , drawn by defendant *C.D.* upon and accepted by defendant *A.B.*, payable 3 months after date.

Principal	$2,000
Interest	
Notarial charges	

And the plaintiff claims $ for costs (*a*).

Place of trial, Hamilton.

(*Warning as above*) (*b*).

(*a*) See *Rule* 773.

(*b*) See p. 1465.

6. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 19 . Conditions for payment of $500 on the 26th December, 18 .

Principal due $500
Interest .....

And the plaintiff claims $ for costs (*a*).

Place of trial, Belleville.

(*Warning as above*) (*b*).

7. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars: Deed dated covenant to pay $3,000 and interest.

Principal due $800
Interest .....

And the plaintiff claims $ for costs (*a*).

Place of trial, Kingston.

(*Warning as above*) (*b*).

8. The plaintiff's claim is to recover possession of a farm and premises called lot No. 1 in the 5th Con. of the Tp. of in the County of which was let to the defendant by the plaintiff for the term of 3 years from the 29th day of Sept. 18 , which term has expired (*or* as tenant from year to (*c*) from the 29th day of Sept. 18 , which said tendency (*d*) became duly determined by notice to quit on the 29th day of Sept., 18 .)

The plaintiff also claim $ for mesne profits.

And the plaintiff claims $ for costs (*a*).

Place of trial, Lindsay.

(*Warning as above*) (*a*).

(*a*) See *Rule* 773.

(*b*) See p. 1465.

(*c*) The word "year" appears to be wanting here.

(*d*) This word should no doubt be "tenancy."

9. The plaintiff's claim is to recover possession of (*or* for the return of [a certain stallion named "Disturbance," *or as the case may be*], unlawfully detained by the defendant, of which the plaintiff is [the owner and lawfully entitled to the possession (*a*).

And the plaintiff claims $ for costs (*b*).

Place of trial, Toronto.

(*Warning as above*) (*c*).

10. *In mortgage actions use the forms provided ante and add the "warning" (c), and add, following the specific claim, the words "and the plaintiff further claims $ for costs" (b).*

Note.—All the following forms are to be preceded by the Court and style of cause or title. See Rule 190.

No. 6.

Appearance.

Enter an appearance for (*giving the names of all the defendants for whom appearance is to be entered*) in this action.

Dated the day of 18 .

(*Signed*)
(*Address*)

If conditional appearance allowed, add: The defendant by order of day of 190 , is permitted to appear without prejudice to his right to dispute the jurisdiction of the Court in this action (*or as the case may be*) (*d*).

(*a*) Probably a racket) should have been placed after "of" in the 2nd line, and a bracket] after "and" in the last line.

(*b*) See *Rule* 773.

(*c*) See p. 1465.

(*d*) As to conditional appearance: see *Rule* 48. As to when, and how, a defendant is to raise the question of jurisdiction, the *Rules* are silent: see note to *Rule* 48.

In case the defendant wishes to dispute the amount claimed, and to make no other defence, add, The defendant disputes the amount claimed by the plaintiff, (*or* the defendant insists that the amount due to the plaintiff is $ only, *or* the defendant insists that the amount due to the plaintiff is, $ for principal and $ for interest, since the day of etc., and no more), *as the case may be.*

In an action for land limiting Defence, add, The said defendant limits his defence to part only of the property mentioned in the writ of summons, namely, to etc.

Appearance to 3rd party notice.

Enter an appearance for to the third party notice issued in this action on the day of 18 , by the defendant.

Dated the day of 18 .

(*Signed*)
(*Address*).

No. 7.

Notice of Entry of Appearance.

Take notice, that have this day entered an appearance at for the defendant to the writ of summons in this action. [*Where the appearance is conditional or without prejudice to the defendant's right to dispute the jurisdiction of the Court, it should be so stated*].

Dated the day of 18 .

(*Signed*)
Solicitor for the defendant.

Notice disputing amount (*a*).

Take notice, that the defendant disputes the amount claimed by the plaintiff (*or* the defendant insists that the

(*a*) This notice may be combined with the appearance, see Form No. 6, *supra*.

amount due to the plaintiff is $ only; or the defendant insists that the amount due to the plaintiff is $ for principal and $ for interest, since the day of &c., and no more, *as the case may be*).

Dated, &c.

(*Signed*)
Solicitor for the defendant.

No. 9.

Notice Limiting Defence (*a*).

The defendant, *C.D.*, limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the north-west quarter of the lot.

No. 10.

PLEADINGS.

Statement of Claim.

Writ issued day of . (*b*).

1. (*Set out concisely in convenient paragraphs a statement of the material facts relied upon.*)

2. The plaintiff claims $

3. The plaintiff proposes that this action should be tried at Whitby.

Delivered the day of 18 , by *X.Y.*, of Plaintiff's Solicitor.

No. 11.

Statement of Defence.

1. The defendant admits the allegations in the and paragraphs of the plaintiff's statement of claim.

(*a*) This notice may be combined with the appearance, see Form No. 6, *supra*.

(*b*) See *Rule* 773.

2. (*Set out concisely in convenient paragraphs a statement of the material facts relied upon.*)

Delivered, etc. (*a*).

No. 12.

Repty.

1. (*If desired*) the plaintiff joins issue upon the defendant's statement of defence.

2. (*Where plaintiff does not introduce into his statement of claim, originally or by way of amendment, the allegations necessary by way of reply to the defence.*)

(*Set out concisely in convenient paragraphs the material facts relied upon in reply.*)

Delivered, etc. (*a*).

No. 13.

Statement of Defence and Counterclaim.

The defence and counterclaim of the abovenamed *C.D.*

1. (*Set out as in Form No. 11 the material facts relied on by way of defence.*)

2. By way of counterclaim the defendant says: (*Set out by reference to paragraphs of defence, or, as in the case of a statement of claim the material facts relied on by way of counterclaim*).

3. The defendant claims (*as in a statement of claim.*)

Delivered, etc. (*a*).

NOTE.—*Where a third person as well as the plaintiff is made a party to a counterclaim add a second style of cause, thus:*

And between *C.D.*, Plaintiff,
and
A.B. and *E.F.*, Defendants.
(By counterclaim.)

(*a*) See Form No. 10.

No. 14.

Reply to Defence and Counterclaim.

(Where plaintiff does not introduce into his statement of claim, originally or by amendment, the allegations necessary by way of reply to the defence:)

(Set out the material facts relied on by way of reply). A joinder of issue on the defence or paragraphs thereof may be added.

Delivered, etc. (*a*).

No. 15.

Special Case.

The following case is stated for the opinion of the Court under an order of the Honourable Mr. Justice dated the day of 18 , made pursuant to Rule (*or as the case may be.*) (*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, etc.

Second—Whether, etc.

(*Signatures.*)

No. 16.

Certificate of Service of Foreign Process.

I, , Clerk of the Supreme Court of Ontario, (*b*) hereby certify that the documents annexed hereto are as follows:

(1) The original letter of request for service of process received from the Court of (*c*) Tribunal at in the of in the matter of versus , and .

(*a*) See Form No. 10.

(*b*) There is no such officer named in the Jud. Act. s. 76.

(*c*) *Quære*, whether "of" should not be "or"?

(2) The process received with such letter of request and

(3) The evidence of service upon the person named in such letter of request duly sworn to before and verified by a Notary Public, duly appointed for Ontario under his hand and official seal.

And I certify that such service, so proved, and the proof thereof are such as are required by the law and practice of the Supreme Court of Ontario, regulating the service of legal process in Ontario, and the proof thereof.

And I certify that the cost of effecting such service amounts to the sum of $.

Dated this day of 191 .

No. 17.

General Form of Affidavits.

I, *E. F.* of (*place of residence and description or addition*) make oath and say as follows:—

Or, We *E. F.* and *G. H.* of, etc., severally make oath and say as follows:—

1.

2.

3. *If necessary,* And I, the said *E. F.*, for myself say etc.

Sworn [*if there be more than one deponent* by the said *naming each deponent*] before me at the of in the County of this day of A.D.

A Commissioner for taking affidavits in and for the County of

An affidavit for use on a motion should (a) *by indorsement on whose behalf it is filed: e.g.,* "Affidavit of John Smith filed on behalf of the plaintiff."

(a) Probably the word "show" should be inserted here.

No. 18.

Form or Jurat in the case of an illiterate person.

Sworn before me at the of in the County of this day of A.D. , the said affidavit having been first read over in my presence to the deponent (*or* the deponent *E. F.*) who seemed perfectly to understand the same and signed the same (*or* made his mark thereto) in my presence.

A Commissioner, etc.

No. 19.

Affidavit of Service of Writ of Summons.

I, of make oath and say as follows:—

(1) I did on the day of 19 , personally serve *C.D.*, the above named defendant in this action with a true copy of the writ of summons (*or* notice of the writ of summons) herein hereto annexed, by delivering the same to and leaving the same with the said defendant on the last day aforesaid at in the county of .

(2) Upon the said copy so served as aforesaid was indorsed at the time of such service true copies of all the indorsements appearing upon the said original writ of summons (*or* notice) except the indorsement hereinafter mentioned.

(3) To effect such service I necessarily travelled miles

(4) Subsequently, namely upon the day of I did indorse upon the said original writ of summons (*or* notice) the day of the month and week of such service.

Sworn, &c.

No. 20.

Affidavit as to Documents.

I, the above-named defendant *C.D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. [*Here state upon what grounds the objection is made, and verify the facts as far as may be.*]

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last mentioned documents were last in my possession or power on (*state when*).

6. [*Here state what has become of the last mentioned documents, and in whose possession they now are.*]

7. According to the best of my knowledge, information and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto, and the pleadings and other proceedings in the action.

Sworn, &c.

No. 21.

Affidavit on production when made by an officer of a Corporation.

I, of , make oath and say as follows:—

1. I am the (*here state the name of the office held by the deponent in the service of the Company on whose behalf he makes the affidavit*), and as such, have knowledge of all documents which are, or have been, in the custody or possession of the said (company), relating to the matters in question in this action.

2. I am cognizant of the matters in question in this action.

3. The said defendants have in their possession or power, the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

4. The said defendants object to produce the said documents set forth in the second part of the said first schedule hereto.

5. (*Here state on what grounds the objection is made, and verify the facts as far as may be*).

6. The said defendants have had, but have not now, in their possession or power, the documents relating to the matters in question in this action, set forth in the second schedule hereto.

7. The last mentioned documents were last in the possession or power of the said defendants on (*state when*).

8. (*Here state what has become of the last mentioned documents, and in whose possession they now are*).

9. According to the best of my knowledge, information and belief, the said defendants have not now, and never had, in their possession, custody, or power, or in the possession, custody, or power of myself, or of any of its solicitors or agents, or of any person or persons whomsoever, on its behalf any (*proceed as in last form*).

Sworn, &c.

No. 22.

Præcipes.

Note.—A præcipe for the action of any officer should contain a concise statement of what is desired and where what is sought is authorized by an order it should be referred to in the præcipe and should be produced. All particulars, save those appearing in the order, necessary for the officer's action should be given.

The following are given as examples.

Required in pursuance of order dated to renew the writ of summons in this action, dated the day of 19 .

(*Signed*)
Solicitor for the

Required in pursuance of order dated a writ of habeas corpus ad testificandum directed to the to bring before

---

Required in pursuance of order [*or* Master's certificate] dated a commission to examine witnesses directed to

---

Required a writ of fieri facias directed to the sheriff of to levy against *C. D.* the sum of $ and interest thereon at the rate of $ per centum per annum from the day of [and $ costs] to

Judgment [*or* order] dated day of

Taxing master's certificate, dated day of

Set down this appeal from the order [*or* judgment] of in the action dated the day of , 19 .

Required a writ of venditioni exponas directed to the sheriff of to sell the goods and chattels (*or* lands and tenements) of *C. D.*, taken under a writ of fieri facias in this action tested day of

---

Enter (*or* set down) this action for trial at the sittings at commencing on

NOTE.—*A præcipe to set down for argument may be indorsed on the notice of motion.*

No. 24.

Third Party Notice.

To *X. Y.* of the of

Take notice that this action has been brought by the plaintiff against the defendant* (as surety for *M.N.* upon

* The variable parts of the Form are between the asterisks, the other parts apply to all cases.

a bond conditioned for payment of $2,000 and interest to the plaintiff.

The defendant *C. D.* claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are his co-surety under the said bond, *or*, also surety for the said *M. N.*, in respect of the said matter, under another bond made by you in favor of the said plaintiff, dated the day of A.D.,).

Or [as acceptor of a bill of exchange for $500, dated the day of A.D. drawn by you upon and accepted by the defendant, *C. D.* and payable three months after date.

The defendant *C. D.*, claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation].

Or [To recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,900 tons of coal.

The defendant *C. D.*, claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent].*

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant *C. D.*, or your liability to the defendant *C. D.*, you must cause an appearance to be entered for you within ten days after service of this notice.

In default of your so appearing, you will be deemed to admit the validity of any judgment obtained against the defendant *C. D.*, and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you.

(*Signed*) *C. D.*
(*or X. Y.*, Solicitor for the defendant, *C. D.*)

Issued from the office of the Supreme Court at , where appearance may be entered.

Date *Signature of Officer.*

No. 25.

Summons to Defendant added by Counter-claim.

(Court and Cause.)
George the Fifth, &c.
To *X. Y.* of, &c.

Whereas in this action the defendant has filed a counter-claim against the plaintiff and upon (*a*) the said *X. Y.*

We command you that within ten days after service upon you of this summons and of the statement of claim and statement of defence and counter-claim to be served herewith, you do cause an appearance to be entered for you and your defence, if any, to the said counter-claim to be delivered, and take notice that in default of your so doing the plaintiff by counter-claim may proceed thereon without further notice to you and will be deemed to admit the statements of the said counter-claim and judgment will be given accordingly.

Your appearance may be entered and defence filed at

Witness, &c.

Issued, &c.

NOTICES.

No. 26.

Notice of payment into Court.

Take notice that the defendant has paid into Court $ in satisfaction of the plaintiff's claim [*or* the plaintiff's claim for, &c.].

No. 27.

Acceptance of sum paid into Court.

Take notice that the plaintiff accepts the sum of $ paid by you into Court in satisfaction of his claim herein (*or* of his claim for, &c.)

(*a*) For "upon" should probably be read "you."

No. 28.

Confession of Defence Arising Pending Action.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

No. 29.

Confession of Action for Recovery of Land.

I, the defendant *C. D.*, hereby confess this action (*or*, confesses (*a*) this action as to part of the land claimed, namely: *describe the part*).

No. 30.

Notice of Discontinuance.

Take notice, that the plaintiff hereby wholly discontinues this action (*or* withdraws so much of h claim in this action as relates to, &c.).

(*If not against all the defendants add* as against the defendant *C. D.*).

No. 31.

Notice to Produce Documents referred to in Pleadings of Applicant.

Take notice that the [plaintiff *or* defendant], requires you to produce for his inspection the following documents referred to in your [statement of claim *or* defence of (*b*) affidavit the day of A.D.]

No. 32.

Notice to Inspect Documents.

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [except the deed numbered in that notice] at my office on day next the instant, between the hours of 12 and 4 o'clock.

(*a*) The word "confesses" should probably be "confess."

(*b*) The word "of" should probably be "or."

Or, that the [plaintiff *or* defendant] objects to giving you inspection of the documents meationed in your aotice of the day of A.D. on the ground [*state the ground*]:—

No. 33.

Jury Notice.

"The plaiatiff (*or one or more of them, or* the defendant, *or one or more of them, as the case may be* (*a*)) requires that the issues in this cause be tried (*or* the daaages ia this cause be assessed) by a jury."

No. 34.

Notice of Trial (General).

Take notice of trial of this action [*or* the issues in this action ordered to be tried] at for the day of next .

No. 35.

Notice of Trial (Toronto Non-jury Sittings).

Take notice that this action [*or* the issnes in this action ordered to be tried] was [*or* were] set down on the day of 19 , for trial at the Toroato non-jury sittings.

No. 36.

Notice of Motion to Court.

Take notice, that the Court will be moved oa behalf of the at Osgoode Hall, Toronto, (*or as may be*) on day the day of 19 , at o'clock in the foreaoon, or so sooa thereafter as counsel can be heard, for aa order that (*state the object of the intended applicotion*) or for such other order as may seem just. [*In cases where it is necessary to set out the grounds of the motion, add* upon the followiag grounds, *stating them concisely*].

(*a*) Where some only of the plaintiffs or defendants give the notice, their names should be specified.

Ancake notice that in support of such motion will be read *tate the affidavits or other evidenc* : *be used*).

Datedhe day of 19 .

(*Signed*).
Solicitor for the

To Scitor for

Con. Rules, Form 10.

No. 3

Notice of Motion in Chambers.

Ta› notice thut a motion will be made on behalf of before the presiding Judge in Chambers (*or* the Master in Chambers, *or as the case may be*) at Osgood Hall, in the City of Toronto, (*or as the case may be*) a day the day of , 19 , at o'clock in the noon, or as soon thereafter as th motion can be heard, for an order for (*sta› object of applications*).

Ad take notice, &c. (*as in preceding form*).

No. 38.

Notice to Produce (General Form).

Tike uotice that you are hereby required to produce uudshew to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession or power, containingany entry, memorandum, or minute relating to the maters in question in this action, and particularly the folowing:—(*Setting them out.*)

Dated, &c.

Description of document. Date.

No. 39.

Notice to Admit Documents.

Take notice that the plaintiff [*or* defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be

inspected by the defendant [*or* plaintiff] his solicitor or agent at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within 4 days from the said day, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies, and such documents are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

No. 40.

Indorsement on Order Adding or Changing Parties.

Take notice that if you desire to discharge this order you must apply to the Court for that purpose within ten days after the service hereof upon you. The statement of claim in this action is filed in the office of the at (*and if the service is after a judgment directing a reference to a Master or other officer, add* and the reference under the judgment in this cause is being prosecuted in the office of the at).

(*Signed*) *A. B.*
Plaintiff's Solicitor.

No. 41.

Indorsement on Office Copy of Judgment or Order.

To , (*the person upon whom service is to be made*).

Take notice, FIRST, that from the time service of this notice you will be bound by the proceedings in this cause in the same manner as if you had been originally made a party, unless you within ten days after the service hereof apply to the Court to add to, vary or set aside the within judgment. And SECONDLY, that you may upon service of notice upon the the plaintiff attend the proceedings under the within judgment.

No. 42.

Indorsement on the Copy Served of an Order Adding a Party.

To A. B., (*the person upon whom service has been directed*).

If you wish to apply to discharge the within order or to add to, vary, or set aside, the judgment in this cause, you must do so within ten days from the service thereof. (*When the order fixes a time for the further proceedings add,* And if you fail to move to discharge the said order or to add to, vary, or set aside the judgment, and fail to attend at the time and place appointed by said order, either in person or by your solicitor, such order will be made and proceedings taken, in your absence, as may seem just and expedient; and without any further notice you will be bound by the judgment, and the further proceedings in the cause, in the same manner as if you had been originally made a party).

No. 43.

Notice to Incumbrancers.

Whereas an action has been instituted by the above named plaintiff for the foreclosure (*or* sale) of (*or* enforcement of a lien on) certain lands, (*insert description of lands*) and I have been directed by the judgment made in this cause, and dated the day of , to inquire whether any person, other than the plaintiff has any charge or lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each (*a*) some lien, charge or incumbrance upon the said estate, and I have therefore caused you to be made part to this action, and have appointed the day of , at o'clock in the noon, for you to appear before me, at my Chambers at , either in person or by your solicitor, to prove your claims.

(*a*) "Each" should be omitted where there is only one incumbrancer.

Now you are hereby required to take notice: 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the judgment, you must do so within fourteen days after the service hereof; and if you fail to do so, you will be bound by the judgment, and the further proceedings in this cause as if you were originally made a party to the action. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

Dated this day of A.D. 19 .

W. L.
Master.

No. 44.

Notice to Parties by Writ Having Incumbrances.

(*Court and Cause.*)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subsequent to the plaintiff's claim, and to take an account of the amount due to the plaintiff and any such person. And it having been made to appear that you may have some lien, charge or incumbrance thereon you are hereby notified that I have appointed day, the day of next at my chambers in the Court House at at o'clock to proceed with the said inquiry and to determine the amount of the claim of the plaintiff, and to such incumbrancers as may come in and prove their claims before me.

If you fail to attend upon such appointment, and to prove your claim, the reference may proceed in your absence, and you will receive no further notice of the proceedings in this action, and you will be treated as dis-

claiming any lien, charge or incumbrance upon the said lands, and will stand foreclosed from any such claim.

Dated this day of 19 .

W. L.
Master.

No. 45.

Notice to all Original Defendants.

(*Court and Cause.*)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subject to the plaintiff's claim thereon.

You are hereby notified that it has been made to appear to me that the persons named in the schedule hereto may have some lien, charge or incumbrance thereon, and I have, therefore, caused such of them as are not already parties thereto to be added as parties in my office, and have appointed day, the day of next at my chambers in the Court house at at o'clock, to inquire and determine whether the said parties have any such lien, charge or incumbrance, and to fix and ascertain the amount thereof, and the amount of the plaintiff's claim upon his security.

If you do not then and there attend, the reference will be proceeded with in your absence, and you will receive no further notice of the proceedings in this action.

Dated this day of 19 .

W. L.
Master.

SCHEDULE.

E.g.

Incumbrancer.	Nature of claim.
A. B.	Mortgage dated.
C. D.	Execution.
E. F.	Mechanic's lien.

No. 46.

Advertisement for Creditors.

(*Court and Cause not necessary.*)

Pursuant to a judgment [*or* an order] in an action in the Supreme Court of Ontario of *A.* against *B.*, the creditors of *A. B.*, late of in the County of who died in or about the month of 19 , are, on or before the day of 19 , to send by post, prepaid to *E. F.*, of , the solicitor for the defendant *C. D.*, the executor [*or* administrator] of the deceased [*or as may be directed*] their Christian and surnames, addresses and description, the full particulars of their claims, a statement of their securities, and the nature of the securities (if any) held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said judgment [*or* order]. Every creditor holding any security is to produce the same before me, at my Chambers, at, on the day of , 19 , at o'clock in the noon, being the time appointed for adjudication on the claims.

Dated this day of 19 .

G. B.,
Master.

Con. Rules, Form 36.

No. 47.

Notice to Creditors to Produce Documents.

You are hereby required to produce, in support of the claim sent in by you, against the estate of *A. B.* deceased [*describe any document required*], before the Master in Ordinary (*or other Master or officer*) at his chambers, at, &c., on the day of , 19 , at o'clock in the noon.

Dated this day of 19 .

No. 48.

Notice to Creditor that Claim Allowed.

The claim sent in by you against the estate of *A. B.*, deceased, has been allowed at the sum of $, [with interest thereon at $ per cent., per annum, from the day of , 19 , and $ for costs, *or as the case may be*].

If part only allowed, add.—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [&c., *as is Form No. 82.*]

No. 49.

Notice to Creditor to Prove His Claim.

You are hereby required to prove the claim sent in by you against the estate of *A. B.*, deceased. You are to file such affidavit as you may be advised in support of your claim, give notice thereof to , Master [*or as the case may be*], on or before the day of , 19 , and attend personally, or by your solicitor, at his Chambers, on the day of , 19 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

No. 50.

Notice that Cheques may be Received.

The cheques for the amounts directed to be paid to the creditors of *A. B.*, deceased, by an order made in this action [*or* matter], dated the day of , 19 , may be obtained at the Accountant's Office, in Osgoode Hall, Toronto, on and after the day of , 19 .

No. 51.

REPORTS, ETC., BY MASTERS, ETC.

Form of Report in Administration Suit.

(*Date.*)

Pursuant to the judgment herein made, dated the day of 19 , having caused an office copy thereof to be served upon [*state the names of persons served, and also the names of those upon whom service has been dispensed with, and the reason for dispensing with service*], I proceeded to dispose of the matters referred to me, and thereupon was attended by the solicitors for all parties interested [*or as the case may be*], and I find as follows:

1. The personal estate not specifically bequeathed of the testator come to the hands of the executors, and wherewith they are chargeable, amounts to the sum of $, and they have paid, or are entitled to be allowed thereout, the sum of $, leaving a balance due from [*or* to] them, of $, on that account.

[*If no personal estate, say:* No personal estate has come to the hands of the executors, nor are they chargeable [with any.]

2. The creditors' claims sent in pursuant to my advertisement in that behalf (published in issues of the newspaper called), and which have been allowed, are set forth in the first Schedule hereto, and amount altogether to $.

[*If no creditors say:* No creditor has sent in a claim pursuant to my advertisement in that behalf, nor has any such claim been proved before me.]

3. The funeral expenses of the testator amounting to $ have been paid by the executors and are allowed to them in the account of personal estate.

4. The legacies given by the testator are set forth in the second schedule hereto, and with the interest therein mentioned, remain due to the persons named [*or as the case may be*].

5. The personal estate of the said testator outstanding or undisposed of, is set forth in the third schedule hereto.

In this third schedule personal estate not specifically bequeathed should be set forth separately from the other personalty outstanding or undisposed of. If there is no specific bequest, it should be so stated in the body of the report.

6. The real estate which the said testator was seised of or entitled to, and the incumbrances (*if any*) affecting the same, are set forth in the fourth schedule hereto.

7. The rents and profits of the testator's real estate received by the said executors, or with which they are chargeable, amount to $ and they have paid, or are entitled to be allowed thereont, the sum of $, leaving a balance due from [*or* to] them of $ on that account.

[*If no rents, etc., received, say:* No rents and profits have come to the hands of the said executors, nor are they chargeable with any.]

8. I have allowed the said executors the sum of $ as a compensation for their personal services in the management of the said estate.

9. I have caused the real estate (other than parcels which were specifically ordered (*a*)) to be sold and the purchasers have paid their purchase-money into Court.

10. In the schedule I have shewn how the money in Court is to be dealt with.

(*a*) For the word "ordered" should probably be read "devised."

The first Schedule referred to in the foregoing report.

No.	Names of Creditors.	Principal.	Interest Allowed.		Costs of this Suit.	Total.
			Rate per Cent.	Amount to date of Report.		
		$ c.		$ c.	$ c.	$ c.
	[Distinguish any which are secured by mortgage, lien, or otherwise entitled to any priority.]					

[No general form can well be framed for the other Schedules, but in all cases brevity is to be studied. Where particulars are given they should shew merely the general character of the things described; as, for instance, the Schedule of outstanding personalty may say: A number of book debts outstanding amounting in the aggregate to $; a quantity of household furniture and effects valued at $; and the like short particulars should be given in other cases. Lands should be described without setting forth metes and bounds.] (*a*)

No. 52.

Standing Conditions of Sale.

1. No person shall advance less than $10 at any bidding under $500, nor less than $20 at any bidding over $500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

(*a*) This note is repeated in the official copy of the *Rules*, probably by mistake.

3. The parties to the action, with the exception of the vendor, (and, *naming any parties, trustees, agents, or others in a fiduciary situation*), shall be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in proportion of $10 for every $100 of the purchase-money, to the vendor, or his solicitor; and shall pay the remainder of the purchase-money, on the day of next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and the premises may be resold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

No. 53.

Report on Sale.

Pursuant to the judgment, hearing date the day of , and made in this cause, I have, in the presence of (*or*, after notice to), all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said judgment (*or* order), and such advertisement having, according to my directions been published in the (*naming the newspaper or newspapers*), once in each week for the weeks immediately preceding the said sale (*or as the case may be*), and bills of the said sale having been also, as directed by me, published in different parts of the township (town *or* city) of and the adjacent county and villages (*or as the case may be*), the said lands were offered for sale by public auction, according to my appointment, on the day of , by me (*or* by Mr. of , appointed by me for that purpose, auctioneer), and such sale was

conducted in a fair, open and proper manner, wh
, of was declared the highest bidd
for, and became the purchaser of the same, at the pri
or sum of $, payable as follows (*set out short
the conditions of sale as to payment of the purchas
m ney.*)

All which having been proved to my satisfaction b
proper and sufficient evidence, I humbly certify.

No. 54.

SUBPŒNAS, ETC., FOR EXAMINATION OF WITNESSES, ETC.

Subpœna ad Testificandum (General Form.)

George the Fifth of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. To greeting: We command you to attend before at on day the of 19 , at the hour of in the noon. and so from day to day, until [the above cause is tried. *or as may be*], to give evidence [*or* for examination for discovery *or as may be*], on behalf of the (plaintiff *or* defendant.)

Witness, the Honourable Chief Justice of Ontario, the day of 19 .

NOTE.—*All writs of subpœna, etc., and execution shall have the following memoranda*:—

In the margin:

Issued from the office of the of the High Court of Justice (*a*) in the County of

To be indorsed:

This writ was issued by A. B., of , Solicitor for the plaintiff (*or as the case may be*).

(*a*) The words "High Court of Justice" are an obvious mistake for "Supreme Court."

No. 55.

Subpœna Duces Tecum (*General Form.*)

George the Fifth of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To greeting: We command you to attend before at on day the day of 19 , at the hour of in the noon, and so from day to day [until the above cause is tried, *or as may be*] to give evidence [*or* for examination for discovery *or as may be*] on behalf of the and also to bring with you and produce at the time and place aforesaid (*specify documents to be produced.*)

Witness the Honourable , Chief Justice of Ontario, the day of 19 .

No. 56.

Subpœna ad Testificandum at Assizes.

George the Fifth of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To greeting: We command you to attend before our Justices assigned to take the Assizes in and for the county of to be holden at on day the day of 19 , at the hour of in the noon, and so from day to day during the said Assizes until [the above cause is tried, *or as may be*] to give evidence on behalf of the

Witness the Honourable , Chief Justice of Ontario, the day of 19 .

No. 57.

Subpœna Duces Tecum at Assizes.

George the Fifth of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, To greeting: We command you to attend before

our Justices assigned to take the Assizes in and for
county of to be holden at on
the day of 19 , at the hour of
in the noon, and so from day to day during the s
Assizes, until the above cause is tried, to give evide
on behalf of the , and also to bring with you a
produce at the time and place aforesaid (*specify do*
ments to be produced).

Witness the Honourable , Chief Justice
Ontario, the day of 19 .

No. 58.

Habeas Corpus ad Testificandum.

George the Fifth of the United Kingdom of Gre
Britain and Ireland, and of the British Dominions beyon
the Seas, King, Defender of the Faith, Emperor of Indi
To the [keeper of our prison at].

We command you that you bring , who it is sai
is detained in our prison under your custody
before at on day the da
of at the hour of in the noon,
and so from day to day until the above action is tried,
to give evidence on behalf of the . And that
immediately after the said shall have so given
his evidence you safely conduct him to the prison from
which he shall have been brought.

Witness, etc.

No. 59.

Warrant for arrest of a defaulting witness.

Province of Ontario,
County of

To *E. F.*, Sheriff, etc.

Whereas proof has been made before me that *H. N.*
was duly subpœnaed to give evidence on behalf of the
plaintiff (*or as the case may be*), in this cause (*a*) at the

(*a*) These words indicate that the warrant is to be entitled in the Court and cause, and see note, p. 1469 *supra*.

sittings of the Court of Assize (*or as the case may be*) at Toronto (*or as the case may be*, which commenced on the day of 19); that the presence of the said *H. N.* is material to the ends of justice; and that the said *H. N.* has failed to attend in accordance with the requirements of the subpœna.

These are therefore to command you to take the said *H. N.* and to bring and have him before me at the said sittings, or before such other Judge as may be presiding thereat, there to testify what he may know concerning the matters in question in the said cause, and that you detain him in your custody until he shall have given his evidence, or until the said sittings shall have ended, or until other order be made by the Court concerning him.

Given under my hand, this day of A.D. 19 , at .

Form 60.

Commission to Examine Witnesses.

(*Court and Cause.*)

George V., (*a*) by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To , greeting.

Know ye that We, in confidence of your prudence and fidelity, have appointed you a Commissioner for the purpose of taking evidence in the above cause now pending in Our said Court; and We do hereby give you full power and authority to administer all necessary oaths and to do all things necessary for the taking of the evidence more particularly mentioned in the order for the issue of this Commission, a copy whereof is hereunto attached. Forthwith after taking such evidence you will return the same, together with these presents. In the execution of this Commission you will have due regard to the general

(*a*) In the preceding Forms of writs "the fifth" is used instead of the letter "V."

rules of practice relating to Commissions, hereu
appended, and the terms of the order hereto attached
the instructions hereunder written.

Witness the Honourable , Chief Just
of Our said Court at Toronto, this day of
in the year of Our Lord one thousand nine hundred a

Signature of Officer.

Issued from the office of the Supre
Court of Ontario at in the County of
under and pursuant to the order of , bearing da
the day of A.D. 19 .

Signature of Officer.

INSTRUCTIONS TO COMMISSIONER.

(1) See that proper notice is given to the parties con
cerned.

(2) Follow strictly all the requirements of the genera
rules and special order attached hereto.

(3) Before acting on this commission take the commis
sioner's oath hereon indorsed.

(4) After the commission has been executed, attach
the depositions, exhibits and all other papers to the com
mission, and complete and sign the "Commissioner's
Return" indorsed hereon.

(5) Securely enclose the commission and attached
papers, and mail them in a sealed envelope to
, postage prepaid. Indorse the envelope as
follows: "Commission in ———*vs.*———. (*Signature
of Commissioner.*)"

(6. Use the following forms of oath).

Clerk's Oath.

You shall truly, faithfully, and without partiality to
any or either of the parties in this cause, take, write
down, transcribe, and engross all and every the questions
which shall be exhibited or put to all and every witness

and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commission to take, write down, transcribe or engross the said questions and depositions. So help you God.

Witnesses' Oath.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners. to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

7. Notice of the execution of this commission is to be given to , representing the plaintiff, and to , representing the defendant.

(*Signature of Officer issuing Commission.*)

GENERAL RULES.

(*Copy Rules 280 to 290, inclusive.*) (*a*)

NOTE.—The Commissioner's oath may be taken: In England or Ireland before a Commissioner authorized to

(*a*) See *Rule* 773.

administer oaths in the Supreme Court of Judicature England or Ireland; In England or Ireland before Judge of the Supreme Court of Judicature of Engla or Ireland; in Scotland before a Judge of the Court Session or the Justiciary Court of Scotland; before Judge of any of the County Courts of Great Britain Ireland, within his county; in Great Britain or Irela or in any Colony of His Majesty, or in any foreign cou try, before the Mayor or Chief Magistrate of any Ci Borough, or Town corporate, certified under the comm seal of such City, Borough, or Town corporate; in a colony belonging to the Crown of Great Britain, or a dependency thereof, or in any foreign country before Judge of any Court of Record or of supreme jurisdictio in the British Possession in India, before any Magistra or Collector certified to have been such under the han of the Governor of such Possession; in Quebec, before Judge or Prothonotary of the Supreme Court or Cler of the Circuit Court; in any foreign place, before an Consul, Vice-Consul or Consular Agent of His Majest exercising his functions; before a Notary Public an certified under his hand and official seal; or before Commissioner authorized by the laws of Ontario to tak such affidavits.

The Commissioner's Oath.

I, the Commissioner within named, do hereby swear that I will, according to the best of my skill and knowledge, truly and faithfully and without partiality to any or either of the parties in this case, take the evidence of each and every witness produced and examined by virtue of this commission, and will cause the said depositions so taken to be truly and faithfully transcribed and returned. So help me God.

(*Signature of the Commissioner.*)

Sworn before me at , this day of , 19 ,

(*Signature and office of person before whom oath taken.*)

RETURN TO THE WITHIN COMMISSION.

The return to the within Commission appears by the depositions and papers thereunto annexed; and I, the undersigned Commissioner, do hereby certify that the proper oaths were administered by me to the Clerk taking down and transcribing the said evidence, and to the witnesses whose depositions are hereunto attached (and to any interpreter called upon by me to interpret the evidence of any of the said witnesses), and that the said depositions were duly and properly taken by me, and that the evidence was duly and correctly transcribed.

(*Signature of Commissioner.*)

ORDERS.

NOTE.—In all orders except decretal orders and vesting orders the shortened style of cause shall be sufficient *e.g.*, Between John Jones, Plaintiff, and Aaron Smith and others, Defendants.

No. 61.

Præcipe Order for Security for Costs.

1. Upon application of the defendant, *C. D.*, and it appearing by the indorsement on [the copy of the writ of summons] served on said defendant that the said plaintiff resides at out of the jurisdiction of this Court.

2. It is ordered, that the plaintiff do within four weeks from the service of this Order, give security on behalf in the penal sum of four hundred dollars, to answer the defendant , costs of this action, and that all proceedings be in the meantime stayed.

3. And it is further ordered, that in default of such security being given by the plaintiff this action be as against such defendant dismissed with costs, unless the Court or Judge upon special application for that purpose otherwise orders.

No. 62.

Præcipe Order to continue Proceedings.

Upon the application of , alleging that sinc
the in this action, and about the da
of A.D. 19 , the above-named
departed this life, having (*recite facts shewing who ar*
the legal representatives), who now the lega
representative of the said ; and furthe
alleging that it is desirable or necessary that this actio
should be continued at the suit of as part
plaintiff thereto against as part
defendant thereto.

It is therefore ordered that this cause may be continued
at the suit of as part plaintiff thereto
against as part defendant thereto
by order to proceed and that the same and all proceedings
therein do stand in the same plight and condition as they
were in at the time of the as aforesaid.

No. 63.

Præcipe Order to change Solicitor.

Upon the application of
It is ordered that he be at liberty to change his Solicitor
in this cause by making his Solicitor in the
place and stead of his present Solicitor.

No. 64.

Præcipe Order to tax a Solicitor's Bill delivered (on Client's application).

In the matter of *A. B.*,

One of the Solicitors of the Supreme Court of Ontario.

Upon the application of , and the applicant submitting to pay what, if anything, shall be found due to the said Solicitor upon taxation of the bill hereinafter mentioned.

It is ordered that the bill of fees, charges and disbursements delivered to the applicant by the above-named Solicitor be referred to to be taxed.

No. 65.

The same (on Solicitor's Application).

[*Title, date, etc., as in Form 64.*]

Upon the application of the above-named Solicitor

It is ordered that the bill of fees, charges and disbursements delivered by the said Solicitor to be referred to to be taxed.

No. 66.

Præcipe Order for Delivery and Taxation of a Solicitor's Bill of Costs.

[*Title, date, etc., as in Form 64.*]

Upon application of , and the applicant hereby submitting to pay what, if anything, shall be found due to the said solicitor upon the taxation of the bill hereinafter mentioned.

It is ordered that the above-named solicitor do, within 14 days from the service of this order, deliver to the applicant a bill of his fees, charges and disbursements and that the same, when delivered, be referred to the to be taxed.

No. 67.

Court Order General Form.

In the Supreme Court of Ontario.

The Honourable the Chief Justice of the King's Bench (*as the case may be*). | the day of A.D.

Between *A. B., etc.*, Plaintiffs.
and
C. D., etc., Defendants.

1. Upon motion made this day unto this Court on behalf of the and upon hearing read and upon hearing counsel for (*where necessary*

add no one appearing for though duly served with notice as by affidavit of appears).

2. This Court doth order

3. And this Court doth further order

Signature of Officer.

No. 68.

Order in Chambers, General Form.

In the Supreme Court of Ontario.

(*Name of the Judge or officer thus*)
The Honourable Mr. Justice,
In Chambers,
or The Master in Chambers
(*as the case may be.*)

Tuesday, the day of A.D.

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

1. Upon the application of and upon reading the affidavit of filed and upon hearing the solicitor (*or* counsel) for (*where any recital is necessary*, and it appearing that, etc.)

2. It is ordered that

3. And it is further ordered that the costs of this application be

---

No. 69.

Order for Service out of the Jurisdiction.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for the plaintiff.

2. It is ordered that the plaintiff be at liberty to issue a writ for service out of the jurisdiction on the defendant who resides at .

3. And it is further ordered that service of the said writ of summons and of this order upon the defendant

at aforesaid, shall he good and sufficient service of the said writ upon the said defendant.

4. And it is further ordered that the time for appearance to the said writ he within days after the service thereof.

5. And it is further ordered that the costs of this application he (*a*)

No. 70.

Order for Particulars.

1. Upon the application of , and upon reading the affidavit of , and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the plaintiff (*or* defendant) deliver to the defendant (*or* plaintiff) [an account in writing of the particulars of the plaintiff's claim in this action, (*or* particulars of the paragraph of the statement of claim *or* defence, stating in what *as may be ordered*)], and that unless such particulars he delivered within days from the date of this order [all further proceedings he stayed until the delivery thereof, *or as may be ordered*].

3. And it is further ordered that the costs of this application be

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No. 71.

Order to Dismiss for want of Prosecution.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that this action be and the same is hereby dismissed for want of prosecution with costs, including the costs of this application (*a*), to be paid to the defendant by the plaintiff, forthwith after taxation.

(*a*) No *ex parte* order is to contain any direction as to costs: see *Rule* 658.

No. 72.

Stop Order.

1. Upon the application of and upon reading the affidavit of , filed, and upon hearing the solicitor for [the applicant] and the applicant by his solicitor submitting to be bound by any order the Court may make as to costs or damages occasioned by this order.

2. It is ordered that any costs or moneys now standing or hereafter to be paid into Court to the credit of this cause (*or* matter) to which the (*naming the party*) is entitled [*or* held by (the Accountant *or other officer*) for the (*naming the party*)] or which may be directed to be paid to him and any interest to accrue due thereon be not paid out or otherwise dealt with or disposed of without notice to the said (applicant).

No. 73.

Order for Commission to Examine Witnesses.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that a commission may issue out of this Court directed to for the examination *viva voce* of witnesses on behalf of the said at

3. And it is further ordered that within days after service of this order the do serve a notice giving the name and place of business of agent in aforesaid, upon whom notice of the said examination may be served.

4. And it is further ordered that days previously to the sending out of the said commission, the solicitor of the said shall give to the solicitor of the said notice in writing of the mail or other conveyance by which the commission is to be sent out.

5. And it is further ordered that upon the execution of the said commission the said commission and the depositions of the witnesses be without delay after the said commission shall have been executed transmitted to the office of the of the this Court at .

No. 74.

Order of Reference.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the following questions arising in this action namely, be referred for inquiry and report to .

3. And it is further ordered that the costs of this application be .

No. 75.

Order of Reference (another form).

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that the [*state whether all or some and, if so, which of the questions are to be tried*] in this action be tried by

3. (*To be used in a case where it is not necessary to reserve any questions as to costs or otherwise*). And it is further ordered that the defendant (*or* the party to whom any amount shall be found by the referee to be due) do pay to the plaintiff (*or* the party to whom such amount shall be found due) the amount which the referee shall find to be payable, forthwith after the confirmation of the referee's report.

4. And it is further ordered that the said referee do determine the question of the costs of this action and of the said reference.

No. 76.

Order for Examination of Witnesses before Trial.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that a witness on behalf of the be examined *vivâ voce* on oath before on days' notice in writing of the time and place where the examination is to take place being given to the solicitor.

3. And it is further ordered that the examination so taken or an office copy thereof may be read and given in evidence at the trial, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the or his solicitor as to his belief.

No. 77.

Garnishee Order (Attaching Debts).

In the Supreme Court of Ontario.

The Master in Chambers (*or as may be*).

[*Date.*]

Between *A. B.*, Judgment Creditor.
and
C. D., Judgment Debtor.
and
E. F., Garnishee.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor on the day of 19 , for the sum of $, on which judgment the

said sum of $, remains due and unpaid, and any other judgments against the said judgment debtor entitled by law to share therein.

3. And it is further ordered that the said garnishee attend before the in Chambers (*or as the case may be*) on day the day of 19 , at o'clock in the noon, on an application by the said judgment creditor, that the said garnishee pay to the said judgment creditor (*a*) the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.

No. 78.

Notice of Garnishee Order, in Lieu of Order, to be Served out of Ontario.

To *E. F.*, of

Take notice that an order has been obtained attaching all debts owing or accruing due from you to the above-named judgment debtor, to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor, on the day of 19 , for the sum of $, on which judgment the sum of $ remains due and unpaid, and any other judgments against the said judgment debtor entitled by law to share therein (*b*).

And take further notice that an order has also been obtained appointing the day of , 19 , at o'clock in the forenoon, for the making of an application before at by the said judgment creditor, for a further order that you pay to the said judgment creditor (*c*) the debt due to the said judgment

---

(*a*) This form does not appear to carry out the provisions of *The Creditors Relief Act* (R. S. O. c. 81), s. 5 (2), under which the moneys attached are to be paid, not to the attaching creditor, but to the Sheriff. In lieu of the words "to the said judgment creditor" it is suggested that the words should be "to the Sheriff of the County of (*naming the County where the garnishee resides*)."

(*b*) See *The Creditors Relief Act* (R. S. O. c. 81), s. 5.

(*c*) See note to Form No. 77. *The Creditors Relief Act* does not state to what Sheriff a garnishee is to pay the debt attached, where the garnishee resides out of Ontario.

debtor from you, or so much thereof as may be sufficie to satisfy the said judgment; and an application will made accordingly, and if you do not attend on the turn of the said motion an order may be made in yo absence.

No. 79.

Garnishee Order (Final).

1. Upoa the application of , and upon readia the affidavit of filed, and the order herein date the day of , 19 , whereby it wa ordered that all debts owing or accruing due from th above-named garnishee to the above-named judgmea debtor should be attached to answer a judgment recov ered against the said judgment debtor by the above named judgment creditor on the day of 19 , for the sum of $, on which judgment the said sum of $ remained due and unpaid (*a*). aad upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the said garaishee do forthwith pay the debt due from him to the said judgment debtor iato Court to the credit of this matter.

3. And it is further ordered that the costs of the judgment creditor of this application be first paid from the said money aad that the balance be then paid to the Sheriff of the County of to be dealt with under the provisions of the Creditors' Relief Act.

No. 80.

Interpleader Order.

1. Upoa the application of the said sheriff for an ia terpleader order, aad upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for and the said claimant not appearing though duly served with notice as by affidavit of appears .

(*a*) "And any other judgments against the said judgment debtor entitled by law to share therein." These words appear to be wanting here: see *supra* Form 77.

2. It is ordered that the claimant and all persons claiming under him be and they are hereby forever barred of and from all claim to the goods and chattels seized herein by the said sheriff as against , that no action be brought against the above-named [*sheriff*] for or in respect to the seizure of said goods.

3. And it is further ordered that the costs of this application be .

No. 81.

Interpleader Order.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the above-named claimant be substituted as defendant in this action in lieu of the present defendant.

3. And it is further ordered that the costs of this application

---

No. 82.

Interpleader Order.

1. Upon the application of the said sheriff for an interpleader order, and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for

2. It is ordered that the said sheriff proceed to sell the goods seized by him under the writ of *fieri facias* issued herein, and pay the net proceeds of the sale, after deducting the expenses thereof (*or as otherwise ordered*) into Court in this cause, to abide further order herein.

Or, It is ordered that upon payment into Court by the said claimant within from this date of the sum of $ (*or* of the appraised value of the goods and chattels seized by the said sheriff herein, together with the expenses of appraisement), or upon the said claimant within the same time, giving to the execution creditor security to the satisfaction of for the payment of the same amount by the said claim-

ant according to the directions of any order to be ma herein, and upon payment by the said claimant to t above-named sheriff of the possession money from (t *date of his notice of motion or of the order or such da as may be proper*), and upon production to the sa sheriff of the Accountant's certificate that the mone has been paid into Court, or the certificate of the sai , that security has been given as aforesaid, th said sheriff do withdraw from the possession of th goods and chattels seized by him under the writ of *fier facias* herein.

And it is further ordered that unless such payment b made (including the sheriff's possession money), or such security be given within the time aforesaid, or in case before the expiration of the time aforesaid, the claim- ant desires the said goods and chattels to be sold by the said sheriff the said sheriff proceed to sell the said goods and chattels, and pay the proceeds of the sale, after de- ducting the expenses thereof (*or as otherwise ordered*) and the possession money as aforesaid, into Court to the credit of this matter, to abide further order herein.

3. And it is further ordered that the parties proceed to the trial of an issue in the Supreme Court of Ontario (*or* in the County Court of the County of), in which the claimant (*or* execution creditor) shall be plain- tiff and the execution creditor (*or* claimant) shall be de- fendant, and that the question to be tried shall be whether at the time of [*insert here the* delivery of the said writ to the sheriff *or* the seizure by the sheriff *or* the sale by the sheriff *as the case may require*] the goods and chat- tels seized [*in case the claimant is plaintiff* were the property of the claimant as against the execution credi- tor], [*or in case the execution creditor is plaintiff* were exigible under the execution of (*the execution* (*a*)) as against the claimant].

4. And it is further ordered that such issue be pre- pared and delivered by the plaintiff therein within from this date, and be returned by the defendant therein within days thereafter and be tried at

(*a*) The word "creditor" appears to be wanting here.

5. And it is further ordered that the question of costs and all further questions be reserved to be disposed of by the Judge at the trial of the said issue, or if not so disposed of then to be disposed of in Chambers.

6. And it is further ordered that any other execution creditors desiring to take part in the contest of the said issue shall be at liberty to do so upon placing their executions against the goods of the defendant in the hands of the said sheriff within (ten) days from this date and upon notifying within the same time the solicitors for (*an execution creditor*) (who shall have the conduct of the said issue for all execution creditors taking part in it) of their desire to come in and of their agreement to contribute *pro rata* to the expense of the said contest according to the statute in that behalf.

7. And it is further ordered that no action be brought against the said sheriff for, or in respect to the seizure of the said goods and chattels or for anything done under this order.

No. 83.

Interpleader Order.

1. Upon the application of the sheriff of for an interpleader order, and upon hearing read the affidavits of and upon hearing the solicitor (*or* counsel) for , and the claimant and the execution creditor having requested and consented that the merits of the claim made by the claimant be disposed of and determined in a summary manner.

2. And it is ordered that

3. And it is further ordered that the costs of this application be

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No. 84.

Interpleader Order.

1. Upon the application of the sheriff of for an interpleader order, and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the above-named sheriff proceed to sell enough of the goods seized under writ of *fieri facias* issued in this action to satisfy the expenses of the said sale, the rent (if any) due, the claim of the claimant, and this (*a*) execution.

3. And it is further ordered that out of the proceeds of the said sale (after deducting the expenses thereof and rent, if any), the said sheriff pay to the claimant the amount of his said claim, and to the execution creditor the amount of his execution, and the residue, if any, to the defendant.

4. And it is further ordered that no action be brought against the said sheriff, and that the costs of this application be .

No. 85.

Order of Replevin.

1. Upon the application of the above-named plaintiff, and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the sheriff of (*here insert the name of County, United Counties, District or City*), do without delay take the security required by Rule 369 [*and where Rule 370 applies add* and Rule 370 (*b*)] and cause to be replevied to the plaintiff, his goods, chattels and personal property following, that is to say: (*here set out description of property as in the affidavit filed*), which the said plaintiff alleges to be of the value of $, and to have been taken and unjustly detained (*or* unjustly detained, as the case may be) by the defendant, *C. D.*, in order that the said plaintiff may have his remedy in that behalf.

3. And it is further ordered that the said sheriff do forthwith, after the execution of this order, make return to (*insert here the officer in whose office the appearance*

(*a*) It seems probable that for "this" should be substituted "the said."

(*b*) The *Rules* intended to be referred to in this Form are probably *Rules* 362, 363, instead of *Rules* 369, 370.

in the action is to be entered) what he shall have done in the premises, and do also return this order.

No. 86.

Order of Withernam.

1. Upon the application of the plaintiff, and it appearing by the return of the sheriff of the of , to the order of replevin made herein on the day of , that the goods, chattels and personal property mentioned in the said order have been eloigned by the defendant, *C. D.*, out of the bailiwick of the sheriff of , to places to him unknown so that he could not replevy the same to the said plaintiff.

2. It is ordered that the said sheriff do forthwith take in withernam the goods, chattels and personal property of the said defendant, *C. D.*, and his bailiwick, to the value of the goods, chattels and personal property by the said defendant, *C. D.*, before taken, and do forthwith deliver them to the said plaintiff to be kept by him until the said defendant, *C. D.*, delivers the goods, chattels and personal property last aforesaid to the said plaintiff.

3. And it is further ordered that if the said plaintiff shall give security to the said sheriff as provided by law for the prosecution of the plaintiff's claims and for the return of the goods, chattels and property so to be taken in withernam as aforesaid, if the return thereof shall be adjudged then the said sheriff do take security with two sufficient sureties from the said defendant *C. D.*, to answer to the said plaintiff for the taking and unjustly detaining of his goods, chattels and personal property aforesaid.

4. And it is further ordered that the said sheriff do forthwith make return to [the Central Office, Osgoode Hall, Toronto, *or name the officer in whose office the proceedings were commenced*], what he shall have done in the premises, and do also return this order.

No. 87.

Order of Certiorari.

1. Upon the application of , and upon reading the affidavit or filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that do send to the Central Office at Osgoode Hall, Toronto, (*or as may be necessary*), forthwith (*or* on the day of) the , with all things touching the same, as fully and entirely as they remain in together with this order, that this Court may further cause to be done thereupon what it shall see fit to be done.

No. 88.

Order of Prohibition.

1. Upon the application of and upon reading the affidavits of filed, and upon hearing the solicitor (*or* counsel) for , and it appearing that the said has [entered an action against *C. D.* in the said Court, and that the said Court has no jurisdiction in the said [cause] or to hear and determine the said [action] by reason that [*state facts shewing want of jurisdiction*].

2. It is ordered that the said be and he is hereby prohibited from further proceeding in the said [action] in the said Court.

No. 89.

Order for Arrest.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

2. It is ordered that the sheriff of the County, United Counties or City where *C. D.*, the defendant (*or* one of the defendants), may be found, do forthwith arrest and take, or if already in custody, do detain the said *C. D.* and him safely keep until he shall have given security

in this action for the sum of $, or shall by other lawful means be discharged from custody.

3. And it is further ordered that a copy of this order be served hy the said sheriff on the said *C. D.*

4. And it is further ordered that the said do, within ten days after his arrest under this order, canse security to he put in for him in this Court and in this action, either by the deposit in Court of the said sum of $, or hy bond or other security, pursuant to the Rules of Court in that hehalf, conditioned that the defendant will pay the amount by any judgment in the action adjudged to he recovered or directed to be paid either as a debt or for damages or costs, or will render himself to the custody of the sheriff, or that his sureties will do so for him.

JUDGMENTS.

No. 90.

NOTE.—The full style of cause is necessary in all judgments.

Default of Appearance or Defence in Case of Liquidated Demand.

The day of , 19 .

The defendants [*or* the defendant *C. D.*], not having appeared herein [*or* not having delivered any statement of defence], it is this day adjudged that the plaintiff recover against the said defendant $], and [costs to be taxed, *or where the officer signing judgments is also the taxing officer,* $ for costs].

Judgment signed the day of , 19 .

(*Signature of Officer.*)

The following may be appended to any judgment at or after the signing of the judgment on production of the taxing officer's certificate:

The above costs have been taxed and allowed at $, as appears by a taxing officer's certificate, dated the day of 19 .

(*Signature of Officer.*)

No. 91.

Judgment in Default of Appearance in Action for Recovery of Land.

No appearance having been entered to the writ of summons, herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned, being (*describing the land*). [*Where plaintiff is so entitled add* "and do also recover against the said *C. D.* (*the defendant*) his costs to be taxed *or* $ for costs."]

No. 92.

Judgment in Default of Defence in Action for Recovery of Land.

No statement of defeace haviag been delivered herein, it is this day adjudged that the plaintiff recover possession of the land in the statement of claim herein mentioned being and do also recover against the said *C. D.* (*the defendant*) [his costs to be taxed *or* $ for costs].

No. 93.

Judgment in Default of Defence in Action for Recovery of Land with Damages.

The defendant not having delivered aay statement of defence, it is this day adjudged that the plaintiffs recover possession of the land in the statement of claim herein mentioned, and described as in (*a*) County of and costs to be taxed, and it is further adjudged that the plaiatiffs recover against the defendant damages to be assessed.

No. 94.

Judgment upon Confession by Defendant of action for Recovery of Land.

The defendant *C. D.* having confessed this action (*or* having confessed this action as to part of the said land.

(c) The word "the" is wanting here.

that is to say: (*state the part*) it is this day adjudged that the said plaintiff do recover possession of the land in the writ (*or* statement of claim) mentioned (*or* of the said part of the said land) with the appurtenances and [costs to be taxed *or* $ for costs.]

No. 95.

Judgment of Seisin for Dower in Default of Appearance.

The defendant not having appeared to the writ of summons, it is this day adjudged that the plaintiff do have seisin of her third part or dower in the lands in question in this action, and that the same be forthwith delivered to her and set out by metes and bounds.

(*If damages are claimed add* And it is further adjudged that the plaintiff do recover against the defendant damages to be assessed).

No. 96.

Final Judgment in Default of Appearance or Defence, Recovery of Chattels.

The defendants [*or* the defendant *C. D.*] not having appeared herein [*or* not having delivered any statement of defence] is is this day adjudged that the plaintiff recover against the said defendant [*or* that the said defendant do forthwith deliver to the plaintiff] possession of the chattels in the writ [*or* statement of claim] mentioned, and do also recover against the said defendant his costs to be taxed [*or* $ for costs].

No. 97.

Interlocutory Judgment in Default of Appearance or Defence where Demand Unliquidated.

No appearance having been entered to the writ of summons (*or* no statement of defence having been delivered by the defendant) herein;

It is this day adjudged that the plaintiff recover against the defendant the value of the goods *or* damages. (*or both, as the case may be*), to be assessed.

No. 98.

Final Judgment in Default of Appearance or Defence, after Assessment of Damages.

No appearance having been entered to the writ of summons [*or* no statement of defence having been delivered by the defendant] herein, and the damages which the plaintiff was entitled to recover having been assessed at $, as by dated the 19 , appears, it is adjudged that the plaintiff recover $ and [costs to be taxed, *or* $ for costs].

No. 99.

Judgment for Plaintiff's Costs after Confession of Defence.

The defendant in his statement of defence herein having alleged a ground of defence which arose after the commencement of this action, and the plaintiff having on the day of 19 , delivered a confession of that defence.

It is this day adjudged that the plaintiff recover against the defendant [costs to be taxed *or* $ for costs].

No. 100.

Judgment for Costs after acceptance of Money paid into Court.

The defendant having paid into Court in this action the sum of $ in satisfaction of the plaintiff's claim, and the plaintiff having by his notice dated the day of 19 , accepted that sum in satisfaction of his entire cause of action, and the plaintiff's costs herein

having been taxed, and the defendant not having paid the same within 48 hours after the said taxation;

It is this day adjudged that the plaintiff recover against the defendant costs to be taxed.

No. 101.

Form of Judgment on Præcipe for Sale or Foreclosure WITH REFERENCE AS TO INCUMBRANCES, *etc., and orders for Immediate Payment and Delivery of Possession.*

1. Upon reading the writ of summons issued in this action, and the statement of claim (*if any*) and an affidavit of service of the said writ on the defendant, and no appearance having been entered (*or* and the defendant having made default in delivering a defence).

2. It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for redemption or sale (*or* redemption or foreclosure) and that for these purposes this cause be referred to the Master at .

3. (*Where judgment is for immediate payment add,* And it is further ordered and adjudged that the defendant do forthwith pay to the plaintiff the sum of $, being the amount due to him for principal money, interest and costs at the date hereof; and upon payment of the amount due to the plaintiff (*when judgment is for sale add,* before the sale hereinbefore directed shall have taken place) that (subject to the provisions of section 3 of *The Mortgages Act*), the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.)

4. (*Where judgment is for recovery of possession add,* And it is further ordered and adjudged that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question, in this cause, or of such part thereof as may be in the possession of the said defendant.)

No. 102.

Form of Judgment on præcipe for Foreclosure or Sale, ACCOUNT TAKEN BY REGISTRAR (*a*) *and Orders for Immediate Payment and Delivery of Possession.*

1. Upon reading the writ of summons issued in this action, and an affidavit of service of the said writ and no appearance having been entered

2. This Court finds that the subsequent interest at the rate of per centum per annum on the sum of principal money secured by the indenture of mortgage in the writ of summons [*or* pleadings] mentioned, up to the day of next, being the time appointed for payment as hereinafter mentioned amounts to , and that the costs of the plaintiff amount to which said subsequent interest and costs being added to the sum of claimed by the indorsement on the writ served on the defendant make together the sum of

3. And upon the said defendant paying the said sum of into the bank at the between the hours of ten o'clock in the forenoon and twelve o'clock noon of the day of next, to the joint credit of the plaintiff and the Accountant of the Supreme Court [*where order for payment granted insert*. (*b*) in case the plaintiff shall (*where judgment is for sale add*, before the sale hereinafter directed shall have taken place) recover the amount due to him under the order for payment hereinafter contained], it is ordered and adjudged, (subject to the provisions of section 3 of *The Mortgages Act*), that the said plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto;

4. But in default of the said defendant making such payment by the time aforesaid, it is ordered and adjudged (*where judgment is for foreclosure, after* "ad-

(*a*) The account is taken in Toronto by the Judgment Clerk, and in outer counties by the officer entering judgment. The Registrars no longer have anything to do with *præcipe* judgments.

(*b*) The word "or" appears to be wanting here.

judged," *add* " that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption in and to the mortgaged premises;" *where judgment is for sale, then after the words* " adjudged," *add* " that the said premises be sold, with the approbation of the Master at ").

5. (*If judgment is for foreclosure omit this clause.*) And it is further ordered and adjudged that the purchasers do pay their purchase-money into Court, to the credit of this cause, and that the same when so paid in be applied in payment of what has been found due to the said plaintiff together with subsequent interest and subsequent costs, to be computed and taxed by the said Master, and that the balance do abide the further order of the Court.

6. (*Where judgment is for immediate payment add:*) And it is further ordered and adjudged that the defendant do forthwith pay to the plaintiff the sum of being the amount due to him at the date hereof for principal money, interest and costs.

7. (*Where judgment is for recovery of possession add:*) And it is further ordered and adjudged that the defendant do forthwith deliver to the plaintiff , or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant.

No. 103.

Form of Judgment on præcipe for Redemption.

1. Upon reading the writ of summons issued in this action and an affidavit of service of the said writ, and no appearance having been entered

2. It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Master at

3. And, (subject to the provisions of section 3 of *The Mortgages Act*), it is further ordered and adjudged that upon the plaintiff paying to the defendant what shall be found due to him, or in case nothing shall be found due to the defendant then forthwith after the confirmation of the said Master's report, the defendant do reconvey the said mortgaged premises, and deliver up all documents relating thereto.

4. And it is further ordered and adjudged that in case the plaintiff shall make default in payment as aforesaid of what may be found due to the defendant that the plaintiff's action do stand dismissed out of this Court, with costs to be paid by the plaintiff to the defendant forthwith after taxation thereof.

5. And it is further ordered and adjudged that in case nothing shall be found due from the plaintiff to the defendant that the defendant do pay the plaintiff his costs of this suit forthwith after the taxation thereof, and in case any balance shall be found due from the defendant to the plaintiff that the defendant do pay such balance to the plaintiff forthwith after the confirmation of the Master's report.

No. 104.

General Form of Judgment for Administration.

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [or no one appearing for the defendant although duly notified as by affidavit filed appears], and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for [the applicant *or* solicitors for all parties].

2. It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the administration and final winding up of the personal [and real] estate of and for the adjustment of the rights of all parties interested therein, by the Master at

3. And it is further ordered and adjudged that all balances which may be found due from the plaintiff or

defendant [or any or either of them] to the said estate be, forthwith after the same shall have been ascertained as aforesaid, paid into Court to the credit of this cause, subject to the further order of the Court.

4. And it is further ordered and adjudged that such personal [and real] estate, or such parts thereof as the said Master may hereafter direct, be sold, as the said Master may direct, and that the purchasers do pay their purchase-money into Court to the credit of this cause, subject to the order of the Court.

5. And it is further ordered and adjudged that the Master do execute conveyances for any infant parties who by reason of their tender years are unable to execute the same.

No. 105.

Form of Judgment for Partition or Sale.

1. Upon the application of the above-named plaintiff in the presence of the solicitor for the defendant [*or* no one appearing for the defendant although duly notified as by affidavit filed appears] and upon hearing read the affidavits and papers filed, and what was alleged by the solicitor for [the applicant *or* all parties].

2. It is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the partition or sale of the lands and premises in the said affidavits mentioned, and for the adjustment of the rights of all parties interested therein, or for a partition of part and sale of the remainder of the said lands as may be most for the interest of the parties entitled to share therein by the Master at .

3. And it is further ordered and adjudged that the said lands, or such part thereof as the said Master shall think fit, be sold, with the approbation of the said Master, freed from the claims of such of the incumbrancers thereon (if any) whose claims were created by parties entitled to the said lands before the death of the said testator [*or* intestate] as shall have consented to such sale, and subject to the claims of such of them as shall not have consented and freed also from the dower of [*as*

the case may be], and that the said Master do execute the conveyances on behalf of such of the infant parties as, by reason of their tender years, are unable to execute the same, and that the purchasers do pay their purchase-money into Court to the credit of this cause, subject to the order of the Court.

4. And it is further ordered and adjudged that, in the event of a partition of the whole of the said land, or in the event of a partition of a part and the proceeds of the sale of the remainder being insufficient to pay the costs in full, the costs, or so much thereof as remains unpaid, be borne and paid by the said parties according to their shares and interests in the said lands [*if there be any infant parties interested in the estate add*] and that the proportion of the said costs payable by the infant parties respectively be, and the same is hereby declared to be, a lien on their respective shares, and that the plaintiff do pay the guardian of the infant defendants his costs of this suit and that the same be added to his own costs.

No. 106.

Final Judgment on Motion.

1. Upon the application of , and upon reading the affidavit of filed, and upon hearing the Solicitor (*or* Counsel) for

2. It is ordered and adjudged that the plaintiff do recover against the defendant the sum of $ and costs to be taxed,

---

No. 107.

Judgment after trial.

In the Supreme Court of Ontario.

The Honourable Mr. Justice

the day of 19 .

(*Date of pronouncing judgment.*)

Between Plaintiff

and

Defendant.

1. This action coming on for trial this day (*or* on the day of 19) at the

sittings holden at for trial of actions without a jury (*or* at the Assizes holden for the County of at) in presence of counsel for all parties [*or if some of the parties do not appear* for the plaintiff and the defendant C. D. no one appearing for the defendants E. F. and G. H. although they were duly served with notice of the trial as by the affidavit of appears. *or as may be*] upon hearing read the pleadings and hearing the evidence adduced and what was alleged by counsel aforesaid (*If judgment was reserved add* this Court was pleased to direct this action to stand over for judgment, and the same coming on this day for judgment).

2. This Court doth order and adjudge *as may be directed*, [*or if any declaration is necessary* This Court doth declare (*e.g.*, that the deed mentioned in the 4th and 5th paragraphs of the plaintiff's statement of claim is fraudulent and void as against the plaintiff and all other creditors of the defendant X. Y. except the defendant C. J. and doth order and adjudge the same accordingly.)]

3. And the Court doth further order and adjudge (*add any special or appropriate direction or reference to Master or other officer*).

4. *If so* And this Court doth reserve further directions and the question of costs until after the Master shall have made his report.

(*Signature of officer settling judgment where not the same person as the officer signing judgments.*)

Judgment signed the day of 19 .

X. Y., Judgment Clerk.

(*or other officer signing judgments.*) .

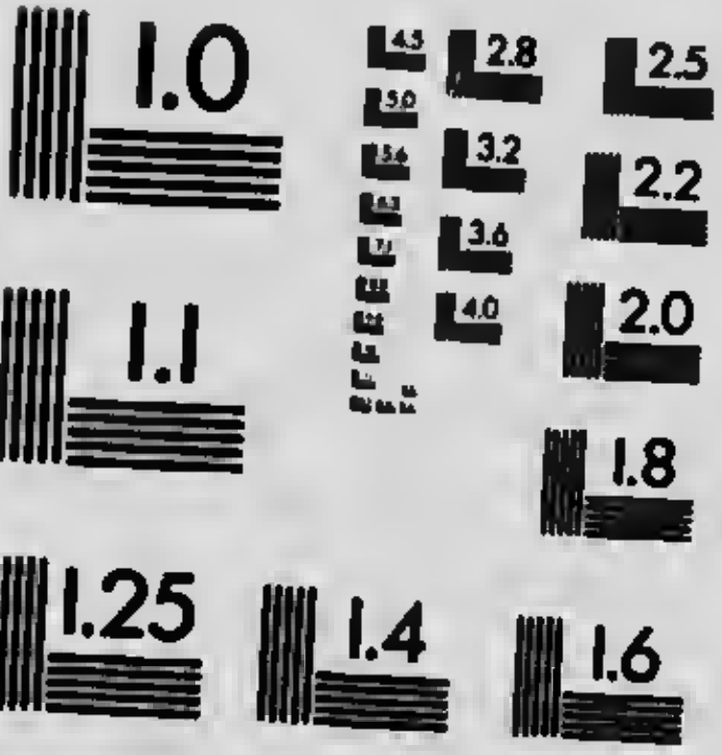
The following may be appended at or after the signing of the judgment on production of the taxing officer's certificate.

The above costs have been taxed and allowed at $ as appears by a taxing officer's certificate dated the day of 19 .

(*Signature of officer signing the judgment.*)

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

No. 108.

Judgment after trial (No. 2.)

(*Formal parts as in Form* 107.)

2. This Court doth order and adjudge that the plaintiff do recover from the defendant (*as may be directed*)

3. And this Court doth further order and adjudge that the defendant do pay to the plaintiff his costs of this action forthwith after taxation thereof [*or* this Court doth order and adjudge that this action he and the same is hereby dismissed with costs to he paid by the plaintiff to the defendant forthwith after taxation thereof].

No. 109.

Judgment on Motion for Judgment.

1. Upon motion for judgment made this day unto this Court hy counsel for the plaintiff (*or as may be*) and upon hearing read and upon hearing counsel for the defendant (*or as may be.*)

2. [*Where necessary* This Court doth declare, etc.]

3. [And] this Court doth order and adjudge, etc.

4. And this Court doth further order and adjudge, etc.

No. 110.

Judgment against a Married Woman.

This Court doth order and adjudge that the plaintiff do recover against the defendant the sum of $ to he levied out of the separate property of the said defendant which she is now or may hereafter he possessed of or entitled to, and any property which she may hercafter while discovert be possessed of, or entitled to and not otherwise, but this judgment shall not render available to satisfy the same any separate property which the defendant was or may he restrained from anticipating unless hy reason of section 21 of *The Married Women's Property Act,* such property shall he availahle to satisfy the judgment notwithstanding such restriction.

No. 111.

WRITS OF EXECUTION, &c.

Writ of Fieri Facias.

(*Court and Cause*).

George, &c.

To the Sheriff of greeting:

We command you that of the goods and chattels and lands and tenements in your hailiwick of *C. D.* you cause to he made the snm of $ and also interest thereon from the day of [*day of the judgment or order, or day on which the money is directed to be paid, or day from which interest is directed by the order to run, as the case may be*], which said sum of money and interest were hy a judgment in this action hearing date the day of adjudged to he paid hy the said *C. D.* to *A. B.*, and also the further sum of $ for the taxed costs of the said *A. B.*, mentioned in the said judgment, together with interest at the rate of 5 per cent. per annum thereon from the day of , (*the date of the certificate of taxation.*) and that you have hefore our Justices of the Supreme Court of Ontario so much of that money as you shall have made from the said goods and chattels immediately after the execution hereof, and so much thereof as you shall have made from said lands and tenements immediately after the expiration of twelve months from the day of your receipt hereof, to he paid to the said *A. B.* in pursuance of the said judgment [*or* order *as the case may be*]. And in what manner you shall have executed this our writ make appear to our Justices aforesaid immediately after the execution thercof. And have there then this writ.

Witness, the Honourahle Chief Justice of Ontario, this day of 19 .

(*Signature of Officer.*)

Issued from the office of the at

(*Signaturc of Officer.*)

Indorsements.

The is entitled to receive for this and other writs renewals of the same, the following sums

For this writ, $6.
For 1st renewal,
For 2nd renewal,
Etc., etc., (*as may be necessary*).

(*Signature of Officer.*)

Levy $ and $ for costs of execution, etc., and also interest on $ at five per centum per annum from the day of 19 , until payment; besides sheriff's poundage, officer's fees, costs of levying, and all other legal incidental expenses.

This writ was issued by
of
agent for
of
solicitor for the .

No. 112.

Fi. Fa. against an Executor or Administrator on a judgment de bonis testatoris et si non de bonis propriis *as to the costs.*

(*Formal portion in No. 111.*)

We command you that of the goods and chattels and lands and tenements in your bailiwick, which were of *C. D.*, deceased, at the time of his death in the hands of *E. F.*, executor of the last will and testament [*or* administrator of the estate and effects] of the said *C. D.* to be administered, you cause to be made the sum of $ and also interest at the rate of five per centum per annum, from the day of 19 , which said sum of money and interest were by a judgment of our said Court, bearing date the day of in 19 , adjudged to be paid by the said *E. F.* as executor (*or* administrator) as aforesaid to the said *C. D.* And further, that of the goods and chattels and lands and tenements in your bailiwick which were of

C. D., deceased, at the time of his death in the hands of *E. F.* as executor (*or* administrator) as aforesaid to be administered, if the said *E. F.* has so much in his hands to be administered you further cause to be made the sum of for the taxed costs of the said *A. B.* mentioned in the said judgment, together with interest thereon at the rate of 5 per centum per annum from the day of 19 , and that if he has not so much, then that you cause to be made of the proper goods and chattels and lands and tenements in your bailiwick of the said *E. F.* the said sum of , together with interest thereon as aforesaid, and that you have before, &c. (*Conclude as in No. 111.*)

No. 113.

Fieri facias against a Married Woman.

Modify the general form so as to make it follow the form of judgment. (*See Form* 110.)

No. 114.

Fieri Facias on a Judgment or Order for Costs.

We command you that of the goods and chattels and lands and tenements of in your bailiwick you cause to be made the sum of for certain costs which by [a judgment *or* an order] in this action dated the day of 19 , were [adjudged *or* ordered] to be paid by the said to and which have been taxed and allowed at the said sum, and interest on the said sum at the rate of per centum per annum from the day of 19 , [*the date of the certificate of taxation*] and that you have before our justices of the Supreme Court of Ontario so much of the said sum and interest as you shall have made from the said goods and chattels, immediately after the execution hereof, and so much thereof as you shall have made from the said lands and tenements immediately after the expiration of twelve

months from the day of your receipt hereof, to be rendered to the said . And in what manner you shall have executed this our writ make appear to our said justices immediately after the execution hereof. And have there then this writ (*a*).

NOTE.—*When costs are payable on a discontinuance after the words* "certain costs," *proceed,* "which are payable by the plaintiff to the defendant upon the discontinuance of this action and which have been taxed," etc. *When costs are payable under Rule 660, proceed* "which are payable as the costs of an abandoned motion," etc.

No. 115.

Writ of Venditioni Exponas after a Certificate or Return of Goods or Lands on Hand to Full Amount Unsold for Want of Buyers.

Whereas by our writ we lately commanded you that of the goods and chattels and lands and tenements in your bailiwick of *C. D.* [*here recite the fieri facias*]. And on the day of you [certified *or* returned] to our Justices that by virtue of the said writ you had taken goods and chattels [*or* lands and tenements] of the said *C. D.* to the value of the money and interest aforesaid, which said goods and chattels [*or* lands and tenements] remained in your hands unsold for want of buyers, and that therefore you could not have that money before our Justices aforesaid, as you were thereby commanded. Therefore, we being desirous that the said *A. B.* should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels [*or* lands and tenements] of the said *C. D.*, so by you taken as aforesaid, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before our Justices aforesaid, immediately after the execution hereof, to be paid to the said *A. B.* And have there then this writ (*a*).

(*a*) For commencement and teste of this writ: see No. 110.

No. 116.

Ven. Ex. for Part, and Fi. Fa. Residue.

Whereas, by our writ we lately commanded you that of the goods and chattels and lands and tenements of in your bailiwick you should cause to be made (*here recite the fieri facias*) and you on the day of certified [*or* returned] to our said justices, that by virtue of the said writ you have taken [goods and chattels *or* lands and tenements] of the said to the value of , parcel of the said several sums of money and interest which [goods and chattels *or* lands and tenements] remained in your hands for want of buyers, and that therefore you could not have that money before our Justices aforesaid, as you were thereby commanded, and that the said had not any other or more [goods and chattels *or* lands and tenements] in your bailiwick whereof you could cause to be made the residue of the moneys and interest aforesaid, or any part thereof; therefore, we, being desirous that the said should be satisfied the said sums of money and interest, command you that you expose to sale, and sell or cause to be sold, the said [goods and chattels *or* lands and tenements] of the said so by you taken as aforesaid, for the best price that can be got for the same, and have the said sum of parcel of the moneys and interest aforesaid arising from such sale, and any further or other moneys which you may receive by virtue of this writ before our Justices aforesaid, immediately after the execution hereof, to be rendered unto the said

If the writ and not merely a certificate has been returned a fi. fa. residue may be added to the writ of ven. ex. *as follows:*

[And we also command you, that of the goods and chattels and lands and tenements of the said in your bailiwick, you cause to be made the residue of the moneys and interest aforesaid; and have before our Justices aforesaid so much of such residue as you shall have made from said goods and chattels immediately after the execution hereof, and so much thereof as you

shall have made from said lands and tenements immediately after the expiration of twelve months from the day of your receipt hereof (*a*), to be rendered to the said for the residue of the moneys aforesaid].

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 there then this writ (*b*).

No. 117.

Writ of Possession.

Whereas lately by a judgment in this action dated . *A. B.* recorded (*c*) [*or E. F.* was ordered to deliver to *A. B.*] possession of all and singular that with the appurtenances in your bailiwick: Therefore, we command you that you enter the same, and without delay cause the said *A. B.* to have possession of the said land and premises with the appurtenances, and that you defend and keep him and his assigns in peaceable and quiet possession when and as often as any interruption may or shall, from time to time, be given or offered to him or them or any of them.

Witness, etc. (*b*).

[*Where money or costs are also recoverable by the judgment, a writ of* fieri facias *may be combined with the writ of possession.*

No. 118.

Writ of Delivery.

We command you, that without delay, you cause the following chattels, that is to say [*here enumerate the*

(*a*) Where the *fi. fa.* has been already twelve months in the Sheriff's hands, *semble*, it would not be necessary to wait twelve months before selling land under a *fi. fa.* residue. In such a case, it would seem proper to modify this Form by making it both as to lands and goods returnable "immediately after the execution thereof."

(*b*) For commencement and teste of this writ: see No. 110.

(*c*) The word "recorded" should probably be "recovered."

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.* by a judgment in this action dated , recovered against *C. D.* [*or C. D.* was ordered to deliver to the said *A. B.*]. 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 to the said *A. B.* the said chattels; and in what manner you shall have executed this our writ make appear to the Justices of our said Court at Toronto, immediately after the execution hereof, and have you there then this writ.

Witness, etc. (*a*).

No. 119.

Writ of Capias ad Satisfaciendum.

Whereas (*insert if necessary any recitals which under the order may be proper*).

We command you that you take *C. D.* if he shall be found in your bailiwick, and him safely keep so that you have his body before our Justices of our Supreme Court of Ontario immediately after the execution hereof to satisfy the sum of $, which by a judgment in this action dated , was adjudged to be recovered by *A. B.* against the said *C. D.* with the further sum of $, for the taxed costs mentioned in the said judgment and interest upon the said sum at the rate of 5 per centum per annum from the and respectively. And have you then there this writ. Witness, &c. (*a*).

On a writ of Capias *before judgment add this note.*

N.B.—This writ is to be in force for two months from the date hereof and no longer.

(*a*) For commencement and teste of this writ: see No. 110.

No. 120.

Writ of Attachment for Contempt.

We command you to attach *C. D.*, notwithstanding any right of place he is in, so as to have him before our Justices in our Supreme Court of Ontario, immediately after the receipt hereof, then and there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, by reason of any liberty, and bring this writ with you.

Witness, &c. (*a*).

No. 121.

Writ of Sequestration.

Whereas by a judgment in this action dated it was ordered that the said *C. D.* should [pay into Court to the credit of the said action the sum of ; *or as the case may be*]. Know ye, therefore, that we have given, and by these presents do give to you full power and authority to enter upon all the lands, tenements and real estate whatsoever of the said *C. D.*, and to collect, receive and sequester in your hands, not only all the rents and profits of his said lands, tenements and real estate, but also all his goods, chattels and personal estates whatsoever; and therefore we command you, that you do at certain proper and convenient days and hours, go to and enter upon all the lands, tenements and real estates of the said *C. D.*, and that you do collect, take and get into your hands, not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said *C. D.* shall [pay into Court, to the credit of the said action, the sum of $ *or, as the case may be*], and clear his contempt, and our said Court make other order to the contrary.

Witness, &c. (*a*).

(*a*) For commencement and teste of this writ: see No. 110.

No. 122.

Writ of Assignment of Dower.

Whereas it has been made to appear to us in an action in our Supreme Court of Ontario that *C. D.* is the owner of (*describe the lands*), out of which is claimed by *A. B.*, and it has been adjudged by the judgment of our said Court bearing date the day of A.D. 19 , that the said *A. B.* is entitled to her proper dower out of the said lands [and also to recover from the said *C. D.* the sum of for damages for the detention of her dower].

We therefore command you that without delay you do deliver to the said *A. B.* seisin of her third part of the said lands with the appurtenances. To hold to her in severalty by metes and bounds and that you do proceed in the execution in that respect of this our writ according to the provisions of "The Dower Procedure Act." (*a*)

[*A fi. fa. for recovery of the damages and costs, if any, awarded by the judgment, may be combined with this writ.*]

No. 123.

Writ of Assignment of Dower where the Right of Dower is Acquiesced in by the owner of the Estate.

Whereas, *A. D.*, widow, who was the wife of *C. D.*, deceased, demands against *E. F.* the third part of (*here describe the estate in which dower is claimed as in other writs of assignments of dower*), as dower. And whereas the said *E. F.* acquiesces in the said claim and is willing to assign to the said *A. B.* her proper dower, but that the said *A. B.* and *E. F.* are not agreed as to the

(*a*) For commencement and teste of writ: see No. 110.

At the time the *Rules* of 1913 were passed and came into effect, there was in fact no *Dower Procedure Act*, it having been repealed by 9 Edw 7, c. 39, and see now *The Dower Act* (R. S. O. c. 70), s. 24 *et seq.* For the words "Dower Procedure Act" the words "The Dower Act" should therefore be substituted.

admeasurement thereof. We, therefore, command you that, without delay, you do deliver the said *A. B.* seisin of her third part of the said lands and tenements with the appurtenances. To hold to her in severalty by metes and bounds; And that you do proceed in the execution of this our Writ, according to the provisions of "The Dower Procedure Act." (*a*)

Witness, &c. (*a*)

No. 124.

Certificate in Lieu of Return of Writ as to Goods.

A writ of execution in this cause against the goods and chattels, lands and tenements of *C. D.*, the above-named defendant (*or as the case may be*), to me directed, dated the day of , 19 , issued from , is now in my hands.

I certify that I have this day indorsed on the above-mentioned writ my return thereto as to goods and chattels as follows:—

(*Here insert the return as indorsed.*)

Dated, &c. (*b*)

No. 125.

PETITIONS OF RIGHT.

Petition.

In the Supreme Court of Ontario.

To the King's Most Excellent Majesty.

The humble petition of *A. B.* (*stating Christian name and surname*) of , [by his solicitor, *E. F.*, of], showeth that (*stating with convenient certainty the facts entitling the suppliant to relief*). Your suppliant, therefore, humbly prays that, etc.

(*a*) For commencement and teste of writ: see No. 110.

See note to Form No. 122.

(*b*) The certificate must, of course, be entitled in the Court and cause in which the writ in question issued.

The suppliant proposes that the trial of this petition shall take place at the of .

Dated this day of 19 .

(*Signed.*) *A. B.*
or *C. D.*, Counsel for *A. B.*
or *E. F.*, solicitor for *A. B.*

(*Stating the usual place of abode of the suppliant, and, if he has a solicitor, the place of business of such solicitor.*)

Indorsement.

The suppliant prays for a plea or answer on behalf of His Majesty within twenty-eight days after the date hereof, or otherwise, that the petition may be taken as confessed. (*a*)

No. 126.

Notice to Appear to Petition. (*b*)

To *A. B.*

, You are hereby required to appear to the within petition in His Majesty's Supreme Court of Ontario within eight days, and to plead or answer thereto within fourteen days after the date of service hereof.

Take notice, that if you fail to appear or plead or answer in due time, the said petition may, as against you, be ordered to be taken as confessed.

No. 127.

Petition of Right.

Certificate of Judgment for Petitioner.

To the Honourable the Treasurer of Ontario.

Petition of right of *A. B.*, in His Majesty's Supreme Court of Ontario.

(*a*) *Semble* the petition ought to be served on the day it bears date, otherwise less than 28 days would be limited for an answer: see *Rule* 740.

(*b*) See *Rule* 741.

I hereby certify that on the day of A.D. , it was by the said Court adjudged (*or* ordered), that the above-named suppliant was entitled to, etc.

Judge's signature.

No. 128.

Certificate of Taxation.

I certify that pursuant to [the judgment *or* order herein dated *or* the request of the Master in Ordinary *or as may be*] I have taxed the costs of the at $.

No. 129.

Mode of Marking Exhibits at the Trial.

In the Supreme Court of Ontario.

Smith v. Jones.

This Exhibit the (property of) is produced by the plaintiff (*or* defendant *as the case may be*), this day of 19 .

A. B.,
Registrar, Dep. Clerk, or Local Registrar.

No. 130.

Schedule of Exhibits.

In the Supreme Court of Ontario.

Smith v. Jones.

List of exhibits put in at [the trial of this action at the day of , 19 .
At] (*a*) the trial of this action at Cornwall, the 4th May, 19 .

Plaintiff's Exhibits.

(1) Patent.
(2) Deed, Jones to Smith.
(3) Bundle promissory notes (six in all).

(*a*) The words in [ ] appear to be superfluous.

Defendant's Exhibits.

(4) Records of proceedings at Lodge of A. O. U. W.
(5) Will of Arthur Brown.

Signature of Officer.

No. 131.

Form of Satisfaction Piece.

Satisfaction is acknowledged of the judgment against defendant in an action for $ and costs. And do hereby expressly nominate and appoint solicitor to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of .

Signed by the said on the day of 1913, in the presence of (*a*) the Supreme Court of Judicature for Ontario. And I hereby declare myself to be solicitor for and on behalf of said expressly named by and attending at request to inform of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by me). And I also declare that I subscribe my name hereto as such solicitor.

(*Signature*).

(*Signature*). the above-named plaintiff.

No. 132.

BONDS, ETC.

Replevin Bond.

Know all men by these presents, that we, *A. B.* (*the plaintiff*) of *W. G.*, of and *J. S.*, of

(*a*) Here is probably wanting "A. B., a solicitor."

are jointly and severally held and firmly bound to W. P., Esquire, Sheriff of the County of , in the sum of of lawful money of Canada, to be paid to the said Sheriff, or his certain attorney, executors, administrators or assigns, for which payment to be well and truly made, we bind ourselves, and each and every of us in the whole, our, and each and every of our heirs, executors and administrators, firmly by these presents.

Dated this day of , one thousand nine hundred and .

The condition of this obligation is such, that if the above bounden *A. B.* prosecute his action with effect and without delay against *C. D.* for the taking and unjustly detaining (*or* unjustly detainiug, *as the case may be*), of his goods and chattels, to wit: (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also to (*a*) pay such damages as the defendant shall sustain by the issuing of the order of replevin if the said *A. B.* fails to recover judgment in his suit, and further do observe, keep and perform all rules and orders made by the Court in the said action, [*where Rule 363 so requires add* and do indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure of the said goods and chattels (*as the case may be*), and of any deterioration of the same in the meantime in the event of their being returned and all costs and expenses which the defendant may incur, including reasonable costs not taxable between party and party], then this obligation shall be void, or else remain in full force and virtue.

Sealed and delivered)
in the presence of)

Form of Assignment.

Know all men by these presents, that I, W. P., Esquire, Sheriff of the County of , have at the request of the within named *C. D.*, the defendant in this

(*a*) The word "to" seems to be superfluous, or should be "do."

cause, assigned over this Replevin Bond unto the said *C. D.*, pursuant to the Rules of the Supreme Court of Ontario in that behalf.

In witness whereof, I have hereunto set my hand and seal of office this day of , one thousand nine hundred and .

Sealed and delivered)
in the presence of)

No. 133.

Verification of Return of Moneys paid into C. C. or Surrogate Court.

I hereby solemnly declare that the annexed statement is a full and true statement of the moneys paid into the Court (*or* Surrogate) Court of the County of , during the year 19 , and that it correctly shows the state of the various accounts therein mentioned upon the thirty-first day of December last.

(*Signature.*) *A. B.*
Clerk, or Registrar.

Subscribed and declared before me, at , this day of January, 19 .

C. D.
Commissioner for taking affidavits, *or*
Justice of the Peace.

TARIFF "A."

TARIFF OF FEES TO BE ALLOWED SOLICITORS IN THE SUPREME COURT.

Services not provided for by Tariff.—The Tariff is not exhaustive and in matters not specifically provided for therein, a reasonable sum may be sometimes allowed for services not covered thereby: see *Bull* v. *Crompton Corset Co.*, 11 P. R. 256; *Toronto* v. *Grand Trunk Ry.*, 13 O. L. R. 12, and see notes to *Rule* 642, *supra*, p. 1313. the expense of shorthand writers employed by consent of parties is not necessarily an expense which will be allowed on a taxation "as between solicitor and client": *Re Roney*, 136 L. T. Jour. 299.

Tariffs A and D are retrospective in their operation, and apply to costs for services rendered prior to their coming into force, and not previously taxed: see note at end of Tariff D: and *Re Solicitors*, 6 O. W. N. 625.

1. For the institution of an action $20 00

This item covers all costs except those of applications in Court or Chambers up to and including search for appearance.

2. Defence 10 00

This item covers the entry of appearance, but does not include any application in Court or Chambers.

3. Pleadings 25 00

This item covers all pleadings, affidavits on production, jury notices, etc., etc.

4. Third party notice or summons to party added by counter-claim 5 00

5. Record and entry for trial 5 00

6. Preparation for trial, including notice of trial, notices to produce and admit, subpœnas, and advising upon evidence 25 00

Subject to increase in the discretion of the Taxing Officer at Toronto to $50.

7. Briefs at trial, per folio (*a*)	$ 0 10
8. Upon ex-parte motions in Chambers, including affidavits, etc.	15 00
9. Upon contested interlocutory Chambers motions	20 00

Subject to increase in the discretion of the Taxing Officer to a sum not exceeding $30. (The Jndge or Officer hearing the motion may fix any smaller sum.)

10. Ex-parte motions in Court	20 00
11. Contested interlocutory motions in Court (*b*)	30 00

Subject to increase by the Taxing Officer to $50. (The Court may fix any smaller snm).

12. Examinations, preliminary attendances, arranging, to cover all charges except Counsel fee;

To the party examining	5 00
To the party examined.....	2 00

Counsel fee on examination;

To the party examining.....	10 00
To the party examined	5 00

Subject to increase in the discretion of the Senior Taxing Officer at Toronto in special cases.

13. Counsel fee at trial, to.....	50 00

An increased Counsel fee and fee to junior counsel may bc allowed in the discretion of the Taxing Officer at Toronto.

(*a*) Charges for procuring copies of opinions of Judges in another action, which were of assistance to counsel, were disallowed: *Platt* v. *Grand Trunk Ry. Co.*, 12 P. R. 273.

(h) The Court will not on appeal usually interfere with the Taxing Officer's discretion as to the allowance of interlocutory costs, nor as to the amount allowed for counsel fees: *Smith* v. *Horwood*, 17 P. R. 36.

14. Solicitor attending trial where no second counsel employed $20 00

If the trial lasts more than one day, then for each additional day, $20.

15. Judgment, including attendance to hear judgment, drafting minutes, settlements and issue of the same, taxation of costs, etc.;
To the party having the carriage of the order 10 00
To other parties 5 00

Subject to increase to $15.

16. Correspondence pending suit, in the discretion of the Taxing Officer, up to..... 10 00

17. On originating motion in Court, to the party moving, to cover all preliminary proceedings, notices, affidavits, services, etc. 20 00

Subject to increase to $40.

In Chambers 15 00

Subject to increase to $30.

To a party appearing for preliminary proceedings 10 00

Subject to increase when affidavits necessary to $30.

In Chambers to $25.

Counsel fee in the discretion of the Taxing Officer at Toronto.

Issuing order, etc., to the party having carriage 15 00

To other parties 5 00

18. Upon motions and originating notices for copies of affidavits properly served on opposite parties per folio..... 10

19. Fair copy of material correspondence in chronological order, for use of the trial Judge, when proper, per folio.....	$ 0 10
Solicitor's attendnnces arranging for its admission by opposite party.....	2 00
Subject to increase to $5.	
20. Upon nppenls to the Appellnte Divisiou preliminnry proceedings, to party appenling...	25 00
To respondent	15 00

Counsel fecs in the discretion of the Taxing Officer at Toronto.

Issuing judgmeut or order, etc., etc.;	
To pnrty hnving carriage.....	10 00
To the other pnrty	5 00
21. References:	
Attending on reference, per hour.....	2 00
To be incrensed in the discretion of the Taxing Officer nt Toronto to $5 per hour, or a lump fee mny be allowed for the whole reference.	
Drawing notices, nffidavits and other documents necessnry upon the reference, per folio	20
For ench copy, per folio.....	10
For every ordinary attendance.....	50
Fee conducting sale	10 00
22. Signing default judgment	5 00
23. Commissions in nddition to costs of motion	5 00

Reasonable fee to counsel and forcign agents attending execution of commission, not exceeding $25, in the discretion of the Tnxing Officer, or to be increased in the discretion of the Taxing Officer at Toronto.

24. Writs of execution, including disbursements $ 6 00
Renewals, including disbursements..... 4 00

25. On application to Taxing Officer at Toronto for increased counsel fees 5 00

The Judge or Officer hearing any motion may allow a smaller fee than above provided. (*As amended by Rule, 1st December, 1913*).

(See Note on page 1552.)

COUNTY COURT TARIFF.

Tariff of Fees to be Allowed Solicitors in County Courts.

1. For the institution of an action..... $10 00

This item covers all costs except those of application in Court or Chambers up to and including search for appearance.

2. Defence 5 00

This item covers the entry of appearance, but does not include any application in Court or Chambers.

3. Pleadings 15 00

This item covers all pleadings, affidavits on production, jury notices, etc., etc.

4. Third party notice or summons to party added by counterclaim 3 00

5. Record and entry for trial 3 00

6. Preparation for trial, including notice of trial, notices to produce and admit subpœnas and advising on evidence 10 00

Subject to increase in the discretion of the Judge, in cases involving more than $200, to	$25 00

See *Thompson v. Canada F. & M. Co.*, 6 O. W. N. 723.

7. Brief at trial, per folio (not to exceed $5)..	10
8. Upon ex-parte motion in Chambers, including affidavits	5 00
9. Upon contested interlocutory Chambers motion	10 00
Subject to increase in the discretion of the Judge to a sum not exceeding.... (The Judge may fix any smaller sum.)	15 00
10. On ex-parte motions in Court	10 00
11. On contested interlocutory motions in Court	15 00
Subject to increase in the discretion of the Judge to a sum not exceeding... (The Judge may fix any smaller sum.)	30 00
12. Examinations:	
Preliminary attendances arranging for examinations, to cover all attendances except the counsel fee:	
To the party examining.....	3 00
To the party examined.....	1 00
Counsel fee on examination:	
To the party examining	5 00
To the party examined	3 00
Subject to increase in cases involving over $200 in the discretion of the Judge to a sum not exceeding....	10 00
13. Counsel fee at trial, up to.....	25 00
Subject to an increase in the discretion of the Judge, in cases involving $200 or more, to a sum not exceeding....	50 00

And in cases involving $400 or more to a sum not exceeding $70 00

(In cases where the claim is not a money demand the Judge shall determine the amount involved.)

See *Thompson* v. *Canada F. & M. Co.*, 6 O. W. N. 723; *Darr* v. *Thompson*, *Ib.* 724.

14. Solicitor attending in Court when not counsel or partner of counsel, in cases involving over $200 ..... 10 00

15. Judgment:
To party having carriage..... 5 00
To other parties 3 00

This includes attendance to hear judgment, drawing and settling same, taxation of costs, etc.

16. Correspondence, aot exceeding 5 00

17. On originating notices in Court:
To party moving for preliminary proceediags, affidavits, aotices, etc. 15 00
Subject to increase to, not exceeding.... 25 00
To party appearing for preliminary proceediags 5 00
Subject to increase when affidavits necessary to 15 00
Allowanee for counsel fee in discretion of Judge, aot exceediag 20 00
Issuiag order to party having earriage.... 8 00
To other parties 3 00

18. Originating aotices iu Chambers:
To party moviag for prelimiaary proceeding 10 00
Subject to increase to 20 00
To party appearing 5 00
Subject to increase when affidavits necessary to 10 00

Counsel fee in discretion of Judge, not exceeding	$15 00
(As amended by Rule, 1st December, 1913).	
Issuing order, to party having carriage	8 00
To other parties	3 00
19. Upon motions, copies, affidavits properly served on opposite party, per folio	10
20. Upon appeals to a Divisional Court of the Appellate Division:	
Preliminary proceedings:	
To party appealing	15 00
To the respondent	10 00
Counsel fee in discretion of Taxing Officer at Toronto, not exceeding	50 00
(As amended by Rule, 1st December, 1913).	
Issuing order, etc.:	
To party having carriage	8 00
To other parties	3 00
21. References:	
Attending on reference, per hour	1 00
Subject to increase to	2 00
Drawing notices, affidavits and other documents necessary upon the reference, per folio	20
For each copy, per folio	10
For every ordinary attendance	50
For conducting sale	10 00
22. Signing default judgment	3 00
23. Commission (in addition to costs of Motion) Attending on execution, foreign agents' fees, etc., in discretion of Judge.	3 00

24. Writs of execution, including disbursements $ 4 0
"3new3ls, including disbursements 3 0

NOTE.—Unless otherwise specitled, tho allowances in the above tariffs of solicitors' foes are exclusive of proper disbursements.

Upon taxn ion between a solicitor and his client, additional allowances may be made in the discretion of the officer taxing, but the exercise of such discretion shall be subject to review upon any appeal.

TARIFF "B."

TARIFF OF DISBURSEMENTS.

(Payable in stamps, [except where the officer is not paid by salary or has not commuted his fees or], unless otherwise expressly [provided]. (*As amended by Rule 773.*) (*a*)

On issue of writ	$2 00
On entry of appearance	1 00

(Any number of defendants may appear at one time by the same solicitor without extra charge.)

On every order except præcipe orders	1 00
On præcipe orders	50
On every judgment	2 00

(Including a certificate of the judgment of the Appellate Division.)

Where a judgment or order is entered, per folio additional	10

(Where an order is required to be entered in more than one place—Rule 518—this fee shall be charged in the Local Office.)

On setting down any motion	50

(a) The [ ] indicate the amendments.

On setting down an appeal to the Appellate Division	$ 2 00
On entering an action for trial:	
With a Jury (including Jury fee)	6 00
Without a Jury	3 00
On certification of record	1 00
On renewal of writs. (*As amended by Rule 773*)	1 00
On every filing (except praecipes in the Accountant's office)	10
On any certificate	50
If over three folios, for every folio	20
On direction to pay money into Court, or a cheque	30

(No stamp on cheques for less than $10 or on directions to receive money paid on mortgages to the Accountant.)

Search: When action less than two years old	10
When action more than two years old	30
When made by the Official Guardian, no charge.	

(No charge shall be made for inspection of the books of the Accountant's Office).

Amending pleadings	30
Writs, other than writs of summons	1 00
Taxations, party and party, including certificate of taxation	1 00

Taxation, solicitor and client, same fees as on a reference.

Comparing and certifying papers prepared by a solicitor: for each three folios	10
Making and certifying copies: per folio	10
Making up and forwarding papers	50

On References:	
Appointments	50
Per hour while attending reference	1 50
Drawing report, per folio	20
Engrossing report	10
Fee (on first report in action only)	2 00

Oath	$ 0
Depositions in infancy matters (no charge to be made for time): per folio	
On quieting titles:	
To Inspector (when petition referred to him); to cover all fees except filings	8
When petition referred to Referee, same fees as on a reference, and additional as follows:	
On each deed in the chain of title, other than satisfied mortgages	5
Where title is possessory only	4
On certificate of title	4
On examination before Special Examiner:	
Appointment	5
Oath	5
Taking depositions, per hour	2
Copy for solicitor, per folio	1
Return	5
Certificate	5
Attendance when examination not proceeded with unless 24 hours' previous notice given	1
Attendance out of office, extra per mile	2
Marking exhibits. (*As amended by Rule 773*)	2
Crier:	
Calling case	6
Swearing witness or constable	2
Deputy Registrar; not paid by salary, and entitled on 1st September, 1913; so long as present officers retain office and are not paid by salary.	
Payable in cash:	
Swearing each witness	2
Marking each exhibit	2
Attending inspection of documents produced	1

Commissioners. Payable in cash:	
Taking recognizance	$ 0 50
Taking affidavits	20
Marking exhibits	10
Upon every Commission appointing a Commissioner to take affidavits, etc. (*1st December, 1913*)	5 00
Fees payable to witnesses, in both Supreme Court and County Court:	
To witnesses residing within three miles of the Court house, per diem	1 00
To witnesses residing over three miles from the Court house, per diem (*a*)	1 50

(*As amended, 24th December, 1913.*)

Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem unless otherwise expressly provided by statute (*b*)	5 00

(*As amended by Rule of 24th December, 1913.*)

(*a*) As to fees which may be allowed to witnesses coming from a great distance: see *Boyle* v. *Rothschild*, 16 O. L. R. 424. Where a party is a necessary witness in his own behalf, he is entitled to be allowed the usual witness fees as if he were a stranger: *Ib*: *Wiltshire* v. *Naylor*, 43 Ir. L. T. 167. Where travelling expenses were claimed for a suitor as a witness, the taxing officer as a condition of allowing them required the suitor's solicitors to produce his receipt therefor, or a letter from him showing that he knew the amount was allowed to him, and this condition was upheld by the Court of Appeal: *Horbin* v. *Gordon*, 1914, 2 K. B. 577.

(*b*) Where all a solicitor's knowledge is acquired by him in the course of rendering professional services, he is entitled to a professional fee: *Campbell* v. *Verral*, 4 O. W. N. 177; and where he has made an affidavit on which he is required to attend for cross-examination, he is so entitled.

Engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them or to give evidence depending upon their skill or judgment, per diem, unless otherwise expressly provided by statute (*a*) ..... $ 5 00

(*As amended by Rule of 24th December, 1913.*)

If witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

A reasonable sum may be allowed for the preparation of any plan, model or photograph, when necessary for the due understanding of the evidence. (*b*) (*Rule 24th December, 1913*).

(*a*) No more than three experts may be called by any party to give opinion evidence: *The Evidence Act* (R. S. O. c. 76), s. 10, where more were called, and the Judge neglected to enforce the statute, a new trial was ordered: *Rice* v. *Sockett*, 27 O. L. R. 410. An expert witness where he has not been required to prepare himself by study or otherwise to give evidence, cannot refuse to be sworn until he is paid more than the fee allowed by the Tariff: *Butler* v. *Toronto Mutoscope Co.*, 11 O. L. R. 12. No sum can be allowed between party and party for payment to a scientific witness to get up a case: see *McGannon* v. *Clarke*, 9 P. R. 555. A reasonable sum is taxable in England: see *Smith* v. *Buller*, L. R. 19 Eq. 473; *Churton* v. *Frewen*, 15 W. R. 559; *Mackley* v. *Chillingworth*, 2 C. P. D. 273; *Windham* v. *Rainton*, 21 Q. B. D. 199. And as to official witnesses called to produce public records: see Jud. Act, s. 118, *supra*, p. 292.

(*b*) A solicitor ordering plans, models, or photographs, to be made on behalf of his client, for the purposes of a trial, does not incur any personal liability therefor, if he notifies the person furnishing them, that he is merely acting as solicitor, and does not expressly pledge his personal credit therefor: *Wakefield* v. *Duckworth*, 138 L. T. Jour. 13.

COUNTY COURT TARIFF OF DISBURSEMENTS.

Fees Payable to County Court Clerks.

1. Upon issue of Writ (in lieu of all fees heretofore payable by a plaintiff prior to Entry for trial or assessment, except those provided for by item 5)	$3 00
2. Upon Entry of Appearance (in lieu of all fees heretofore paid by a Defendant, or third party, prior to entry of action for Trial or Assessment, except those provided for by item 5) (Any number of persons may appear at the same time by the same solicitor without extra charge.)	1 00
3. Upou Entry of action or issue for Trial or Assessment:	
Non-jury case	3 00
Jury case	5 00
4. Upon Entry of Judgment (including Taxation of Costs)	3 00
5. Upon Examinations and References:	
Appointment	50
Not exceeding one hour	1 50
Additional per hour after first	1 00
Marking Exhibits, each	20
Copies of depositions per folio	10
For each oath	20
For each certificate	50
Drawing reports, per folio	20
Engrossing reports, per folio	10
6. On every writ of execution and renewal	1 00
7. Every certificate uot otherwise provided for	50
8. Exemplificatiou of judgment (including certificate and seal)	1 50

9. Every search not made in the ordinary course of an action, or made after the close of the action, if within three years..... $ 0
If made after that time.....
For copies of papers, per folio.....

10. On appeal from County Court to High Court (*a*) (including making up and forwarding papers, preparing certificate and entry of judgment of Appellate Court 2 0
Disbursements for express or postage to be added.

11. For every subpœna in matters outside of actions such as in Municipal and Voters' List proceedings, etc., and all other proceedings in which a subpœna is issuable out of the County Court 1 0

12. On all applications and proceedings before a County Court Judge, other than application in an action, not otherwise provided for, and upon all applications in an action after judgment 1 0
Where there is a trial or hearing upon oral evidence in any matter other than an action or issue, a further fee of 2 0

TARIFF "C."

Fees of Sheriffs.

	Supreme Court.	County Court.
1. Service on one party of any writ, subpœna, notice, pleading, or other paper, including receiving, filing, return, affidavit of service and one letter (exclusive of mileage); when more than one paper served at the same time it shall be considered as one service	$3 00	$2 00

(*a*) This is obviously a mistake for Supreme Court.

	S.C.	C.C.
2. Each additional party served	$0 75	$0 50
3. When writ returned without service being made	1 00	75
4. On writs of Fieri Facias and Ven. Ex. and renewals thereof covering receiving, filing warrant and return and one letter (payable in advance; see 9 Edw. VII. c. 6, s. 30) (*a*)	2 00	1 50
5. Transmitting copy execution to Master of Titles (1 Geo. V. c. 29, s. 62) (*b*)	1 00	50
6. Executing each order or writ relating to Arrest, Attachment, Absconding Debtor, Replevin, Sequestration, Possession, Hab. Fac. Pos., Escheat and Striking a Special Jury, and including receiving, filing return, preparing warrant, precept, bond and affidavits when necessary and other necessary attendances and including correspondence (exclusive of mileage, of poundage when chargeable, and of reasonable and necessary actual disbursements)	12 00	8 00
7. Poundage on executions and on attachments on the sum made; up to and including $1,000, 6% excess over $1,000 and up to and including $4,000, 3%; and on excess over $4,000, 1½%. In County Court cases 5% on the sum made. (Exclusive of mileage and of all reasonable and necessary actual disbursements)	——	——

(*a*) For this section here referred to, see now *The Sheriffs' Act* (R. S. O. c. 16), s. 31.

(*b*) This reference is obviously erroneous, the Act referred to being *The Water Privileges Act*. The reference probably intended was 1 Geo. V. c. 28, s. 62, which is now *The Land Titles Act* (R. S. O. c. 126), s. 62.

	S.C.	C.C.
8. Schedule made on the execution of any process, including copy for the debtor not exceeding 5 folios.....	$1 50	$1 0
9. Each folio above 5	20	2
10. Drawing advertisement and copies, including transmitting and posting..	2 00	1 0
11. Every notice of sale or postponement thereof	25	2
12. For each day's attendance upon a view by a Jury (exclusive of mileage and reasonable and necessary disbursements)	3 00	3 0
13. Mileage from the Court house to the place where a paper is served, writ executed or other service performed (one way except in the case of an arrest, when mileage is both ways) per mile (see 9 Edw. VII. c. 6, s. 30) (*a*)..	15	15
14. Every letter not above provided for and required by a party or his solicitor	50	30
15. Bringing up prisoner on attachment or Habeas Corpus, besides travel at 20 cents per mile	2 00	1 50
16. Certificate of surrender by sureties..	1 00	1 00
17. Where a Sheriff is directed by the Court to perform any service or do any act for which no fee is provided, he may be allowed such fee as the Court may think fit, and it shall be payable as the Court may direct (9 Edw. VII. c. 6, s. 29) (*b*).....	——	——

(*a*) See now *The Sheriffs' Act* (R. S. O. c. 16), s. 31.

(*b*) See now *The Sheriffs' Act* (R. S. O. c. 16), s. 30.

	S.C.	C.C.
18. Every search for writs against one debtor not being by a party to a cause or his solicitor	$0 30	$0 30
19. When search embodied in a certificate including mailing to solicitor... (It shall include any sales during the six months preceding its date.)	1 00	1 00
20. Maximum fee for a land certificate relating to the investigation of one title and in which shall be included all names required (see 9 Edw. VII. c. 6, s. 21) (*a*)	4 00	4 00
21. On Trials	1 00	1 00
22. For notices, etc., upon seizure of stock, mortgages, and patents, additional	2 00	1 50
23. For Sheriff's deed or bill of sale....	4 00	3 00
24. For schedule of distribution under Creditor's Relief Act	2 00	1 00

TARIFF "D."

TARIFF OF FEES FOR WORK DONE IN ONTARIO UPON PRIVY COUNCIL APPEALS (IN ADDITION TO DISBURSEMENTS).

Giving security and obtaining its allowance....	$20 00
To respondent on allowance of security.....	10 00
Settling record	20 00
Supervising printing, etc., per folio.....	20
Transmission of record, etc.	5 00
Fees, drawing and settling case..... (Subject to increase in discretion of taxing officer in Toronto.)	50 00
Correspondence, etc.	10 00
Entry of certificate and taxation of costs.....	10 00

NOTE.—Tariffs A. and D. shall be used in all taxations after these Rules come in force.

(*a*) See now *The Sheriffs' Act* (R. S. O. c. 16), s. 21.

TARIFF "E."

PASSED 19TH JUNE, 1914.

Costs allowed on sales of land under *The Devolution of Estates Act*:—

(*a*) *To the Solicitor for the Personal Representative*

1. Where sale price is under $200 ..... $10
Where it is over $200, up to and including $400.. $1
Where it is over $400, up to and including $600.. $1
Where it is over $600, up to and including $800.. $2
Where it is over $800, up to and including $1,000.. $2
Where it is over $1,000, up to and including $1,500, 2½ per cent.
Where it is over $1,500, up to and including $2,000, $7 plus 2 per cent.
Where it is over $2,000, up to and including $3,000, $17 plus 1½ per cent.
Where it is over $3,000, up to and including $5,000, $32 plus 1 per cent.
Where it is over $5,000, $57 plus ½ of 1 per cent.

Where a part of the land of an estate has been sold, in the case of any subsequent sale, three-fourths of the foregoing amount shall be allowed.

2. In addition to the above amounts there shall be allowed:—

(*a*) The cost of taking out letters of administration or letters probate, and of succession duty affidavits as fixed by the Surrogate Court Rules, where there is no personal estate out of which costs can be paid.

(*b*) The proper disbursements for advertising for creditors where there is no personal estate out of which such disbursements can be paid.

(*c*) Where the sale is by auction the auctioneer's fee and the cost of all necessary printing of advertisements.

(*d*) The fees paid to valuators.

(*b*) *Costs of Official Guardian.*

3. The costs of the Official Guardian shall be one-third of the amount allowed under item 1, and his actual disbursements.

(*c*) *Special Allowances.*

When special circumstances render the amount taxable under this tariff unreasonable or inadequate, a Judge may order the allowance of a smaller or larger sum.

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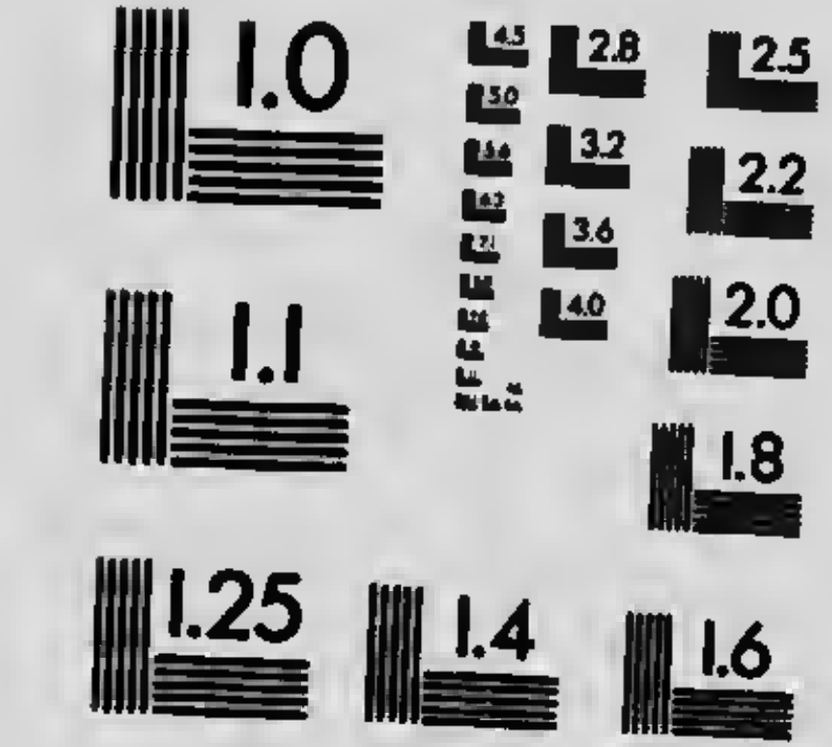

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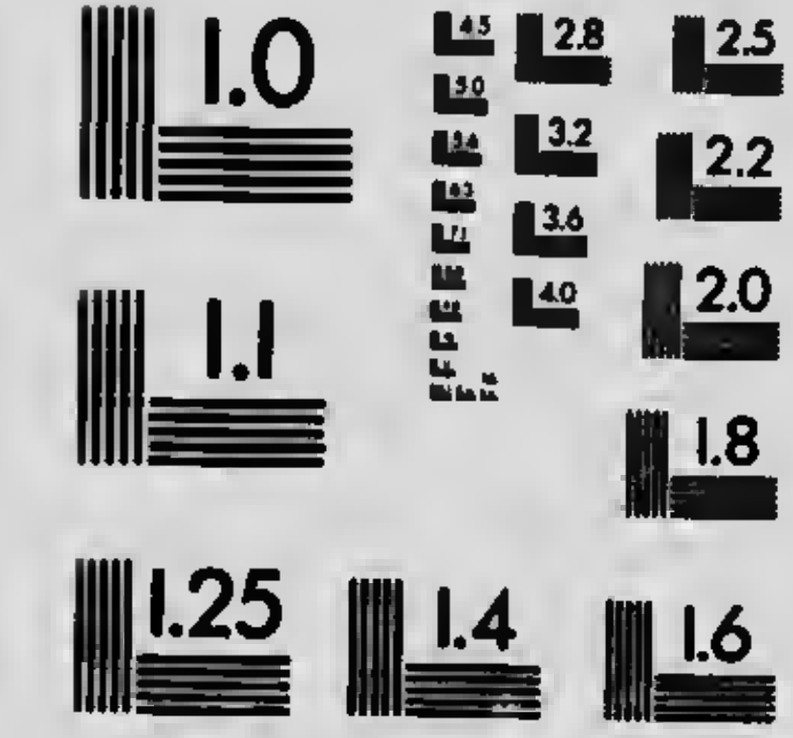

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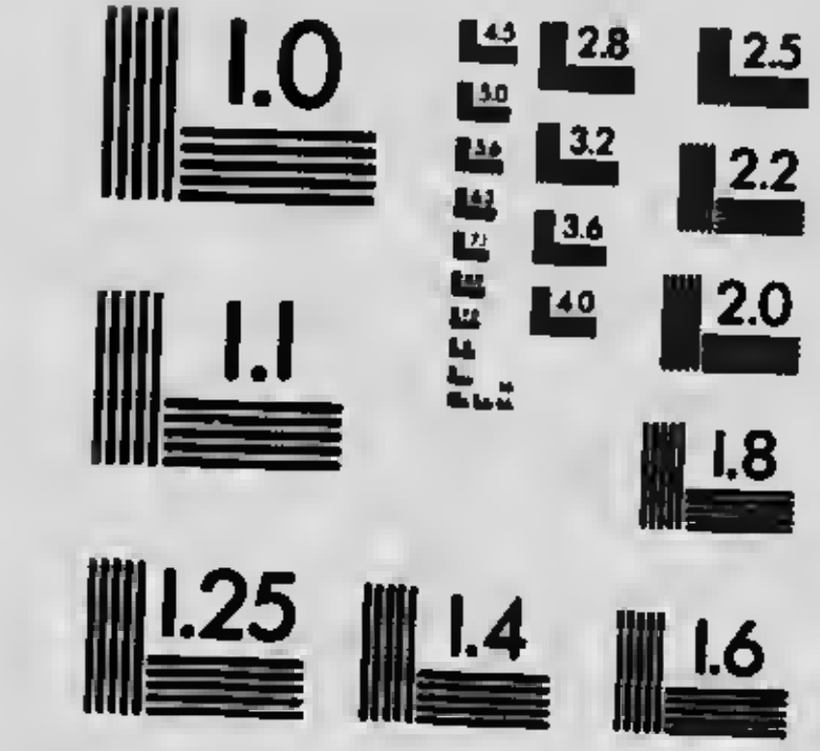

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