## Technical and Bibliographic Notes / Notes technique et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

L'Institut a microfilmé le meilleur examplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers / Couverture de couleur
- [ ] Covers damaged / Couverture endommagée
- [ ] Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- [ ] Cover title missing / Le titre de couverture manque
- [ ] Coloured maps / Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. eutre que bleue ou noire)
- [ ] Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- [ ] Bound with other material / Relié avec d'autres documents
- [ ] Only edition available / Seule édition disponible
- [ ] Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- [ ] Blank leaves edded during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauretion apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [x] Additional comments / Commentaires supplémentaires: Various pagings.

- [ ] Coloured pages / Peges de couleur
- [ ] Pages damaged / Pages endommagées
- [ ] Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- [ ] Pages detached / Pages détachées
- [x] Showthrough / Transparence
- [ ] Quality of print varies / Qualité inégale de l'impression
- [ ] Includes supplementary material / Comprend du matériel supplémentaire
- [ ] Peges wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveeu de taçon à obtenir la meilleure image possible.
- [ ] Opposing peges with varying colouration or discolourations ere filmed twice to ensure the best possible image / Les peges s'opposant eyent des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleur imege possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X 14X 18X 22X 26X 30X

12X 16X 20X 24X ✓ 28X 32X

The copy filmed here has been reproduced thanks to the generosity of:

National Library of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol —► (meaning "CONTINUED"), or the symbol ▼ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

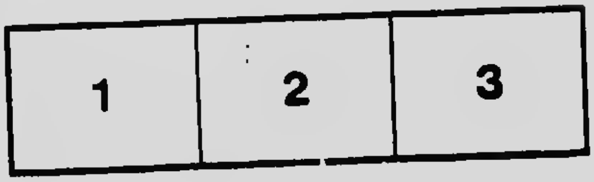
Bibliothèque nationale du Canada

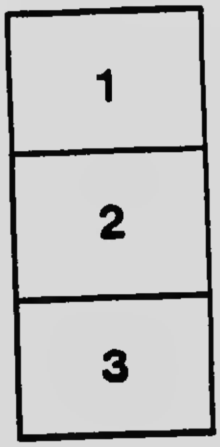
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole —► signifie "A SUIVRE", le symbole ▼ signifie "FIN".

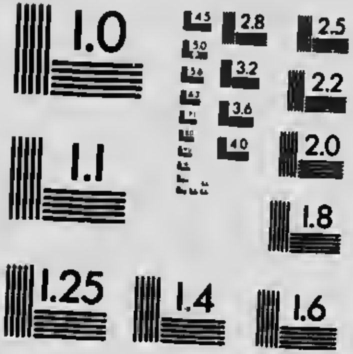
Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.




MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



# THE LAW OF COSTS IN CANADA

MORE PARTICULARLY AS REGARDS

## THE TAXATION OF COSTS

TOGETHER WITH

## A TARIFF OF COSTS AND DISBURSEMENTS ALPHABETICALLY ARRANGED

**Second Edition**

BY


HIS HONOUR JUDGE WIDDIFIELD

LOCAL MASTER OF THE SUPREME COURT
OF JUDICATURE FOR ONTARIO,
AT OWEN SOUND


"Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand, costs are so largely in the discretion of the Judge that it is more difficult to secure uniformity in that department than in any other, and it is well nigh impossible to lay down any general rule which can be depended on to meet the ever varying circumstances of particular cases. But when an opportunity occurs, it is well to enunciate rules for the guidance of the profession." Per Kekewich, J., in *Re Buckton*, (1907) 2 Ch. 113.


TORONTO:
CANADA LAW BOOK COMPANY, LIMITED
32-34 TORONTO STREET

PHILADELPHIA:
CROMARTY LAW BOOK COMPANY
1112 CHESTNUT STREET
1911

# TABLE OF CONTENTS

# TABLE OF CASES CITED

c—Costs.

an
as
1

ti
af
co
wi

mo
mo

pu
pa
cat
117

ma
it w
cost
up
*Reg*

aban

done
v. *G*

J
the f

1—

# LAW AND TAXATION OF COSTS.

## ABANDONED MOTION.

Where a party moving does not appear the motion is called an abandoned motion, and the opposite party is entitled to ask for the costs of it. *Barry* v. *Exchange Trading Company*, 1 Q.B.D. 77.

A motion for an injunction had been served by the plaintiff, and when it was brought on time was asked to answer affidavits, which was granted, and the motion stood over accordingly. Subsequently the plaintiff served the defendant with a notice that he intended abandoning the application. *Held*, that the defendant was entitled to the costs of a motion refused, and not merely the costs of an abandoned motion. *Dennison* v. *Devlin*, 11 Gr. 84.

Where a notice of appeal is given, but the appeal is not put on the paper by the party giving the notice, the other party ought not to appear, but may make a substantive application for the costs of the motion. *Webb* v. *Mansel*, 2 Q.B.D. 117. But see *Loomis* v. *Pearsall*, *post*, p. 2.

Under the former practice, where after a rule *nisi* for a mandamus had been served, the applicant gave notice that it would not be proceeded with, but did not offer to pay any costs, the Court on application discharged the rule with costs up to the time of the notice, and costs of the application. *Regina* v. *Justices of Huron*, 31 U.C.Q.B. 335.

A person in contempt cannot apply for the costs of an abandoned motion. *Ellis* v. *Walmsley*, 4 L.J. Ch. 461.

A motion cannot be renewed until the costs of an abandoned motion for the same purpose are paid. *Bellchamber* v. *Giani*, 3 Mad. 550.

Jessel, M.R., asked the taxing master for a certificate upon the following questions of practice: (1) Whether, on taxing the costs of an abandoned motion, it is usual to allow the costs of preparing, and briefing, or otherwise relating to affidavits which have not been actually sworn, or, being sworn, have not been filed. (2) Whether, in taxing costs, on discontinuance of action, any change of practice has been made from the former practice before the Judicature Act on dismissal of bill; and in particular, in respect to pleadings and evidence, etc., in course of preparation.

The taxing masters certified as follows: "That we have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any change of practice in this respect since the Judicature Act."

The Master of the Rolls acted upon this certificate. *Harrison* v. *Leutner*, L.R. 16 Ch. Div. 559.

The plaintiff had succeeded at the trial and the defendant moved before the Divisional Court to set aside the judgment, but did not order the notes of evidence or set down the motion. Plaintiff now moved before the Divisional Court for the costs of the motion.

The Court held there was no necessity to come there for an order and so add a counsel fee to the trifling costs incurred by the plaintiff. The taxing officer should tax the costs of the motion to the plaintiff as part of the costs in cause without any order. *Loomis* v. *Pearsall*, 11 C.L. Times 331.

A motion to commit for contempt is a "criminal matter," and, if abandoned, the costs cannot be taxed as of an abandoned motion. "The proper course would be for either party to make application to the Court for such order as might be just for the termination of the proceedings, and to decide if costs should be payable, and if so by whom and to whom." *Rex ex rel. Bawkes* v. *Letherby*, 12 O.W.R. 703.

Two persons had received goods from the judgment debtor prior to his making an assignment, and plaintiff served them with notice of motion for an order under Rule 903 for their examination as transferees. The motion was abandoned, and the persons served moved for costs. *Held*, they were entitled to their costs. Rule 1130(1) discussed. *Lumbers* v. *Dundass*, 7 O.W.R. 230.

Where a motion is treated as abandoned and the opposite party intends to ask for the costs of an abandoned motion, he ought before doing so to communicate his intention to the party by whom the motion was made. *Aitken* v. *Dunbar*, 25 W.R. 366.

Jessel, M.R.:—"As regards the first part of the application we wish it to be understood as the rule of the Court, that henceforth the costs of an application for the costs of an abandoned notice of appeal will not be allowed unless the applicant has made a previous demand for payment which has not been complied with." *Griffen* v. *Allen*, 11 Ch. D. 913, 28 W.R. 10.

*Con. Rule 790.*—(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.

(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.

(3) In either 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 four days from taxation, the party entitled thereto may obtain upon præcipe an order for payment of the same, on filing the certificate of taxation and an affidavit of non-payment of the costs.

Sub-sections (2) and (3) are new.

## ABORTIVE PROCEEDINGS.

The costs of abortive proceedings are disallowed unless they are specially allowed by order or judgment.

Where an application was made to strike out a jury notice, and the motion was referred by the Local Master to the trial Judge, and nothing further was done, costs should be disallowed. See Report I. L. O. 1885, p. 25.

Where the successful party is not to blame for the proceedings proving abortive this rule does not apply.

Where the first trial was abortive because the jury disagreed, and no order to the contrary was made by the Judge at the trial.

*Held*, that the party who ultimately succeeded was entitled to tax the costs of the first trial. *Copeland* v. *Blenheim*, 11 P.R. 54.

The retirement of Blake, V.-C., who sat during the argument, occurred before judgment, whereupon it was ordered that the appeal should be re-argued before the Court as then constituted.

*Held*, following *In re Pender*, 10 Jur. 891, that the successful party was entitled to the full costs of both arguments. *Platt* v. *Attrill*, 3 C.L. Times 543, 19 C.L. Journal 348.

A solicitor and client taxation. The solicitors had moved to vary an interpleader order and the motion was unsuccessful. The taxing officer allowed the solicitors the costs of the motion and the client appealed.

Meredith, C.J.:—"I cannot say that the solicitors did not undertake the prosecution of the appeal in the exercise of an honest and fair discretion, especially as in so deciding I should be interfering with the decision of the deputy clerk, which I ought not to do unless he has clearly come to a wrong conclusion; and I am of the opinion that it cannot be said, on the facts of this case, that the proceeding was an unauthorized one. See Con. Rule 1215 (now Con. Rule 1176)." *Smith* v. *Harwood*, 17 P.R. 36.

An order was made by the Master in Chambers changing the venue from the Assizes at Simcoe to the Chancery Sittings at London. The Judge presiding at these sittings refused to take the case as it belonged to a common law division.

On the final taxation of the costs of the action the taxing officer refused to allow the plaintiff the costs occasioned by the abortive attempt at trial. On appeal it was contended that the Master in Chambers had no jurisdiction to make such an order.

Cameron, J.:—"Without assuming to determine whether or not the order of the Master in Chambers directing the trial of this cause at the Chancery Sittings, was a proper order, I am of the opinion the plaintiff was justified in acting thereon, and the costs incurred by this proceeding are costs caused by the defendant's application to change the venue, and should properly follow the event. The Judge upon the trial having given the plaintiff the general costs, these costs follow. *Green* v. *Wright*, L.R. 2 C.P.D. 354; *King* v. *Hawksworth*, L.R. 4 Q.B.D. 371. The taxation should therefore be revised and these costs allowed." *Schwob* v. *McLaughlin*, 9 P.R. 475.

Proudfoot, J.:—"This is an appeal from a taxing officer because he has refused to allow the expenses of seventeen witnesses who were subpœned to attend the trial at Hamilton, a trial that turned out abortive from the defendants not having obeyed an order to produce, and the case was postponed to another day. The Master has disallowed the expenses of these witnesses, as they were subpœned to be examined upon matters concerning the internal management of the company, which the Judge held could not be interfered with by the Court. The reception of the evidence was objected to at the final hearing by the defendants' counsel, and was taken subject to objection.

"I think the taxing officer was right. The costs of the hearing at Hamilton, which the defendants were ordered to pay, were costs that would have been properly taxable had the case been decided there. It was assumed on both sides that these witnesses were only examined on matters relating to the internal management of the company. These were not matters with which the Court could interfere, and the evidence on the subject was inadmissible. The expenses of the witnesses for that purpose were therefore not taxable.

"Rule 442, O.J.A. (now Con. Rule 1175) gives a very wide discretion to the taxing officer as no costs are to be allowed which do not appear to him to have been necessary or proper for the attainment of justice.

"I do not think it has been shewn that he has erroneously exercised his discretion. See Arch. Prac., 13th ed., p. 454." *Christopher* v. *Noxon*, 9 Pr. Rep. 149.

In an action of false imprisonment, the Court of Appeal, in ordering a new trial, directed that the costs of the former trial should abide the result of the new trial. At the second trial the jury gave a verdict for the plaintiff one farthing damages, and the Judge refused to give the plaintiff a certificate for costs.

Lord Esher, M.R.:—"The part of the order in question related to costs only—to the costs of the first trial. It says, in effect, that the result with regard to the costs of the first trial is to be the same as the result of the second trial with regard to the costs of that trial. It seems to me clear that the 'result' as used in that order means the result of the second trial as far as costs are concerned. If the result of the second trial is that the plaintiff has no costs of that, then the same result must follow as to the first trial." *Botherton* v. *Metropolitan District Railway Joint Committee* (1894), 1 Q.B. 666.

Costs will not be allowed for shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning wholly on a point of law. *Ex parte Webster*, 22 Ch. Div. 136.

After issue joined in demurrer, but a month before term, the plaintiff prepared demurrer books. The case was subsequently referred to arbitration and the books became useless. On taxation the Master disallowed the costs of the demurrer books and the plaintiff appealed from the taxation.

Wilson, J.:—"The rule of the offices here, it is said, is not to allow the costs of making up the demurrer books unless the demurrer has been argued. That is not a reasonable practice, and must operate unjustly in many cases.

"The plaintiff must be authorized to make up the paper books some reasonable time before they are to be set down for argument, and at any rate, so long a time before the term as he has to make up a *nisi prius* record before the assize day, and to charge the cost of his proceeding to the adverse party if such adverse party were then to settle the cause. Appeal allowed." *Eliott v. Northern Assurance Co.*, 6 P.R. 111.

See Advertisement of Sales; Unnecessary or Vexatious Costs; Record.

## ABSTRACT OF TITLE.

In an action for damages for trespass to lands the title to the land was in dispute, and the plaintiff sought to tax the costs of a registrar's abstract as a part of his costs of the action. On an appeal from the taxation allowing such costs—Boyd, C.:—"Attending to bespeak and for registrar's abstract should not be allowed. This is to prepare the plaintiff for litigation, or to enable him to prove his title, and it is not taxable against the defendant." *Carlisle v. Roblin*, 16 P.R. 328.

## ADJOURNMENTS.

Where a motion is adjourned at the request of either party, the costs occasioned by the adjournment are costs in the action unless otherwise fixed by the order disposing of the motion.

An adjournment into Court from Chambers is deemed to be part of the proceedings in Chambers; the costs of such adjournment follow the same rule as the costs in Chambers; and the party obtaining the adjournment into Court will not be ordered to pay the costs thereof, even if the question appears to be unarguable, unless there was, in the opinion of the Court, misconduct in requiring the opinion of the Judge on the question.

Where a respondent is ordered to pay the costs of an application, which has been adjourned into Court, but as to the costs of which no order would have been made if the question had been decided in Chambers, the costs payable by him are simply the costs occasioned by the adjournment into Court. Dan. Chy. Prac. 973.

See Postponing Trial.

Where the trial of the action was adjourned by reason of there being no Court room available no costs of the adjournment were allowed. *McDonnell* v. *Perry*, 10 B.C.R. 326.

## ADMINISTRATION PROCEEDINGS.

It is a general rule, that wherever an action for the administration of the assets of a deceased person is rendered necessary by the nature of his will, or the circumstances of his property, or by his dying intestate, his estate must bear the costs of it. The rule equally applies though the doubt on the construction of the will was introduced by parol evidence for the defendant. Nor will it make any difference that a declaration of the rights of the parties is all that is required to enable the executors or trustees to administer the estate or execute the trusts of the will. Mor. & W. 165.

The costs of a special case on the construction of a will generally follow the same rules as those of an administration action. *Cookson* v. *Bingham*, 17 Beav. 266.

In a suit to obtain the decision of the Court on a very doubtful will, the plaintiff turned out to have no interest. The Court, upon making a declaration of rights, ordered the costs of all parties to be paid out of the fund. *Thomason* v. *Moses*, 5 Beav. 77, 6 Jur. 403.

But an administrator or executor has no right to launch administration proceedings merely to obtain an indemnity by passing his accounts; there must be some real question to submit to the Court, or some dispute or difficulty requiring its interposition, otherwise he will be refused his costs. *Springer*

v. *Clarke*, 15 Gr. 664. There is no distinction in this respect between an administrator and a trustee.

If it should appear that the conduct of the administrator or executor has been *mala fide*, or unreasonable, he will be ordered to pay the costs of the defendants. *White* v. *Cummins*, 3 Gr. 602.

In *Tebbs* v. *Carpenter*, 1 Madd. 290, V.-C. Plumer said:—"If a suit would have been proper and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay all the costs of that suit, though in the course of the suit it appears 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."

"If the executors by their unfounded claims, or by their supineness, negligence or other misconduct, occasion an administration suit to be brought, they *primâ facie* subject themselves to liability for the general costs of it." *Per* Mowat, V.-C. *McGill* v. *Courtice*, 11 Gr. 271.

"I must in this case reiterate my opinion that the principle stated in *Tebbs* v. *Carpenter* is the sound one; and certainly there is less hardship in applying it in this country, where an executor doing his duty to the estate he represents is allowed a fair compensation for his pains and trouble; a compensation of which he is not deprived unless there be serious misconduct or mismanagement on his part. I would not, however, apply the rule in *Tebbs* v. *Carpenter* too rigidly. We have to remember that the class from which executors in this country are largely drawn are men with little acquaintance with, and many of them with little aptitude for business; and are often chosen for other reasons than their business capacity. Where they manage the estate carefully as well as conscientiously, I should not apply the rule. With this qualification (if it can be called a qualification) I would apply the rule enunciated in *Tebbs* v. *Carpenter*." Spragge, C. *Simpson* v. *Horne*, 28 Gr., at p. 9.

Another exception to the general rule which gives the costs of an administration action out of the estate is made where the action is not for the benefit of the estate, or as to so much of the costs as are occasioned by unfounded charges or vexatious proceedings. "No costs ought to be given out of an estate except for those proceedings only which are in their origin directed with some shew of reason and a proper foundation for the benefit of the estate, or which have in their result conduced to that benefit." *Per* Lord Westbury, C. *Bartlett* v. *Wood*, 9 W.R. 817.

But if the suit has enabled the Court to administer the estate, the plaintiff, though he fails in his particular claim, will be allowed his costs: see *Thompson* v. *Sheppard*, 2 Cox 161, where the plaintiff filed his bill on the footing of an intestacy, and a will was afterwards established; and *Taylor* v. *Haygarth*, 8 Jur. 135, where the plaintiffs unsuccessfully claimed to be the next of kin of an intestate, but the real next of kin were ascertained by inquiries in the suit.

If an executor refuses to join his co-executor as plaintiff in a proper case, and is therefore made a defendant, he will be refused his costs. *Colyer* v. *Dudley*, 2 L.J. Ch. (O.S.) 15.

"In certain cases of mere neglect or refusal to furnish accounts, where the neglect is very gross, or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal. But I expressly guard myself from saying that in every case of mere neglect, or even in every case of mere refusal, an honest executor or trustee, who has fairly discharged his duty, an onerous and thankless duty, is to pay costs. But where I find, in addition to an unjustifiable neglect or delay that there has been misconduct in dealing with the trust fund, then I look upon that neglect or delay as an aggravation of the latter misconduct; and although, standing alone, the neglect or delay might not be sufficient, to induce me to order the trustee or executor to pay costs, yet, when combined with such misconduct, I should order him to do so." Jessel, M.R., in *Hough* v. *Seard*, 24 W.R. 51.

In other cases executors, while given the general costs of the administration proceedings, have been disallowed the costs of special inquiries rendered necessary by the misconduct or neglect of the executors. *Tebbs* v. *Carpenter*, 1 Madd. 290; *Raphael* v. *Boehm*, 11 Ves. 92; *Colyer* v. *Colyer*, 11 W.R. 79, 32 L.J. Ch. 101; *Re Boyd, Boyd* v. *Boyd*, 3 O.W.R. 343.

An administrator acting *bonâ fide* was held to be entitled to costs out of the estate, where the letters of administration were afterwards revoked on the production of the will of the supposed intestate. *Mirehouse* v. *Herbert*, 5 W.R. 583.

But where the administrator, after knowledge that another person claimed the right to administer, started administration proceedings, and the letters of administration were revoked, he was refused his costs. *Houseman* v. *Houseman*, 1 Ch. D. 535.

Where executors or administrators are entitled to costs out of the estate, these costs are payable in priority to those of all other parties, whether as plaintiffs or defendants: *Tanner* v. *Dancey*, 9 Beav. 339; and even to the payment of debts where the estate is insolvent. *Gaunt* v. *Taylor*, 2 Hare 413; *Sanderson* v. *Stoddart*, 11 W.R. 275.

Similarly in a creditor's action for administration, and the estate is insufficient for the payment of all the creditors in full, the plaintiff will be entitled to his costs. *Stanton* v. *Hatfield*, 1 K. 358; *Bissett* v. *Burgess*, 23 Beav. 278. The same rule applies to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin. *Richardson* v. *Richardson*, 14 Ch. D. 611.

Where a plaintiff, instead of applying for an administration order on notice, commenced an action by writ of summons, he was held not entitled to the extra costs occasioned thereby. *Sovereign* v. *Sovereign*, 15 Gr. 559; *Moon* v. *Caldwell*, 15 P.R. 159.

And such unnecessary costs are not recoverable between solicitor and client. *Allenby* v. *Weir*, 13 P.R. 403, 14 P.R. 227.

Where it is not clear whether the proceedings by writ was necessary the costs will be reserved until after the Master's report is made. *Eberts* v. *Eberts*, 25 Gr. 565.

No person other than the executor or administrator is entitled to appear in Court or in Chambers, or before the Master, on the claim of any person against the estate of the deceased in respect of any debt or liability, unless by leave. Con. Rule 204.

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. *Batty*, 21 Ch. D. 830. See *Sharp* v. *Lush*, 10 Ch. D. 473, *post*, under ATTENDANCES.

Where two or more actions or proceedings are instituted for administration, or partition or sale, all or any of the costs may be disallowed. Con. Rule 1147.

Under Con. Rule 662 the Master has power to classify the parties, and require the parties constituting each class to be represented by the same solicitor. Where this is done, any member of the class who insists on being represented by a different solicitor must pay not only the costs of his solicitor, but the additional costs occasioned to any of the other parties by his being represented by a different solicitor. Con. Rule 1148.

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts. *In re Ætna Insurance Co.*, 17 Gr. 160.

See COMMISSION IN LIEU OF COSTS; OFFICIAL GUARDIAN; ATTENDANCES; CONDITIONS OF SALE; ADVERTISEMENT OF SALE; AUCTIONEER; COPIES; INCUMBRANCERS.

## ADMISSIONS.

*Con. Rule 269.*—Each party shall admit such of the material allegations contained in the statement of claim or defence of the opposite party as are true; or he may give notice, by his own statement or otherwise, that he admits for the purposes of the action the truth of the case generally, or of any part of the case, stated or referred to in the statement of claim or defence of the opposite or any other party. Con. Rule 400.

*Con. Rule 270.*—Admissions are, in all cases where it is practicable, to be by reference to the number of the paragraphs in the pleading to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions: thus—"the defendant admits the allegations made in the first, second and third paragraphs of the plaintiff's claim." Con. Rule 401.

*Con. Rule 527.*—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 No. 63. Con. Rules 617, 618.

*Con. Rule 528.*—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. Con. Rule 619.

*Con. Rule 1149.*—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. Con. Rule 1189.

*Con. Rule 1150.*—The costs of proving a document shall not be allowed unless a notice to admit has been given under Rule 527, except where the omission to give the notice is a saving of expense. Con. Rule 1190.

A party is not bound to rely on the admissions of an opposite party on his examination for discovery, and therefore the costs of procuring the attendance of a witness to prove what was then admitted should be taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

Malins, V.-C.:—"The defendant ought not to deny the plain and acknowledged facts, which it is neither to his interest nor in his power to disprove." *Lee* v. *Button*, 12 Ch. Div. 383.

Sir J. Hannen:—"The useful practice of making admissions would be valueless if, notwithstanding that the material facts are set out by the plaintiff and admitted by the defendants, evidence in addition were allowed to be given, because it would come to this, that neither the Court nor the defendants would be sure that all the facts were before them, and the admissions would not be final. It must, therefore, be taken that such facts should be stated in a statement of claim as if admitted would constitute the whole of the plaintiff's case, and that evidence will only be admitted at the discretion of the Court and on special grounds." *The Hardwick*, 9 P.D. 32.

Where a new trial is granted a notice to produce, given for the first trial, is available for the second trial, and a second notice is not necessary. *Hope* v. *Beadon*, 17 Q.B. 509, 21 L.J.Q.B. 25.

The *ratio decidendi* in *Hope* v. *Beadon* is as applicable to a notice of intention to use the probate of a will as it is to a notice to produce, or to a notice to admit, both of which, if given for one trial, are available for another. In *Elton* v. *Larkins*, 5 C. & P. 386, Tindal, C.J., says: "The former trial is deemed as no trial, and the new trial being of the same cause, is therefore subject to the same admissions." Indeed, the argument for the admission of a probate of a will at the second trial, upon the same notice as was given for the first trial of the same cause, seems stronger; for the object of the statute is to dispense with the necessity of proving a will *per testes*, unless the case of the defendant is such as to require such proof; therefore the statute gives him an opportunity within four days after the receipt of such notice, to give a counter-notice that he intends to dispute the validity of the devise, and if he fails to do so, he is deemed to convey that he has no intention to dispute, and he is excluded from disputing the validity of the will. *Wilson* v. *Baird*, 19 U.C.C.P. 102.

See NOTICE TO ADMIT.

## ADVERTISEMENT OF SALE.

An advertisement was not properly drawn through the neglect of the party having the carriage of the decree, who now asked to have it referred back to the Master. The advertisement was referred back to the Master, and the additional costs occasioned thereby were ordered to be paid by the applicant. *Heward* v. *Ridout*, 1 Chy. Ch. 244.

See SALE; CONDITIONS OF SALE.

The advertisement is prepared by the solicitor having the conduct of the sale proceedings, and is then brought into the Master's office, with the affidavits verifying, etc., and settled. The draft advertisement as settled is then left with the Master who hands out a fair copy thereof for which he charges ten cents per folio.

In drawing advertisement for the sale of real or personal estate under the direction of the Court, including copies except for printing, the solicitor is entitled to $2 and twenty cents for each folio over five; to be increased in the discretion of the Master when special information has been obtained to a sum not exceeding $10.

See ITEM 132, TARIFF A.

## ADVISING ON EVIDENCE.

Item 157 of the tariff of costs reads as follows: "On settling pleadings, interrogatories, special cases, issues or petitions, and advising on evidence in contested cases, in the discretion of the taxing officer (or C. C. clerk in C. C. cases) not exceeding $5, $3." *In re Robinson, a Solicitor*, 16 P.R. 423, there was an appeal from a taxation, as between solicitor and client, of a solicitor's bill of costs in an action of *Ramsay* v. *McLean*. Before the sittings it was arranged between the solicitors that the action should be referred to the Local Master as referee. The reference seems to have occupied an unseemly length of time, and the Court characterized the costs of the litigation as "simply appalling." Two of the allowances objected to were \$5 for advising on evidence, and \$40 for counsel fee at trial. In delivering judgment Street, J., said: "It is not shewn that any occasion arose for considering or advising on evidence, or for preparing for any trial. Under clause 158 (now 157) of the tariff the maximum allowance for advising on evidence is \$5. Under clause 153 of the tariff counsel fee with brief at the trial is fixed at \$10, 'to be increased in the discretion of the taxing officer in actions of a special and important character.' These words in the tariff must be taken to mean what they say, viz., that the discretion given to the taxing officer does not arise at all unless the action is shewn to be both special and important.

"Every contested action may be said to be important to the parties, but here the issues raised upon the record were such as must manifestly result in an immediate reference, even had none been previously agreed on, so that the action can not, we think, fairly be described as special and important in its character. We cannot help thinking that the taxing officer has clearly erred in treating this as a case for the exercise of his discretion, and the fee for advising on evidence should therefore be disallowed altogether, and the counsel fee reduced to the ordinary fee of \$10 allowed by the tariff."

It is somewhat difficult to follow the reasoning of Street, J., in regard to the disallowance of the fee for advising on evidence. He bases his decision on the ground that the action of *Ramsay* v. *McLean* was not "of a special and important character." But these words are not found in item 157 of the tariff, which is the only item dealing with advising on evidence. They are found in item 153, but that item deals with counsel fee with brief at the trial. There does not seem to be any authority for importing the words of item 153 into item 157. Reading the judgment in connection with the facts of the case one cannot help thinking it is an instance of a hard case making hard law.

In *Denison* v. *Woods*, 18 P.R. 328, the same point came again before Street, J., on an appeal from a taxation. The action was brought by an architect for professional services and was referred by consent to an official referee for trial. The taxing officer allowed a fee of $5 for advising on evidence, and *Re Robinson* was relied on as an authority against its allowance. The judgment of Street, J., is as follows:—

"Neither as to the counsel fee nor as to the fee advising on evidence does the present case fall within the decision in *Re Robinson*. The reference there was in reality merely to take accounts. The reference in the present case was for the trial of all issues in the action. Expert evidence was given upon this reference, and the present case, unlike *Re Robinson*, was not one which would have been referred *in invitum*. The quantum of the counsel fee, the case being proper for a counsel fee, will not be reviewed on appeal; and though the fee advising on evidence should not be allowed where the action is of such a nature that it must resolve itself into a reference to take accounts as in *Re Robinson*, the same rule does not apply to a reference for trial of other issues than mere questions of account, such as were involved in the present case."

The inference from the judgment in *Re Robinson* seems to be that no allowance will be made to a solicitor for advising on evidence in the Master's office. The matter came before Riddell, J., on an appeal from the taxation in *Plenderleith* v. *Parsons*, 15 Ont. L.R. 397, where *Re Robinson* was cited. Riddell, J.:—"Counsel fee advising on evidence. It is argued that such a fee cannot be allowed upon taking accounts in the Master's office. Fees for counsel are allowed for counsel attending on reference to the Master: Item 155; and I am unable to understand why, that being so, tariff item 157 does not apply to justify the taxing officer in allowing a fee advising on evidence. If I am permitted to appeal to my own experience, I would say that the taking of accounts requires as close a scrutiny of evidence and winnowing out of the immaterial as any part of a counsel's practice." Affirmed by a Divisional Court.

As soon as issue is joined either party should be entitled to tax a fee for advising on evidence, if the Master, in his discretion, thinks the opinion of counsel was reasonably taken. *Union Bank* v. *Morrisett*, 11 C.L. Times 168 (Manitoba case).

## AFFIDAVITS.

*Burnham* v. *Garvey*, 27 Gr. 80. Motion for an injunction.

Spragge, C.:—"I give the plaintiff the general costs of the cause. I except, however, out of these costs, the costs of the affidavits used on this application. I do so because those put in to be read by me are scarcely legible; many words it is difficult to decipher, and they can hardly be made out except by reference to the context. This is in direct contravention of G. O. 67."

G. O. 67 does not appear to have been fully incorporated into the Judicature Act, or the Consolidated Rules of Practice, but no doubt the practice as to taxation in respect to affidavits contravening the rule therein laid down will be followed.

The costs of affidavits filed on a motion, but not entered in the order, will not be allowed even on a taxation as between solicitor and client. *Stevens* v. *Lord Newborough*, 11 Beav. 403; *Stuart* v. *Greenall*, 13 Price 755.

On a motion for an interim injunction it was dismissed on a preliminary objection. The order dismissing the motion contained a general recital of the reading of "the material filed," instead of a specific recital of the affidavits. The taxing officer disallowed the costs of the affidavits. Armour, C.J.:—"This appeal must be dismissed with costs. Morgan on Costs, p. 486, and the authorities therein cited fully support the taxing officer's course, with which I entirely agree."

Meredith, C.J.:—"The appeal in my opinion fails. Whether or not the omission to recite the affidavits in the order was fatal to the claim of the defendant to have the costs of them taxed to her, the taxing officer certainly had a discretion to disallow the costs of unnecessary affidavits, and in the exercise of that discretion, as well as because they were not recited in the order, he did disallow the costs of those in question. The motion in respect of which the costs were ordered to be paid failed because the action was brought without the written authority of the next friend being first filed. . . . We cannot say that, in these circumstances, the taxing officer erred in disallowing the costs of the affidavits filed in opposition to the motion, and which were not read owing to the preliminary objections which I have referred being taken and being given effect to." *Whitewood* v. *Whitewood*, 19 P.R. 183.

It is proper and necessary to make an affidavit of service of subpena and appointment on, and payment of, conduct money to a party to be examined for discovery. *McLean* v. *Bruce*, 12 P.R. 602.

Where an affidavit had been made to prove certain items of disbursements, and these disbursements were disallowed on taxation:—

*Held*, that the charges for preparing the affidavit were also properly disallowed. *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

Where plaintiff filed many useless affidavits, and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the Master that they should not be allowed to the plaintiff on taxation, though the defendant's summons was discharged with costs. *Hooper* v. *Burley*, 1 L.J.N.S. 225.

One bailiff had served four defendants and made four separate affidavits of service.

Spragge, V.-C.:—"There is no necessity of four affidavits of service; the costs of one only should be taxed." *Boulton* v. *McNaughton*, 1 Chy. Ch. 216.

Costs of unnecessary affidavits were disallowed in *Redford* v. *Todd*, 6 P.R. 154; and in *Nash* v. *Glover*, 6 P.R. 267.

A barrister or solicitor attending for cross-examination on an affidavit made on a motion is entitled to be paid $4 conduct money. *Sutherland* v. *Phippen*, 7 L.C. Times 432.

The local officers acting as clerks at Assize, etc., have now instructions to endorse on the record the names of counsel engaged in the case at the trial, the number of witnesses sworn, and the time occupied by the trial. An affidavit to obtain increased counsel fees is, therefore, unnecessary, and will not be allowed on taxation. Report I. L. O. 1887.

Boyd, C.:—"The plaintiff made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavit. The taxation now stands with the allowance of an affidavit and extra folio for the additional matter evolved during the litigation. The Master has laid down a wholesome rule, somewhat akin to the resolution of the Irish Judges that where a good deal of skirmishing goes on which does not advance the course of justice, it might be right to say that neither plaintiff or defendant's solicitor shall have the costs thereof as against their clients. (See *Holland* v. *Eastwood*, 4 C.L.J.N.S. 259.) I do not interfere with the order."

On appeal the Divisional Court affirmed the judgment of the Chancellor. *Baldwin* v. *Quinn*, 16 P.R. 248.

An affidavit purporting in the jurat to be sworn on a day not yet arrived is a nullity. *In re Robertson*, 5 P.R. 132.

On a review of taxation the costs of an affidavit on production was objected to on the ground that it was false, insufficient and misleading. Objection overruled, for although the affidavit was insufficient, it appeared that the plaintiff's application for a better one was dismissed with costs, and he did not appeal. *Craig* v. *New Oxley Ranche Co.*, 15 C. L. Times 322.

Two affidavits on production, one by each plaintiff, objected to because they could have been joined in one. The plaintiffs resided in different parts of the country. It appears that both were sworn at Macleod, but on different days. It was not shewn that both plaintiffs were present at Macleod on the same day. *Held*, that it was not unreasonable to allow for an affidavit made by each. *Allison v. Christie*, 15 C. L. Times 324.

Affidavits to shew matters which the Court knows from its own records will be disallowed. *Odell v. Doty*, 1 Chy. Ch. 207; *Massey-Harris v. Hutchings*, 3 W.L.R. 252; Can. An. Digest (1906), 79.

In *Johnston v. Ryckman*, 7 Ont. L.R. 511, which will be found more fully noted under "counsel fees," there was an appeal as to counsel fees paid by one member of a firm to another member of the same firm. On the taxation an affidavit was made by the member who acted as counsel. *Held*, that the defendant was not entitled to tax the costs of or occasioned by this affidavit. The Chancellor said the affidavit was superfluous.

Certain affidavits for use on a motion in the Weekly Court were filed with the clerk in Chambers, instead of in the registrar's office as required by Rule 102, and the taxing officer disallowed them as being irregularly filed. On appeal, Boyd C., held that this irregularity did not determine the taxibility of these affidavits as they were used on the motion and recited in the order, and allowed the appeal. *Sturgeon Falls E. L. Co. v. Town of Sturgeon Falls*, 19 P.R. 286.

The costs of preparing affidavits for use in opposing a motion which is afterwards abandoned, are taxable, if such affidavits are proper and reasonable and not prematurely made.

See *Harrison v. Leutner*, under Abortive Proceedings.

## IMPERTINENCE AND SCANDAL IN AFFIDAVITS.

*Con. Rule 296.*—If upon the hearing of a cause or matter, the Court is of opinion that any pleading, petition or affidavit, or any part of a pleading, petition or affidavit, is scandalous, the Court may order the pleading, petition or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and may give such directions as to costs as may seem just. Con. Rule 421.

*Con. Rule 297.*—A motion to have any pleading, petition or affidavit taken off the files for scandal, or to have the scandalous matter expunged, may be made to the Court or a Judge at any time before the hearing of the cause or matter. Con. Rule 422.

The Master in Chambers, or Local Judge or Master, has no power to strike out for impertinence interogatories which have been delivered for the examination of a witness under commission. *Williams* v. *Corby*, 8 P.R. 83.

A pleading or affidavit is scandalous which alleges anything unbecoming the Court to hear, or is contrary to good manners, or which charges a crime immaterial to the issue. *Millington* v. *Loring*, 6 Q.B.D. 190, 50 L.J.Q.B. 214.

But allegations material to an issue are not impertinent; and if relevant and pertinent, are not in any case scandalous. *Ex parte Simpson*, 15 Ves. 476, 10 R.R. 104; *Christie* v. *Christie*, 8 Chy. App. 499.

*In re Savage*, 15 Ch. D. 557, parties lost their costs of a successful motion because they had filed an irrelevant affidavit containing improper imputations.

Morrison, J.:—"I cannot refrain from noticing that in the affidavit made by the plaintiff's attorney, after negativing a statement of the defendant, and shewing why he declined to consent to delay at the Assizes, he states: 'He (the defendant), then replied, I think it hardly fair that you should punish me for the act of my attorneys, and I then replied, that I considered keeping him dancing about the Court, and giving him a little trouble, might teach them all better manners for the future.'

"Such a statement, besides being wholly irrelevant and impertinent, coming from an officer of the Court, is highly unbecoming, and an affidavit containing such matter ought not to have been read or filed, and the doing so would of itself justify me in ordering the plaintiff's attorney to pay the costs of this application."

And the plaintiff's attorney was accordingly ordered to pay the defendant's costs of the application. *Anonymous,* 4 P.R. 242.

An interpleader application by a sheriff:—

Osler, J.A.:—"I should not have given costs in any case, looking at the affidavit I have referred to, in which the sheriff's officer is accused of intemperance, misapplication of moneys received by him, and which otherwise contains much that is irrelevant and beside the merits of the case." *Vanstaden* v. *Vanstaden,* 10 P.R. 428.

*In re Fitch,* 2 Chy. Ch. 288, affidavits containing allegations of misconduct on the part of the solicitor, altogether unconnected with the dealings between the solicitor and the client were held scandalous and ordered to be taken off the files.

See also *Clark* v. *Chipman,* 26 U.C.Q.B. 170; *Corby* v. *Roblin,* 5 U.C.L.J. 225; *Davidson* v. *Grange,* 5 P.R. 258; *Sadlier* v. *Smith,* 7 P.R. 409, Mor. & Wurt. 36.

In drawing affidavits superlative words and needlessly offensive expressions should not be used, and where they are so made use of the costs of such affidavits should be disallowed on taxation.

Wilson, J.:—"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 shew 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 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." *Fisher* v. *Green*, 2 C.L.J.N.S. 16.

On a motion to change the venue the Master in Chambers fixed the costs at a small sum. He said: "I do so to mark my disapproval of the affidavit of the plaintiff's solicitor on two grounds. . . . The other ground is the objectionable character of the affidavit. I do not think that a solicitor is warranted before the trial of an action in speaking of 'this action as one of five all arising out of the same fraudulent conspiracy between the defendant and others for the purpose of extorting money out of the plaintiff and others by means of an agreement alleged by the defendant to have been signed by the plaintiff.'" *Baker* v. *Weldon*, 2 Ont. W.R. 432.

Osler, J.A.:—"I dismiss the motion without costs because of the language used in the plaintiff's affidavit. It serves no purpose, and is especially objectionable in the affidavit of a professional gentleman, to stigmatize statements in the affidavit of another deponent as 'absolutely false to his knowledge,' or 'as cunningly devised and deliberately made to produce innuendoes false to his knowledge and intended to mislead.' It is enough to state the facts as the deponent understands them, leaving it to the Judge to determine between the opposing statements." *Kirby* v. *Township of Pelee*, 7 Ont. W.R. 864.

See also remarks of Hagarty, C.J., in *Re Stanton*, 3 Ont. R., pp. 91, 92.

## AGENCY FEES.

The former practice was to disallow all agency letters, where both principal and agent resided in the same county. Now necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county where the solicitor resides, or in another county or in Toronto. *Agnew* v. *Plunkett*, 9 P.R. 456.

Mr. Winchester, in his report for 1885, states that the following letters had been disallowed in some bills of costs, and should have been allowed:—

Letters to client, (1) advising of trial; (2) result of case where judgment reserved; (3) motion to change venue; (4) result of application to Divisional Court.

Letter to agents with papers to file and serve; letter from agents advising that papers served; letter from solicitor returning admission of service of papers sent by the opposite party are taxable.

The solicitor for the defendant lived in Cobourg and was a member of the firm of Riddell & Armstrong, practising at Cobourg; he was also a member of the firm of Riddell & Nesbitt, practising at Brighton where the solicitor for the plaintiff lived and practised. On an appeal from the taxation of the defendant's costs of the action as against the plaintiffs, the costs of the agency letters written by Riddell & Armstrong to Riddell & Nesbitt, and *vice versa* were objected to. Ferguson, J., held, that the letters were properly allowed if they were necessary letters and did not increase the expense beyond what would have been incurred if other agents at Brighton had been employed. *Yott* v. *Hubbs*, 11 C.L. Times 358.

The decision in *Yott* v. *Hubbs* simply decides that where two firms have a common partner that makes no difference, there being no expression of opinion as to what the effect would be if it were proved that there was a community of profit among the three members of the two firms.

In *Re Brough*, 7 R. 75, agency fees were disallowed where the two firms had a common partner, but it is not likely this case would be followed in Ontario, in view of the decision in *Yott* v. *Hubbs*, unless it was shewn there was a community of profit.

The relation between town agent and country solicitor is one of solicitor and client. *Reid* v. *Burrows* (1892), 2 Chy. 413.

The usual "agency terms" entitle the agent to disbursements out of pocket and half profit charges whether the country solicitor is paid by his client or not. *Ward* v. *Lawson*, 38 W.R. 300.

## ALIMONY ACTIONS.

Section 34, Jud. Act. "The High Court shall have jurisdiction to grant alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the Court." 58 Vict. ch. 12, sec. 30.

*Con. Rule 1144.*—An application for costs, in an alimony action, 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. Con. Rule 1185.

*Con. Rule 1145.*—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. Con. Rule 1186.

Prior to the passing of the statute 32 Vict., chapter 18 (now Con. Rules 1144, 1145), the defendant husband in an alimony suit was bound to pay the costs of the plaintiff's solicitor in any event, following the authorities in the ecclesiastical Courts. This was the case, even where the wife was to blame, and failed to obtain a decree for alimony. *McKay* v. *McKay*, 6 Gr. 380.

And where the plaintiff succeeded she was entitled to her full costs of suit, that is, the costs as between solicitor and client. The reason given for this was the then state of the law with reference to the property of a married woman, it being at that time under the control of the husband by virtue of the martial relation. *Saules* v. *Saules*, 3 Gr. 113.

It does not appear that the legislation respecting married women has wrought any change in the law as to the payment of disbursements in England. It can only have that effect here, when the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony. *Knapp* v. *Knapp*, 12 P.R. 105; and see *Magurn* v. *Magurn*, 10 P.R. 570; *Snider* v. *Snider*, 11 P.R. 140.

And the rule still appears to be to give a successful plaintiff in an alimony action costs as between solicitor and client. See *Roblin* v. *Roblin; Ferris* v. *Ferris*, *post*.

The only test in regard to the allowance of the costs of particular proceedings in alimony suits appears to have been whether or not they had been vexatiously incurred. Even if the proceedings were abortive, if they were had in good faith, then costs of such proceedings were taxable to the plaintiff's solicitor against the husband. *Glennie* v. *Glennie*, 1 Chy. Ch. 155.

An order for security for costs will not be made in an alimony action. As the wife would not, in any case, be ordered to pay costs, such an order would be merely a bar in the way of her proceeding without any possible benefit to the defendant.

*Semble*, if the wife is out of the jurisdiction and is acting in a manner that cannot be justified, and is abusing the process of the Court, or if she has separate property, the Court might alter the practice. *Bennett* v. *Bennett*, 7 P.R. 54.

The defendant by his answer offered to receive his wife and children and support them. At the hearing the plaintiff did not call witnesses, but agreed to accept the defendant's offer, whereupon a decree to that effect was drawn up whereby the defendant was ordered to pay the plaintiff's full costs; and in pursuance of such decree the plaintiff returned to the defendant's residence. The Court, on rehearing, refused, under the circumstances, to vary the decree as to costs, although the plaintiff was strictly entitled under the statute to cash disbursements only. *Keith* v. *Keith*, 25 Gr. 110.

*Keith* v. *Keith* was decided at the hearing by V.-C. Proudfoot, and in giving full costs as against the defendant, he acted upon the opinion that the consent given there by the husband to receive back and support the wife was equivalent to a decree for alimony within the meaning of that term in the statute. In a later case the learned Vice-Chancellor said he thought he had erred in this. *Ringrose* v. *Ringrose*, 10 P.R. 299.

A woman brought a suit for alimony seventeen years after the marriage, on the ground of refusal by the man to receive her as his wife. He set up the invalidity of the marriage, but while under examination stated that if it was determined that she was his wife he would receive her as such. The Court found there was a valid marriage, and directed that upon the defendant undertaking to receive the plaintiff as his wife, the bill should be dismissed; but ordered the defendant to pay the plaintiff's costs as between solicitor and client. *Roblin* v. *Roblin*, 28 Gr. 439.

The defendant in his defence alleged that he had refused, and still refused, to support the plaintiff by reason of her having committed adultery with M. The evidence shewed that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she actually departed, he forbade her to go. The defendant persisted in the charge of adultery, but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim.

The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to her house.

*Held*, that the judgment for alimony should stand over for six weeks to see if this offer was carried out, and that the plaintiff was, in any event, entitled to her full costs of suit. *Ferris* v. *Ferris*, 7 Ont. R. 496.

During the pendency of a motion for interim alimony, the plaintiff returned to her husband.

The plaintiff's solicitor asked for an order against the defendant for his costs, and the Master in Chambers directed the defendant to pay the plaintiff's costs as between solicitor and client. *Leonard* v. *Leonard*, 9 P.R. 450.

The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitor's costs. He afterwards refused to pay anything but disbursements.

The Master in Chambers made an order against the defendant for the costs, holding that the plaintiff had not "failed" to obtain a decree. *Moore* v. *Moore*, 10 P.R. 284.

In a later case where the facts were the same as in *Leonard* v. *Leonard* and *Moore* v. *Moore*, the Local Judge at Orangeville had made an order for the defendant to pay full costs. On appeal from this order these cases were relied on by the defendant, but Proudfoot, J., held that the English authorities cited in *Leonard* v. *Leonard* had no application, as there is no statutory provision in England equivalent to the provisions of what is now Con. Rule 1186. *Ringrose* v. *Ringrose*, 10 P.R. 299, affirmed 10 P.R. 596.

Upon an application for interim disbursements proof of the marriage is all that is required. *Nolan* v. *Nolan*, 1 Chy. Ch. 368.

Where the marriage is admitted the defendant will not be allowed to go into merits. *Carr* v. *Carr*, 2 Chy. Ch. 71; *Bradley* v. *Bradley*, 3 Chy. Ch. 329.

A marriage *de facto* may be inferred from conduct and reputation.

The authorities, English and Canadian, go to this extent, that where it appears from the admissions of the parties, or from the affidavits of the one not impeached by the other that there has been a ceremony of marriage between them and the real controversy is whether that is a valid marriage, then the Court adjudges that the litigation should be carried on at the expense of the putative husband, and that the plaintiff should receive interim support from him. The principle which underlies all the decisions is, that the allotment of alimony *pendente lite* depends upon the martial relationship of the parties existing *de facto*. *Walker* v. *Walker*, 10 P.R. 633.

The plaintiff applied for an order for witness and counsel fees in advance. The referee refused the order. The application was subsequently renewed at the hearing, and Proudfoot, V.-C., ordered the cause to stand until a sum for necessary witness fees (but not counsel fees) was paid by the defendant. *Haffey* v. *Haffey*, 7 P.R. 137.

The course pursued in *Haffey* v. *Haffey* was strongly disapproved of by the Chancellor in *Stevenson* v. *Stevenson*, 19 P.R. 48. To allow the application for interim disbursements to be made at the hearing, and then have the hearing stand until these disbursements are paid "is a very expensive method of securing payment of necessary money to enable the impecunious wife to have the merits of her controversy properly litigated." To avoid this roundabout method the proper practice is to order payment at once to the plaintiff's solicitor, upon his undertaking to account for all sums not actually and properly disbursed.

The Master in Chambers made an order directing the defendant to pay the plaintiff before the trial "on account of her interim disbursements for witness fees $22.35, and on account of her disbursements for counsel $40." The defendant appealed.

Ferguson, J.:—"The order appealed from says that the $40 is given for a counsel fee, and I am to say whether or not this should have been done. See Bishop on Marriage and Divorce, Vol. II., p. 394. After consultation with Mr. Justice Proudfoot in regard to the principle of his decision in *Haffey* v. *Haffey*, 7 P.R. 137, I am of opinion that the appeal must be dismissed with costs. The order appealed from might be fuller in regard to the fee not being payable to the solicitor for the plaintiff or his partner as counsel, but I cannot reverse it." *Ingram* v. *Ingram*, 10 P.R. 569.

The plaintiff obtained a judgment at the trial, and the defendant appealed to the Court of Appeal. The plaintiff now applied to a Judge of that Court in Chambers for an order for payment by the defendant to the plaintiff before the hearing of the appeal of a sum for the purpose of paying the wife's counsel fee.

Osler, J.A.:—"It seems clear that where the counsel fee is, or must be an actual disbursement by the wife's solicitor, the husband will be ordered to provide it. I have not found, nor have I been referred to any decisive authority that this will not also be done where the solicitor or his partner is or may be counsel as well. That seems to me to be merely an accident of the cause. I take it the solicitor has a right, if he is retained as counsel, to insist on payment of his fee in the usual way. He is not bound to give credit for it, and it becomes a disbursement of the wife in one case as well as in the other. I have spoken to some of my learned brethren, Justices of the Chancery Division, who do not dissent from this view.

"I shall act upon it in the present case as only carrying out the practice as I find it. But if it becomes my duty to reconsider the practice of ordering the husband to pay his wife's disbursements in suits of this nature, I should be strongly disposed to think that owing to the altered status of the married woman, the reason for it has ceased to exist. The order will be that the husband pay a sum of $40 for the purpose of paying the wife's counsel fee." *Magurn* v. *Magurn*, 10 P.R. 570. Dec. 21st, 1883. And see *Bucke* v. *Bucke*, 21 Gr. 77.

The Master in Chambers followed these two cases and ordered the defendant to pay the plaintiff's witness fees, counsel fee, and cash disbursements, before trial. March 4th, 1885. *Bradley* v. *Bradley*, 10 P.R. 571.

The Local Master at Chatham ordered the defendant to pay interim alimony, and also the plaintiff's solicitor's actual and prospective disbursements. It was shewn that the plaintiff was in possession of the homestead, the husband having deserted her, but the defendant failed to shew that she was deriving any income from the property. On appeal from this order. November 9th, 1885.

Proudfoot, J.:—"I shall not interfere with the order upon the ground taken as to the altered status of married women under the Married Women's Property Act, 1884, or with the discretion of the Master in ordering interim alimony, although the plaintiff was in possession of the homestead. However, I shall set aside so much of the order as directs the payment of a sum of $40 to the plaintiff's solicitor as a prospective disbursement for counsel fee, as it is alleged and not denied that one of the firm of plaintiff's solicitors is to act as counsel. I do not lay down any general rule as to this; each case must stand on its own circumstances; and in this case I do not think the disbursements should be increased." *Lalonde* v. *Lalonde*, 11 P.R. 143.

In *Gallagher* v. *Gallagher*, 17 P.R. 575, Meredith, C.J., refused to follow *Magurn* v. *Magurn* and held that a prospective counsel fee would not be ordered to be paid "unless it is shewn that the fees are to be paid to counsel who is not the solicitor for the plaintiff or the partner of the solicitor."

*Gallagher* v. *Gallagher* was followed by Anglin, J., in *Cowie* v. *Cowie* (1908), 17 O.L.R. 44, so that it may now be accepted as the settled practice that where the counsel to be engaged is the solicitor for the plaintiff or his partner payment of his counsel fee will not be ordered as an interim disbursement. See also *Leslie* v. *Leslie*, 12 C.L.T. 326.

In *Cowie* v. *Cowie* the Master in Chambers refused to make an order for counsel fee because it was not shewn that the case was of such a difficult nature that the plaintiff's solicitor could not act as counsel. Anglin, J., reversed the order and held that the test applied by the Master, namely, the fitness of the solicitor himself, because he fills the character of a barrister, to conduct the case at the trial, is not the test contemplated by the practice.

Though the plaintiff may have a separate estate and income, and so make out no sufficient case for interim alimony, she may still be entitled to payment of disbursements for costs.

The change in the status of married women under recent legislation has no effect on the law as to disbursements in actions for alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony. *Knapp* v. *Knapp*, 12 P.R. 105, 7 C.L. Times 161.

The defendant in an alimony action died during the pendency of the action. The wife's solicitor sued the husband's executor for the amount of his bill of costs, as for necessaries supplied to the wife.

Ketchum, Jun. Co. J., of Northumberland and Durham, held that R.S.O. 1877, ch. 40, sec. 48 (now Con. Rule 1145), does not apply where a distinct and substantive action is brought by the plaintiff's solicitor for his costs as for necessaries supplied to the wife. In such case the law stands as before the Act, and the solicitor is entitled to recover full costs against the husband, or his executor, as for necessaries supplied to the wife, if they are necessaries. *Kerr* v. *Rickard*, 8 C.L. Times 335.

The decision in this case does not seem consistent with the construction placed on the statute in *Ringrose* v. *Ringrose*, *ante*. The plaintiff undoubtedly "failed" to obtain a judgment for alimony, just as much as if the parties had, before the trial, resumed cohabitation. If the defendant, instead of dying, had put an end to the alimony action by receiving the plaintiff back to his home and maintaining her, *Ringrose* v. *Ringrose* decides that the plaintiff's solicitor could only have recovered disbursements. In the latter case he could not, surely, have defeated the statute by suing the husband for his full costs, "as for necessaries supplied to the wife"; and unless a distinction can be drawn between a failure to obtain a judgment, as in *Ringrose* v. *Ringrose*, and a similar failure by the death of the defendant, all a plaintiff's solicitor has to do to make the husband or his personal representatives liable for full costs is to sue him, or them, in a distinct action as for necessaries supplied to the wife.

The defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the Committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if the plaintiff would not insist on defendant so paying his fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proven, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application.

*Held*, Wilson, J.:—"The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose." *McDougall* v. *Campbell*, 41 U.C.Q.B. 332.

The defendant did not appear, and an order had been made for interim alimony for the amount endorsed on the bill, which the defendant considered excessive; on a motion by him to set aside the order, a reference was directed on the defendant paying the costs of the application. *Hooper* v. *Hooper*, 3 Chy. Ch. 114.

The cash disbursements mentioned in Con. Rule 1145 do not include fees paid to agents for solicitors' services. Holmested & Langton, 1272.

## AMENDMENTS.

*Con. Rule 306.*—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 require the insertion of more than 200 words in any one place, or 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 reprint or fresh copy of the pleadings as amended. Con. Rule 431.

*Con. Rule 307.*—(1) Where a pleading is amended it shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz.: "Amended day , under order dated day of ."

(2) The amendment shall be written or underlined in ink of a different colour from that used in the original pleading. Con. Rule 432, *amended.*

*Con. Rule 308.*—The amended pleading shall be delivered to the opposite party within the time allowed for amending the same. Con. Rule 433.

Con. Rule 306 is substantially the same as the English rule, except that the English rule mentions 144 words instead of 200, the folio in England being 72 words.

It was held that although amendments to a bill did not in any place exceed two folios, the clerk of records and writs had a discretion to refuse to file the bill without a reprint, if the amendments were numerous and complicated. *John* v. *Lloyd*, L.R. 1 Chy. 64.

Where under Rule 306 it becomes necessary to deliver a reprint or fresh copy of the pleading as amended, the solicitor, if he gets the costs of amendment, is entitled to ten cents per folio for each amended copy filed and served. He is also allowed twenty cents per folio for drafting the new matter for amendment, and not for the whole pleading as amended.

The general rule is that where a party desires to amend his own pleading, leave to amend will be given, but he must pay all costs of and occasioned by the amendment. Mor. & Wurt. 33.

If a statement of claim is amended so as to set up a wholly different and inconsistent case from that originally made, the defendant will be entitled to all the costs of the action up to the time of the amendment. Mor. & Wurt. 35.

If a plaintiff, by amendment, converts his statement of claim so as to set up a new action the defendant should receive the costs of the defence rendered useless by the act of the plaintiff. But if the amendments are not of so wide a scope as this, and no special disposition is made of the costs, the costs of the amendment are costs in the cause. *McGillivray* v. *McConkey*, 6 P.R. 56.

A motion to amend the bill of complaint.

Blake, C.:—"With respect to the costs in these cases it is impossible to lay down any general rule. Applications of this kind may be so proper, and so necessary, as to make it absolutely fitting that the costs should be costs in the cause. On the contrary it may become necessary to modify that result by visiting with costs either the party applying or the party opposing the application. Each case must depend upon its particular circumstances." *Applegarth* v. *Baker*, 2 Gr. 428.

By mistake the judgment, which had been entered by the plaintiff's solicitor, was improperly dated. On discovering the mistake the defendant's solicitor applied to the plaintiff's solicitor for his consent to an amendment, but the latter refused to give the consent and a motion was made to amend. The Master in Chambers:—"It was pointed out in *Bodine* v. *Howe*, 1 O.L.R. 208, which was followed in *McGuire* v. *Corry*, *Ib.*, 590, that applications for consent should not be unreasonably refused. In the present case I cannot see that the defendants were in any way to blame for the error in the entry of the judgment. The costs of the motion should be to the defendants in any event as they were not in any way responsible for the erroneous date inserted in the judgment." *St. Mary's Co. v. Grand Trunk Ry. Co.*, 2 Ont. W.R. 472.

The plaintiff had obtained leave to amend his claim, but only on terms of paying the costs of the motion, together with the costs of the proceedings rendered unnecessary, and the costs thrown away by reason of the plaintiff having delivered the amended statement of claim, and staying the proceedings in the action until the costs should be paid. On appeal:—

Meredith, C.J.:—"The terms imposed as to the conditions upon which the amended pleading was allowed to stand were too onerous. It was not reasonable to provide that proceedings in the action should be stayed until the costs should be paid. The stay of proceedings in default of payment should have been limited to proceedings on the additional charges introduced into the statement of claim by the amendment, and it would not have been unreasonable to have provided that in case of default in payment of the costs within a named time the amendments should be stricken out. See as to the question of staying proceedings for non-payment of costs, *Re Wickham*, 35 Ch. Div. 272; *Graham v. Sutton Carden Co.* (1897), 2 Chy. 367." *Anthony v. Blain*, 1 Ont. W.R. 842.

Where leave is given to a plaintiff to amend upon payment of costs, such costs should be paid or tendered before any further proceedings are had; otherwise the defendant may apply to the Court to stay proceedings until the plaintiff has made the required payment; and if default is made in payment of the costs the action may be dismissed with costs. *Blackmore v. Edwards*, W.N. (1879), 175; *White v. Bromige*, 26 W.R. 312.

Where an irregularity was trifling, such as an omission to fill in the date of the entry of judgment for default, an amendment was allowed without costs. *Dunn v. Dunn*, 1 L.J.N.S. 239.

Where the material upon which a party is moving is defective, and he is allowed to amend or supply what is wanting, he cannot tax the costs of doing so. *Morris v. Armit*, 4 Man. L.R. 307, 7 C.L. Times 180.

An application was made to amend the decree drawn up after judgment pronounced on the hearing, one of the terms having been omitted.

Blake, C.:—"We think it reasonable that the indulgence which the plaintiff finds himself obliged to ask in this case should be granted at his expense. That seems to us, as a general rule, to be highly reasonable. At law it is almost of universal application; and Mr. Daniel would seem to regard it as equally prevalent in this Court." *Emmons* v. *Crooks*, 1 Gr. 558.

## APPEAL FROM TAXATION.

See Taxation of Costs.

## APPEAL, PROCEEDINGS IN.

The appeal bond and the affidavits of execution and justification, are separate documents, and must be stamped as such when filed. *Macbeth* v. *Smart*, 1 Chy. Ch. 269.

Instructions for appeal, or to oppose appeal, $2.00; revising proof of appeal book, 10 cents per folio; fee settling reasons for appeal, or against appeal, in an ordinary case, $5.00.

Burton, J.A.:—"There is no item in the tariff for instructions for appeal, unless it is considered as instructions for a step in the cause. The $4 is confined to instructions to sue or defend. It is, therefore, simply a question of whether anything should be allowed, or, by analogy to those proceedings wherein instructions are allowed during the progress of the cause, the fee of $2. I therefore decline to interfere (the taxing officer had allowed $2 instead of $4). I think there is no reason to interfere with the previous decision in this Court as to allowing 10 cents for revising proof. It is, I think, little enough if the work is properly done; and, if not properly done, then the Court should adhere to its rule and disallow this charge altogether.

"I think a fee of $5 would not be unreasonable for revising and settling reasons of appeal in an ordinary case, and that would be a proper sum to allow here." *Barber* v. *Morton*, 2 C.L. Times 340.

Burton, J.A.:—"Our attention has been called to the unnecessary length of the appeal books in this case. The simple question for decision was, the construction to be placed upon the condition of a policy of insurance, and the case might have been stated upon two, or at least three, pages of this appeal book. Instead of this a mass of evidence and other matter has been printed, having no bearing whatever upon the point presented for adjudication, covering 129 pages, and imposing upon us an enormous labour and waste of time in the perusal of it. It appears to us to be a very grave abuse and violation of the rules which we have made on the subject, and we do not intend to impose upon the registrar the task which the appellants have cast upon us, of wading through this mass of matter for the purpose of discovering whether some portion of it may properly be applicable to this appeal, but we disallow the whole of the appeal books in the taxation. If a similar case should occur again after this warning, it will be our duty seriously to consider whether it is not a sufficient reason for refusing the whole costs of the appeal." *Parsons* v. *The Standard Insurance Co.*, 4 App. R. 326.

For correspondence during the progress of an appeal to the Court of Appeal a reasonable sum in the discretion of the taxing officer may be allowed, not exceeding $5, and in County Court cases, $2. Item 131 of Tariff A.

As to printing appeal books, see new Rule 1265 (repealing Rules 802 and 803), and Rules 806, 807 and 808.

Osler, J.A.:—"The appeal book invites the attention of the taxing officer, as it appears to me to contain much unnecessary matter. The submission and award are twice printed at length, and there is much so-called evidence which might, with ordinary care, in settling the appeal book, have been judiciously omitted. On the whole, we think it might save the parties some expense, and the taxing officer some trouble, if we direct that one-third of the appeal book be disallowed on the taxation, which will include as well what should not have appeared in the appeal book at all, as so much of it as relates to the case against the two corporation defendants as against whom the appeal is dismissed." *Bryce* v. *Loutit*, 21 A.R., p. 106.

## APPORTIONMENT OF COSTS.

See DEFENDANTS SEVERING; DIVIDED SUCCESS.

## ARBITRATORS AND ARBITRATIONS.

Where the taxing officer taxed to the arbitrators a *per diem* allowance, held, he was right in disallowing their travelling expenses.

The amount to be allowed *per diem* to arbitrators and counsel is a matter peculiarly within the province of the taxing officer, and will not, generally, be interfered with. *Re Hillyard and The Royal Insurance Co.*, 12 P.R. 285.

In taxing the costs of an arbitration upon the County Court scale, no larger fee for attendance of counsel before the arbitrators than $25 can be allowed, even though the attendance is for several days. *Re Montague and The Township of Aldborough*, 12 P.R. 141; and see *Wood* v. *Fisher*, 6 P.R. 175.

Where subpœnas were served on witnesses in an arbitration matter where the arbitrators had no power to compel the attendance of witnesses,

*Held*, there was no power to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed. *Re McRae and the Ontario and Quebec Railway Co.*, 12 P.R. 282, 327.

Upon a submission of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs as between solicitor and client. *Whitehead* v. *Firth*, 12 East 165.

But where all matters in issue in a suit, including the costs of the cause, have been referred by the Court, he has power to award costs as between solicitor and client. *Mordue* v. *Palmer*, L.R. 6 Chy. 22.

On a reference by consent the Master disallowed all the costs of the submission to arbitrators on the ground that they were not provided for; that the submission was no part of and was not included in the arbitration; that it was analogous to an order of reference, which was not included in the reference but in the cause; and that his decision was in accordance with the practice which had previously obtained.

Huddleston, B.:—"I have no doubt whatever that the Master was wrong in not having allowed all the expenses incurred preliminary to the agreement to refer, but necessary for the purpose of putting the agreement of the parties into form. They agreed that the dispute should be referred and that the costs of the reference and award should be in the discretion of the umpire. What are the costs of the reference? Those costs which are incidental to the reference and incurred in bringing it about—costs of arrangements, meetings, discussions, consultations, conferences, and all that are necessary to bring the parties *ad idem*—to the point on which they agree, but up to which there must be preliminary steps. The Master thought he was bound by the practice which had previously obtained, but I think that he failed to discriminate between a reference in an action and the present case of a reference by agreement, and overlooked the distinction suggested by the learned counsel for the plaintiffs, that when a cause at *nisi prius* is referred 'the costs of the arbitration and award to be in the discretion of the arbitrator,' those costs begin only at the time of the reference, because all the costs prior to the reference are allowed as costs of the references and award. In *Re an Arbitration between Walker & Son and Brown*, 9 Q.B.D. 434, which was a reference by agreement, Field, J., said: 'Common sense suggests that the power over the costs of the reference includes a power to give the costs of the award. If no award was made, the reference would never be finished.' Here, if no arrangement had been made prior to the reference there never would have been any reference.'' *In re Autothreptic Steam Boiler Co.*, 21 Q.B.D. 182.

The costs of shorthand notes of evidence and transcripts thereof will not be allowed on taxation unless by arrangement between the parties. *Re Autothreptic Steam Boiler Co.*, 59 L.T. 632.

An action involving long accounts was referred, and it was ordered that the plaintiff, by an accountant to be named by the arbitrator, should have inspection of, and take extracts from the defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in the plaintiff's favour, with the costs of the action, reference and award. The Master, on taxation, allowed the expenses of the accountant as a witness, but he disallowed the accountant's charges for the preliminary examination. On appeal—

Cockburn, C.J.:—''I am of opinion that this rule must be discharged. It would have been a very different question, if the whole matter were open, and there were no rule as to these preliminary expenses, and it may well be questioned whether it would not have been better that it should be left to the Master's discretion to allow or disallow these expenses, according to circumstances. But there is an inflexible rule that the preliminary expenses of what has been called qualifying the witness to give evidence shall not be allowed. Here the application for inspection was made on behalf of the plaintiff, and under ordinary circumstances the costs of such inspection are not allowed to the successful party; and in what respect did the present order differ from the ordinary order for inspection, except in one immaterial circumstance? The plaintiff desired inspection of the defendant's books, to which he was clearly entitled, but the defendant objected to his books being submitted to a person altogether in the plaintiff's interest, and a species of compromise was come to, by which the plaintiff was to have inspection, but by some independent person to be named by the arbitrator; but the inspection was not on that account the less the inspection by or on behalf of the plaintiff; and the same principle applies as if the inspection had been in the ordinary way by an agent of the plaintiff." *Nolan* v. *Copeman*, 8 L.R.Q.B. 84.

Where professional arbitrators had sat more than six hours each day, they charged $3.33 per hour, and this was allowed by the taxing officer. On appeal, Street, J., held that this was not right; that the arbitrators could not be allowed anything beyond the maximum amount fixed by the statute for one day, no matter how many hours beyond six they were engaged; and that for a day on which they sat for less than six hours they were entitled only to the *per horam* allowance fixed by the statute; and allowed the appeal. Armour, C.J.:—"The order of my brother Street is right and must be affirmed.

"But for the decision in *Armstrong* v. *Darling*, 6 C.L.T. 214, I should not have thought that the provisions of the Act R.S.O. 1887, ch. 53 (now R.S.O. 1897, ch. 62), admitted of any doubt.

"The day, according to our law, commences at midnight and ends the following midnight. Co. Litt. 135*a*; *Williams* v. *Nash*, 28 Beav. 93.

"The words, 'for every day's sitting, to consist of not less than six hours,' clearly means for every day upon which the arbitrator sits for six hours or more; and there is no ground for the contention that for the hours beyond six during which he sits in any one day he is to be paid at the rate of so much for each hour beyond the six. See *Bones* v. *Booth*, 2 W. Bl. 1226." *In re Town of Thornbury and County of Grey*, 15 P.R. 192.

In taxing the costs of an arbitration, the taxing officer has jurisdiction in his discretion, to allow a second counsel fee. *Re Pollock and City of Toronto*, 15 P.R. 355.

Where a reference is made from the assize to a Judge of a County Court by name, adding his description Judge of a County Court, and not to him as Judge of the County Court, he is entitled to his fees as such arbitrator. *Wood* v. *Fisher*, 6 P.R. 175.

Arbitrators made their award under section 385 *et seq.* of the Municipal Act, 1892 (now 448 *et seq.* of the Municipal Act, 1903), and directed that the costs should be paid by the land owners, but did not fix the amount or direct on what scale they should be taxed. The taxing officer taxed them on the High Court scale.

Street, J.:—"The arbitrators have decided that the land-owners should pay the costs of the arbitration, but they have not fixed any sum, nor directed that they should be taxed upon any particular scale. There is, therefore, no authority for their taxation upon the High Court scale, and the appeal must be allowed with costs. Were it not for the provision authorizing the arbitrators to fix a sum for costs I should have allowed the corporation the option of taking costs upon the lowest scale; but it may be that the arbitrators would fix a sum lower than the amount taxable upon the lowest scale, and I think I have no right to assume a discretion entrusted to them.

"Upon a proper application the award would probably be referred back to the arbitrators in order that they might make it complete in the matter of costs under section 399 (now 460). See *Harland* v. *Mayor of Newcastle*, L.R. 5 Q.B. 47." *Re Preston*, 16 P.R. 318.

In arbitrations under the Railway Act, all persons interested in a piece of land must appear together by one solicitor. If they employ two or more solicitors only one set of costs will be allowed. *Re Murphy and Lindsay, etc., Ry. Co.*, 6 O.W.R. 361.

In expropriation cases the costs should be taxed liberally in favour of the proprietor, and if "full costs" are given by the statute in such cases it means costs as between solicitor and client. *Doe d. Hyde* v. *Manchester*, 12 C.B. 474; though it is not the meaning of the term in ordinary litigation in the Courts. *Ireland* v. *Pitcher*, 11 P.R., at p. 407.

By the agreement the railway were to "pay all costs incidental to the arbitration." *Held*, these words did not cover costs as between solicitor and client, nor costs preliminary to the arbitration. *Re Bronson and Canada Atlantic Ry.*, 13 P.R. 440.

In arbitration proceedings the usual and convenient course is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation, and his conclusions may be adopted or varied by the Judge.

If lands are taken compulsorily, the cases shew that the costs should be assessed in larger measure than in ordinary litigation, but in cases of mere desistment, it is enough if the bill is fairly taxed. Boyd, C., *Re Oliver* (1904), 7 O.L.R. 567.

In the last mentioned case, on an appeal from taxation, the Chancellor made the following rulings:—

That a consent to take possession was not a part of desistment proceedings, and the costs of it were properly disallowed.

That costs of steps taken to appoint a third arbitrator were not costs of the landowner; the appointment was a matter to be arranged by the two arbitrators already named.

That "instructions for brief" should be allowed. "If it is proper to have counsel, then brief and instructions for brief follow as of course. On taxation substance rather than form is to be regarded."

That what was actually disbursed in witness fees to a necessary and material witness should be allowed.

That the quantum of counsel fee was a matter in the discretion of the taxing officer.

"Instructions to move for costs of arbitration" was properly disallowed by the taxing officer in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.

That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed.

## ATTENDANCES.

Where the Judge fixes a day to deliver judgment and defers it till a subsequent day, a fee of $2 is proper for attending to hear judgment, although judgment is not then given.

A fee of $2 for attending to hear judgment when it is given, should be taxed, although a fee of $2 on a previous attendance when judgment was deferred had been allowed. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157. *Per* Wilson, C.J.

This would seem to overrule the decision to the contrary in *Ham* v. *Lasher*, 24 U.C.Q.B. 357, where it was held the attendance could only be taxed once, that is, when judgment is delivered. See also items 96, 97, of the tariff.

Where judgment was reserved at the trial of the action, and the written judgment of the Court was sent to the registrar's office for persual instead of being read in open Court, counsel attended at the registrar's office and there read the judgment.

*Held*, that such an attendance was an attendance to hear judgment, and that a fee of $2 should be allowed therefor. *Gage* v. *Canada Publishing Co.*, 3 C.L. Times 267. *Per* Proudfoot, V.-C.

There is no necessity for attending to settle a judgment which simply dismisses the action. Rep. I.L.O., 1887.

Attending to enter judgment is allowed as a common attendance in addition to the fee on judgment, and attending on taxation. Rep. I.L.O., 1885.

The local taxing officer refused to tax to a successful plaintiff on a party and party taxation two fees of fifty cents each for attending to bespeak for copies of the depositions of the plaintiff and defendants after issue joined, upon the ground that the solicitor attending on the examination could have ordered copies when the examination was completed, without making a special attendance therefore:—

*Held*, Wilson, C.J., these fees should have been allowed. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

"Attending to give admission of service of affidavits," cannot be taxed. *Malone* v. *Davies*, 10 C.L. Times, 18, Occ. N.

Attending for præcipe orders. Only one attendance of 50 cents should be allowed.

Boyd, C.:—"It is not usual to allow two attendances in procuring orders of course, even though the charge appears under the formula 'attending to bespeak and for.'" *Latour* v. *Smith*, 13 P.R. 214.

A counsel fee will not be allowed where counsel attends on a motion merely to shew that the motion is irregular. *Waller* v. *Claris*, 11 P.R. 130.

Or where notice of appeal is served on a party whom the appeal does not effect, and he appears on the hearing of the appeal. *Ex parte Webster*, 22 Ch. Div. 136.

A Master or a single Judge has no discretion to allow more than $1 per hour on the taxation of a bill of costs, either between solicitor and client, or party and party; the tariff being fixed at that rate. *Re Totten*, 8 P.R. 385.

Plaintiff sued for damages for bodily injuries sustained and got a verdict. An order was made, before trial, for the examination of the plaintiff by medical men on behalf of the defendants. The plaintiff's own physician attended on him during the examination, and was called as a witness at the trial, and stated what his charges for attendance on the plaintiff amounted to.

*Held*, that there being nothing to shew that he did not include in his statement the charges for attendance at the examination, they must be taken to have been included in the verdict, and could not be taxed to the plaintiff as part of the costs of the action. *Carty* v. *City of London*, 13 P.R. 285, 9 C.L. Times 457.

*Administration Proceedings.*—Upon a warrant to consider the Master has power to direct what parties shall attend on the several accounts and inquiries. See Con. Rules 203(3), 204 and 665.

"The law stands in this way, that any persons interested who ought to be served can, under the general practice, attend, as of course, the proceedings; but that does not entitle them to the costs of attending. That is determined by the Judge in Chambers, who, under a general order, decides what parties interested in the estate shall attend the taking of the accounts at the cost of the estate; that is the subject of a special application. I cannot prevent anybody attending the proceedings; if there were fifty people, I could not prevent them instructing fifty solicitors to attend all the proceedings; but if they did, they would not only pay their own costs where I found forty-eight of them unnecessary, but I should make them pay the extra costs occasioned by attending unnecessarily. That has always been the practice in my Chambers since I have had the honour of sitting here." *Per* Jessel, M.R., *Sharp* v. *Lush*, 10 Ch. Div. 473.

Attending for writ. This is allowed as a common attendance besides the $2 for the writ. Rep. I.L.O., 1885, p. 24.

Attending sheriff with writ to serve. Attending sheriff for writ when served. Attending sheriff for fees (mileage). The solicitor is entitled to charge for each attendance. *Ib.*

Attending to enter action for trial—attending to deposit record. The solicitor is entitled to charge for both attendances. *Ib.*

Attending to have pleadings certified is a common attendance. *Ib.*

Attending on return of motion. Where a counsel fee is allowed no other fee is taxed for attendance on the motion. *Ib.*

Attending for certificate of taxation. No fee is allowed. If necessary, it should be obtained when the taxation is completed. *Ib.*

Attending for subpœna, a common attendance. Rep. I.L.O., 1889.

Attending to bespeak and for *lis pendens.* $1 should be allowed. *Ib.*

Attending return of writ from sheriff, where sheriff unable to serve it. Should be taxed as a common attendance. *Ib.*

Where under Con. Rule 204 leave is given in administration proceedings for any person other than the administrator or executor to appear in the Master's office, the mere liberty to attend the proceedings does not necessarily entitle the party to the costs of the attendance. The order giving leave to attend should provide for the costs of the attendance. *Day v. Beatty*, 21 Ch. Div. 830.

On an appeal from the taxation by a local taxing officer, Boyd, C., held that the following attendances were not taxable:—

1. Searching affidavit on production. This attendance is not now taxed as against an opposite party: it is a measure of precaution which the client pays for, not the opponent.

2. Attending to bespeak and for registrar's abstract should not be allowed. This is to prepare the plaintiff for litigation, or to enable him to prove his title, and is not taxable against the defendant.

3. No fiat should be granted for counsel fee for an attendance to obtain an *ex parte* order. The tariff does not contemplate it, and it is not to be stretched to cover such a case (No. 91, tariff).

4. Attending to file order for subpœna should not be allowed, as it is included in the attendance for the subpœna. *Carlisle v. Roblin*, 16 P.R. 328.

Where one solicitor attends in Chambers for two parties in different interests the costs of one attendance only will be allowed. *Brown* v. *Gellatly*, 16 L.T. 553, 15 W.R. 887.

Where the defendant's solicitor produced documents for inspection under the usual order to produce and charged:— "Attended by plaintiff's solicitor on inspection by him of our productions, $4." Mr. Thom allowed $2, and on an appeal Riddell, J., in a careful review of the English authorities points out the difference between the English and the Ontario tariffs and says: "There is no such item as our No. 90, which allows costs for 'an inspection of documents when produced under order.'"

The English case (*Brown* v. *Sewell*, 16 Ch. Div. 517), therefore, does not govern—the amount is right when reduced to $2, as it has been by the taxing officer. *Plenderleith* v. *Parsons* (1908), 15 Ont. L.R. 397.

Attending all day making copy of entries in Howard's books, $10.

Attending completing copy of entries in book in Master in Ordinary's office, $10.

Reduced by the taxing officer to $10. (Howard was the solicitor who had had charge of the estate of Mary Ann Plenderleith, and the books were those in which he made entries in reference to the estate.)

*Brown* v. *Sewell*, 16 Ch. Div. 517, is cited as against this charge, but I am unable to see the relevancy of that case here. This was allowed at so much per folio, and is justified by item 57.

Attended by defendants going over account and surcharge of plaintiff, considering and advising on (two hours), $5. Reduced to $4 by the taxing officer. Is properly allowed.

Feb. 3. Attended by plaintiff's solicitor, going over account thoroughly, and discussing and making list of such as cannot be agreed upon and arranged that same be presented to Master in Ordinary, and evidence and argument confined thereto, $5.

Feb. 6. Attended by T. Hislop (plaintiff's solicitor), going over accounts, when he admits certain of accounts and initials them, $1.

Allowed by taxing officer at $5 in all. Are proper charges under item 142.

March 19. Attending Master in Ordinary, and arranging for case to proceed on Friday, 23rd inst., $1. Allowed by taxing officer at fifty cents, and not further objected to. I insert it to explain the following, which is objected to as "not taxable."

Attended by client and advising, fifty cents. See tariff item 106 and in lieu of a letter.

Attending to leave authorities with Master in Ordinary, fifty cents. Tariff item 106. It is argued that this is included in the counsel fee, but I think not. It is not usual for counsel to perform this service, and the office boy must be made to earn his salary." Riddell, J., *Plenderleith v. Parsons, supra.*

Solicitor attending trial, examination of witnesses, etc. See TRAVELLING EXPENSES.

Seventeen actions were brought by different plaintiffs against the same defendant in respect of the same subject-matter, and the defendant's solicitor had entered appearances in all the actions at one and the same time. The defendants succeeded. *Held*, he was entitled on taxation to the full costs for entering appearances in each action, and the taxing master had no jurisdiction to reduce the fee in respect of all the appearances subsequent to the first. *Price v. Clinton* (1906), 2 Ch. 487.

## AUCTIONEER.

"Sometimes a fixed sum for the entire sale, or for each lot sold or bought in, is arranged to be paid to the auctioneer, for his remuneration; and sometimes he is allowed a commission on each lot sold, and a fixed sum for each lot not sold. The amount in either case depends upon the magnitude of the sale, the ability and position of the auctioneer, the trouble he has had, or is likely to have, in the business, and whether he is to pay any, and what expenses attending the sale, or to make any survey with a view of lotting the property, or any valuation preparatory to fixing the reserved bidding. In any case, the terms should be approved by the chief clerk before the proposed auctioneer is appointed to sell.'' Dan. Chy. Pr. 1079; *Re Page*, 9 Jur. N.S. 1116.

Where the Master acts as auctioneer he is entitled to charge $1.50 per hour, or if he travels more than two miles from his office, $2 per hour, and 20 cents per mile travelled. Rep. I.L.O., 1889.

An auctioneer was held entitled to fees as a professional witness in *Re Workingmen's Mutual Society*, 21 Ch. Div. 831; *Willshire* v. *Marshall*, W.N. (1886) 80.

In the English cases where professional fees have been allowed to auctioneers there appears to have been no discussion as to the status of the witnesses. That an auctioneer was a professional witness seems to have been admitted, and the only dispute was as to the amount he was entitled to be paid.

It must be borne in mind that, in England, an auctioneer is generally an expert valuator and estate agent, and the auctioneering is not a mere incident to his usual occupation; also, that the English tariff as to witness fees is much more liberal and elastic than our own.

## BILLS OF COSTS.

The costs of drawing bills of costs are allowed where there is litigation, or where there is quasi-litigation (*e.g.*, an application for payment out of a fund or to determine the construction of a will), but are never allowed where the order is to tax a bill already delivered, or the order is one as between the solicitor and his own client for delivery of a bill and its taxation. The rule is applicable in the case of the costs of a liquidator in a voluntary winding-up.

The N. bank sold to the M. bank certain assets, including claims against third parties. The M. bank was to pay all costs of the N. bank and its liquidators of and incidental to its winding up. To recover the amount of these claims the liquidator of the N. bank incurred £3,754 costs and claimed payment of this amount from the M. bank. The M. bank required particulars of these costs, and the liquidator accordingly procured the bills of costs from his solicitor. The costs of drawing the bills amounted to £301, which the M. bank did not pay, and the liquidator obtained an order in the winding up for taxation. The taxing master refused to allow the costs of preparing the bills, and, on appeal, Buckley, J., affirmed the judgment of the taxing master. He said: "The expense of drawing the bills shewing what was the amount due must have been borne by the solicitor whose duty it was to prepare the bills, and not by the client. This is not disputed. Does it make any difference that there had been the sale by the N. bank to the M. bank? I think not. If before applying to the M. bank for the £3,764 the liquidator had asked his solicitor for his bills of costs, the solicitor must have prepared them at his own expense. I do not think that the incidence of the costs of drawing the bills is shifted by reason of the fact that the liquidator did not ask his solicitor for the bills until a later date—namely, when the M. bank had asked for them before they would make payment." *In re National Bank of Wales* (1902), 2 Chy. 412.

## BRIEFS.

The brief should contain copies of the pleadings, a statement of the case of the party, and such observations on the case of the other side, and such materials for cross-examination as may be necessary, and should conclude with the proofs of the witnesses proposed to be called. If counsel's opinion has been taken on the evidence it should be copied at the end of the statement of the case. Copies of notices to produce and admit, and of any correspondence, opinions, or other necessary documents, should accompany the brief. Arch. Pr. 601.

A solicitor should not part with original deeds belonging to his client, and in preparing briefs for counsel where these deeds are a necessary part of his case, they should be briefed and allowed on taxation. *In re Beamish*, 19 W.R. 740.—Ir. R.

Where one party, by his pleadings, puts in issue documents which the other may reasonably expect will be read in evidence, and he accordingly has them briefed, the taxing officer ought, in the exercise of his discretion, and having regard to the probable materiality and relevancy of these documents to the case as pleaded, to allow the costs of the brief containing them, if he considers that the party was justified in having them briefed; even though they were not read in evidence at the hearing. *Haslam* v. *O'Connor*, 6 Ir. Eq. 615.

A case having been made a remanet, a correspondence took place between the respective attorneys with a view to a reference, which failed.

*Held*, that the Master exercised a proper discretion in disallowing copies of this correspondence as part of the briefs in taxing the costs of the cause. *Pilgrim* v. *Southampton and Dorchester Railway Co.*, 8 C.B. 25.

"A brief of depositions or special affidavits is to be allowed only where fee and brief for second counsel is taxed." Rep. I.L.O., 1886.

The writer submits that this direction to the taxing officers is not wholly correct. Some portions of the examination of the opposite party are, generally, put in as evidence at the trial. These portions are required to be marked by counsel when put in. If the depositions are not briefed counsel can not know exactly what evidence has been put in in this way without referring to the exhibits. Where argument takes place after the trial, or before a Divisional Court, it would be extremely inconvenient not to have copies of the depositions on the brief, marked to correspond with the depositions put in at the trial. Wherever, therefore, depositions of the opposite party have been read at the trial and put in as evidence, the solicitor should be allowed for briefing a copy of the depositions, even where there is one brief only.

Where a copy of the brief was actually prepared for second counsel for the defendant, the accidental absence of the counsel at the trial should not deprive the defendant of the charge for such brief. *Ham v. Lasher*, 24 U.C.Q.B. 357.

A second term brief was allowed at the amount for which a second copy of the evidence could have been procured from the shorthand writer. *Morris v. Armit*, 4 Man. L.R. 307, 7 C.L. Times 180, Dec. N.

Where the brief itself is allowed instructions for brief should also be allowed. *McCallum v. McCallum*, 11 P.R. 179.

A plaintiff is not in any case entitled to the costs of preparing for trial, such as instructions for brief, drawing and copying briefs and documents, and advising on evidence, until after notice of trial is given.

Erle, C.J.:—"It has been an established rule that neither party has any right to charge the other with the costs of preparing for trial until notice of trial has been given. When further time to plead is granted, with the stipulation that the defendant accept short notice of trial, I think the plaintiff's attorney should ask the Judge that he should be allowed to prepare for trial, and to charge the opposite party with the costs of such preparation, and that the same should be made one of the terms on which the indulgence of further time should be given. I take it that many of the costs disallowed in this case were rightly incurred as between attorney and client, but not as between party and party, for the general rule is as I have already stated it." *Freeman v. Springham*, 32 L.J. C.P. 249, 14 C.B.N.S. 197.

Followed in *Curtis v. Platt*, 33 L.J.C.P. 255.

And when a consent to judgment was given by the defendant the day after service upon him of notice of trial, the plaintiff was held not entitled to the costs of preparing brief incurred before the service of the notice of trial. *Meldon* v. *Lawless*, 18 W.R. 761.

Where a bill had been dismissed, before notice of hearing was given, and the Master allowed a counsel fee of $15 on the allegation that the brief had been given to counsel immediately after the filing of replication,—

On appeal, Strong, V.-C., said the English practice should be followed; and no brief or counsel fee allowed until after the cause is set down and notice of hearing given. *Dewar* v. *Orr*, 3 Chy. Ch. 141.

Brief and instructions for brief are taxable on arbitration proceedings. *Re Oliver and Bay of Quinte Ry. Co.* (1904), 7 O.L.R. 567.

Where pleadings have been amended it is improper to include both the original and amended pleadings in the brief. *Higgins* v. *Bateman*, 2 Dr. & War. 70.

Boyd, C.:—"I think the provisions of the rules as to four copies covers all the copies required during the litigation, and that extends to what goes into the brief. Such has been the interpretation of the officers; and such was the express direction in the Chy. O. 403, from which the present rule has sprung." *Sparks* v. *Purdy*, 15 P.R. 1.

The local taxing officer had taxed the costs of certain witnesses not called at the trial. On appeal these costs were disallowed as there was nothing to shew that their evidence was relevant. Boyd, C.:—"The ruling on this head will also necessitate the disallowance of their evidence as briefed for counsel." *Carlisle* v. *Roblin*, 16 P.R. 328.

In *Re Robinson, a Solicitor*, 16 P.R. 423 (see *ante* "Advising on Evidence") the costs of copies of evidence taken in the Master's office and included in brief were disallowed. But no general rule can be deduced from *Re Robinson*, and in a latter case the costs of such copies were allowed after a discussion of *Re Robinson*. See *Plenderleith* v. *Parsons* (1908), 15 O.L.R. 397.

And in *Rennie* v. *Block*, 17 P.R. 317, copies of depositions of parties as witnesses were allowed as a part of the brief.

No brief is allowed upon a Chamber motion. *Rennie* v. *Block*, 17 P.R. 317.

Britton, J.:—"As to the copy of the correspondence which was allowed as part of brief, that is within the discretion of the taxing officer and I ought not to interfere. In *Budgett* v. *Budgett* (1895), 1 Ch. 202, the decision was that 'the allowance on taxation of the costs of copies of correspondence used at the trial of an action is a matter for the discretion of the taxing master: but in exercising his discretion he ought to ascertain which part of the correspondence was in his judgment necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case.' I must assume that the taxing officer did ascertain and did exercise a discretion as to which part should be allowed. This case perhaps differs from *Budgett* v. *Budgett*, as the correspondence here was not used at the trial. It may have been necessary to brief it for the purpose of cross-examination of the plaintiff, or in reasonable anticipation of the correspondence being required and used. Even if not used, the decision arrived at by the senior taxing officer must stand." *Johnston* v. *Ryckman* (1904), 7 O.L.R. 511.

Senior counsel was retained by the plaintiff for the argument in the Divisional Court and the brief in question prepared and handed to him, but owing to his other engagements he was unable to argue the case and returned the brief to the plaintiff's solicitor, who acted alone as counsel. On the argument the defendant's counsel had not been furnished with any brief of the evidence, and, at the suggestion of the Court, the plaintiff's counsel handed him the brief in question. Defendant's counsel made use of the brief and retained it. The taxing officer allowed the plaintiff so much of the brief as consisted of a copy of the evidence.

Meredith, C.J., held that the allowance made by the taxing officer was correct. *Pennington* v. *Honsinger*, 1 Ont. W.R. 507.

## COMMISSION IN LIEU OF COSTS.

*Con. Rule 1146.*—In actions or proceedings for administration, or partition, or administration and partition, unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff, each person properly 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," "as between solicitor and client," or "between solicitor and client." Con. Rule 1187.

(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 sub-section 1, unless it is otherwise expressly provided by the order or judgment, or unless the Court or a Judge of the High Court otherwise directs. Rule 1253.

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 Rule 203(3), 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. *Gorham* 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. H. & L. 1273.

The commission under this rule does not cover costs of interlocutory proceedings, where one party is ordered to pay costs to another party.

The commission covers both solicitor's fees and counsel fees, counsel fees not being disbursements within the meaning of the rule. *Cobban Manufacturing Co.* v. *Lake Simcoe Hotel Co.* (1903), 5 O.L.R. 447.

The division of the commission should be in fractional parts, proportionate to the work done and responsibility involved. *Dodge* v. *Clapp*, 8 P.R. 388; *Cameron* v. *Leroux*, 9 P.R. 304.

The commission covers all the costs of the action. On a motion for distribution the plaintiff asked that a lump sum be allowed for the costs and disbursements of the motion. The Chancellor refused to allow any sum for costs and disbursements over and above the amounts found in the report. *Re Fleury, Fleury* v. *Fleury*, 9 P.R. 87.

Where other matters are involved in the action besides a simple administration of the estate, *e.g.*, where the construction of a will is asked for, taxed costs will be allowed up to judgment, in addition to commission. *Rody* v. *Rody*, 2 C.L. Times 86.

But the commission does not cover the costs of getting out of Court the cheques for the parties entitled thereto.

The plaintiffs' solicitors were instructed by certain legatees to obtain cheques for the amounts found due them by the Master's report, and the solicitors procured the cheques and charged the legatees with the costs of procuring them. The legatees objected to pay these costs, on the ground that the plaintiffs' solicitors had already been paid therefor by the commission allowed them; and that the legacies should be paid to them without any deduction whatever.

*Held*, Mr. Dalton, M.C., that the solicitors were entitled to the costs in question; for it was no part of their duty, as solicitors having the conduct of the cause, to take out and deliver to legatees or creditors their respective cheques, but if they notify them that they may attend and procure their cheques they have done all that is required of them. *Armitage* v. *Armitage*, 3 C.L. Times 172.

The scope of Con. Rule 1146 is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation.

A very liberal compensation is not *per se* a reason for reducing the commission, or directing a taxation of the bill in its stead, nor *per contra* is a low or inordinate compensation a reason for increasing the commission or directing payment by a taxed bill.

*Semble*, that where any party interested in the estate desires that a solicitor should be paid on the scale of a taxed bill instead of by commission he should give notice to the solicitor to that effect, and have the Master note it in his book, at the earliest possible stage of the proceedings; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *In re Stuebing. Authers* v. *Dewar*, 10 P.R. 236.

Where there has been an unusual amount of work done and responsibility borne by the solicitors the Court will increase the commission or give taxed costs. *In re Sayers, Sayers* v. *Kirkpatrick*, 1 C.L. Times 439.

The Master has no power to order taxed costs under this rule; that can only be done by a Judge of the High Court. *Hendricks v. Hendricks*, 13 P.R. 79.

The proceeds of the personalty and the realty must be added together and the commission computed thereon as on one sum realized. *In re Woods, Whittrick v. Woods*, 4 C.L. Times 134.

Land was subject to a mortgage and the mortgagee refused to consent to a sale free from the mortgage.

*Held*, Blake, V.-C., that the Master was right in allowing commission only on the amount realized, being the actual value of the interest of the intestate in the land. Had the mortgagee consented to a sale free from his mortgage then the commission would have been estimated on the whole amount. *Re McColl, McColl v. McColl*, 8 P.R. 180, 1 C.L. Times 283.

Jessel, M.R.:—"When the Court administers the estate of a testator which is subject to a mortgage, that is, an estate in which he has only the equity of redemption, what is administered is not the whole of the estate, but only that which the testator had, namely, the equity of redemption, though in case of a sale being directed the mortgagee may come in and concur, and so get paid. Supposing a man has property worth £2,000, and he mortgages it for £1,500, all he can get on a sale is £500, for the remainder belongs to the mortgagee. If, then, the action were brought for the administration of his estate, how could it be said that his interest in the mortgaged property was worth more than he could get, namely, the £500? *In re Sanderson*, 7 Ch. Div. 176.

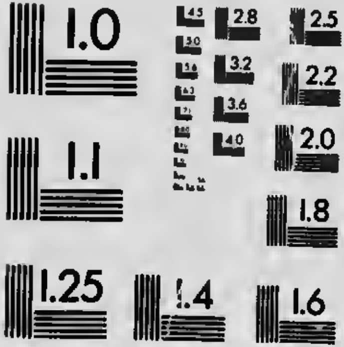
The commission, however, is to be calculated on the total amount accounted for, and not merely on the net amount in the hands of the accounting party.

Where the personal representative had received \$2,451.17 and expended \$1,625.97, leaving a balance of \$825.20 in his hands, and the Master allowed commission on \$2,451.17.

Proudfoot, J.:—"This matter has been mentioned to me by the accountant, who referred me to the case of *Re McColl*,

**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

*McColl* v. *McColl*, 8 P.R. 480. I at first thought that the case was governed by that decision, but on further consideration I do not think that it is, and that the Master has properly allowed the commission on the gross amount accounted for in this action." *Re Brown, Brown* v. *Brown*, 19 C.L. Journal 367, 3 C.L. Times 595.

And see *Re Batt, Wright* v. *White*, 9 P.R. 447.

In *Re Goodfellow, Traders Bank* v. *Goodfellow*, 10th June, 1889, Ferguson, J., allowed taxed costs in an administration suit, 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.

Taxed costs were also allowed by Robertson, J., in *Wright* v. *Bell*, 32 C.L.J. 362, 16 C.L.T. 193, where the solicitors had had many difficult questions to contend with during the course of the administration, and no infants were interested.

Magee, J.:—"The Master's certificate does not shew any unusual proceedings or difficulties such as arose in *Wright* v. *Bell*, 16 C.L.T. 193. The adding of parties, advertising for creditors, considering claims, sale of lands, and examination of accounts, are the most ordinary experiences. It is stated that the executors' accounts were intricate and badly kept, and gave rise to many questions, some difficult to determine, and required much time and trouble to adjust, and covered about 300 items on each side, the receipts being over $9,000 and the disbursements about $11,500, the estate now being about $3,400, and some personalty specifically bequeathed, outside of the balance, if any, due from the surviving executor. Some 74 pages of evidence have been taken and 135 hours spent in attendance before the Master.

"The Master had power to direct the accounts to be brought in in proper shape, and the parties beneficially interested should not be put to greater expense because of the executors' neglect of duty. It does not appear on what sum the commission under Rule 1146 would be calculated in this case. See *Re Brown*, 19 C.L.J. 367. But as pointed out by the

Chancellor, in *Re Stuebing*, 20 C.L.J. 193, the rule was not intended to do strict justice, but only to afford a convenient mode of fixing the remuneration, though in some cases it might be too little, or, as alleged in that case, too much. And, as he points out, if a departure from it is desired, it should be asked at any early stage.

"The solicitors for all parties agree in the application, but if, as is to be assumed, the clients also approve, there should be no difficulty in getting what may be considered proper remuneration. On the material before me I do not think Rule 1146 should be departed from." *Re Greer, Greer* v. *Greer*, 8 Ont. W.R. 69.

In *McLaughlin* v. *McLaughlin*, 1 Ont. W.R. 378, an application was made in a partition action for taxed costs, on the ground that of unusual time and trouble expended, and the order was granted by Robertson, J., and affirmed (p. 424) by the Divisional Court. The report does not give the facts of the case and is not of much assistance.

In a partition suit the Master divided the commission seven-eighths to the plaintiff, and one-eighth to the guardian of the infants. The Master also fixed the disbursements, which were not revised.

Blake, V.-C., held that the Master had not allowed the guardian sufficient, and that it was open to a Judge in Chambers to review the distribution of the commission made by the Master; that the question as to what are or are not disbursements is a very difficult one, and these bills should still be referred for revision. *Campbell* v. *Campbell*, 8 P.R. 159.

## COMMISSION TO TAKE EVIDENCE.

The practice governing the issue of commissions for the examination of persons residing without the limits of the province is contained in Con. Rules 499 to 515.

Where the parties join in a commission each party pays the costs of the commission consequent upon the examination of his witnesses without prejudice to the question by whom such costs are ultimately to be borne. Con. Rule 513.

The general rule is that the costs of a commission to take evidence in a foreign country form part of the costs of the cause. *Colborne* v. *Thomas*, 4 Gr. 169; *Prince* v. *Samo*, 4 D.P.C. 5.

The rule is the same where the commission is to examine a party on his own behalf. *Brunton* v. *Hardy*, 10 W.R. 562.

The quantum of costs paid in executing a commission is a matter for the discretion of the taxing officer; and where the amount paid to the commissioner was twenty-two guineas, and the Master on taxation disallowed twelve, the Court refused to interfere.

Morrison, J.:—"It can hardly be said that no matter what amount may be paid to a commissioner, the Master should allow it. A great deal necessarily depends upon the standing of the commissioner. If he is a professional gentleman, in some cases ten guineas a day may be a reasonable charge to be allowed; that would depend entirely upon the standing of the commissioner, and the necessity for the services of a gentleman whose time is so valuable. In ordinary cases I should say that five guineas a sitting was reasonable." *Fox* v. *Toronto and Nipissing Railway Co.*, 7 P.R. 157.

In *Grey* v. *Smith*, 7 C.L. Times 168, $20 *per diem* was allowed as solicitor's charges for attending at Chicago on a commission issued by the opposite party.

A commission was taken out by the defendant to examine a witness in Paris. At the trial the plaintiff's counsel abandoned that part of his case to which the evidence under the commission applied, and the defendant had a verdict on that issue.

*Held*, that he was entitled to the costs of the commission. *Jewell* v. *Parr*, 17 C.B. 636, 2 C.B.N.S. 809.

The plaintiffs obtained an order for the issue of a foreign commission. The order contained the usual direction that the costs be costs in the cause. The evidence was taken, and the plaintiffs succeeded in the suit, but the evidence was not put in at the trial. The taxing officer disallowed the costs of the commission on the ground that the evidence was not used.

Boyd, C., held that the direction in the order as to costs did not preclude the taxing officer from disallowing the costs of the commission to the plaintiffs. *Dominion, etc., Co. v. Stinson*, 9 P.R. 177, 2 C.L. Times 45.

See also *Curling v. Robertson*, 8 Scott, N.R. 288, 7 M. & G 525, to the same effect.

If a witness is so old and infirm that it is a prudent course to take his examination, but he is afterwards able to attend the trial, the party may be allowed the costs of the commission, as well as the costs of the witness's attendance at the trial. *Beaufort v. Ashburnham*, 13 C.B.N.S. 598, 9 Jur. N.S. 822.

See also *Fox v. Toronto and Nipissing Railway Co.*, 7 P.R., at p. 161.

See *McIntyre v. Canada Co.*, 18 Gr., at p. 370, where the Court directed that the costs of a commission should not be allowed to the defendant where the facts were such that the defendant should have admitted them.

In *Watt v. Mackay*, 5 O.W.R. 93, application was made to examine the plaintiff in New York on his own behalf. The Master in Chambers made the order on the following terms: "Plaintiffs, before issuing the order, are to pay to the defendant's solicitor $40 to enable him to attend on the execution of the commission. In the event of the success of the plaintiffs no greater costs are to be allowed against the defendant for and incidental to the commission than would have been taxed if plaintiff Mackay had attended and given evidence at the trial, and the $40 is not to be chargeable to defendant in any event. See *Mills v. Mills*, 12 P.R. 473."

The plaintiffs appealed from so much of the order as imposed these terms, and the appeal was dismissed by Falconbridge, C.J., 5 O.W.R. 170.

See also *Toronto Industrial Exhibition Association v. Houston*, 5 O.W.R. 349, where Street, J., in making an order for a commission made it on the terms that the plaintiffs pay the costs thereof.

The costs incurred examining witnesses abroad under a commission must be taxed in this country upon the scale that would be allowed in the country where the commission is executed. *Wentworth* v. *Lloyd*, 34 L.J. Ch. 81.

But where witnesses were examined under a commission at Calcutta, and the commissioners, being non-professional men, called in the assistance of an attorney and charged 66 pounds for "legal advice and assistance to the commissioners executing the commission": the Master disallowed this sum. An appeal from the Master's decision was dismissed by Bovill, C.J., who held that the commissioners had no right to call in the aid of an attorney to conduct the examination under the commission. "The matter must be in the discretion of the Master in each particular case; and, unless we see that the Master has been clearly and substantially wrong, we cannot interfere with his decision." *Potter* v. *Rankin*, L.R. 4 C.P. 76.

Where the questions involved were of an extremely complicated and important character the Master allowed the expenses of sending a barrister as commissioner to the Canary Islands. On appeal, Bovill C.J.:—"This matter depends not on any positive or peremptory rule. Indeed, it is impossible to lay down any general rule on the subject. In an ordinary case, of course, the Master would refuse to allow the expenses of a barrister sent out to conduct a commission. But there undoubtedly are cases where it would be highly expedient for each side to send one; and there is no absolute rule against it. The propriety of doing so must depend entirely upon the nature and circumstances of the particular case. The Master has, with the briefs before him, investigated the matter, and has come to the conclusion that the expense in question was reasonably and properly incurred. He having done so, it must be clearly shewn that he has erroneously exercised his discretion before we can interfere."

Brett, J.:—"Where the Master has exercised his discretion we should be very loath to interfere; though I think it would be equally objectionable if we were to act upon a rigid rule n t to interfere in any case unless some principle is involved. Upon the present occasion the Master has exercised his discretion, and I think very properly exercised it." *Yglesias* v. *The Royal Exchange Assurance Corporation*, L.R. 5 C.P. 141, 39 L.J.C.P. 173.

The Court will not, under the code of rules regulating discovery, require the attendance of a non-resident defendant at a point within the jurisdiction. *Lefurgey* v. *Great West Land Co.*, 11 Ont. L.R. 617.

Nor do the rules give a Master power to direct a non-resident defendant to attend before him on a reference in his office, or to issue a commission, naming himself as commissioner. It is possible that he could under Rule 485 make an order for the attendance of a party before himself at the residence of the party outside the jurisdiction.

"But the Court or a Judge, under Rule 499(1) may direct that a commission should issue, and I see no reason why the Master should not be named as the commissioner." Anglin, J., *Connolly* v. *Connor*, 12 O.L.R. 304.

The plaintiff, an officer in the militia, expected to be drafted to South Africa. He accordingly obtained a commission and his evidence was taken thereunder, but when the action came on for trial he had not received orders to proceed to South Africa, and the commission evidence was not used. The Master, in taxing the plaintiff's costs, disallowed the costs of the examination holding that he was concluded from allowing the costs under *Ridley* v. *Sutton*, 32 L.J.N.S. (Ex.) 122, and this was affirmed by Ridley, J.

The Court of Appeal reversed this decision, the Court holding "that it is not correct to say that costs are not to be allowed simply because in the ultimate event they turn out to have been unnecessary. The taxing master must not consider whether they have been 'necessary' having regard to the event, but whether they 'have been necessary or proper for the attainment of justice'—that is (as I think), necessary or proper having regard to the state of things at the time the examination was ordered. That it seems to me, is the time with reference to which the propriety of incurring the costs should be considered." *Bartlett* v. *Higgins* (1901), 2 K.B. 230.

Robertson, J.:—"The defendants had caused a commission to issue to take evidence in Montreal. The order therefor was in the usual terms, costs to be costs in the cause. At the trial the defendant's called the plaintiff, who in his evidence, admitted such facts, contrary to his pleadings, as made it unnecessary to open the commission, which was in Court. The local taxing officer has disallowed the costs of the commission on the ground that the commission evidence was not used at the trial. In my judgment, that, of itself, is not sufficient.

"The taxing officer should have inquired into the circumstances attending the non-user of such evidence, and, if he found the commission was obtained *bonâ fide*, that the evidence taken was, in the honest opinion of the defendant's solicitor, necessary and material for the proper defence of his clients, and that it became unnecessary to open the commission by reason of what afterwards unexpectedly came out at the trial, which would have been otherwise necessary for the defendants to prove, and which the evidence under the commission would have established if it had been opened and put in, I think there is no reason or rule against allowing the costs of and incidental to the taking out and executing of the commission."

On appeal the Divisional Court affirmed the decision of Robertson, J. *Rondot* v. *Monetary Times*, 18 P.R. 141.

A commission was issued to take evidence in Wales, and the defendant's solicitor, living in London, attended on the execution of the commission. The Master allowed his expenses, and said: "I doubt whether any expense would have been saved. The rule that the costs of a London solicitor attending the execution of a commission in the country shall not be allowed on taxation of costs as between party and party, is not so imperative as not to be relaxed under circumstances."

On appeal the decision of the Master was affirmed. *Howell v. Tyler*, 12 L.J. Ch. 223.

To entitle the successful party to the costs of the attendance of counsel on a commission to examine witnesses abroad, it must be shewn that the attendance of counsel was necessary for the conduct of the commission. *Le Cocq. v. S. E. Ry. Co.*, 6 B. & S. 415.

The costs of more than one counsel attending the examination of witnesses before an examiner will not be allowed. *Hallows v. Fernie*, 17 L.T. 347, 16 W.R. 175.

## CONDITIONS OF SALE.

The standing conditions of sale are those set forth in form No. 85 to the appendix in the Con. Rules. Rule 723.

Any conditions varying from, or in addition to, the standing conditions, must be stated in the advertisement of sale. Rule 721.

At the time when the advertisement is settled it is necessary for completing it to determine what, if any, variations the conditions of sale should contain from the standing conditions. The affidavits on which to ground any such variations should then be brought into the Master's office, and, if necessary, spoken to. For this work the Master and solicitors are paid by the hour according to the tariff.

The conditions of sale are prepared, in the first instance, by the solicitor having the conduct of the sale and brought in and filed with the Master. When settled the Master makes a fair copy of the conditions for the solicitor, and is paid ten cents per folio for such copy.

## COPIES.

*Con. Rule 265.*—(1) Every writ, pleading or other document may be printed or written in whole or in part, but no more than four copies thereof exclusive of the draft, but inclusive of all other copies that may be required or made, in the progress of the cause, shall be allowed. Con. Rule 395. Rules 23 June, 1894, 1325.

(2) If more than three copies exclusive of the draft are required, the party may have the writ or pleading or document printed, and he shall in lieu of all charges for copies be allowed thirty cents per folio of the writ or pleading or document, and his reasonable disbursements for printing. Con. Rule 396. Rules 23 June, 1894, 1325.

*Con. Rule 322.*—Where service of affidavits and other proceedings, other than judgments or orders of which office-copies are by the practice of the Court required to be served, is required, true copies, instead of office copies are to be served. Con. Rule 453.

*Con. Rule 323.*—Office copies of orders and judgments to be served shall be certified by the officer in whose office the same are entered. Rules of 1 Jan., 1896, 1447, *amended.*

*Con. Rule 324.*—A party requiring a copy of any pleading, affidavit, exhibit, or document not directed to be served shall make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself. Con. Rule 455.

*Con. Rule 325.*—Where an application is made for a copy of any pleading, affidavit, exhibit or document, it shall be delivered within 48 hours from the time of the demand: and any further time which may elapse before the delivery is not to be computed against the party demanding the same. Con. Rule 456.

*Con. Rule 326.*—A party entitled under the Rules or a special order to, and requiring copies of or extracts from, any document in possession of another party shall pay to the party producing the document for such copy or extract as he may by writing require at the rate of 10 cents per folio; and if the solicitor of the party producing the document refuses or neglects to supply the copy or extract, the party requiring the same shall be at liberty to make it, and the party producing shall not be entitled to any fee in respect thereof. Con. Rule 457.

The costs of obtaining copies of the evidence for the purpose of moving against a judgment or for a new trial are costs in the cause unless the court otherwise orders. Con. Rule 1142.

Costs will not be allowed for copies of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a point of law. *Ex parte Webster*, 22 Ch. Di., 136.

Charges for procuring copies of opinions of Judges in another action for the instruction of counsel, should not be taxed as between party and party. Boyd, C. *Platt v. Grand Trunk Railway*, 7 C.L. Times 400, 23 C.L. Journal 373.

The trial began in October and continued four days, and was then adjourned till 22nd December after thirty-two witnesses had been examined, and 1185 folios of evidence had been taken. The plaintiff's solicitor procured a copy of this evidence for the use and convenience of counsel at the adjourned trial, when other witnesses were examined and the case argued. The taxing officer ruled that it was the duty of the junior counsel to take notes of evidence, and disallowed the disbursement for the copy of the evidence.

*Held*, Proudfoot, J., reversing his ruling, that the item should be allowed between party and party as a necessary disbursement at the trial of the action. *Gage v. Canada Publishing Co.*, 3 C.L. Times 267.

The Court of Appeal had ordered part of an affidavit filed on behalf of the plaintiff to be expunged as scandalous, and had given the defendants their costs of the application as between solicitor and client. The taxing master disallowed the costs of copies of the pleadings for the use of the counsel and the Judges, on the ground that it was not the practice to allow all the expense of copies of pleadings on interlocutory applications.

The Court reversed the decision, and allowed the costs of the copies, holding that the general rule laid down by the taxing master could not be sustained, and that as the copies were necessary to enable the case to be properly argued they must be allowed. *Warner* v. *Moses*, 19 Ch. Div. 72.

"Only four copies of the writ of summons can be taxed": see Rule 395 (now 265, *ante*). Such a writ is on occasion a pleading. Rule 370 (now 245).

I think the provision of the rules as to four copies covers all the copies required during litigation, and that extends to what goes into the brief. Such has been the interpretation of the officers; and such was the express direction of the old Chy. Order 403, from which the present rule has sprung. Boyd, C., *Sparks* v. *Purdy*, 15 P.R. 1.

No costs are allowed for engrossing an *ex parte* order. That is sufficiently covered in the charge for drawing the order. Boyd, C., *Carlisle* v. *Roblin*, 16 P.R. 328.

The plaintiff made a garnishing application in Chambers and was ordered to pay the costs thereof. While the application was pending certain parties were examined as witnesses upon the application and the taxing officer allowed the costs of copies of the depositions.

Street, J.:—"The appeal must be allowed as to the costs of the copies of the depositions. There is no item in the tariff under which such costs can be taxed. Indeed, copies of depositions are of no use in any case except for the purpose of a brief; and, as no brief is allowed upon a Chambers motion, I do not see how these costs can be taxed." *Rennie* v. *Block*, 17 P.R. 317.

These costs would now, in a proper case, be taxable under item 61 of Tariff A, which was not in the tariff in force when *Rennie* v. *Block* was decided.

The allowance on taxation of the costs of copies of correspondence used at the trial of an action is a matter for the discretion of the taxing officer; but in exercising his discretion he ought to ascertain what part of the correspondence was, in his judgment, necessary and proper to be supplied to counsel and the Court for the proper argument and decision of the case. The Court will not review the taxing officer's discretion unless inadvertently, or by some erroneous conclusion, he has omitted to allow important letters, or has included unimportant letters. *Budgett v. Budgett* (1895), 1 Ch. 202.

The defendants were ordered to pay the costs of certain proceedings. In consequence of the destruction, by fire, of the offices of the plaintiff's solicitor, his papers were destroyed, and it became necessary to take new office copies.

The Master of the Rolls said that although the defendants were to pay the costs, it did not follow that they were to be charged with the expenses which arose from accidents. That would introduce a rule that all additional expenses, properly incurred by a plaintiff in prosecuting a suit, formed a part of the costs of the suit. *The Attorney-General v. Kerr*, 3 Beav. 425, 10 L.J. Ch. 177, 52 R.R. 173.

The costs of all copies of documents which are required by the Judge for his assistance in hearing the cause, are costs in the cause. *Small v. Attwood*, 1 Y. & Coll. 53.

What copies of documents should be furnished to counsel is a matter for the discretion of the taxing officer; and it is the invariable practice of the Court not to interfere where the taxing officer has exercised his discretion unless some serious mistake has been made. *Turnbull v. Janson*, 3 C.P.D. 264.

Where the Court is asked to construe the terms of a document, a copy should be provided for its use, and the costs of such copy should be allowed on taxation. *In re Houstoun's Settlement*, 80 L.T. 469.

A party to an application gave notice to his opponent of his intention to use as evidence a deposition which was on file, the deposition having originally been taken for another purpose. At the same time he served a copy of the deposition. Jessell, M.R., refused to allow the costs of the copy so served. "Notice of the intention to use any document which is already on the file ought to be sufficient. The party to whom the notice is given can go and look at it and make extracts of such parts as are material, or it might happen he has already taken a note of the deposition. We ought not to sanction any such practice of serving copies of long examinations." *Ex parte Hall*, 19 Ch. Div. 580.

The defendant appealed from a referee's report, and the plaintiff cross-appealed. Both appeals were dismissed with costs. The taxing officer refused to tax the defendant the amount paid by him for a copy of the evidence.

Street, J.:—"The disbursement for evidence was incurred by the defendant for the purpose of his own appeal. It would have been required even though the plaintiff had not cross-appealed, and cannot be allowed to the defendant as part of his costs of the plaintiff's cross-appeal." *Denison* v. *Woods*, 18 P.R. 328.

An action for redemption was referred to the Master. The reference lasted 137 hours and there was an appeal from the Master's report. On a taxation of costs as between solicitor and client the taxing officer allowed $77.50 for brief. On appeal, Street, J.:—"The sum allowed for brief appears to be largely made up, so far as we can ascertain from the papers, of sums amounting in all to $68 or thereabouts, paid to the Master from time to time during the progress of the reference for copies of the depositions as they were taken. These copies were not, therefore, obtained with a view to the appeal, but parts of them were, no doubt, referred to upon the argument of the appeal.

The argument in favour of their allowance as a brief upon the appeal would, no doubt, be that if they had not been obtained during the progress of the reference they would have been obtained when the appeal was determined upon. We think there is much evidence to doubt this. The question we have, however, to determine, is whether in every appeal from a Master there is a *primâ facie* right to order and charge for a copy of the depositions before him, and we must hold there is not, and that such a charge should only be allowed where it is shewn to be necessary to the client's interests. If there had been no appeal the solicitor would, we think, have found it hard to justify the expense of these copies as a charge against his client, without special instructions to obtain them, which are not here alleged. With an adverse finding by the Master upon the questions involved, and upon an appeal which was to be argued as counsel by the solicitor who attended throughout in the Master's office, we think the authority of the client to so large an expenditure ought to have been shewn. The original depositions were accessible, and might in this case, as they frequently have been in others, have been used by counsel upon the argument, and we think, under the circumstances of this case, that course should have been adopted. We think, in this case, therefore, that the discretion of the taxing officer has been wrongly exercised in the wholesale allowance of these copies, and that the allowance for brief should be reduced to $10." *Re Robinson, a Solicitor*, 16 P.R. 137.

For "the circumstances of this case," see remarks thereon under "Advising on Evidence."

No general rule can be deduced from *Re Robinson*; the most that it decides is that on an appeal from a Master there is no *primâ facie* right to order and charge for a copy of the depositions in the Master's office when the evidence is taken in longhand.

In *Plenderleith v. Parsons* (1908), 15 O.L.R. 397, the same question was before Riddell, J., on an appeal from a taxation by Mr. Thom, whereby he had disallowed an item of $29.25 paid for a copy of the notes of evidence in the office of the Master in Ordinary.

Riddell, J.:—"It was stated before me that the taxing officer rejected the item because he considered that the case of *Re Robinson* prevented him allowing such an item in any case in the Master in Ordinary's office. . . . The case of *Re Robinson* did not, I think, decide what has been suggested. (Mr. Justice Riddell then read the judgment of Street, J., before abstracted and the remarks of Armour, C.J., and continues.) This must be read in connection with the facts of the case. Where, as in *Re Robinson*, the evidence was taken in longhand, what is said by the learned Chief Justice may still be law, but I do not hesitate to say that where the evidence is taken in shorthand it is impossible for any counsel that I know of to take 'such notes of the evidence as he may require as the case proceeds.' *Crede experto.* And this is *a fortiori* if the evidence deals with a number of small items, and still more so if the evidence has been taken from time to time over an extended period. One may read a hurried and abbreviated note an hour or a day after it is made, but when it 'has got cold' fail to make head or tail of it.

"No general rule can be deduced from *Re Robinson*, at least where the evidence is not taken in longhand.

"I have examined the proceedings before the Master and availed myself of such information as could be furnished me by the stenographer in the office of the Master in Ordinary. From such inquiry I am of opinion that the evidence was properly ordered, and that the costs thereby incurred 'were necessary and proper for the attainment of justice and defending the rights of the defendant.'"

From this decision there was an appeal to a Divisional Court. *Per Curiam*:—"We are of opinion that the matter of costs of procuring copies of evidence is to be dealt with according to the facts of each case. If it was reasonable to procure the copies, it was right to allow them. The appeal is dismissed with costs."

In an interpleader proceeding the trial Judge gave judgment for the claimant, and gave the judgment creditors leave to appeal to the Divisional Court upon condition, that, if successful, they should not ask for costs of the appeal. On the appeal to the Divisional Court the judgment creditors provided copies of certain documents which were necessary for counsel. The Divisional Court dismissed the appeal. By leave the judgment creditors appealed to the Court of Appeal, and this appeal was successful, and the claimants were ordered to pay the costs of the judgment creditors incident to the last appeal.

The before-mentioned documents were necessary for, and were used on the argument in the Court of Appeal; and the judgment creditors sought to tax the costs thereof as a part of the costs of appeal. The Master disallowed these costs on the ground that they were not costs incurred for the purpose of appeal to the Court of Appeal, and the Court held the Master was right. *Mason* v. *DeFries* (1910), 1 K.B. 535, W.N. 51.

## COSTS BEFORE WRIT ISSUED.

The only costs allowed on taxation, before the writ is issued, where the writ has been issued, are necessary letters to defendants, unless by statute, or the practice of the Court, the plaintiff is required to give some other particular notice, in which case the reasonable costs of the notice and service of it are taxable.

Where a solicitor is retained to demand a debt, and the debtor pays the amount before the writ of summons is issued, the solicitor cannot insist on payment of any costs for his letter, or for instructions to sue. *Caine* v. *Coulson*, 32 L.J. Exch. 97; *Holman* v. *Stephens*, 6 Jur. N.S. 124; *Kinton* v. *Braithwaite*, 2 Dowl. P.C. 101, 49 R.R. 712.

In an old case of *Morrison* v. *Summers* (1830), 9 L.J.K.B. 13, Lord Tenterden held that where in answer to an application for payment of a debt, the debtor applied for and obtained time, he was bound to pay the reasonable costs of the creditor's attorney. I have been unable to find any subsequent reference to this case, and it is not cited in recent books on costs. It is doubtful whether it is still an authority, at least in Ontario.

In *Capel* v. *Staines* (1837), 6 L.J. Ex. 212, the defendant, before action, applied for indulgence, and several letters were in consequence written by the plaintiff's attorney. The Court held that the practice was only to allow one letter before action brought, and that this practice ought not to be departed from. No reference was made to *Morrison* v. *Summers*.

The plaintiff filled a bill to obtain a production and inspection of title deeds. Before the bill was filed, but in anticipation thereof, the defendant's solicitors had prepared an abstract of title to enable counsel to prepare an answer. The Master of the Rolls disallowed the costs of the abstract, and his decision was affirmed on appeal. *Davis* v. *Earl of Dysart*, 25 L.J. Ch. 122, 322.

Defendant, being threatened with an action for being party or privy to a fraud disclosed in a previous action to which he was not a party, obtained a transcript of the speeches, evidence and judgment therein before the issue of the writ in the present action, with a view of defending the same. The present action was subsequently dismissed for want of prosecution. The English Order LXV., r. 27 (29), directs the taxing officer to allow all costs which "appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party." See Ont. Rule 1176.

On an appeal from the taxation the Court held that the plaintiff was entitled to the costs of so much only of the transcript of the evidence as related to the issue in the present action. *Bright* v. *Sellar* (1904), 1 Ch. 369.

A bill was filed to compel the defendant to reconvey to the plaintiff certain lands which it was alleged the defendant had obtained by fraud. Before serving the bill the plaintiff's solicitor prepared and tendered to the defendant for execution a reconveyance of the land.

Dalton, M.C.:—"I do not see that preparing and tendering to the defendant a reconveyance for his execution was a necessary preliminary to the institution of the suit, or that the plaintiff should do so at all essential to his ultimate success. In this it differs from those cases at law, where by statute notice must be given before bringing an action. There the giving of the notice is really the first step in the cause, and without it the action cannot be maintained. The costs of preparing and tendering the reconveyance for execution before serving the bill, must therefore be disallowed." *Pringle* v. *McDonald*, 7 P.R. 152.

Where it was necessary to serve a railway company with notice of action, the plaintiffs were allowed the costs thereof. *Kent* v. *Great Western Railway Co.*, 4 D. & L. 481; *Edwards* v. *Great Western Railway Co.*, 12 C.B. 419.

By various statutes certain persons fulfilling public duties, and others, are entitled to notice of action before writ is issued. The costs of preparing and serving these notices are taxable. See *post*, under NOTICE OF ACTION.

## COSTS IN THE CAUSE.

Burns, J.:—"The rule of what forms costs in the cause I take to be this: all rules which form part of the regular proceedings in the cause, and where costs are not mentioned, the party substantially succeeding will be entitled to the costs of or opposing, as the case may be, as part of the costs of the cause. Costs accruing upon irregular proceedings should be provided for in any rule or order to be made, and if not provided for they do not form part of the costs of the cause." *Cameron* v. *Campbell*, 1 P.R. 170.

The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award, as follows: "We also order and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201.50," it was held that the words "costs in the cause" meant the whole costs of the plaintiff and defendants. Richards, C.J., *Scott* v. *The Grand Trunk Railway Co.*, 3 P.R. 276.

The costs of a special jury are costs in the cause, not costs of the day. *Whitehead* v. *Brown*, 2 O.S. 345.

The costs of shewing cause against a rule for setting aside an award are costs in the cause. *Essex* v. *Parke*, 12 U.C.C.P. 159.

The plaintiff had obtained a decree with costs against the defendant. Afterwards, by consent, a supplemental order varying the decree was made, which was silent as to costs.

*Held*, that the costs of such order and proceedings thereunder were not costs in the cause, and could not be taxed against the defendant. *Attorney-General* v. *Taylor*, 1 Chy. Ch. 362.

Where, after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid; the costs of the motion to stay proceedings will be made costs in the cause. *Little* v. *Hawkins*, 3 Chy. Ch. 78.

A motion was made to the presiding Judge at the Assize to postpone the trial upon the ground of the absence of a necessary and material witness. The order was made and the question of costs reserved.

Rose, J.:—"I reserved my decision to look at the case of *Pattison* v. *McNab*, 12 Gr. 483. I have also referred to *McMillan* v. *McDonald*, 22 Gr. 362.

"It seems clear that in the Court of Chancery the rule was well established that where a party had made diligent efforts to secure the attendance of a witness within the jurisdiction of the Court, and failed to secure it from a cause which he could not control, then the costs of such an application would be costs in the cause, unless it was possible to take the evidence before a special examiner, or the knowledge of the fact that the attendance could not be secured, came to the applicant in time to enable him to advise the other side so that the witnesses might be notified not to attend.

"I think, on the facts before me, the plaintiff was in no default, and that the costs must be costs in the cause. The rule appears to be a just one, and I willingly follow it." *Brown* v. *Porter*, 11 P.R. 250.

And see *Graham* v. *Machell*, 2 Chy. Ch. 376; and *Rees* v. *Attorney-General*, 3 Chy. Ch. 386.

The plaintiff amended his writ and the order allowing the amendment made the costs thereof costs in the cause. The plaintiff succeeded in the action, but the taxing officer refused to tax him these costs which he thought were improperly incurred. Ferguson, J., reversed this ruling, holding that the taxing officer was obliged to tax the costs as ordered. *Edwards* v. *Pearson*, 3 C.L. Times 504. But see the next case.

But where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," or "costs in the cause to the successful party," that is not a final disposition of such costs, but merely puts these costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial Judge under Rule 1130. The matter was fully dealt with in a reasoned judgment by Meredith, J., in *Dickerson* v. *Radcliffe*, 19 P.R. 223. At the hearing of the action the trial Judge ordered that the action "be and the same is hereby dismissed without costs except as hereinafter mentioned," and "that the plaintiffs do pay to the defendants forthwith after taxation the costs of any interlocutory motions in which the defendants succeeded and which the trial Judge had power to dispose of."

Meredith, J.:—"The trial Judge intended to give to the defendants so much of their costs in the action as were incurred in interlocutory proceedings in which the defendants were successful, and to guard against any conflict with any previous order respecting any of such costs; and that is the fair meaning of the words of the formal judgment awarding the defendants such costs.

"Did the order dispose of the costs of the proceedings so as to exclude the trial Judge's general discretionary power over the costs of the action under Rule 1130 and section 119 of the Judicature Act?

"It may be taken for granted that, if the orders disposed of the costs one way or the other, there was no intention, and no power, to alter such disposition of them. That is to say, the trial Judge could not deal with them as if hearing an appeal against the order. He could not, for instance, award costs to either party if the order provided that neither party should have the costs of it.

"In all the proceedings in question the only order made as to costs was, substantially, that they should be 'costs in the cause.' And so the whole thing seems to hinge upon this, whether such an order gives the costs to either party, or leaves them to be dealt with in the discretion of the trial Judge the same as the other costs of the action.

"It never would have occurred to me that, in such a case as this, making the costs of a motion costs in the cause or action, was any final disposition of them, or anything more than putting them in the same position as any other of the ordinary costs of the action, as, for instance, the costs of the pleadings, and so, of course, subject to the trial Judge's power over costs, under the statute and rule; and I have always acted under the supposition that such was the effect of such an order.

"Of course in the days and in the Courts when and where the trial Judge had no discretionary power over the costs, but they went by law to the successful party, an order making costs costs in the cause or action had the effect of giving them to the successful party, but he got them, not under the order, but under the judgment awarding him the costs of the action. Without that judgment I do not see how we could ever have taxed them.

"There are two things urged against this view of the matter. The first was, that, if the words 'costs in the cause' meant no more than that which I have indicated, it was useless to insert them in the order, because the costs of all such interlocutory proceedings are, according to the practice, costs in the cause. That may have been so at common law. *Pugh* v. *Kerr* (1840), 6 M. & W. 17; but it was not so in Chancery;

there a party failing in his motion, and a party failing in opposing a motion, would not get them; and the latter practice prevails here. But even if this were not so, would it not be nearer the mark to attribute the use of the words to needless caution or forgetfulness of the practice affecting the question?

"There seems to me to be no real force in either of these points.

"But it is said that the case of *Koosen* v. *Rose* (1897), W.N. 25, is an authority for the contention that the order making the costs costs in the action is an order awarding them to the party who shall succeed in the action, but postponing the taxation until after the judgment.

"That case is certainly no authority for that, though an expression of one of the Judges is to that effect; nor in my judgment does it at all conflict with the views I have expressed, but they are quite in accord with the ruling in it.

"That was a case of this character; under a Rule of Court expressly requiring the Judge to deal with the costs of the application there in question, upon the hearing of it, or to refer them to the Judge at the trial, he made them costs in the action. At the trial, the trial Judge thought that the order was wrong in that respect, and virtually set it aside to that extent, and ordered that there should be no costs of that application, though the party who sought to tax them succeeded in the action and was given his costs of it by the trial Judge."

Shortly after the decision in *Dickerson* v. *Radcliffe*, the same point came before Rose, J. Certain interlocutory orders made the costs to be costs in the cause, others costs in the cause to the successful party, and one costs to the plaintiff in any event. At the trial the plaintiff succeeded but the trial Judge gave no costs of the action to either party. The formal judgment contained this provision: "This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs."

Rose, J.:—"There is no dispute as to the order giving the plaintiff the costs in any event. It is admitted that the plaintiff is entitled to such costs, notwithstanding the disposition of the costs at the trial.

"I am of opinion that the disposition of the costs of the remaining orders was practically the same. 'Costs in the cause to the successful party' does not, I think, mean more than costs in the cause. Costs in the cause would not go to the unsuccessful party; and in *Botherton* v. *Metropolitan, etc.*, (1894), 1 Q.B. 666, Lord Esher held that where the costs of a former trial were to abide the result of a new trial, the result meant the result of the second trial as far as costs were concerned.

"The making of the order that the costs should be in the cause brings the case within the decision of my brother Meredith in *Dickerson* v. *Radcliffe*, where he determined that where costs were made in the cause they were subject to the order and disposition of the trial Judge. I think, therefore, that when the learned Chancellor declined to give the plaintiff any costs . . . he determined that the costs that by these orders had been made costs in the cause should not go to the plaintiff.

"If 'costs in the cause to the successful party' means more than 'costs in the cause,' then it seems to me that the plaintiff has not been a successful party within the decision of Lord Esher above referred to." *Muir* v. *Squire*, 19 P.R. 237.

By several orders certain interlocutory costs had been given to the defendant in any event. Afterwards the action was settled and the settlement provided that "each party shall pay all their own costs." *Held*, following *Campbell* v. *Dunn*, 18 C.L.T. 382, that the disposition of the costs by the settlement included the costs of the interlocutory motions. *McDonald* v. *Crites*, 7 O.W.R. 795.

## COSTS OF THE DAY.

Under the Common Law Procedure Act, where notice of trial was given, and the party giving the notice did not bring the issue to trial, he was bound to pay the costs of the day to the opposite party. The rule for these costs could be drawn up on affidavit without a motion therefor being made in Court. R.S.O. 1877, ch. 50, secs. 275, 276.

For the former practice see Harrison's C.L.P. Act, 323.

The Master in Chambers held that this practice was superseded by the Judicature Act; and though these costs may still be imposed as a very just condition, no officer of the Court has now power to issue a rule for such costs, nor has the Master in Chambers jurisdiction to entertain an application for such costs. *Hopkins* v. *Smith*, 9 P.R. 285.

Where the plaintiff is prevented from proceeding to trial by any act of the defendant, the defendant is not entitled to any costs of the day. *Fitzgerald* v. *Ludwig*, 7 P.R. 187; *Parkinson* v. *Thompson*, 44 U.C.Q.B. 29.

By an order of the Master in Chambers the cause was brought down to be heard at sittings for the trial of actions in the Chancery Division, but the trial Judge refused to entertain the case as it came from a Common Law Division.

*Held*, Cameron, C.J., reversing the ruling of the taxing officer, that the plaintiff was entitled to the costs of the day. *Schwob* v. *McLaughlin*, 3 C.L. Times 173.

In an action for damages for trespass to lands where the line fence was in dispute, the defendant in his depositions taken before trial said he knew nothing about the line except what he had been told, but that he had traced the line as run by others.

The trial was adjourned at the plaintiff's request on payment of the costs of the day. The defendant, who resided in the North-West Territories, swore that he had come to the trial for the sole purpose of giving evidence on his own behalf, etc. His counsel also certified that he was a material witness. The taxing officer refused to allow his witness fees as part of the costs of the day, on the ground that he knew nothing about the boundary, and no other issue was before the Court, and therefore his evidence could not be material.

*Held*, Proudfoot, J., reversing the ruling of the taxing officer, that it was premature for him to decide, at this stage of the case, that no material evidence could be given by the defendant. *Goodfellow* v. *Shuttleworth*, 3 C.L. Times 105.

In *Hogg* v. *Crabbe*, 12 P.R. 14, 23 C.L. Journal 79, Proudfoot, J., held that where the trial had been postponed at the Assizes upon payment of "the costs of the day" only one counsel fee of $10 was taxable.

In a more recent case this decision was dissented from by Armour, C.J., who said: "My brother Proudfoot was clearly under a misapprehension, or was misinformed as to the practice that obtained at common law in taxing costs of the day. The phrase 'costs of the day' is a general term applicable to different circumstances, and varying with those circumstances. There were costs of the day for not proceeding to trial pursuant to the practice of the Court; and in such cases no counsel fee was chargeable. There were costs of the day for not proceeding to trial according to notice, that is, where the plaintiff gave notice of trial and did not countermand it, but did not enter his record; and in such cases it became and was the practice in the taxing office, although a counsel fee was chargeable, to tax only $10. There were costs of the day where the plaintiff gave notice of trial and entered his record, and afterwards withdrew it; and counsel fees were in such cases chargeable, but were taxable according to the discretion of the taxing officer, and not according to any arbitrary limit. And there were costs of the day where the plaintiff gave notice of trial and entered his record, and the defendant moved to postpone the trial, and it was postponed upon payment of the costs of the day; and counsel fees were in such cases chargeable, but were taxable according to the discretion of the taxing officer, and not according to any arbitrary limit.

"Under the term 'costs of the day' used in the order made by me in this case, counsel fees were chargeable and were taxable according to the discretion of the taxing officer, and not according to any arbitrary limit." *Outwater* v. *Mullett*, 13 P.R. 509, 10 C.L. Times 299.

Where, before the commission day, an order had been obtained by the defendant to postpone the trial on payment of costs, and the plaintiff sought to tax a counsel fee as paid to the partner of the plaintiff's attorney without shewing when or how paid; and it appeared that the record had not been entered for trial, the Master refused to tax the counsel fee, and the Court sustained his ruling. *Manary* v. *Dash*, 9 L.J. 327.

A judgment purchased by the defendant from a third party, cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, so as to defeat the solicitor's lien. *Bennett* v. *Tregent*, 6 P.R. 171.

And see Con. Rule 1165.

The plaintiff brought the action on for trial in an imperfect state (one of the plaintiffs having died since issue joined and his personal representatives not being before the Court), and was obliged to ask that the hearing stand over. Plaintiffs' counsel submitted to paying the costs of the day, but objected to paying defendant's witness fees as part of these costs. The Court said that the plaintiffs had chosen to bring the action on to a hearing and take their chance, and they must pay the actual costs of the day, and these included witness fees. *Lydall* v. *Martinson*, 5 L.R. Ch. Div. 780.

The plaintiff's counsel was prevented by a[illegible]dent from appearing when the action was called on and judgment was entered for the defendant with costs. On an application to set aside the judgment and restore the case to the list, Fry, J., ordered that the judgment be set aside on payment of the costs of the day, and of the application, as a condition precedent. *Cockle* v. *Joyce*, L.R. 7 Ch. Div. 56.

## COUNSEL FEES.

(1) *Generally.*
(2) *When taxable.*
(3) *When not taxable.*
(4) *As between solicitor and client.*
(5) *Discretion of taxing officer.*
(6) *On references—Master's office.*
(7) *Solicitor suing or defending in person.*
(8) *Miscellaneous.*

### (1) *Generally.*

In estimating the amount of fees to counsel the taxing officer should always have regard to the difficulty and complication of the questions of law and fact involved in the case, and the importance of the result of it to the parties.

The fees *bonâ fide* paid by a solicitor to counsel and fairly required by the magnitude or complication of the case should be allowed on taxation between party and party. *Robb* v. *Connor*, 9 Ir. R. Eq. 373

Counsel fee should be exclusively, as for fee with brief at the trial. *Boulton* v. *Switzer*, 1 Ch. Rep. 83.

On taxation of the plaintiff's costs he made the usual affidavit of increase, and on this affidavit witness and counsel fees were taxed to him. After the taxation was closed defendant discovered that the fees had not been paid as sworn to, and made a motion to set aside the certificate of taxation and to disallow the items.

Rose, J.:—"The object of the rule requiring prepayment of witness fees is stated by Erle, J., in *Freeman* v. *Rosher*, 6 D. & L. 517. Our Rule 1213 (now 1173) provides for the affidavit of increase. Here the affidavit makes incorrect statements as to subpœnas, witness and counsel fees. Had the truth appeared the taxing officer could not have properly allowed the items; and now that the truth is made to appear, they must be disallowed.

"Intentional wrong-doing was denied. I have not to deal with the motive. The rule is a salutary one. Its provisions have been violated, and the penalty must be enforced.

"*Barnes* v. *Attwood*, 5 C.B. 164, cited on behalf of the plaintiff, is, I think, a strong authority in the defendant's favour. The motion to have disallowed the counsel and witness fees must be granted with costs." *Harding* v. *Knust*, 15 P.R. 89.

*Barnes* v. *Attwood*, referred to by Mr. Justice Rose, was a case where the taxing officer had been induced by false affidavits to allow a large sum for commissioner's fees on a commission to examine witnesses, which it was suggested had not been paid. The Court referred it back to the taxing officer to inquire, by such means as he saw fit, what sums had actually been paid, and to review the taxation if necessary.

In *Hornick* v. *Township of Romney*, 11 C.L. Times 329, the Divisional Court went still farther. The taxing officer had disallowed $300 of witness fees on the ground that they were not paid at the time the affidavit of increase was made by the plaintiff, although it was admitted they were paid before the taxation was closed. The question was whether payment pending taxation was sufficient in the face of the falsity of the affidavit. The Court held the taxing officer was right in disallowing the witness fees, and the same rule would appear to apply to counsel fees. *Per* Armour, C.J.:—"Those who propound false affidavits must take the consequence."

But where the alleged payment was made after the trial, but before swearing the affidavit, and was not an actual handing over of cash, but a setting-off, with the consent of the witness, of a sum due by him to the deponent, Armour, C.J., held that the consent made the transaction quite different from a mere set-off, and that it was a payment of witness fees. *In re Solicitors*, 9 C.L. Times 35.

(2) *When taxable.*

Harrison, C.J.:—"Where a brief has been delivered to counsel for the *bonâ fide* purpose of procuring his attendance at the trial, and his fee paid as it ought to be at the time of the delivery of the brief, the mere circumstance that he is, from no fault of his own, unable to be present at the trial, is no good reason for refusing to tax the fee paid to him in the event of the person paying him succeeding in the litigation. (*Taylor* v. *Clarke*, 13 I.C.L.R. 571. See also *Henderson* v. *Comer*, 3 U.C.L.J. 29.) In this province a practice has sprung up for taxing fees to counsel in every case without any proof of payment, and the consequence is, that although the fees are taxed and paid, they do not always reach the counsel who earned them. But it must for the honour of the profession be stated that this does not often happen." *In re North Victoria Election*, 39 U.C.Q.B. 152.

A counsel fee of $5 for each necessary and proper enlargement of a Court motion should be allowed. *McCallum* v. *McCallum*, 11 P.R. 179.

Where evidence taken before a Master sitting for a Judge was entered in the decree as having been taken in Court, the same fees were taxed to counsel before the Master as before a Judge. *Rae* v. *Trim*, 8 P.R. 405.

In an alimony suit a decree was made by consent whereby the defendant was ordered to "pay the plaintiff the sum of $75 *and all disbursements* in the suit as between solicitor and client."

*Held*, that the Master had properly allowed to the plaintiff a sum of $50, paid by her to her solicitors, they being also counsel, for counsel fees on the examination and hearing of the cause. *Bucke* v. *Bucke*, 21 Gr. 77.

Where three actions were brought by three different plaintiffs against one defendant, the cause of action in each case being the same, and on appeal to the Court of Appeal, an order was made that only one appeal book should be printed for the three cases, and the three cases were argued together.

*Held*, that the Master was right in allowing separate counsel fees in each case. *Petrie* v. *Guelph Lumber Co.*, 10 P.R. 600.

Where the trial had been postponed at the Assizes upon payment of the costs of the day, Proudfoot, J., held that only one counsel fee of $10 was taxable; but in a subsequent case Armour, C.J., pointed out that "costs of the day" is a general term applicable to different circumstances, and varying with these circumstances, and the counsel fee therefore is taxable according to the discretion of the taxing officer. See *Outwater* v. *Mullett*, 13 P.R. 509, under "Costs of the Day."

A. brought an action against B. which was dismissed with costs. A. appealed, and the Court of Appeal, without calling on counsel for the respondent, dismissed the appeal with costs. A. objected to pay the fee of B.'s leading counsel in the Court of Appeal on the ground that he was not present at the hearing of the appeal, but the Court said it would not disturb the uniform practice in party and party taxations extending over forty years, and disallowed the objection. *Charman* v. *Brandon*, 80 L.T. 369.

### (3) *When not taxable.*

A counsel fee with brief at trial is not taxable until notice of trial has been given. *Dewar* v. *Orr*, 3 Chy. Ch. 141; *Pegg* v. *Pegg*, 7 U.S.Q.B. 220.

Where a person who was both a barrister and solicitor in Ontario attended Chicago on a commission to take evidence, the taxing officer ruled that a charge of $20 per diem was to be regarded as for a solicitor's attendance and not as a counsel fee. *Grecy* v. *Smith*, 7 C.L. Times 168.

A Master declined to tax a counsel fee for consultation between counsel previous to the trial, and on appeal Morrison, J., declined to make a precedent for the allowance of such a disbursement. *Fox* v. *The Toronto and Nipissing Ry. Co.*, 7 P.R. 157.

A counsel fee will not be allowed where counsel attends on a motion merely to shew that the motion is irregular. *Waller* v. *Claris*, 11 P.R. 130.

Or where a notice of appeal is served on a party whom the appeal does not effect, and he attends on the hearing of the appeal. *Ex parte Webster*, 22 Ch. Div. 136.

"A merely ornamental respondent," who appears only to ask for costs, will not be allowed costs. *In re Arden*, 14 Q.B.D. 121.

Jessel, M.R.:—"I have said many times since I have had the honour of a seat on the Bench, that I do not recognize what some Judges have said is the rule, that every party served is entitled to appear merely to ask for his costs. It does not appear to me that, in any event, the plaintiff could have any interest whatever in this question, and therefore I shall not give him any costs of appearance." *Campbell* v. *Holyland*, 7 Ch. Div. 166.

Boyd, C.:—"Upon the examination under commission in British Columbia it was proper to allow a fee for counsel attending, and less was taxed than paid. I have no means of knowing what rate of compensation for such services obtains in that jurisdiction, and have no right therefore to interfere with the $10 allowed.

"Nor do I interfere with reference to the examination for discovery; if the officer or person examined was not a representative in any sense of the municipality the objection should have been taken at the outset and not at the close of the litigation." *Township of Logan* v. *Kirk*, 14 P.R. 130.

Before trial the solicitors for all parties arranged that the questions should be referred to the Local Master, and, as a consequence no witnesses were subpœnaed. On a taxation of costs as between solicitor and client, the taxing officer allowed a counsel fee of $40 with brief at trial. Street, J.:—"There was no trial; the case was entered for trial, but the solicitors had entered into a written consent, some six days before the Court opened, agreeing to refer the matter to the referee, and no witnesses were subpenaed." The counsel fee was accordingly reduced to $10. *Re Robinson, a Solicitor*, 16 P.R. 423.

### (4) *Solicitor and Client Taxation.*

Solicitor and client taxations are distinct from party and party taxations, both as to the scope of the inquiry and as to the powers of the Master to whom the reference is made in regard to the allowance of items. According to the practice, there is in these taxations, no power of intervention on the part of the taxing officer in Toronto in order to obtain an increase in amount under such items of the tariff as numbers 102, 142, 148 and 153. But it has always been understood (see *Re Robinson*, 16 P.R., at p. 426, and *Smith v. Harwood*, 17 P.R. 36), that the Master who is charged with the solicitor and client reference has power to exercise the discretion recognized by the tariff in increasing the amount chargeable for certain services ordinarily exercised by the officer in Toronto in part and party taxations. On solicitor and client taxations the local officers can tax increased counsel fees without a fiat. *Re Macaulay, a Solicitor*, 17 P.R. 461.

Notwithstanding the provisions of the tariff, a taxing officer may allow a solicitor a larger counsel fee on a solicitor and client taxation than has already been allowed to the client on a party and party taxation.

Meredith, C.J.:—"It is difficult on principle, and having regard to the language of the tariff which provides for a 'general allowance for plaintiffs and defendants as well between solicitor and client as between party and party,' to justify the allowance for the same service in a matter for which provision is made by the tariff, of one sum where the taxation is between party and party, and a larger sum where it is between solicitor and client; and, with the single exception of counsel fees, the rule is that no greater fee can be taxed for business for which the tariff makes provision, between solicitor and client than upon a taxation between party and party.

See *Re Geddes & Wilson*, 2 Chy. Ch. 447; *Re Totten*, 8 P.R. 385. But as said by Vice-Chancellor Mowat in the former case, the exception as to counsel fees 'was made very early in the history of the Court and has ever since been recognized'; and it is still, I find, the practice of the taxing officers. That being so, the amount of the fees was a matter in the discretion of the taxing officer, and I ought not to interfere." *Smith* v. *Harwood*, 17 P.R. 36.

A solicitor sued his client on a bill of costs including £54 disbursements for counsel fees. By consent judgment was signed for £185, the judgment to stand for such amount as should be found due upon taxation. On taxation it appeared that the counsel fees had not been paid, and the Master adjourned the taxation to allow the plaintiff to pay them, which he did. The Master then allowed the items.

Jelf, J., refused to direct a review of the taxation, and the defendant appealed. The Court allowed the appeal, saying: "We hold that for the purpose of taxation under the Solicitors' Act 'disbursements' means actual payments made before the delivery of the bill, and that any sums claimed in the bill as disbursements and not paid before its delivery must be disallowed." *Sadd* v. *Griffen* (1908), 2 K.B. 510.

(5) *Discretion of taxing officer.*

The discretion of the taxing officer as to the amount of counsel fee will not be interfered with upon appeal. *Talbot* v. *Poole*, 15 P.R. 274; *Carlisle* v. *Roblin*, 16 P.R. 328; *Rondot* v. *Monetary Times*, 17 P.R. 139.

Where, however, the taxing officer altogether omits to exercise any discretion, or decides on a wrong principle, there an appeal would lie from his decision. *Re Robinson, a Solicitor*, 16 P.R. 423 (see *post*).

In *Rankin* v. *McKenzie*, a Manitoba case reported in 6 C.L. Times 502, it was held that in a proper case an appeal from the Master will be allowed upon the quantum of counsel fees. This is opposed to the uniform practice in Ontario.

Falconbridge, J.:—"The Court will not determine questions relating to *quantum* only, which will be left to the taxing officer: Morgan on Costs, 480, and cases there cited. And his decision applies not only to the *quantum* but the *quoties*, and therefore, in my opinion, covers any question of distribution or allotment of fees, charges, or disbursements between or among the different cases or branches of a case.

"It was said in *Gilbert* v. *Guignon*, 21 W.R. 745, that this rule did not apply to counsel's fees on an appeal, as the Judge of the Court below is better able to decide the question of *quantum* in such a case.

"In the present case the Judge of the Court below has not expressed any opinion on the subject of *quantum*. And in *Attorney-General* v. *Carrington*, 6 Beav. 454; *Hargreaves* v. *Scott*, 4 C.P.D. 21, and other cases, it has been laid down that the Court will not interfere with the discretion of the Master as to the amount allowed for counsel's fees unless it be manifest that he has failed to exercise it in a reasonable manner." *Connee* v. *North American Ry. Co.*, 13 P.R. 433.

The Court never interferes with the Master's taxation as regards counsel fees except to correct an error of principle into which he may have fallen. *Burton* v. *Burton*, 29 L.J.N.S. 291.

"We find no principle or rule of decision violated. We find no plain error or mistake," and the Court refused to interfere with the Master's ruling. *Re Attorneys*, 29 C.P. 495.

The Court must necessarily possess a general jurisdiction over the taxing officers in all matters to prevent any positive wrong to parties or suitors, but where the taxing officer has not made any mistake in principle, and the sum awarded is not so grossly large or small as to be beyond all question improper, the Court will not interfere with the discretion of the taxing officer. *Re Solicitor*, 12 Ont. W.R. 1074.

But in party and party taxations the local taxing officers cannot allow larger fees to counsel than $40 and $20 without a fiat, even where the solicitors for all parties consent. Rep. I.L.O., 1897.

This does not apply to solicitor and client taxations. And where costs were ordered to be paid out of an estate as between solicitor and client, the senior taxing officer held that he was not restricted by order 29 of the Court of Appeal orders (now item 149 of the tariff of costs) to the allowance of a fee not exceeding $80 to counsel for the executors, and an increased fee was taxed. *Archer* v. *Severn*, 3 C.L. Times 602. And see *Cameron* v. *Campbell*, 1 P.R., at p. 173; *Re Macaulay*, 17 P.R. 461.

(6) *On references—Master's office.*

"On important points and matters, requiring the attendance of counsel, and when counsel attends, before a Master, examiner, referee, registrar, inspector of titles or county clerk, a counsel fee may be allowed by a taxing officer in Toronto (or the Judge in the County Court cases) in lieu of fees for attendance, such counsel fee in County Court cases not to exceed $5." Item 107 of tariff A. See also item 155.

The allowance of counsel fees upon a reference, under item 107 of the tariff, should be exceptional and made only when matters of special importance or difficulty are involved at some particular sitting. Where the reference involves merely the taking of accounts the solicitor should be restricted to the allowance of $2 per hour. *Re Robinson, a Solicitor*, 16 P.R. 423.

But where the reference is one for the trial of all the issues in the action it is proper to allow a counsel fee, and the amount of the fee allowed, the case being proper for a counsel fee, will not be reviewed on appeal. In this case the reference and argument occupied 33 hours and the taxing officer allowed a counsel fee of $110, in lieu of a sum per hour, and the Court refused to interfere. *Denison* v. *Woods*, 18 P.R. 328.

"Counsel fee advising on evidence. It is argued that such a fee cannot be allowed upon taking accounts in the Master's office. Fees for counsel are allowed for counsel attending on reference to the Master: item 155; and I am unable to understand why, that being so, tariff item 157 does not apply to justify the taxing officer in allowing a fee advising on evidence. If I am permitted to appeal to my own experience, I would say that the taking of accounts requires as close a scrutiny of evidence and winnowing out the immaterial as any part of a counsel's practice." Riddell, J., in *Plenderleith* v. *Parsons* (1907), 15 O.L.R., at p. 401.

A Local Master has no power to order taxed costs in lieu of commission under Con. Rule 1146. That power is reserved to a Judge of the High Court. *Hendricks* v. *Hendricks*, 13 P.R. 79.

(7) *Solicitor suing or defending in person.*

It is somewhat difficult to ascertain from the decided cases just what the law is upon the point of allowing fees where counsel is a litigant, or the legal partner of a litigant. Nor can the different rulings be supported on any rational principle. "It cannot be upon the principle that party and party costs are to be looked upon as indemnity only, for that would exclude solicitor's costs as well as counsel fees. Nor can it be of the impossibility of making payment to one's self, for that is far from impossible." *Per* Meredith, J., in *Johnston* v. *Ryckman* (1904), 7 O.L.R., p. 524.

In *Smith* v. *Graham* (1846), 2 U.C.R. 268, it was held that a solicitor suing in person is entitled to tax costs for solicitor's services and disbursements, but if he acts as counsel at the trial he cannot tax a counsel fee.

In *Henderson* v. *Comer* (1856), 3 U.C.L.J. (O.S.) 29, will be found a short decision by Burns, J., that "the rule of practice that a person cannot tax a counsel fee in his own case against an opposite party, does not extend to his partner."

On the assumption that the litigant partner would not share in the counsel fee (see judgment of Meredith, J.), *Henderson* v. *Comer* was approved of by the Divisional Court in *Johnston* v. *Ryckman*, 7 O.L.R., at p. 524.

*Smith* v. *Graham* was followed and approved of by Street, J., in *Clarke* v. *Creighton*, 15 P.R. 105.

In *Baldwin* v. *Montgomery*, 1 U.C.R. 283, plaintiffs sued defendants on bills of costs for conducting and defending suits for defendant. These bills included counsel fees of a member of plaintiffs' firm. It was held that plaintiffs might recover certain of the fees charged which had been collected against the opposite parties, but that as to the other counsel fees the English rule must be held to govern under which the fees of counsel are not recoverable by action.

But where one of several trustees was a barrister and solicitor, and acted for himself and his co-trustee as solicitor and counsel in an action, it was held that he was entitled to tax against the opposite party his full costs, including counsel fees. *Strachan* v. *Ruttan*, 15 P.R. 109.

In *Cradock* v. *Piper*, 1 MacN. & G. 664, the Court, while recognizing the rule that a sole trustee, acting as solicitor for himself as such trustee, was not entitled to recover costs even in defending an action against him, held that one of several trustees, acting as solicitor for them and himself in an action brought against them, was in a different position and might recover costs. The reason given seems hardly satisfactory, viz., that it is no part of the duty of a trustee to act as solicitor for the other trustees, and that therefore if they employ him he is entitled to tax his costs; but the decision has become settled law: see *Re Corsellis*, 34 Ch. Div. 675.

In *Johnston* v. *Ryckman* (1904), 7 O.L.R. 511, counsel fees were paid by a member of a firm of barristers and solicitors to his partner for the latter's services as counsel in an action in which the former was defendant, under an agreement to pay such fees as would be payable to counsel outside of the firm. Britton, J., held that the effect of the agreement was to allow the defendant to share in the taxed fees, and ordered the fees to be reduced one-half. "A barrister who is a partner (party) to an action should not be allowed individually to profit at the expense of the opposite unsuccessful party by having such counsel fees taxed to the partner as will give any portion of it to the party litigant."

The Divisional Court differed with Britton, J., as to the effect of the agreement, holding that the partner who acted as counsel could have recovered payment of these fees from the defendant by process of law. The judgment of Britton, J., was reversed and the full counsel fees allowed. Boyd, C.:—"The reason why a barrister, sued as defendant, and who acts as his own counsel, cannot recover for counsel fees is because he is in the same plight in this regard as the lay client who pleads his own cause. He is not in Court as an officer of the Court, but as a litigant. The necessary factor in the taxation of counsel fees is that the money must be disbursed for the payment of them as a condition precedent, and the barrister-litigant cannot pay money or be liable to himself. There is no principle in the matter beyond this—it is rather a rule of practice or procedure than anything higher.

"But if a barrister, sued for an individual claim, is member of a partnership, there is no rule against his engaging a partner as his counsel, and then there is a professional person to whom he is liable and to whom he can make payment of counsel fees, and these being paid become proper subjects of taxation.

"The distinction is to be noted between the case of a firm of solicitors and barristers suing and being sued, and the case of one of the firm being a litigant. In the former case it is decided that the firm cannot employ one of their own members as counsel, and tax his fees, and that probably because the payment of the fee could only have come out of the money of the firm, which would be tantamount to paying it to himself. This was decided in *Smith* v. *Graham* and was explained by Mr. Justice Street in *Strachan* v. *Ruttan*. But in the case of one member of a firm being sued, he may retain and pay his partner to act as counsel, which will make the fee a taxable one as against the other side, and this the law does not forbid."

The result of the decisions would appear to be:—

(*a*) A counsel fee will not be allowed to a party holding his own brief.

(*b*) One member of a firm acting as counsel for another member of the firm will be entitled to tax a counsel fee if the member who is a party litigant does not share in the fee.

(*c*) If the member of the firm who is sued shares in the fee, he can only tax the portion of the fee going to the member who acted as counsel.

(*d*) A sole trustee acting as a counsel is in the same position as counsel who is not a trustee, and cannot tax a counsel fee.

(*e*) A solicitor-trustee acting as counsel for himself and his co-trustee is entitled to tax his counsel fee.

(*f*) A firm of solicitors suing as plaintiffs cannot employ one of its own members as counsel and tax his fees.

See MORTGAGEE-SOLICITOR and SOLICITOR SUING OR DEFENDING IN PERSON.

R.M.L.

(8) *Miscellaneous.*

For counsel fees advising on evidence, see *Re Robinson*, and *Plenderleith* v. *Parsons*, under "Advising on Evidence."

Although the Solicitors Act, R.S.O. (1897), ch. 174, purports to apply to solicitors only, a bill of costs consisting wholly of counsel fees can be taxed. *Re Crooks*, 6 P.R. 226.

Boyd, C.:—"Upon the examination under commission in British Columbia it was proper to allow a fee for counsel attending. I have no means of knowing what rate of compensation for such services obtains in that jurisdiction, and have no right therefore to interfere with the $10 allowed. Nor do I interfere with reference to the examination for discovery; if the officer or person examined was not a representative in any sense of the municipality, the objection should have been taken at the outset and not at the close of the litigation." *Township of Logan* v. *Kirk*, 14 P.R. 130.

A counsel fee paid to counsel in a mechanics' lien case is not an "actual disbursement" within the meaning of section 42 of the Mechanics' Lien Act. *Cobban v. Lake Simcoe Hotel Co.* (1903), 5 O.L.R. 447.

But in an alimony suit where a decree was made by consent whereby the defendant was ordered to "pay the plaintiff the sum of $75 and all disbursements in the suit as between solicitor and client." *Held*, that the Master had properly allowed to the plaintiff a sum of $50, paid by her to her solicitors, they being also counsel, for counsel fees on the examination and hearing of the cause. *Bucke v. Bucke*, 21 Gr. 77.

A taxing officer has jurisdiction, in his discretion, to allow a second counsel fee on an arbitration proceeding, and increased fees may be taxed in a proper case. *Re McKeen and Township of South Gower*, 12 P.R. 553; *Re Pollock and City of Toronto*, 15 P.R. 355.

But where arbitration costs are taxable on the County Court scale no larger counsel fee than $25 can be taxed, even though the attendance is for several days. *Re Montague*, 12 P.R. 141.

A "merely ornamental respondent," who appears to ask for costs, will not be allowed costs. *In re Arden*, 14 Q.B.D. 121.

In Ontario a counsel's right of action for his fees is against the client of the solicitor retaining him, and not against the solicitor, unless by special agreement, or when there is evidence of credit given to the solicitor alone, or of money in the solicitor's hands to answer the claim. *Armour v. Kilmer*, 28 Ont. R. 618.

In an action for damages for personal injuries, the defendants entered no appearance and filed no statement of defence. Interlocutory judgment was not signed, and there was no admission of liability of the defendants. Notice of assessment was served by posting up in the office of the Court. Both parties issued commissions and took evidence abroad, and defendants obtained an order for the medical examination of the plaintiff. On opening the case defendant's counsel admitted they did not intend to contest liability, and the only matter tried was the *quantum* of damages. There was a verdict for the plaintiff for $7,500. Mr. Thom allowed a counsel fee of $125, and defendants appealed.

Falconbridge, C.J.:—"It would be a manifest hardship that under these circumstances the allowance for counsel fee should be limited to $10, but it may be that item 152 is the only one applicable.

"However, I think (though with diffidence) that the following considerations may prevail to sustain the taxing officer's judgment. There was no interlocutory judgment in the case, and there was no admission upon the record of the liability of the defendants. On the opening of the case counsel for the defendants admitted that they did not intend to contest liability, and the only matter tried out was the *quantum* of damages. *Gath* v. *Howath* (1884), W.N. 99, is not in point, as there interlocutory judgment had been signed."

The defendants appealed and the judgment of the Divisional Court was delivered by Meredith, C.J.:—"We think we cannot give effect to this appeal. The framers of the tariff evidently had in view what was well known to Judges and members of the profession as an assessment of damages, which always followed upon interlocutory judgment being signed. Rule 586 has not the effect contended for. *McDermott* v. *McDermott*, 3 Chy. Ch. 38, and *Tucker* v. *Goyer* (1898), not reported, before Mr. Justice MacMahon, shew that there is an important difference between noting a defendant in default, and signing interlocutory judgment against him.

"For my part—my brothers express no opinion—I should be very much inclined to hold that the paragraphs which follow 152 and 153 were intended to give to the taxing officer a discretion to increase the fee for the brief both for the assessment of damages and for the trial. However, as we affirm the decision on other grounds, it is unnecessary to determine what the true effect of that provision of the tariff is." *Hamilton* v. *Hamilton, etc., Ry. Co.* (1907), 15 O.L.R. 50.

Solicitors have no right to brief any particular counsel against the expressed wish of their client, and if they do so the [illegible] fee paid to such counsel, and the costs of preparing his brief, will be disallowed on taxation. *In re Harrison* (1908), 1 Ch. Div. 283.

## COUNTERCLAIMS.

In cases of counterclaims most difficulty has occurred in cases where the costs follow the event under Con. Rule 1130 (3), or where an order is made which has the same effect as to costs, namely, giving costs to the successful party. It therefore becomes necessary to decide what is, and what is not, a counterclaim, because if the alleged counterclaim is a mere set-off, or something going to a reduction of damages, then the rules govering the taxation of costs on a counterclaim do not apply.

*Cutler* v. *Morse*, 12 P.R. 594, was an action on a building contract. The defence was that plaintiff's work was unskilfully and negligently done, and that part of the work contracted for had not been done, and the defendant counterclaimed for damages. The Local Master, to whom the action was referred, found the plaintiff entitled to what he claimed upon his contract, less the sum of \$177, which was deducted on the counterclaim. On a motion for judgment on the report: Armour, C.J.:—"According to the pleadings and the report of the Master, no question arose in this case which could not have been raised and determined herein had the action been brought before the Judicature Act. I do not think, therefore, that because this action was brought since the Judicature Act, and the defendant has chosen to call, in his statement of defence, that a counterclaim which is not properly a counterclaim, he is entitled on that account to have the costs dealt with as if it were properly a counterclaim.

"The plaintiff is entitled to judgment for the amount found due by the Master, with costs to be taxed upon the same principle as they would have been taxed in like cases before the Judicature Act.

"I refer to *Lowe* v. *Holme*, 10 Q.B.D. 286; *Lund* v. *Campbell*, 14 Q.B.D. 821; *Hawke* v. *Brear*, 14 Q.B.D. 841."

In *Bennett* v. *White*, 13 P.R. 149, the plaintiff claimed a balance of $169 on certain transactions between the plaintiff and defendant. The defendant denied the indebtedness and alleged the plaintiff was indebted to him for goods supplied and certain promissory notes, and counterclaimed for $1,325. Ferguson, J.:—"The matter of what is called a counterclaim is, I think, really a set-off, though perhaps it was not, looking at the provisions of Rule 373, improperly called a counterclaim: but this could not, I think, change the real character of it. See the remarks of Chief Justice Armour in *Cutler* v. *Morse*, 12 P.R., at p. 595."

*Sanderson* v. *Ashfield*, 13 P.R. 230, was a case similar to *Cutler* v. *Morse*. The plaintiff claimed $1,205, balance of contract price of work in building three houses. The defendant counterclaimed for the inferiority and incompleteness of the work. The referee found for the plaintiff as claimed and allowed defendant $266 on his counterclaim.

Boyd, C.:—"This line of defence is neither a set-off nor a counterclaim, but it is of avail to shew that the value of what was done amounts to less than claimed, or that so much should be deducted from the contract price. *Thornton* v. *Place*, 1 Moo. & Rob. 218; *Chapel* v. *Hickes*, 2 Cr. & M. 214.

"The defendant filed particulars of the various items of work complained of, and in respect of the claim for deduction the Master allowed $266, which being deducted from the balance claimed by the plaintiff forms the amount found due to him. There is no room on this state of facts for applying the provisions of the Judicature Act as to costs upon counterclaim. The plaintiff has substantially succeeded, and should get the general costs of the action and reference. From this the Master should deduct the costs incurred by the defendant in establishing the items of improper work on which he succeeded. *Cutler* v. *Morse*, 12 P.R. 594, is quite in point, and justifies generally this disposition of costs."

*Girardot* v. *Welton*, 19 P.R. 162, deserves special attention. The action was brought to restrain the exercise of a power of sale in a mortgage. The defendant pleaded her right to exercise the power of sale, and then proceeded: "The defendant Welton as such mortgagee as aforesaid, in the alternative and by way of counterclaim, claims payment, or in default sale or foreclosure, etc." The trial Judge dismissed the plaintiff's action with costs, and dismissed the counterclaim with costs, the defendant at the trial not desiring a foreclosure. On an appeal from taxation Armour, C.J., said: "The paragraph which I have quoted from her statement of defence was not a counterclaim properly so called, and calling it a counterclaim could not make it one. In *Ryan* v. *Fraser* (1884), 16 L.R. Ir. 253, May, C.J., said: 'I do not think that the nomenclature of the defendant altered the substantial nature of the case.' And Fitzgibbon, L.J., said: 'In my opinion neither ingenuity or inadvertence on the part of the pleader should be allowed to succeed in making two causes of action out of that state of facts, or to found a liability to two sets of costs in the High Court in a case in which recourse ought not to have been had to that Court by either party.' "

If the defendant could make her statement above quoted a counterclaim by merely calling it so, then, had she accepted the foreclosure offered by the learned Judge, she would have been entitled to two sets of costs, her costs of the dismissal of the plaintiff's action, and her costs of her counterclaim as an independent or cross-action; but it is not in the defendant's power to make that a counterclaim which is not one in reality, by merely calling it a counterclaim.

In *Winterfield* v. *Bradnum* (1878), 3 Q.B.D. 324, Brett, L.J., said: "A counterclaim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counterclaim is, that they are wholly independent suits which, for convenience of procedure, are combined in one action."

When he says "a counterclaim is sometimes a mere set-off," he is speaking of the law in England; but this is not applicable to the law of this province. Under the law relating to set-off in England, the defendant, if his set-off exceeded the plaintiff's claim, could not recover the excess in that action; his set-off could only be used as "a shield, not as a sword": *Stooke* v. *Taylor*, 5 Q.B.D. 569. And, consequently, in such case in England the defendant has to counterclaim for his set-off in order to recover the excess.

Under the law relating to set-off in this province, the defendant, if his set-off exceeded the plaintiff's claim, could recover the excess. In this province, therefore, a set-off should not be treated as a counterclaim, or be pleadable as such.

The counterclaim of a defendant properly so called is a claim by the defendant for relief which cannot be obtained by him in the action which is brought against him, and in order to obtain which he must resort to a cross or independent action, and such cross or independent action, when set up by him to the action brought against him, is a counterclaim properly so called; but, if the defendant's claim for relief is obtainable in the action brought against him, it is not a counterclaim properly so called, and is not properly pleadable as such."

On an appeal to the Divisional Court the decision of Armour, C.J., was affirmed. 19 P.R. 201.

And see *Gates* v. *Seagram* (1908), 19 O.L.R. 216.

Where a claim and a counterclaim are both dismissed with costs, the plaintiff pays to the defendant the general costs of the action, and the defendant pays to the plaintiff only the amount by which the costs have been increased by reason of the counterclaim; there is no apportionment. *Mason* v. *Brentini*, 15 Ch. Div. 287; *Saner* v. *Bilton*, 11 Ch. Div. 416; *In re Brown. Ward* v. *Morse*, 23 Ch. Div. 377.

If both parties recover something, the plaintiff on his claim and the defendant on his counterclaim, the plaintiff is entitled to the general costs of the action, and the defendant to the costs of his counterclaim. *Baines* v. *Bromeley*, 6 Q.B.D. 191; Mor & W. 131, and cases there cited.

In an action where there is a claim and counterclaim, the party ordered to pay or receive the costs of the action pays or receives the whole of such costs as if there were no counterclaim. The party ordered to pay or receive the costs of the counterclaim pays or receives the costs occasioned by the counterclaim, and in determining what they are, costs which have been saved by a counterclaim being brought instead of a cross-action are not to be taken into account.

Costs which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counterclaim, must be apportioned by the taxing officer, but no costs incurred in the action which have not been increased by reason of the counterclaim are to be apportioned. *Atlas Metal Co.* v. *Miller* (1898), 2 Q.B.D. 500.

In *Summerfeldt* v. *Johnston*, 17 P.R. 6, the Master in Chambers reversed the decision of the taxing officer and held that the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in his suit, and in like manner to allow the defendant his costs of the counterclaim as though he had wholly succeeded in the suit. This decision was affirmed by Meredith, C.J.

To the same effect is the judgment in *Ontario Forge Co.* v. *Comet Cycle Co.*, 17 P.R. 156.

The plaintiff recovered judgment on his claim without costs. The defendants recovered judgment on their counterclaim with costs of their counterclaim. The taxing officer taxed to the defendants their costs as if the counterclaim had been a separate action, and allowed them the full amount of all items which were common to both defence and counterclaim, *e.g.*, "attending to file and serve defence and counterclaim," "affidavit on production," and attendances, "notices to admit" and attendances, "attending to hear judgments," "order to produce" and attendances, amounting in the whole to some $30.

The bill was referred to Mr. Thom, who reported in favour of disallowing to defendants items common to both defence and counterclaim, and of allowing only such items as were applicable to the counterclaim alone, following *In re Brown, Ward* v. *Morse*, 23 Ch. Div. 377. On a motion to dispose of the appeal, before Street, J., the defendants contended that *Summerfeldt* v. *Johnston* was an authority for the allowance of the items, or for a share of the common items. Street, J., said:—

"It has been over and over again laid down that a claim and a counterclaim are to be treated as separate actions, and that the costs are to be taxed in accordance with that principle: *Finska* v. *Brown*, 7 Times L.R. 578; *Amon* v. *Bobbett*, 22 Q.B.D. 534; *Shrapnal* v. *Laing*, 20 Q.B.D. 334; *Summerfeldt* v. *Johnston*, 17 P.R. 6; *Re Brown, Ward* v. *Morse*, 23 Ch. Div. 377; *Saner* v. *Bilton*, 11 Ch. Div. 416; *Mason* v. *Brentini*, 15 Ch. Div. 287; *Stumore* v. *Campbell* (1892), 1 Q.B. 314.

"The difficulty which arises in applying the principle to the actual process of taxation arises only with regard to what are called "common items," that is, items which are fixed in amount by the tariff, and are not applicable entirely either to defence or counterclaim, but partly to one and partly to the other.

"I cannot find that it has been determined by any English or Canadian Court that these items should be apportioned, although that course has been suggested by individual members of the Courts in which the principle above stated has been under consideration: and I do find that in *Re Brown, Ward* v. *Morse*, 23 Ch. Div. 377, the English Court of Appeal, affirming the taxing master and Mr. Justice Chitty, held that items common to both defence and counterclaim should not be taxed either in whole or in part to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him. I cannot find that this rule has been disturbed either in England or here. The point actually decided in *Summerfeldt* v. *Johnston* does not cover the point raised here.

"In an Irish case of *Griffith* v. *Patterson*, 22 L.R. Ir. 656, decided in 1888, five years later than *In re Brown, Ward* v. *Morse*, the Irish Court of Appeal determined that 'common items' under the circumstances should be apportioned; but the last mentioned case is not referred to either by counsel or in the judgments of the Court. In my opinion, therefore, the question raised here is governed by the case of *In re Brown, Ward* v. *Brown*;" *Haggart* v. *Town of Brampton*, 17 P.R. 477.

The last word on the subject is contained in *James* v. *Jackson* (1910), 2 Ch. 92. At the trial the claim and counterclaim were both dismissed with costs, with a direction that there should be a set-off of the costs.

The minutes of the judgment were settled by the registrar as follows:—"And it is ordered that it be referred to the taxing master to tax the costs of the defendants of this action except so far as they have been increased by the defendants' counterclaim, and also to tax the plaintiff's costs so far as they have been increased by the defendants' counterclaim."

The defendants objected to this form, whereupon the matter was brought before Warrington, J., the trial Judge, who said:—

"The judgment . . . ought to be drawn up exactly as it was pronounced, that is to say that the defendants' costs of the action should be taxed and the plaintiffs ordered to pay them, and that the plaintiffs' costs of the counterclaim should be taxed and the defendants ordered to pay them. The minutes as handed out by the registrar propose—in accordance with what is said to be the usual practice—to tax the costs of the defendants except so far as they have been increased by the counterclaim, and to tax the costs of the plaintiffs only so far as they have been increased by the counterclaim, with a set-off of the one against the other. It may be that when the taxing master comes to tax the cos s he will pursue some such course as that which is indicated by the minutes. It might be right that he should do so, but as to that I say nothing. I think the order ought to direct the defendants' costs of the action to be taxed and to order the plaintiffs to pay them, and direct the plaintiffs' costs of the counterclaim to be taxed and to order the defendants to pay them, with a set-off."

And see *Jones* v. *Stott*, C.A. (1910), 1 K.B. 898, under "Divided Success."

## COURT FEES.

See TERM FEES.

## DEFENDANTS SEVERING.

*Con. Rule 1162.*—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. Con. Rule 1202.

See also Rules 1147, 1148.

Independently of Rule 1162 the Court may allow only one set of costs to several parties appearing by separate solicitors or counsel. *Harbin* v. *Masterman* (1896), 1 Chy. 351.

It may be stated in general terms that defendants representing the same interests must join in defending, and be represented by the same solicitor, upon terms of being allowed but one set of costs, if successful; and that defendants who have identical but separate interests need not join.

Where the House of Lords had, subject to certain directions, left it to the taxing officer to determine how many sets of costs should be allowed to defendants who had severed in their defences, it was held that no appeal would lie from the ruling of the taxing officer on the point, unless he altogether omitted to exercise his discretion. *Boswell* v. *Coaks*, 36 Ch. Div. 444.

In an action for damages for injuries caused to a drain, two contractors who had constructed the drain, and the assignee of one of them were added defendants. The two contractors were partners when the drain was constructed, but had dissolved partnership before the action was begun. One contractor defended by one solicitor, and the other and his assignee by another solicitor. Judgment was given dismissing the claim against the added defendants with costs.

*Held*, by Armour, C.J., that there was no "law of the Court" which, under the circumstances of this case, justified the taxing officer in refusing to allow more than one set of costs to the added defendants. *Melbourne* v. *City of Toronto*, 13 P.R. 346.

*Melbourne* v. *Toronto* was decided under the former Rule 1202, which read: "Where two or more defendants defend by separate solicitors under circumstances *that by the law of the Court* entitle them to but one set of costs," etc. These words have been eliminated from Rule 1162, but there appears to be no decision as to the effect of the alteration in the wording of the rule. The words, "under circumstances" in Rule 1162 seem to be analogous to the words in the former Rule 1202.

Where the several members of classes of persons interested in an estate severed in instructing counsel, the Court, though it gave them costs out of the estate, directed the attention of the Master to the subject on taxation. Proudfoot, V.-C., *Crawford* v. *Lundy*, 23 Gr. 244.

Where three plaintiffs brought separate actions against the same defendants for the same alleged cause of action, and on appeal to the Court of Appeal one appeal book was printed and the three cases argued together.

*Held*, that the taxing officer was right in allowing separate counsel fees in each case.

The actions were against a company and one McLean. The claim was for an alleged conspiracy to defraud. McLean defended meeting the charge directly; the other defendants did the same and said they obtained their information from McLean, and that they believed it to be true.

*Held*, that the taxing Master was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants. *Petrie* v. *Guelph Lumber Co.*, 10 P.R. 600.

In an action of tort against two defendants, they paid money into Court; the plaintiff denied its sufficiency, and one of the defendants obtained leave to amend by severing in his defence and setting up other defences. The plaintiff succeeded against both defendants with costs. On the taxation the taxing officer taxed the costs occasioned by the defendants severing in his defence against him only, and not against his co-defendant, and the Divisional Court held that the taxing officer was right. *Stumm* v. *Dixon*, 22 Q.B.D. 99, 529.

In a suit for specific performance by a vendee against his vendor, and a person to whom he had sold after agreeing to sell to the plaintiff, the defendants severed in their defences and employed separate solicitors, and it was held each was entitled to tax a separate bill. *Barrett* v. *Campbell*, 7 P.R. 150.

In a suit for redemption the bill alleged that a deed absolute in form was really a mortgage. The grantee in the deed had died, and the defendants were his son, to whom the lands had been devised, and two executors. The defendants employed different solicitors and set up different defences.

*Held*, that the defendants were justified in severing in their defences, and could tax separate bills.

*Held*, also, that where one of several defendants is charged with fraud, the others are not obliged to connect their defence with his. *Conolly* v. *Hill*, 7 P.R. 441.

In an administration action by a residuary legatee the plaintiff represents all the residuary legatees, and if other residuary legatees appear by separate solicitors they may be deprived of costs. *Gorham v. Gorham*, 17 Gr. 386.

In a Manitoba case the Master found that, although the defendants appeared by separate solicitors, there was not any *bonâ fide* defence by two solicitors, that there was in fact a defence by one solicitor, although the name of another was used, and he allowed only one set of costs. Taylor, C.J., held that the Master had come to a correct conclusion and in ruling as he did exercised a sound discretion. *Thompson v. Dilon*, 16 C.L. Times 16.

In arbitrations under the Railway Act, all persons interested in a piece of land, must appear together by one solicitor. In *Re Murphy and Lindsay Ry. Co.*, 6 O.W.R. 361, the life tenant, the owner of the reversion, and an annuitant, with an annuity charged on the land, employed separate solicitors. Mr. Thom, the senior taxing officer, reported that only one set of costs should be allowed. He points out in his report, that before the arbitrators there is no question of separate interests; that the proportions of the several interests of the different claimants could not be considered, but only the amount of one lump sum for damages. Anglin, J., adopted the report, and directed the bills of costs to be taxed as one bill and to be apportioned among the solicitors.

Boyd, C.:—"This action is by a municipality against a contractor, his surety, and three executors of a deceased surety; there are separate defences for the chief defendant, the surviving surety, and the representatives of the surety deceased. There is no imputation against the *bonâ fides* of the parties thus severing, and there is no rule of law against them so severing. It does not appear that separate solicitors were employed for the mere purpose of increasing costs, and we may reasonably infer good reasons why the defendants should act by their respective solicitors and counsel. The rule of practice (Rule 1202) which obtains when defendants improperly sever in their defence is not peculiar to equity, but is found likewise in common law practice where costs have been needlessly multiplied, and is indeed a part of the inherent jurisdiction of the Court, however constituted, to prevent unwarrantable charges. Here, however, the defendants are not liable in any joint character; each set has peculiar defences and as to the sureties, this is because the union once existing has been ended by the death of one. His representatives cannot be regarded as acting vexatiously if they seek to be protected by their own solicitor. The law of the Court does not require them to make common cause with the solicitor of the surviving surety. *Reid* v. *Stephens*, 3 Ch. Ch. 372; Gordon on Costs, p. 166; *Gambrell* v. *Falmouth*, 5 A. & E. 403." *Township of Logan* v. *Kirk*, 14 P.R. 130.

An action to establish the third, and, alternatively, the second, will of a testator, was separately defended by the executors of the first will and the two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The plaintiffs failed to establish either will, and the taxing master allowed only one set of costs, and this was affirmed by Gorell Barnes, J.

On appeal this judgment was reversed. Lindley, M.R., said: "The result shews that the appellants might have left the defence of the action to the executors. But I do not think that that is conclusive. The question is whether they were really justified in separately appearing to protect their own interests. I have come to the conclusion that they were, because, although it is true that the two Pimms were the executors of the will of 1895, nevertheless there was such a divergence of interest between the Pimms on the one hand and the appellants on the other, that if any difficulty arose the executors might have preferred to compromise on the footing of the will of 1898 being allowed to stand. That in my opinion is sufficient to justify the appellants in appearing by separate counsel. It does not at all follow that the Court will allow the costs of appearing separately, however many defendants there might be; but in this case counsel for the defen dants has succeeded in convincing me that there was no sufficient cause for depriving them of their costs." *Bagshaw* v. *Pimm* (1900), P. 148.

Where one defendant agreed to save his co-defendant harmless from the costs of an action, and on the written retainer of the latter it was provided that the costs should be charged to the former; no reason for defending by separate solicitors appeared. *Held*, that the indemnified defendant was not entitled to costs against the plaintiff. *Meriden* v. *Braden*, 16 P.R. 410, affirmed, 17 P.R. 77.

A trustee who severed in his defence, because his co-trustee had refused to act in conjunction with him in the management of the estate, was refused his costs. Mowat, V. C., *Gibson* v. *Annis*, 11 Gr. 481.

But a trustee ought not to be deprived of his costs out of the trust estate merely on the ground that he has severed from his co-trustee in his defence to an action to administer the estate. He ought to have an opportunity of explaining the reasons for his severance, so that the Court may be able to decide judicially whether the severance was improper. *Cronbach* v. *Isaac* (1897), 1 Chy. 251.

In an action of tort against two defendants they pleaded jointly payment into Court only. The plaintiff replied, denying the sufficiency of the payment. One of the defendants then amended his defence and added an alternative separate defence, denying any liability. At the trial a verdict was found against both defendants for an amount beyond the sum paid into Court, and judgment was entered for the amount of the verdict, with costs to be taxed. It was held that the defendant who delivered the separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate defence. *Stumm* v. *Dixon*, 22 Q.B.D. 529. *Wilson* v. *Foore*, Buller's N.P. (7th ed.), 335, a decision to the contrary, seems to be overruled by *Stumm* v. *Dixon*.

## DISCONTINUANCE.

*Con. Rule 430.*—(1) Subject to any special statutory provisions, 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. A plaintiff may discontinue as to one or more of several defendants.

(2) Such costs may be taxed upon production of the notice served without any order, and if not paid within four days from taxation the defendant may, without any order, sign judgment therefor.

(3) Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

(4) Save as in these rules otherwise provided it shall not be competent for the plaintiff to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action against all or any of the defendants, and otherwise, order the action to be discontinued, or any part of the alleged cause of complaint to be withdrawn. Con. Rule 641.

*Con. Rule 431.*—A defendant may, with the leave of the Court or a Judge, withdraw his defence or counterclaim, or any part thereof, upon such terms as may seem just. Con. Rule 642.

On an appeal to the Court of Appeal the appellant may discontinue at any time, and thereupon the respondent is entitled to his costs of the appeal. Con. Rule 820.

Rule 430 forms a complete code of procedure, governing discontinuance, as far as relates to costs, and the provisions of Rule 1130, giving the Court or a Judge discretion as to costs, are not applicable. *Armstrong* v. *Armstrong* (1905), 9 O.L.R., at p. 19.

And where the plaintiff discontinues without leave of the Court or a Judge the defendant has an absolute right to all costs of the action. *The St. Olaf*, 2 P.D. 113; *The J. H. Henkes*, 12 P.D. 106. And the costs will include costs made costs in the cause on an interlocutory application on which the plaintiff has succeeded. *The St. Olaf, supra.*

But where the plaintiff applies for leave to discontinue under sub-section (4) of Rule 430, the Court or a Judge may give leave to discontinue without costs. *Armstrong* v. *Armstrong* (1905), 9 O.L.R. 14.

Where the plaintiff discontinues the defendant is a successful defendant, and he should not be deprived of his costs except for good cause. *Wallace* v. *Mumm*, 10 O.W.R. 247; *Bradshaw* v. *Cohen*, 9 O.W.R. 51.

The plaintiff was injured by a team of horses, supposed to belong to the defendant. After the writ was served the plaintiff moved to add the defendant's husband a party, the husband alleging the team belonged to him. Before the writ was issued both husband and wife refused to give any information as to the ownership of the team, and the Master in Chambers allowed the plaintiff to discontinue without costs. *McIlroy* v. *Miles*, 9 O.W.R. 542.

Where the defendant paid a sum into Court as part of the plaintiff's claim, and the plaintiff, after issue joined, discontinued, it was held he was entitled to his costs up to the time of payment into Court. *Suckling* v. *Gabb*, 36 W.R. 175.

The defendant is entitled to costs though the plaintiff discontinue before appearance. *Moore* v. *S. Counties Bank*, W.N. (1889), 156.

Where a plaintiff serves notice of discontinuance he has no right to take out an appointment for the taxation of the costs; and it make no difference that he is entitled to interlocutory costs in any event. It is not necessary for the plaintiff to ascertain the amount of the defendant's costs and pay them to make the discontinuance effectual. *Barry* v. *Hartley*, 15 P.R. 376.

In *Harrison* v. *Leutner*, 16 Ch. Div. 559, the taxing masters were asked to certify as to the practice of taxing costs on abandoned motions, and they certified as follows: "That we have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of the notice which stops the work, is allowable; and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any change of practice in this respect since the Judicature Act."

## DEPOSITIONS, COPIES OF

See Copies and section 41 of the Evidence Act (9 Edw. VII. ch. 43).

## DISCOVERY.

See Examination of Parties.

## DOCUMENTS.

*Con. Rule 527.*—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 No. 63.

*Con. Rule 1150.*—The costs of proving a document shall not be allowed unless a notice to admit has been given under Rule 527, except where the omission to give the notice is a saving of expense.

*Con. Rule 1155.*—No allowance shall be made for any order for production or any notice or inspection under any of the rules relating to the production and inspection of documents unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for taking the order, giving the notice, or making the inspection

The Evidence Act, 9 Edw. VII. ch. 43, makes provision for proof of public and official documents. See sections 21-29.

As to proof of wills, see sections 42, 43, 44.

As to registered instruments, see sections 45-48.

As to other written instruments, see section 49.

Rule 527 extends to all documents which a party proposes to adduce in evidence, and whether they are in his custody and control or not. *Rutter* v. *Chapman*, 8 M. & W. 388.

A notice to admit must be given a reasonable time before trial, and holds good upon a subsequent trial. *Wilson* v. *Baird*, 19 C.P. 98.

Before a party will be allowed to tax the costs of obtaining an exemplification of a judgment he must serve the other side with a notice to admit. The taxing officer, however, though he cannot allow the costs of exemplification without notice, may allow the costs of procuring a copy of the judgment. *Conger* v. *McKechnie*, 1 Ch. Rep. 220.

See NOTICES.

A solicitor concerned for two or more parties is not entitled to charge for supplying to himself copies of documents which he has prepared. *Sharp* v. *Wright*, 1 Eq. 634.

A copy of any material document should be provided for each member of the Court of Appeal, and the costs allowed on taxation. *Re Randell*, 56 L.T. 8.

Other means having been provided by statute for proving documents at the trial of actions, the costs of obtaining orders for subpœnas to public officers to produce documents, and of procuring the attendance of such officers at trials, should not be allowed on taxation except where it is clearly shewn that the documents could not be proved in any other way. *Hope* v. *Traders Bank*, 27 C.L.J. 61, 11 C.L.T. 55, *per* Street, J.

Where a Court is asked to construe the terms of a document a copy should be provided for its use, and the costs of such copy should be allowed on taxation. *In re Houstoun's Settlement*, 89 L.T. 469.

Where the plaintiffs made six affidavits on production, held they were entitled to tax the costs of one only, with extra folios for the additional matter contained in the subsequent affidavits. See *Baldwin* v. *Quinn*, 16 P.R. 248, under "Affidavits."

In the administration of an estate it became necessary to have translations of certain French documents. The defendant's solicitor had a clerk in his office who was a competent French scholar, and this clerk with the assistance of a lady, who was also a competent French scholar, made the translations. The taxing officer refused to allow a sum for making these translations, on the grounds that no actual disbursements were made for translating the documents, and that the translators were not professional translators. On appeal, Cozens-Hardy, J., held the taxing officer was wrong, that it would be inconvenient that documents of a confidential nature should be sent out of the solicitor's office, and that it is within the scope of the solicitor's duties, if he has a staff competent for the purpose, to make the translations. *In re Bowes* (1900), 2 Chy. 251.

In *Toronto* v. *Grand Trunk Ry. Co.* (1907), 13 O.L.R. 12, a certain contract and plans of material importance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services $350 was paid them and taxed by Mr. Thom. The defendants appealed on the grounds "that the said costs were incurred in procuring evidence, there being no provision in the Consolidated Rules of practice or in the tariff of costs providing for the allowance of such costs upon a party and party taxation."

Boyd, C.:—"In a book of great accuracy, it is said that searches for pedigrees and for ancient records, charters or other documents may, if successful, be allowed between party and party. Marshall on Costs (2nd ed.), 285. This charge, though not expressly provided for in our tariff of costs, is not necessarily excluded therefrom; it is in fact by the practice of the Courts a recognized item to be allowed in a proper case according to the discretion of the taxing officer. Rule 1178 makes the tariff conclusive in respect of the matters thereby provided for, but it does not mean to exclude charges which might be proper though omitted therefrom.

"In *Bastard* v. *Smith* (1839), 10 A. & E. 213, a charge of £93 paid to a gentleman of the Chapter House for making searches, etc., was allowed, though it was objected to on the ground that it was not properly an item between party and party to charge for such precautionary measures as searching for evidence. The distinction is well marked between such instances of successful search for existing evidence in the shape of lost or mislaid documents and preparation being made for giving evidence by preliminary experiment or investigation. Such was the case of *McGannon* v. *Clarke* (1883), 9 P.R. 555, where the charges claimed were in order to qualify one to become a witness. These, unless special provision is made for them by rule or tariff are not proper items to be paid by the opposite party.

"Item 142 of the tariff is perhaps wide enough to cover the case of searches out of Court in different places by competent persons in the case of material documents which have gone astray from the proper custody. But without explicit directions it was the practice to allow these searches for existing documents according to the course of the Court in dealing with costs—see this elucidated in Archbold's Q.B. Practice, (14th ed.), Vol. I., p. 703, note "*u*." See *Churton* v. *Frewen* (1867), 15 W.R. 559. The documents searched for and found in this case were, it is not disputed, of vital importance, and the efforts made and expenses incurred were reasonable in themselves."

On appeal to a Divisional Court the judgment of the Chancellor was affirmed. Meredith, C.J., delivering the judgment of the Court, said: "I agree in the view of the Chancellor that our rule is not exhaustive in the sense in which he dealt with it in the *Compton Corset Company* case, 11 P.R. 256. There is nothing in the tariff to exclude the allowance of such items as these. The tariff does say that in respect of items dealt with by it, no greater sums shall be allowed than those fixed by the tariff, but it does not say that no allowance shall be made in respect of matters not dealt with in the tariff."

See INSPECTION OF DOCUMENTS.

## DIVIDED SUCCESS.

Where costs "follow the event" under Rule 1130(3), and where neither plaintiff nor defendant is wholly successful, it becomes necessary to decide what is meant by "event." Where the event is the result of a single issue, there can be no difficulty; it only arises where there are 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. Where an action was divisible into two parts, and the judgment gave the plaintiff the costs of the first part and no costs of the second to either party, the taxing officer taxed to the plaintiff one-half of his general costs of the action, beginning with instructions, and also the costs exclusively relating to the first part. The Chancellor held that the taxing officer had not erred in principle. *Vanzant* v. *Markham*, 15 P.R. 412.

But where the plaintiff recovered one-sixth of his claim which was not divisible, Falconbridge, C.J., refused to apply the principle of *Markham* v. *Vanzant*. *Murphy* v. *Murphy*, 11 O.W.R. 410, 727.

Ferguson, J.:—"The defendants are husband and wife, and they defended by the same solicitor. There was judgment for the plaintiff against the wife with costs. The action was dismissed as against the husband with costs.

"The taxing officer, in taxing the costs of the defendant, the husband, against the plaintiff, allowed in his favour the full amount of costs, not only of the charges or items in the bill appertaining solely to the husband's defence, but also of those charges or items which were common to the defence of both defendants, that is, which appertained alike, or equally, in some degree, to the defence of each of the two defendants.

"I am of the opinion that the taxing officer was clearly in error in proceeding with the taxation and taxing the bill as he did. The judgment gave the defendant, the husband, his costs, that is, his proper costs; and what were his proper costs? Certainly, these did not and do not embrace and comprehend the costs of services performed partly for or in his defence, and partly for or in the defence of his co-defendant, but at most only a proper proportionate share of such costs. See Gray on Costs, 96. See also *Re Allen, Davies* v. *Chatwood*, 11 Ch. Div. 244, going to shew that the defendant's solicitor could not collect from this defendant the whole of the costs that have been so taxed in his favour against the plaintiff. The case *Heighington* v. *Grant*, 1 Beav. 228, indicates the mode of taxation that should be adopted where an apportionment of costs has been directed.

"This defendant, the husband, should, as I think, be allowed on the taxation the costs of services (if any) appertaining wholly to his own defence, and at most only a proper proportionate part of the costs of services appertaining to both defences of the defendants." *Clark* v. *Virgo*, 17 P.R. 260.

An action was brought by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent. The action was dismissed with costs, the costs of the judgment debtor to be set off against the judgment recovered against him by the plaintiff. There was a common defence by one solicitor. On appeal from the taxation:—

Boyd, C.:—"The amount to be set off will be so much of the costs of the whole defence as are properly payable by this defendant to the joint solicitor. Now the rule is well settled, based upon the certificate of the Master in *Re Colquhoun*, 5 DeG. M. & G. 35, that the general costs of a common defence are divided equally among the defendants who unite in their defence, or have one common defence, subject to the particular liability of one for any proceedings taken for his exclusive advantage.

"Here there are no such separate proceedings for the benefit of particular defendants; there was one defence, for the costs of which all are equally liable to contribute to their solicitor. Therefore, I think, the Master has erred in allowing a set-off of only $12.86 out of a total bill taxed of $179.69. The true measure of set-off would be one-third of this latter sum. I may note the late case of *Clark* v. *Virgo*, 17 P.R. 260." *Zavitz* v. *Dodge*, 17 P.R. 295.

Four slanders were charged in four paragraphs of the statement of claim. There was a verdict for $1 in respect of the slanders alleged in the third and fifth paragraphs and the judgment was that "the plaintiff do recover against the defendant in respect to the matters set forth in the third and fifth paragraphs of the statement of claim the sum of $1 and costs to be taxed," and that "the defendant do recover from the plaintiff in respect of the matters set forth in the fourth and sixth paragraphs of the statement of claim to be taxed." The taxing officer taxed to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded. The defendant appealed, contending that the plaintiff was entitled to recover one-half only of the costs of the action. Meredith, C.J.C.P., dismissed the appeal, and there was a further appeal to a Divisional Court. The judgment of the Court was delivered by Street, J.: "The form of the judgment in this case seems to me not to be distinguishable in substance from that which was considered in *Sparrow* v. *Hill* by the Q. B. D. in England, reported at 7 Q.B.D. 362, and by the Court of Appeal, 8 Q.B.D. 479; and I think we should follow the judgment of the Court of Appeal there in holding that the taxing officer at Stratford has adopted the proper mode of taxing the costs of the parties under the judgment in question." *Davis* v. *Hurd* (1902), 4 O.L.R. 466.

The action was for two distinct claims, and the plaintiff succeeded in one and failed on the other. The Judge directed judgment to be entered for the plaintiff with costs as to the one claim, and dismissed with costs as to the other.

The taxing officer ruled that plaintiff was entitled to one-half his general costs of the action, and the defendant to half the general costs of defence, plus such costs as were specially applicable to the claim upon which the defendant succeeded. The plaintiff appealed, on the ground that defendant was entitled only to the costs of his defence so far as they were increased by the claim on which the plaintiff failed.

Anglin, J.:—"Though the phraseology of the judgment entered in this action is somewhat out of the ordinary, I am unable to distinguish it upon any satisfactory ground from that which was before the Court in *Sparrow* v. *Hill*, 8 Q.B.D. 479, or from that in *Hurd* v. *Davis*, 4 O.L.R. 466. It is true that the words used are yet more nearly like those found in *Jenkins* v. *Jackson* (1891), 1 Ch. 89, and in *Todd* v. *North-Eastern Ry. Co.* (1903), W.N. 9, 30. For that reason, I should, if untrammelled by authority, hesitate long before interfering with the action of the learned and experienced senior taxing officer in applying those authorities to the present case. But in *Jenkins* v. *Jackson* the Lords Justices intimate that, upon the common law side of the English High Court, the language there under consideration would probably have been construed as giving plaintiff the general costs of the action. It is not, therefore, upon the mere verbal differences in the respective orders in *Sparrow* v. *Hill* and *Jenkins* v. *Jackson* that the different principles of taxation applied depend, but solely upon the prevalence of a divergence in practice between the two sides of the English High Court of Justice.

"In refusing leave to appeal from the judgment of the Divisional Court in *Davis* v. *Hurd*, where this very difference was emphasized in argument, Mr. Justice Osler, referring to the former practice, says: 'I see no reason why a judgment framed as is the judgment at the trial in this case should not lead to the same result. That it may properly do so, is shewn by *Sparrow* v. *Hill* and *Jenkins* v. *Jackson*. In the latter case the actual decision was different because the judgment happened to be in the Chancery Division, in which the practice appears to be different from that which prevails in the Queen's Bench Division in England. The Judges regretted that the practice was not uniform, and there is no earthly reason why we should follow or adopt their decision and thus give occasion here for a similar regret. I think the practice is right, but it is even more convenient that it should be settled.' See 1 O.W.R. 471.

"I read this language as meaning that in Ontario we must be taken to have adopted as the more convenient practice the rule of construction applied in *Sparrow* v. *Hill* as that to be applied in all cases where language of like import is employed. Not without some doubt I allow the plaintiff's appeal." *Pugh* v. *Hogate*, 3 O.W.R. 799.

In *Sparrow* v. *Hill*, referred to in the foregoing decisions, the plaintiff sued for three items, and recovered a sum in respect of one. It was ordered "that the plaintiff recover against the defendants" the sum recovered, "and such costs as one of the masters may find that he has rightly incurred in recovering the above amount, and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded."

On taxation the Master allowed the plaintiff the general costs of the cause, disallowing only those which applied exclusively to the parts of his claim on which he failed; and he allowed the defendants such costs only as were incurred by reason of the two items which were successfully resisted. The Queen's Bench Division reversed the Master's ruling, but the Court of Appeal (8 Q.B.D. 479) reversed the decision of the Queen's Bench Division and held that the Master had properly construed the order, and had taxed the costs on the right principle.

Bramwell, L.J.:—"I interpret this order to mean that the plaintiff is to get the general costs of the action, but not the costs of attempting to recover the items of claim as to which he failed. I think the defendants are to have such costs as they incurred in defending themselves against claims which were unfounded. The case is to be treated as if there had been a certain issue found for the plaintiff, with judgment for him, and certain issues found for the defendants, and that, in my opinion, is what is meant by this order."

On an interpleader issue, where a mortgagee claimed all the goods seized, and at the trial it appeared that some of the goods claimed, amounting to one-sixth of the total value, were not covered by the mortgage, the mortgagee got the general costs of the issue, less a deduction of one-sixth. *Segsworth v. Meriden Silver Plating Co.*, 3 Ont. R. 413.

At the trial the action was dismissed without costs. The defendant appealed and the plaintiff cross-appealed. The Court of Appeal ordered that both appeals be dismissed with costs, with a set-off. On the taxation the Master taxed the costs on the principle that the plaintiff was entitled to all his costs of the appeal except so far as they were increased by his cross-appeal, and the defendant's costs should be disallowed except so far as they were increased by the plaintiff's cross-appeal. He therefore allowed the plaintiff items charged in respect of brief and fees paid to counsel, and disallowed items charged in respect of the defendant's brief and counsel fees. On appeal to a Judge in Chambers the Master was directed to review his taxation by apportioning these costs between the appeal and cross-appeal, and the Court of

Appeal held the direction of the Judge was correct. *Jones* v. *Stott* (1910), 1 K.B. 898.

## ENLARGEMENT OF MOTIONS.

Unless otherwise ordered by the Court or the Judge, the costs of an application to extend the time for taking any proceeding is in the discretion of the taxing officer. Rule 1152.

By the practi in Chancery, as a general rule, the costs of a first application for further time were costs in the cause, but those of subsequent applications were ordered to be paid by the applicant. Dan. Ch. Pr. (5th ed.), 643.

A counsel fee of $5 for each necessary and proper enlargement of a Court motion should be allowed. *McCallum* v. *McCallum*, 11 P.R. 179.

A party is not entitled to costs for enlarging the opposite party's motion for his own convenience. *Ham* v. *Lasher*, 24 U.C.Q.B. 357.

See ABANDONED MOTIONS; ADJOURNMENTS.

## EXAMINATIONS DE BENE ESSE.

With respect to the costs of examinations *de bene esse*, no specific rule appears to have been laid down which makes any distinction between them and the costs of examinations under ordinary circums' .ees; and the costs of such examinations will usually be directed to be costs in the cause. Dan. Chy. Pr. 659.

If a witness is so old and infirm that it is a prudent course to take his examination, but he is afterwards able to attend the trial, the plaintiff may be allowed the costs of the commission, as well as the costs of the witness attending at the trial. *Beaufort* v. *Ashburnham*, 13 C.B.N.S. 598.

The true test in exercising the discretion of the taxing master is whether the costs of the examination were reasonably necessary under the circumstances existing at the time the examination was ordered, irrespective of the eventual state of circumstances at the time of the trial. There is no hard and fast rule of taxation that the costs should not be allowed unless the examination has been actually read at the trial. See *Bartlett* v. *Higgins* (1901), 2 K.B. 230; *[illegible]ot* v. *Monetary Times*, 18 P.R. 141, under "Commission to take Evidence."

And see *Fox* v. *Toronto and Nipissing Railway Co.*, 7 P.R., at p. 161.

The plaintiff sued for damages for bodily injuries sustained, and obtained an order for his own examination *de bene esse* before trial. The order provided that after the conclusion of the plaintiff's examination he should submit to a personal examination by medical men on behalf of the defendants, and that the defendants might afterwards continue their cross-examination of the plaintiff; and that the examination might be given in evidence at the trial "provided the defendants had been able to continue and complete their cross-examination of the plaintiff after the said medical examination." The plaintiff was examined and partly cross-examined under this order, and was examined by a medical man, but his cross-examination, owing to his ill-health, was not completed. The plaintiff was not examined as a witness at the trial; the depositions taken were offered in evidence, but were rejected as inadmissible under the terms of the order. The plaintiff succeeded in the action.

The Divisional Court held that under the circumstances of the case the examination of the plaintiff *de bene esse* was a proper and reasonable proceeding, and as the failure to complete it was through no fault of the plaintiff or his solicitor, and as it was not without use to the defendants, the costs of it should have been taxed to the plaintiff as part of the costs of the action. *Carty* v. *City of London*, 13 P.R. 285.

## EXAMINATION FOR DISCOVERY.

*Con. Rule 447.*—(1) In lieu of the personal service of a subpœna on a party for his examination, service of an appointment upon his solicitor shall be sufficient, if made seven days before the day appointed for the examination; and the conduct money may 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) Notwithstanding anything in this rule, the party to be examined may be served personally with a subpœna, as in the preceding rules provided, in case the party desiring the examination so chooses. Rules of 1 Jan., 1896, 1452.

*Con. Rule 1267.*—Rule 1136(1) is hereby repealed and the following substituted therefor:—

1136. (1) 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 the High 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 High Court, if more than $25 is claimed, besides the disbursements 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.

Any increase of costs occasioned by proceeding, without good reason, otherwise than as provided by Rule 447(1) shall not be allowed.

Rule 447 only applies in the case of an examination of a party who has a solicitor. It cannot be employed for service of an officer of a corporation. H. & L. 620.

The right to examine the person of a litigant in an action claiming damages for bodily injury, depends on Con. Rule 462. That rule does not authorize the medical practitioner to question the person being examined, but merely to make a physical examination. *Clouse* v. *Coleman*, 16 P.R. 496, 541.

If it was a proper and reasonable proceeding, and one likely to be of benefit, the costs of examination for discovery should not be disallowed merely because it was not used at the trial. *Carty v. City of London*, 13 P.R. 285; *Beaufort v. Ashburnham*, 13 C.B.N.S. 598.

The president of the plaintiff's company lived in the United States, but being in Toronto he was there subpœnaed on the 22nd April to attend on the 28th April for examination for discovery before a special examiner at Toronto. He was paid $1 and made no objection as to the amount, nor did he object that he was prevented by engagements from being present on that day, but he failed to attend.

*Held*, Boyd, C., that the president should have attended on the day appointed for examination, and he was ordered to attend for examination at Toronto at his own expense. *George T. Smith Co. v. Greey*, 22 C.L. Journal 268.

There is no provision in the tariff for attendance on examination of parties residing out of the jurisdiction. In one case $20 *per diem* was taxed to the solicitor for the successful party for attending on a commission to examine witnesses at Chicago. *Greey v. Smith*, 7 C.L. Times 168.

Instructions for Examination. See INSTRUCTIONS.

The local taxing officer refused to tax to a successful plaintiff on a party and party taxation two fees of fifty cents each for attending to bespeak for depositions of plaintiff and defendant after issue joined, upon the ground that the solicitor attending on the examinations should have ordered copies when the examinations were completed without making a special attendance therefor. On appeal, Wilson, C.J., held these fees should have been allowed. *Alexander v. School Trustees of Gloucester*, 11 P.R. 157.

The plaintiffs objected to the costs of examining a representative of the plaintiff corporation on the ground that he was not an official of the corporation subject to examination under the rules. The Chancellor dismissed an appeal from the taxing officer on the ground that such an objection should have been taken at the outset and not at the close of the litigation. *Township of Logan* v. *Kirk*, 14 P.R. 130.

Where the examination of a party is adjourned to another day, the party examined is entitled to be paid his witness fees for the second day. The position is analogous to that of a witness at a trial. A witness is entitled to be paid for the second day after the adjournment on the first day, and is not obliged to come back on the second day if not so paid. *Chamberlain* v. *Thwaite*, 11 C.L. Times 53.

*Semble*, that where the costs of an examination for discovery is unnecessarily long, the costs of it should be entirely disallowed. *Evans* v. *Jaffray* (1902), 3 O.L.R., p. 342.

Where an examination is rendered abortive by an act of the party to be examined, the costs of a second examination are properly made payable by such party in any event. *Boisseau* v. *Dun*, 10 O.W.R. 751.

Before the passing of Rule 1267 it was held that no appeal lay from the adjudication by the senior taxing officer as to the allowance or disallowance of the costs of an examination, because the jurisdiction conferred by the former Rule 1136 on the senior taxing officer was concurrent with that given to a Judge. Mr. Thom, having refused to allow the costs of an examination, under Rule 1267, the defendant appealed. Anglin, J.:—"In my opinion, it was not intended that the change effected by Rule 1267, doing away with the original jurisdiction in this matter formerly vested in a Judge of the High Court, should render an adjudication of the senior taxing officer under Rule 1136 appealable; and I strongly incline to the view that from such decision there should be no appeal." The appeal was dismissed on the ground that no proper notice of appeal had been given. *Mann* v. *Crittenden* (1906), 11 O.L.R. 46.

As to examination for discovery in mechanics' lien cases, see *Cobban* v. *Lake Simcoe Hotel Co.* (1903), 5 O.L.R., at p. 448.

For copies of examination see STENOGRAPHER'S FEES.

## EXAMINATION OF JUDGMENT DEBTORS.

The practice governing the examination of judgment debtors is contained in Con. Rules 900-910. By Rule 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, shall be in the discretion of the Court or a Judge.

The amendment made to Rule 1139 makes the decision in *Ginty* v. *Rich*, 7 P.R. 319, no longer applicable.

The judgment debtor attended upon an appointment for his examination and procured an enlargement, and meanwhile, under force of the proceedings, paid the judgment debt, but not the costs of the attempted examination. The Master in Chambers refused to make an order for payment of the costs, thinking he had no power to do so. On appeal:—

Meredith, J.:—"The Rule (1139) plainly contemplates the whole costs properly incurred in all the proceedings requisite in such an examination; it is not limited to such as are incurred after the party or person has been sworn; neither is it proper or needful to limit it to cases in which the proceedings have gone that far; that is quite too narrow a view of its effect.

"I cannot but consider that any, as well as all, of the costs of proceedings for such an examination are under the rule, if not otherwise, in the discretion of the Court or a Judge.

"In this particular case the defendant, having attended upon the appointment and having then procured an enlargement of it, and meanwhile, having, evidently under force of the proceedings, paid the balance of the judgment debt, ought to pay the costs of such proceedings. See *French* v. *Lake Superior Mineral Co.*, 14 P.R. 541." *Popham* v. *Flynn*, 15 P.R. 286.

"Where a transferee of property is served with a motion for his examination under Rule 903, and the motion is abandoned or dismissed, the party served is entitled to his costs." *Lumbars* v. *Dundass*, 7 O.W.R. 230.

## EXECUTIONS.

Prior to the Judicature Act the practice had obtained of giving an unsuccessful party, against whom judgment had been entered, time to receive communication from his solicitor advising him of the result of the taxation before issuing executions. The old cases are not always consistent, but it was undoubtedly irregular to take out a *fi. fa.* the instant costs were taxed without allowing a reasonable time for the solicitor of the client who had to pay to communicate with his client. *Cullen* v. *Cullen*, 2 Chy. Ch. 94.

And see *Parkhill* v. *McLeod*, 2 C.L. Times 37; *Coolidge* v. *Bank of Montreal*, 6 P.R. 73; *Davidson* v. *Grange*, 5 P.R. 258.

It has been held, however, that the word "immediately" in Con. Rule 863 means "instanter," and a party to whom costs are awarded may issue execution therefor on the day of taxation. *Clarke* v. *Creighton*, 10 C.L. Times 342, 14 P.R. 34.

This rule also abrogates the old practice, under which a judgment creditor was held to have waived his right to costs by issuing execution for the debt before taxing his costs. *Harris* v. *Jewell*, W.N. 1883, 216.

## EX PARTE ORDERS.

No fiat should be granted for counsel fee for an attendance to obtain an *ex parte* order. The tariff does not contemplate it, and it is not to be stretched to cover such a case. *Carlisle* v. *Roblin*, 16 P.R. 328.

Where interim orders were made *ex parte* and by the orders costs were given to the applicants; held that the disposition of the costs should not be reviewed on a motion to continue the order. *Stark* v. *Ross*, 17 P.R. 237.

Where one of the Vice-Chancellors made an order *ex parte* that a person ordered to attend as a witness should pay the costs of the application, the Court, on appeal, held that the order as to costs was irregular, the Court having no authority to give costs against an absent person upon an *ex parte* application. *Cast* v. *Poyser*, 26 L.J. Chy. 353.

## EXPERTS.

*Con. Rule 94.*—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 in evidence in any cause or proceeding, and may act on the certificate of such persons. Con. Rule 207.

This rule does not authorize a Master to whom a cause is referred to employ experts.

Although a Master has no power to employ experts, where, in an administration action he had at the instance of the plaintiffs, and with the consent of the creditors, engaged the services of an expert, and these services had been of benefit to the estate, the Court held that the creditors could not afterwards, on the taxation of costs, object to the allowance for the sums paid to such expert. *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

By Chy. O. 240 (now Con. Rule 683), the Master may substitute a different course of proceedings for that ordinarily taken. A Master had reported in a partition matter, but the report was referred back to him to take further evidence. The Master being, apparently, unable to devise a scheme of partition, appointed two skilled persons to prepare a scheme. This was done, and on the evidence of these witnesses the Master adopted a scheme of partition. The taxing officer disallowed two sums of $110 and $115 paid these two persons. Ferguson, J., held that the course adopted by the Master was a reasonable one, and that these fees should be taxed. *McKay* v. *Keefer*, 12 P.R. 256.

The travelling expenses of experts were allowed in *Churton* v. *Frewen*, 15 W.R. 559.

An allowance was made for preparing partnership accounts in the Master's office, where it was not the duty of either partner to prepare them. *Scott* v. *Griffen*, 8 C.L. Times 452, Taylor, C.J. (Man.).

In an action for damages sustained in using an electric machine, two witnesses being put in the box refused to testify to any matters of opinion unless paid \$100 and \$50 respectively. The trial Judge held that the witnesses were not bound to give expert opinion evidence unless paid the fees demanded. On appeal:—

Meredith, C.J.:—"I am unable to understand upon what principle an "expert witness" whether coming within either of the classes mentioned in items 119 and 120 or not is entitled to refuse, until he has been paid his fee for the opinion he is called on to give, to testify as to any matter relevant to the issues as to which he is competent to speak, though it be requisite for him to use his technical knowledge or skill in order to answer the questions put to him.

"It would be a serious hindrance to the proper administration of justice if an 'expert witness,' who may or may not be of the learned professions, were at liberty to refuse to testify unless upon the condition of being paid for the opinion, which he is called upon to give; and I know of no distinction in this respect between an 'expert witness' who is of the learned profession and one who is not.

"It would be quite another matter to require an expert witness to qualify himself to give an opinion by an examination of the person or thing as to which his opinion is asked, or by doing anything else that would require study or preparation, and I am not to be understood as referring to such a case, but to cases where the witness is able from the knowledge or skill he possesses to give an answer to the question propounded to him." *Butler* v. *Toronto Mutoscope Co.* (1905), 11 O.L.R. 12.

In the Scotch case of *Turnbull* v. *North British Ry.* (1903), 5 Ct. of Sess. Cases 944, Lord McLaren said:—

"Now, when a medical man or a lawyer is called as a witness to speak to matters of fact, he is in no more favoured position than any other citizen. He may be compelled to attend the trial, and he is entitled to receive no more and no less than the fees allowed by the Act of Sederunt. In his case they may be an altogether inadequate recompense for his time and trouble in connection with giving evidence; but that is just one of the burdens which the duties of citizenship impose upon him, and the Court can allow no higher standard of remuneration in his case. But when a medical man is desired to give evidence as to matters of opinion, he is not a compellable witness; and as it is open to him to refuse to attend unless he gets what he considers an adequate fee, he is entitled to make his own bargain as to his remuneration."

But in Ontario the expenses incurred in order to qualify a witness to give evidence are not taxable as between party and party. In this respect our rule differs from the English order by omitting the part relating to procuring evidence. *McGannon* v. *Clarke*, 9 P.R. 555. And see under WITNESSES.

Rule 94 does not, however, authorize the Court after the evidence has been taken, to call in the aid of experts and base its judgment on their opinion as to the result of conflicting technical evidence. *Wright* v. *Collier*, 19 A.R. 298.

Where a professional accountant was employed by direction of the arbitrator to examine the defendant's books at the defendant's counting-house, and to ascertain for the purposes of the reference, the amount of the profits on certain contracts, as shewn by such books, which investigation would otherwise necessarily have been held before the arbitrator himself, and at a greater expense to the parties, the charges of the accountant and of the solicitor attending the meetings were allowed. *Hawkins* v. *Rigby*, 29 L.J.C.P. 228.

## FEES.

See TEAM FEES.

## FIATS.

The clerks of Assize have now instructions to endorse on the records the names of counsel engaged in the trial, the number of witnesses sworn, and the time occupied by the trial. An affidavit to obtain increased counsel fees is therefore unnecessary, and will not be allowed on taxation. Rep. I.L.O., 1887.

Instructions to apply for fiats will not be allowed. Rep. I.L.O., 1885.

The local taxing officers cannot allow larger fees than $40 and $20 without fiat, even by the consent of the solicitors. Rep. I.L.O., 1887.

## FILINGS.

The costs of affidavits irregularly filed (*e.g.*, filed in the wrong office) should nevertheless be taxed, if otherwise taxable, where they have been before the Court on the motion and are recited in the order made therein. *Sturgeon* v. *Sturgeon*, 19 P.R. 286.

The appeal bond, and affidavits of execution and justification, are separate documents, and must be stamped as such when filed. *Mocbeth* v. *Smort*, 1 Chy. Ch. 269.

## FOLIO.

A folio is 100 words. Rule 321. In England it is 72 words, every figure being counted as a word.

## INCUMBRANCERS.

No creditor need make an affidavit or attend the Master's office in support of his claim (except to produce his security, if any), unless served with a notice to do so. Con. Rule 704.

Parties attempting to prove claims as creditors or heirs-at-law, who fail to establish their claim, may be ordered to pay the costs occasioned to the opposite party. *Hatch* v. *Searles*, 2 Sm. & G. 147, at p. 157; *Re Knight*, 57 L.T. 238.

The costs of proving a claim are added to the claim, and where there is a deficiency of assets the costs are only paid proportionately and not in priority to the debts. *Re Ætna Fire Insuronce Co.*, 17 Gr. 160; *Morse...* v. *Reynolds*, 21 Beav. 638.

The costs of proving an ordinary claim in the Master's office on a mortgage security, judgment debt or simple contract, where the solicitor for the incumbrancer or creditor appears personally, is $8, and where an agent of the solicitor is required to attend $10. The Master's fee is $1.50 for hearing and determining, and 10 cents for filing, no bill of costs or taxation being necessary. Rep. I.L.O., 1885.

Where the claim is disputed and there is a contest, the Master may allow the claimant a larger sum, or a taxed bill, in case he succeeds, and may direct such costs to be paid by the party disputing the claim, or out of the estate. If the claimant fails the costs of the contest may be taxed against him.

In *Belcher* v. *Williams*, 45 Ch. Div. 510, North, J., decided that in a partition action the costs of incumbrancers on particular shares should be paid generally out of the estate, and not out of the particular shares encumbered. In *McDougall* v. *McDougall*, 14 Gr. 267, Vankoughnet, C., came to the opposite and, we think, the preferable conclusion.

Where a person made a party to the action in the Master's office appears and disclaims he is not entitled to any costs, as by remaining inactive the same end will be attained as by his disclaiming. *Hall* v. *Park*, 6 Gr. 553.

## INFANTS.

An infant must sue by a next friend. Con. Rule 1907. If no next friend is named the solicitor who issues the writ or institutes the proceedings may be ordered to pay the costs of the defendant. *Flight* v. *Bolland*, 4 Russ. 298.

Any person is at liberty to act as next friend of an infant, but the father, if not adverse in interest, is the proper person to act. *Woolf* v. *Pemberton*, 6 Ch. D. 19.

It is not necessary that the next friend be a solvent person, and he cannot be ordered to give security for costs if resident within the jurisdiction. *Re McConnell*, 3 Chy. Ch. 423; *Fellows* v. *Barrett*, 1 Keen 119.

A married woman cannot be a next friend. *Thynne* v. *St. Maur*, 34 Ch. Div. 465

As between the next friend and the defendants, the former is in the same position with respect to costs as any other plaintiff, and the action will, in a proper case, be dismissed with costs payable by the next friend. *Frank* v. *Mainwaring*, 4 Beav. 37; *Smith* v. *Mason*, 17 P.R. 445. But as between the next friend and the infant, if the action is properly instituted for the infant's benefit, the next friend, though *primâ facie* liable for the infant's solicitor's bill of costs as well as those of the other side, will be entitled to the costs out of the infant's estate. *Taner* v. *Ivie*, 2 Ves. 467; *Smith* v. *Mason*, *supra*. In general the next friend's costs will be allowed as between solicitor and client. *Brown* v. *Wetherhead*, 4 Ha. 122. And see *Vano* v. *Canadian Colored Cotton Mills Co.* (1910), 21 O.L.R. 114.

Where at the hearing costs are ordered to be paid by a next friend, without any reservation of the question who is to bear them ultimately, the order is final against him personally. *Caley* v. *Caley*, 25 W.R. 528.

The official guardian's costs of defending an action on behalf of an infant defendant were ordered to be paid by the plaintiff, although the plaintiff succeeded and the defendant had been found to be a party to a fraud. *Westgate* v. *Westgate*, 11 P.R. 62.

The last case seems difficult to defend on any sound principle, and was not followed in *Lipsett* v. *Perdue*, 18 Ont. 575, although not expressly dissented from. In that case the infant defendant endeavoured, without success, to avoid a lease. In dismissing the action, Street, J., said: "I have found no satisfactory authority, and no intelligible principles laid down, in either the books or the cases. At law, it appears that an infant defendant might be made liable for costs. *Anderson* v. *Warde*, Dyer 104; *Gardener* v. *Holt*, 2 Stra- 1217.

"Rule 1170 (now 1130) gives a discretion as to costs which seems wide enough to extend to the present case . . . and the defendant should be ordered to pay the plaintiff's costs, including the costs which they pay the guardian, these being added to their own upon the authority of Rule 1170."

In the Divisional Court, Rose, J., delivering the judgment of the Court, said: "The distinction between ordering costs to be paid out of the infant's estate, and ordering the infant to pay the costs to be realized out of his estate, is too fine to be practical. I see no reason why, in a proper case, there should not be an order for costs against an infant, to be recovered in the usual way. In *Defries* v. *Davies*, 3 Dowl. 629, the Court had so little tenderness for the infant that it held that, where he could not satisfy the costs out of his estate, he must afford the creditor the satisfaction of having his person in execution."

The costs of serving an infant personally who is out of the jurisdiction will not be allowed, an order should be obtained appointing a guardian *ad litem*. *Rew* v. *Anthony*, 9 P.R. 545.

## INJUNCTION MOTIONS.

The Court has full jurisdiction to deal at its discretion with the costs of a motion for an injunction on notice at the time of the application. *Pearce* v. *Wycombe Ry. Co.*, 17 Jur. 660. But inasmuch as it may ultimately turn out that the merits of the case may be very different from those which appear on the face of the matter at the time of the application, the usual course of the Court is to order that the costs of the application shall be costs in the cause and whoever gets the costs in the cause will have the costs of the proceeding. Kerr on Inj. (3rd ed.), 30.

Where the plaintiff's legal right is invaded he is under no obligation to make an application to the defendant before applying for an injunction. The plaintiffs were manufacturers of cigars, and the defendant purchased abroad a large number of cigars for his private use. The cigars were consigned to the defendant in boxes bearing the plaintiff's brand, but the defendant was no party to this. Without communicating with the defendant the plaintiffs issued a writ and applied for an injunction to restrain defendant from selling the cigars, whereupon the defendant stated he had no intention of selling the cigars, and offered all the relief asked for by the writ. Chitty, J., in disposing of the costs, said: "There has been a wrongful user prior to the commencement of the action, and the plaintiffs, therefore, were entitled to an injunction or undertaking. They are, therefore, also entitled to costs. Although as against the defendant the case may be a hard one, he must not on that account be excused from payment of costs. As the late Master of the Rolls said in *Cooper* v. *Whittingham*, 15 Chy. Div. 501, he cannot be allowed to escape by saying, 'I never intended to do wrong,' and to use an observation of the same learned Judge, as there is no fund out of which successful plaintiffs can receive costs, their costs must be paid by defendants, although they may be innocent." *Upmann* v. *Forester*, 24 Ch. Div. 231.

In *Upmann* v. *Elkan*, L.R. 12 Eq. 140, Lord Romilly takes the same view; he says: "It has never been laid down that a plaintiff entitled to relief must, before filing a bill, apply to the defendant and ascertain previously whether he will do without suit all that is required, although such a rule might, and probably would, be a very useful one."

The same rule was followed in *Wittman* v. *Oppenheim*, 27 Ch. Div. 260, where the defendant had innocently infringed the plaintiff's registered design.

Where a motion for an injunction is refused, the proper course is not to give the costs of the application; as, if the suit fails, the plaintiff must pay the costs: and if it succeeds, the judgment pronounced at the trial provides for the paymen of them. *Carruthers* v. *Ardour*, 7 Gr. 34.

Where an *ex parte* injunction is dissolved on the ground of concealment of the true state of facts, it is proper to dissolve it with costs; and the "with costs" in such case means "with costs payable forthwith." *Walton* v. *Henry*, 13 P.R. 390; *Holden* v. *Waterlow*, 15 W.R. 139.

Where a suit is dismissed with costs a defendant is entitled to his costs of unsuccessfully opposing a motion for an injunction as "costs in the action." *Stevens* v. *Keating*, 1 M'N. & G. 659, 663.

Where the plaintiff succeeded in the suit, but was ordered to pay the costs of it up to a certain day, which was after an injunction obtained in the suit had been dissolved, it was held that he must pay the costs of the motions to obtain and dissolve the injunction. *Walter* v. *Danby*, L.R. 4 Ch. 372.

Where a judgment dismissed the action with costs, and no reference was made to the costs of an interim injunction adjourned to the trial, but not then brought on, it was held, nevertheless, that the costs of this motion should be taxed to the defendant as part of the costs of the cause. *Gosnell* v. *Bishop*, 38 Ch. Div. 385.

The decree in the cause gave the plaintiff the general costs thereof.

*Held*, that this did not carry the costs of rehearing an interlocutory order made refusing an injunction, and such order was reversed on rehearing; the practice requiring that where costs of rehearing are intended to be given they must be expressly mentioned in the decree or order giving the costs of the cause. *Mossop* v. *Mason*, 20 Gr. 406.

Pending a motion for injunction, the plaintiff took out a *Præcipe* order to dismiss his bill.

*Held*, that the defendant's costs of the injunction motion were properly taxable under this order. *Jenkins* v. *Ryan*, 5 Man. L.R. 112, 8 C.L. Times 30.

In an action to restrain the defendant from maintaining fences across certain streets, the plaintiff succeeded, and was given the general costs of the action, but he was not only refused the costs of an interim injunction (which had been reserved) but was ordered to pay the defendant's costs of the motion for it. Street, J., observed that the interim injunction was entirely unnecessary; there was no such serious and immediate damages to be apprehended as could alone justify a party seeking the extraordinary interference of the Court. *Sklitzsky* v. *Cranston*, 22 Ont. 590.

In *Johnson* v. *Jenking*, 13 C.L.T. 270 Rose, J., in dismissing the motion to continue an injunction, made the costs costs in the cause to the defendant in any event. The dispute was over a line fence between farms, and the Judge said: "Surely the re-erection of a fence on the old line—no other fact appearing—was not a ground for granting an injunction before the plaintiff had established his claim that the old line was not the true one."

See further, under MOTIONS.

## INSPECTION OF DOCUMENTS.

*Con Rule 1155.*—An allowance shall not be made for any order for production or any notice or inspection under any of the rules relating to the production and inspection of documents unless it is shewn to the satisfaction of the taxing officer that there were good and sufficient reasons for taking the order, giving the notice, or making the inspection. Con. Rule 1196.

See also Rules 469, 470, 471.

*Brown* v. *Sewell*, 16 Ch. Div. 517, is cited in some of the recent works on practice as the rule governing the costs of inspection in Ontario. That case decided that wheu an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party, if ultimately successful in the action, is not entitled, as between party and party, to the costs of the production, nor to his own costs of inspecting the documents of the other party.

In respect to this decision, it is to be observed that at that time there was no tariff item allowing costs for attending on such inspection: see Wilson's Jud. Act (2nd ed.), pp. 459-462. Nor in England is there now. McKenzie's Yearly Practice (1907), 1076. In the former tariff there is a fee allowed for attendance to inspect or produce for inspection documents referred to in any pleading or affidavit pursuant to notice under Order xxxi., R. 14, our Con. Rule 469(1). See Form 60; Wilson's Jud. Act, 459; McKenzie's Yearly Prac., 1077. There is no such item as our No. 90, which allows costs for "an inspection of documents when produced under order." The English case, therefore, does not govern. *Plenderleith* v. *Parsons* (1907), 15 O.L.R. 397.

## INSPECTION OF PROPERTY.

In an action for the infringement of a patent, it was agreed, between the solicitors for the parties, that the defendant's counsel and expert should be allowed to inspect certain machinery, and, to avoid costs, that no order should be taken out for that purpose. The defendant having succeeded the taxing master held he had no authority to tax the defendant the costs of the inspection, because an order had not been obtained for the inspection. On appeal: —

Joyce, J.:—"The inspection is found and also admitted to be necessary and proper, and I think it would be the worst possible precedent if the costs of it were disallowed merely because the inspection was made without an order of the Court having been obtained. I therefore allow these costs." *Ashworth* v. *English Card Clothing Co.* (1904), 1 Ch. 702.

See Con. Rule 1096.

The costs of inspecting property by a jury are governed by Con. Rule 572. The costs are paid by the party requiring the view unless the Court or a Judge otherwise orders.

## INSTRUCTIONS.

Instructions for brief should be allowed where the brief itself is allowed. *McCallum* v. *McCallum*, 11 P.R. 179.

Instructions for brief cannot be allowed where the plaintiff, a solicitor of the Court, is acting in his own behalf. *Malone* v. *Davies*, 10 C.L. Times 18.

A solicitor who is a litigant, although sueing or defending by another solicitor, cannot tax instructions. *Scott* v. *Petrie*, 29 June, 1894, *per* MacMahon, J.

The decision of the Master in Chambers in *Clarke* v. *Creighton*, 25 C.L.J. 380, is either wrongly reported, or is not to be followed.

But where a solicitor acts for himself and his co-trustees in an action, he is entitled to charge for instructions. *Strachan* v. *Ruttan*, 15 P.R. 109.

Instructions for brief upon arbitration proceedings should be allowed. *Re Oliver* (1904), 7 O.L.R. 567.

"Instructions to move for costs of arbitration" was held properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff. *Ib.*

No instructions for brief, or brief, allowed on a motion in Chambers. Rep. I.L.O., 1885.

A bill had been filed but not served, and it was subsequently dismissed with costs to be paid by the plaintiff. It appeared that though no answer had been drawn the defendant's solicitor had received instructions to defend some two months before the dismissal of the bill.

*Held*, that the defendant was entitled to tax instructions and the costs of the taxation. *Bissett* v. *Strachan*, 8 P.R. 211.

Instructions for order to produce is a common instruction —50 cents. Rep. I.L.O., 1886.

Instructions for the examination of the plaintiff $2, and instructions for the examination of the defendant $2, should be allowed, as well as attendance to bespeak copy of depositions of plaintiff, fifty cents, and attending to bespeak copy of depositions of defendant, fifty cents. Wilson, C.J., *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

Instructions for pleadings can only be taxed once in the course of the action. Where instructions for statement of claim had been allowed instructions for reply were taxed off. *Torrance* v. *Torrance*, 9 P.R. 271, 2 C.L. Times 311.

Instructions for appeal to the Court of Appeal should be allowed at $2. See APPEAL. *Barber v. Morton*, 2 C.L. Times 340.

No instructions should be allowed for an ordinary affidavit of disbursements. *Alexander v. School Trustees of Gloucester, supra.*

Instructions for suit cover instructions for *lis pendens.* Rep. I.L.O., 1886.

Where an order to examine a party is necessary $1 is a proper allowance for instructions for the order. *Ib.*

Where a solicitor makes an affidavit on which to get an order allowing service, instructions for the affidavit are not taxable. Rep. I.L.O., 1885.

Instructions to apply for fiats for increased counsel fees is not a taxable item. *Ib.*

Instructions will not be taxed for the ordinary *præcipe* order to produce documents. *Ib.*

Where the defendant appears to a specially endorsed writ of summons, and judgment is signed under Con. Rule 603, the plaintiff is entitled to $4 for instructions to sue. *Ib.*

Where instructions are allowed for a motion in Chambers not less than $1 should be taxed. *Ib.*

Instructions for affidavit on production of documents in ordinary cases $1. *Ib.*

The English practice provides for a further allowance for instructions, to sue or defend, and for briefs, if the taxing officer shall, on special grounds, consider the fee in the tariff inadequate. There is no such provision in our Act or rules.

## INTERLOCUTORY APPLICATIONS AND ORDERS.

Under section 73 of the Judicature Act certain interlocutory orders are not appealable. Under Rule 1165 interlocutory costs in the same action may be set off, and under the County Courts Act, an order made in a County Court action, that is merely interlocutory and not final, is not appealable.

For instances of order that have been held to be interlocutory, see Holmested & Langton (2nd ed.), 119; Stroud's Judicial Dictionary, 400; *Babcock* v. *Standish*, 19 P.R. 195; *Girardot* v. *Welton*, 19 P.R. 201.

The word "interlocutory" as used in the Judicature Act is to be given a liberal meaning. It is not to be restricted to matters or proceedings between writ and judgment, but may extend to applications made to satisfy, by equitable execution or otherwise, the judgment obtained. That is the view affirmed by *Salt* v. *Cooper*, 16 Ch. Div. 544, and *Smith* v. *Cowell*, 6 Q.B.D. 75. Proceedings may be considered interlocutory until satisfaction is obtained on the judgment. *Clarke* v. *Creighton*, 14 P.R. 34.

In *British Natural Premium Association* v. *Bywater* (1897), 2 Ch. 531, Bryne, J., said that the Judges of the Chancery Division had, for the guidance of the taxing masters, given the following directions:—

Where interlocutory applications have been ordered to stand to the trial and are not mentioned to the Judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment.

Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or orders, or allowed on taxation, without the special direction of the Judge.

No such general rule as above referred to has been laid down in Ontario, but it seems to be merely declaratory of the practice, and will probably be followed here.

But where the costs of the interlocutory proceedings have been disposed of by the order made upon the application, the Court or Judge, on the final disposition of the action, has no power to make the costs payable otherwise. *Beynon* v. *Godden*, 4 Ex. D. 246; *Dickerson* v. *Radcliffe*, 19 P.R., p. 224.

Where an interlocutory order makes the costs of the application "costs in the cause," that is not a final disposition of the costs, and the discretion of the trial Judge is not ousted. See *Dickerson* v. *Ratcliffe*, *supra*, and *Muir* v. *Squire*, 19 P.R. 237, under the title "Costs in the Cause."

Where under the judgment the costs of the action are to be taxed to one party, and under interlocutory orders the costs thereof are taxable to the opposite party, the taxing officer should not close the taxation of the costs of the action until the opposite has had a reasonable time to tax the interlocutory costs. *Cousineau* v. *Park*, 15 P.R. 37.

During the course of the action certain interlocutory costs had been given to defendant in any event. Afterwards the action was settled, "each party shall pay his own costs." The defendant contended, that notwithstanding the terms of the settlement, he was entitled to the interlocutory costs, relying on *Walter* v. *Bewicke*, 90 L.T.J. 409. The Master in Chambers held, that although a judgment of the Court at the trial does not interfere with interlocutory costs, where a judgment is by consent such costs are not recoverable. *McDonald* v. *Crites*, 7 O.W.R. 795.

As a rule the Court will not, on appeal, interfere with the taxing officer's discretion as to allowance of interlocutory costs. *Smith* v. *Harwood*, 17 P.R. 36.

See *post*, under MOTIONS.

## INTERLOCUTORY JUDGMENT.

See *Hamilton* v. *Hamilton, Grimsby & Beamsville Ry.* (1907), 15 O.L.R. 50, *ante*, under "Counsel Fees, (8) Miscellaneous," and *Whitting* v. *Fleming* (1908), 16 O.L.R. 263.

## IRREGULARITIES.

Where an irregularity is not moved against promptly no costs will be allowed. *Stevenson* v. *Hodder*, 15 Gr. 542; *Harrington* v. *Fall*, 15 U.C.C.P. 541.

Where defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—

*Held*, that he was not entitled to the costs of counsel attending on the motion merely to shew that the motion was irregular. *Waller* v. *Claris*, 11 P.R. 130.

The mere fact that affidavits have been irregularly filed does not determine their taxability. Where, on an injunction motion, affidavits were filed with the clerk in Chambers instead of in the registrar's office as required by Rule 102, but were used on the motion and recited in the order, the Chancellor held that the taxing officer was wrong in refusing to tax them on this ground. *Sturgeon* v. *Sturgeon*, 19 P.R. 286.

It is not open to a party on taxation to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows:—

1. The costs of an order *de bene esse*, irregularly obtained, where no application had been made to set it aside, and the other side had attended on the examination.

2. The costs of an insufficient affidavit on production where an application for a better affidavit had been dismissed and no appeal taken.

3. The costs of an order to examine issued *ex parte*, where an application to set it aside had been refused. Scott, J., *Craig* v. *New Oxley Ranche Co.*, 2 Terr. L.R. 277; Can. Ann. Dig. (1905), 90.

## GUARDIAN'S COSTS.

*Con. Rule 1138.*—Where the Official Guardian or other guardian of an infant, lunatic, or person of unsound mind, is entitled to costs, or is entitled to costs against any party to an action or proceeding, the Court or Judge may order the successful adult party, if any, to pay such costs and add them to his own. Con. Rule 1179.

Except in cases of gross misconduct the guardian *ad litem* of an infant will not be ordered to pay the costs of an unsuccessful defence. *Morgan* v. *Morgan*, 11 Jur. N.S. 233.

In England where the solicitor to the Suitor's Fee Fund is appointed guardian to a defendant who is an infant, or of unsound mind, at the instance of the plaintiff, it is the settled rule that the plaintiff shall pay his costs in the first instance, and add them to his own. *Fraser* v. *Thompson*, 4 DeG. & J. 659; *Clements* v. *Arnold*, 3 Chy. Ch. 76. But in a partition suit, the guardian's costs were charged on the infant's share. *Robinson* v. *Aston*, 9 Jur. 224.

Where a guardian was appointed at the pla ntiff's instance to a defendant alleged to be, but who was not really an infant, the plaintiff bore the costs. *Green* v. *Badley*, 7 Beav. 271, Mor. & W. 343.

In Ontario the position of the official guardian, in respect to costs, must be considered to bear a strong analogy to that of the solicitor to the suitor's fund in England. *Westgage* v. *Westgate*, 11 P.R. 62.

In the last case the official guardian's costs of defending the action on behalf of the infant defendant were ordered to be paid by the plaintiff, although the plaintiff succeeded in the action, and the infant had been found guilty of a fraud.

In a subsequent case of *Lipsett* v. *Perdue*, 18 Ont. 575, where an infant defendant had, unsuccessfully, endeavoured to avoid a lease, the Court ordered him to pay the plaintiff's costs, including the costs of the guardian.

Where the official guardian, or a guardian *ad litem* is ordered to be paid costs, he is to be treated as if he were a successful party. An action of tort was brought against an infant and the official solicitor was assigned to represent him. One of the defences set up was that the infant was of unsound mind, on which the defendant failed. By the judgment it was ordered that the plaintiff should pay the costs of the guardian *ad litem* and add them to his own.

On taxation the Master held that the costs of the official solicitor must be taxed on the party and party scale, and he disallowed altogether the costs of witnesses to prove unsoundness of mind.

Grantham, J., allowed the appeal on both grounds, but the Court of Appeal held, (1) that an order for the payment of the costs of a guardian *ad litem* which gives no special indication of the scale to be applied in assessing the costs, only gives party and party costs; (2) that the guardian was entitled to the costs of the witnesses because he must be treated as a successful party on all the issues. *Eady* v. *Elsdon* (1901), 2 K.B. 460. See INFANT.

## JUDGMENTS.

In an action against two defendants for the price of a machine the plaintiffs signed judgment for default of appearance against the defendant Richards for the whole amount claimed against both defendants, but did not at the time tax costs against him. The defendant Garrett defended the action, but judgment was finally entered against him, also for the full amount claimed with costs, but no special direction was given as to the taxation of costs against the two defendants.

On an application for a direction as to the taxation of costs the Master in Chambers ordered "that the whole costs of action be taxed against the defendant Garrett, including the costs of entering judgment by default against the defendant Richards; costs up to and including such judgment to be also taxed against the defendant Richards, and if recovered from either party to be credited on the judgment against both." *Wilkinson Plough Co.* v. *Garrett*, 7 C.L. Times 22.

Where the Judge directed reasons for judgment in the plaintiff's favour to be put in, the plaintiff's charges for drawing, settling, engrossing, etc., such reasons were held proper. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

There is no necessity for a notice of settling, or of attending to settle a judgment, which simply dismisses the action. Rep. I.L.O., 1887.

Attending to hear judgment, attending to enter judgment. See *ante* under ATTENDANCES.

Judgment on discontinuance. See *ante* DISCONTINUANCE.

A charge for registering a judgment cannot be allowed. *Walt* v. *Lai*, 1 Ch. R. 216.

## JOINDER OF ISSUE.

Instructions for reply or joinder will not be allowed in addition to instructions for statement of claim. Such instructions are only taxed once in the course of an action. *Torrance* v. *Torrance*, 9 P.R. 271.

## JOURNEYS.

See *post*, under TRAVELLING EXPENSES.

## JURY FEE.

The defendant gave notice for a jury and paid the jury fee. A verdict was found in his favour, but a new trial was directed. The plaintiff gave notice of trial again, but the prothonotary refused to enter the record until a further jury fee was paid. The plaintiff then moved to strike out the jury notice, and after argument such an order was made by Bain, J., but upon appeal to the full Court the order was set aside upon the ground that a second payment could not have been exacted. *Elliott* v. *Wilson*, 8 C.L. Times 451, 9 C.L. Times 71, 6 Man. L.R. 63.

See RECORD.

## LETTERS.

A practice obtained of disallowing all agency letters where both principal and agent resided in the same county. In this action it was decided that all necessary letters between a solicitor and his agent on the business of the cause are taxable as between party and party, whether the agent resides in the county town of the county where the solicitor resides, or in another county, or in Toronto. *Agnew* v. *Plunkett*, 9 P.R. 456.

Mr. Winchester, when Inspector of Legal Offices, in his report for 1885, states that the following letters had been disallowed in some bills of costs where they should have been allowed.

Letters to client (1) advising of trial; (2) result of case where judgment reserved; (3) motion to change venue; (4) result of application to Divisional Court.

Letter to agents with papers to file and serve.

Letter to agents with papers to file and serve.

Letter from solicitor returning admission of service of papers sent by opposite party.

Before the action was brought the defendant applied for indulgence, and several letters were, in consequence, written by the plaintiff's attorney. The Court said that the practice was to allow for only one letter before action brought, and that this practice should not be departed from. *Capel* v. *Staines*, 2 M. & W. 850, 6 L.J. Ex. 212.

See further, *ante*, COSTS BEFORE WRIT ISSUED.

The defendant's solicitor had received notice that the plaintiff proposed to cross-examine defendant on his affidavit filed on the reference, and he thereupon wrote his client to call, and the plaintiff objected to the costs of the letter.

RIDDELL, J.:—"It is claimed that the client would have had to call in any case, and that the solicitor should have waited for him to come in. I do not think so. Then it said that the charge should be included in the instructions given when the client did call. I think not." *Plenderleith* v *Parsons* (1907), 15 O.L.R., p. 402.

## LIS PENDENS.

Where a *lis pendens* is proper and necessary, the costs of issuing the same and registering a certificate thereof, are taxable costs in the action.

A *lis pendens* may be vacated by the Court or a Judge at any time, and any party to the application may be ordered to pay the costs thereof. Sec. 98, Jud. Act.

The plaintiff registered a certificate of *lis pendens*, but never proceeded with his action. The defendant entered an appearance gratis and moved to vacate the registration of the *lis pendens*. There being serious doubts as to the *bona fides* of the action the plaintiff was ordered to pay the costs of the motion. *Green v. Temple*, 6 O.W.R. 15.

## MAPS AND PLANS.

*Con. Rule 1174.*—The necessity for maps or 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 an affidavit of disbursements. *Con.* Rule 1213, *part.*

Under the orders and rules of Court in England the taxing masters may allow such just and reasonable charges as appear to have been properly incurred in procuring evidence and the attendance of witnesses. The construction put upon the words "procuring evidence," is, that it was intended to include the costs of witnesses preparing themselves for examination; and under it, the expenses of surveys, and other special work made by surveyors in order to qualify the surveyors to give evidence, were allowed in *Mackley v. Chillingworth*, L.R. 2 C.P.D. 273. Without such a provision the Judges held that the expenses of this nature were not taxable as between party and party. *Nolan v. Copeman*, L.R. 8 Q.B.D. 84.

That part of the English rule relating to "procuring evidence" is omitted from our rule, and the practice in Ontario is to disallow all costs that were not taxable in England before the adoption of the rule above referred to.

Adopted N.S. by Jud. Act p 240

The plaintiff and defendant were owners of adjoining lots, and the plaintiff sued defendant for trespass, cutting timber, etc. Defendant claimed by possession and asserted the line between the lots was not properly drawn.

Boyd, C.:—"The Master has, according to the usual course, allowed for maps and plans which were proper and were used at the trial, but he disallowed charges for maps prepared to identify the details of the line mentioned in the judgment

as that which the Judge considered the true line. The Master considered that though they were useful and convenient it was not proper in the circumstances to allow them. There is no error in principle here, but only a matter where the officer has exercised his discretion, and according to an authority very much in point, of *Pilgrim* v. *Southampton Ry.*, 8 C.B. 25, the Court is not to interfere by way of appeal in such cases.

"Preliminary expenses such as I have been dealing with are matters that the Judge or jury may consider in awarding damages and the like, but so far as the taxing officer is concerned it is not in his power under the present tariff and practice to allow them to the successful party." *McEnamon* v. *Clarke*, 9 P.R. 555.

The Nova Scotia Jud. Act allows a successful litigant to tax "just and reasonable charges aud expenses properly incurred in procuring evidence and the attendance of witnesses," being, in this respect, similar to the English Order.

In an action for trespass committed upon plaintiff's land by entering thereon and cutting trees, there was a judgment for the plaintiff with costs. The plaintiff endeavoured to tax a sum of money paid to a uumber of men for going over the land in question and counting the stumps of trees cut. *Held*, per Longley, J., that the above words could not be interpreted to include the above costs.

*Held*, however, that under the words "maps, plans, surveys," plaintiff was entitled to tax for the services of men employed to assist the surveyor in making a survey of the land, such survey being necessary and having been rendered more difficult by reason of the action of the defendant in destroying trees and obliterating blazed lines. *Ferguson* v. *Chappelle*, 46 C.L.J. 590.

## MECHANIC'S LIENS.

The "actual disbursements" which, by section 42 of the Mechanic's Lien Act, may be allowed in addition to an amount equal to 25% of the claim, are restricted to professional disbursements, and do not include fees paid to counsel by the solicitor as agent of his client. *Cobban* v. *Lake Simcoe Hotel Co.* (1903), 5 O.L.R. 447.

## MILEAGE.

See *post*, SERVICE OF PAPERS.

## MORTGAGEE AND TRUSTEE SOLICITOR.

In *Cradock* v. *Piper*, 1 Mac. & G. 664, 84 R.R. 233, Lord Cottingham, L.C., held that a solicitor appearing for himself and his co-trustees in a suit, was entitled to full costs as if he was not a party, except in so far as the costs were not increased by his being a party.

The soundness of this decision has been questioned more than once, but in spite of the adverse criticism it must now be considered the settled practice.

In *Re Corselles*, 33 Ch. Div. 160, it was strongly impugned by Kay, J., and commented on by Cranworth, L.C., in *Broughton* v. *Broughton*, 5 D. M. & G. 160; but in *Re Barber*, 34 Ch. Div. 77, Chitty, J., declared the decision has not been overruled and followed it. The judgment of Chitty, J., was affirmed by the Court of Appeal, 34 Ch. Div. 675. Lindley, L.J., said he did not admire the decision in *Cradock* v. *Piper*, but it had been acted on for so long as a binding authority it ought not now to be overruled.

*Cradock* v. *Piper* was followed in our own Courts in *Strachan* v. *Ruttan*, 15 P.R. 109; *Pearson's Case*, 26 Ont. 289, and *Re Williams* (1902), 4 O.L.R. 501.

In *Re McNab*, 19 C.L.T. 74, it was held that a solicitor-trustee, acting on behalf of himself and his co-trustee, is entitled to profit costs for preparing the accounts of the trustees and attending the audit thereof before the Judge of the Surrogate Court.

While refusing to overrule the judgment in *Cradock* v. *Piper* the Courts have said that the principle of that decision must not be extended, and have refused to allow a sole trustee to tax more than his actual disbursements, or costs out of pocket. It will also be limited expressly to costs of litigation, and will not be extended to proceedings or professional services rendered to the estate out of Court. *Pearson's Case* and *Re Williams, supra.*

Nor will the principle be extended to a mortgagee solicitor. A solicitor-mortgagee acting as solicitor for himself is entitled to costs out of pocket, but not to remuneration for his trouble. *Stone* v. *Lickorish* (1891), 2 Ch. 363.

In *Re Doody Fisher* v. *Doody* (1893), 1 Ch. 129, the Court of Appeal held that a solicitor-mortgagee, acting as solicitor for himself and his co-mortgagee, cannot charge any profit costs against the mortgagor, either as to proceedings in an action, or business done out of Court. Stirling, J., said that in principle there is nothing to prevent a partner of the solicitor-mortgagee from receiving remuneration for his trouble, and, in the absence of any agreement that the solicitor-mortgagee is not to share in the profits arising from the litigation, the proper course is to ascertain what the profit costs are, and then to allow the other partner the same share in them as he is entitled to in the general profits of the partnership business.

In *Eyre* v. *Wynn-Mackenzie* (1894), 1 Ch. 218, Kekewich, J., followed the suggestion of Stirling, J., in *Re Doody.*

Where the mortgagee employs an agent to take sale proceedings, and the agent is not a certified solicitor, he cannot tax more than costs out of pocket. *In re McArthur*, 12 O.W.R. 177.

## NEW TRIAL.

Where a new trial was occasioned by a misunderstanding between the counsel for the respective parties as to the terms on which a verdict had been taken, a new trial was granted without costs. *McLeod* v. *Boulton*, 2 U.C.Q.B. 44.

Where it was held that both parties to the action were entitled to a new trial because of the contradictory findings of the jury, and a new trial was ordered, no costs of the appeal or of the application for a new trial were allowed, and the costs of the former trial were made costs in the cause. *Kirk v. Chisholm*, 39 N.S.R. 98, Can. An. Digest (1906), 78.

Where the trial Judge had taken the matter into his own hands at the trial, and nonsuited the plaintiff against the wish of the defendants, who desired to give all their evidence and complete the case; the Court of Appeal, in granting a new trial, held there was nothing shewn by the respondent to induce the Court to depart from the general rule; and the defendants were orderd to pay the costs of the appeal, the lost trial, and the motion in term. *Mills v. Hamilton Street Ry. Co.*, 17 P.R. 74.

The defendant applied for a new trial on the ground that the trial Judge misdirected the jury. The application was opposed, but the new trial was ordered. The Court reserved judgment as to costs to ascertain what the rule was, and in giving judgment said there was no absolute rule applicable to all cases, but that the Court has a discretion—that where there is an application for a new trial and the appl[illegible]on is opposed and a new trial is granted, the costs of that s[illegible]essful application ought, in the absence of special circumstances, to be borne by those who oppose it. *Hamilton v. Seal* (1904), 2 K.B. 262.

A new trial was ordered, and the order directed the costs of the first trial should abide the result of the new trial. At the second trial the jury gave one farthing damages, and the Judge refused to give the plaintiff any costs.

Lord Esher, M.R.:—"The part of the order in question related to costs only—to the costs of the first trial. It says, in effect, that the result with regard to the costs of the first trial is to be the same as the result of the second trial with regard to the costs of that trial. It seems to me clear that the "result" as used in that order means the result of the second trial so far as costs are concerned. If the result of the second trial is that the plaintiff has no costs of that, then the same result must follow as to the first trial." *Botherton* v. *Metropolitan Ry.* (1894), 1 Q.B. 666.

See TRIAL.

## MOTIONS.

In disposing of the costs of interlocutory applications the Court is generally guided by the following rules laid down by Sir John Leach, V.-C., in 1823:—

"First, that the party making a successful motion is entitled to his costs as costs in the cause; but the party opposing it is not entitled to his costs, as costs in the cause.

"Second, that the party making a motion which fails is not entitled to his costs, as costs in the cause; but the party opposing it is entitled to his costs, as costs in the cause.

"Third, that when a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause."

The exceptions to these rules occur chiefly:—

(1) Where, on the merits the costs are reserved until the trial or other disposition of the action.

(2) The party moving, although successful, must pay the costs of the application if it is rendered necessary by his own default; or where he is asking an indulgence; or where he raises a new defence by amendment.

(3) Where the motion is rendered necessary by the respondent's default, the respondent must pay the costs of it. Mor. & W., 49-54.

Maclennan, J.A.:—"Mr. Hodgins also urged that, even if his motion should not be granted, the costs should be costs in the appeal; that such was the rule. I do not think the cases cited by him (*Burdick* v. *Garrick*, L.R. 5 Ch. 453; *Adair* v. *Young*, 11 Ch. Div. 136, H. & L. 1003) support that proposition. It is a motion which fails, and as a general rule the successful party should have costs." *Wintemute* v. *Brotherhood*, 19 P.R. 6.

Costs should not be given against the opopsite party on an *ex parte* application. *McLean* v. *Allen*, 14 P.R. 84; *Nokes* v. *Gibbon*, 33 Jur. N.S. 282.

It is now a settled rule that the party moving may be granted the costs of the motion, though they are not asked for in the notice of motion. Mor. Wurt. 46; *Ontario Bank* v. *Leacock*, 6 C.L. Times 355; *Sanders* v. *Christie*, 1 Gr. 137; *In re Peck and The Corporation of the Town of Galt*, 46 U.C.Q.B. 211.

Generally the costs of a successful party on interlocutory applications will be costs in the cause without express directions. *Hind* v. *Whitmore*, 2 K. & J. 458; *Harris* v. *Hillard*, 20 L.T. 216.

Where a motion by the plaintiff was ordered to stand till the hearing, no order being made as to costs, and the plaintiff ultimately obtained a decree with costs, but the costs of the motion were not mentioned in the decree, it was held that the motion was substantially a successful one, and that the costs of it were costs in the cause. *Mounsey* v. *Earl of Lonsdale*, 10 Eq. 557, 6 Ch. 141; and see Mor. & Wurt. 48.

Where a motion is made in Chambers and argued as a Chamber motion the Judge has no power to issue the order as a Court order, so as to tax the costs of a Court motion. *Re Flemming*, 11 P.R. 272.

Three interlocutory motions were made during the progress of the action, and the orders made thereon gave the plaintiff costs of the motions "in any event of the action." The plaintiff succeeded, but was only awarded costs on the County Court scale.

*Held*, that the costs of these motions should be taxed on the County Court scale, as well as the general costs of the action. *Blake* v. *Toronto Brewing and Malting Co.*, 8 C.L. Times 123.

Where a motion is treated as abandoned, and the opposite party intends to ask for the costs of an abandoned motion, he ought before doing so to communicate his intention to the party by whom the motion was made. *Aitken* v. *Dunbar*, 25 W.R. 366; *Griffen* v. *Allen*, 11 Ch. Div. 913.

The costs of all work relating to affidavits or pleadings reasonably and properly and not prematurely done, down to the time of an abandoned motion or discontinuance of an action should be allowed on taxation. *Harrison* v. *Leutner*, 16 Ch. Div. 559.

And see Dan. Chy. Pr., 1557, 1561.

The costs of a successful motion to commit any person for contempt are payable by such person. *Pennel* v. *Roy*, 1 W.R. 271.

But where the object of the motion is to obtain an apology and payment of costs rather than a committal, the Court is inclined not to grant costs. *Plating Co.* v. *Farquharson*, 17 Ch. Div. 49.

Where costs are reserved until the trial or further order they should, it seems, be mentioned to the Court and provided for by the judgment or subsequent order; where, however, an action is dismissed with costs this includes all costs reserved. Mor. & Wurt. 50.

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—

*Held*, Wilson, C.J., that the defendant was not entitled to the costs of counsel attending merely to shew that the notice was irregular. *Waller* v. *Claris*, 11 P.R. 130.

A motion for attachment when made for non-compliance with the rules of practice or with orders of course, should be made in Chambers; but when made for non-compliance with a judgment of the Court, should be made in Court. *Klein* v. *The Union Fire Insurance Co.*, 3 C.L. Times 602.

Where a motion is made in Court that could be made in Chambers, the party moving will be allowed no costs, other than those of a Chamber motion. *King* v. *Connor*, 9 Gr. 364.

A person of the same name as the defendant was served.

by mistake, with a copy of the writ. A motion was made for judgment under Rule 324 (now Con. Rule 744). The person served appeared on the motion and asked for costs.

Osler, J.:—"As to costs, I think the person served is entitled to his costs of coming here to oppose the motion. He did not appear merely to ask for his costs, but *quia timet* an order would be made against him. See *The Great Northern Committee* v. *Trett*, L.R. 2 Q.B.D. 284, and *Campbell* v. *Holyland*, L.R. 7 Ch. Div., at p 175." *Lucas* v. *Fraser*, 9 P.R. 319.

A counsel fee of $10 was allowed on a motion for security for costs. *Bell* v. *Landon*, 9 P.R. 100.

Upon an interlocutory application the defendant refiled material used by him upon a previous application which he had made and which had been refused without costs. An order was granted upon the new application with costs. Upon taxation the Master allowed the costs of preparing the old material; but upon appeal,

*Held*, that such costs were improperly allowed. *Hooper* v. *Bushell*, 5 Man. L.R. 300, 8 C.L. Times 261.

A notice of motion was served by the plaintiff for a day on which the Court was not sitting, and was not served two clear days. The Court held that the notice was so obviously bad that it could not be cured, and that the defendants need not have appeared on it, and their costs were refused. *Daubney* v. *Shuttleworth*, 1 Ex. D. 53.

A motion for speedy judgment failed because the plaintiff's solicitor had improperly indorsed his writ of summons. On a taxation between solicitor and client the solicitor was held not entitled to these costs because the proceeding was useless and not in accordance with the well-known practice. *Baldwin* v. *Quinn*, 16 P.R. 248.

*Held*, on a motion for a new trial, where the Court divided equally, the rule dropped, and neither party was entitled to costs. *Girvan* v. *McLean* (New Brunswick), 12 C.L.T. 450.

A motion to strike a solicitor off the roll, should be made in Court, and the costs are taxable as a Court motion. *Re Bridgman*, 16 P.R. 232.

On a motion in Chambers no allowance can be made for copies of depositions taken for use upon the motion. *Rennie* v. *Block*, 17 P.R. 317. See COPIES.

Where it is known that the defendant intends defending the action, and alleges such facts that a motion for speedy judgment cannot possibly succeed, the plaintiff will be ordered to pay the costs of such a motion in any event. *Merchants Bank* v. *Irvine*, 2 O.W.R. 47; *Lawrence* v. *Smith*, 2 O.W.R. 521. In both these cases the costs of the cross-examinations on the motions were excepted from the costs, and allowed to stand as examinations for discovery.

"It certainly is a commendable practice that the solicitor for a defendant should call attention to the fact of the plaintiff being in any default before moving to dismiss as in the present case. The omission to do so cannot fail to effect the disposition of the costs." *Thibadeau* v. *Lindsay*, 2 O.W.R. 431.

## NOTICES.

*Con. Rule 527.*—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 No. 63. Con. Rules 617, 618.

*Con. Rule 528.*—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. Con. Rule 619.

*Con. Rule 1149.*—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. Con. Rule 1189.

*Con. Rule 1150.*—The costs of proving a document shall not be allowed unless a notice to admit has been given under Rule 527, except where the omission to give the notice is a saving of expense. Con. Rule 1190.

A notice to admit or produce documents is available at any trial of the cause, and not merely at the first trial after the giving of the notice. If given the second time they would, probably, be disallowed as being unnecessary. *Wilson* v. *Baird*, 19 U.C.C.P. 98.

Notice to admit should be given even though the opposite side assert that the document is a forgery. *Spencer* v. *Barragh*, 9 M. & W. 425.

A party to a cause, proposing to adduce in evidence at the trial any written or printed document, ought to serve a notice to admit the same, although the document is not in his possession, or even in a place inaccessible to him; and in the event of his neglecting to do so, he will not be allowed the costs of proving it. *Rutter* v. *Chapman*, 8 M. & W. 388.

A notice to admit may be given in respect of a document the validity of which is directly in issue. *Spencer* v. *Barragh*, 9 M. & W. 425.

The costs of an exemplification of a judgment will not be allowed unless notice to admit is first given. *Conger* v. *McKechnie*, 1 Ch. R. 220.

Where one of several defendants gives notice of trial, and afterwards becoming aware that the action is not at issue against the other defendants, abandons his notice, he cannot tax the costs of it against the opposite party. *Strachan* v. *Ruttan*, 15 P.R. 109.

"Had I been the taxing master, I probably should not have allowed the expenses of bringing from Plymouth to London, and keeping here for nine days, a witness merely required to prove some photographs, unless the defendants had first been asked to make the necessary admissions, and had refused to do so." North, J., *East Stonehouse Local Board* v. *Victoria Brewery Co.* (1895), 2 Ch. 514.

In taking proceedings under a power of sale in a mortgage drawn under the Short Forms Act, execution creditors of the mortgagor come within the scope of the word "assigns," and as such are entitled to notice under the power of sale, but only those having executions in the sheriff's hands at the time notice of default is given need be served. *Re Abbott and Medcalf*, 20 Ont. R. 299.

A mortgage provided that on default for three months the mortgagees might sell without notice. There being default for more than three months the mortgagees exercised the power of sale and served notices of sale. Street, J., held that the mortgagees had the right to proceed after three months' default to sell with notice if they so desired, notwithstanding there was power to sell without notice, and that they were entitled to tax the costs of the notices. *In re Young and London and Ontario Investment Co.*, 10 C.L. Times 189.

There is no necessity for a notice of settling a judgment which simply dismisses the action. Rep. I.L.O., 1887.

## NOTICE OF ACTION.

Where a statute requires notice to be given before bringing an action, there the notice is really the first step in the action, and can be taxed between party and party. *Pringle* v. *McDonald*, 7 P.R. 152.

Where a railway company was entitled to notice of action, the plaintiffs were allowed the costs af the notice as a part of the costs of the action. *Kent* v. *Great Western Railway Co.*, 4 D. & L. 481, 16 L.J.C.P. 72; see also *Edwards* v. *Great Western Railway Co.*, 12 C.B. 419.

But where a conveyance of land was set aside as being fraudulent, the costs of preparing and tendering a reconveyance for execution before the service of the bill, were held not taxable against the defendant, as they were not necessary preliminaries to the suit. *Pringle* v. *McDonald*, *supra*, and see COSTS BEFORE WRIT ISSUED.

Persons filling the following offices have been held entitled to notice of action:—

Arbitrators. *Kennedy* v. *Burness*, 15 U.C.R. 487; *Hughes* v. *P ke*, 25 U.C.R. 95.

A chief constable in an action for malicious arrest. *McKay* v. *Cummings*, 6 O.R. 400.

A constable and justice of the peace for having and concealing a colt belonging to another person. *Howell* v. *Armour*, 7 O.R. 363.

A constable in an action for false arrest, where he acts in the honest belief that he was discharging his duty as a constable. *Scott* v. *Reburn*, 25 O.R. 450.

One sworn in as a special constable to assist in making an arrest. *Sage* v. *Duffy*, 11 U.C.R. 30.

A county Crown Attorney and clerk of the peace. *McDougal* v. *Peterson*, 40 U.C.R. 95.

A bailiff of Division Court, when acting under the process of the Court. *Anderson* v. *Grace*, 17 U.C.R. 96; *Pardee* v. *Glass*, 11 O.R. 275.

A justice of the peace even when acting without jurisdiction. *Bross* v. *Huber*, 18 U.C.R. 283; *McGuiness* v. *Dafoe*, 23 A.R. 704; or in excess of his jurisdiction, if acting *bonâ fide*. *Neil* v. *McMillan*, 25 U.C.R. 485.

A Board of License Commissioners. *Leeson* v. *Dufferin*, 19 O.R. 67.

A person arresting another while in the act of stealing his property. *McDonald* v. *Cameron*, 2 U.C.R. 406.

A pathmaster doing the work imposed upon him by law. *Helliwell* v. *Taylor*, 16 U.C.R. 279; *Stalker* v. *Dunwich*, 15 O.R. 342.

A pound-keeper. *Davis* v. *Williams*, 13 C.P. 365; *Denison* v. *Cunningham*, 35 U.C.R. 383.

A registrar of deeds in an action to recover back excessive fees. *Ross* v. *McLay*, 40 U.C.R. 87; but not in an action for negligence. *Harrison* v. *Brega*, 20 U.C.R. 324.

A revenue officer. *Wadsworth* v. *Murphy*, 2 U.C.R. 120.

A school trustee and a tax collector. *Spry* v. *Mumby*, 11 C.P. 285.

The following have been held not entitled to notice:—

A person otherwise entitled to the benefit of notice voluntarily doing an act not imposed on him in the discharge of any public duty. *Kelly* v. *Barton*, 26 O.R. 608, 22 A.R. 522.

A Division Court bailiff in an action to recover the excess of money levied under an execution. *Dale* v. *McCool*, 6 C.P. 644.

An execution creditor. *Timon* v. *Stubbs*, 1 U.C.R. 347; *Dollery* v. *Whaley*, 12 C.P. 105.

A Division Court clerk for money received under an execution. *McLeish* v. *Howard*, 3 A.R. 503.

A justice of the peace acting without jurisdiction and not *bonâ fide*. *Cummins* v. *Moore*, 37 U.C.R. 130; for not returning a conviction. *Grant* v. *McFadden*, 11 C.P. 122.

Members of a municipal council. *Township of Chatham* v. *Houston*, 27 U.C.R. 550; *McDonald* v. *Dickinson*, 25 O.R. 45.

A post office inspector, in an action for slander. *Hanes* v. *Burnham*, 23 A.R. 90.

A returning officer, in an action for a penalty. *Walton* v. *Apjohn*, 5 O.R. 65.

A sheriff. *McWhirther* v. *Corbett*, 4 C.P. 203.

Actions of replevin. *Lewis* v. *Teale*, 32 U.C.R. 108.

## ORDERS.

Evidence cannot be received by a taxing officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction. *Keim* v. *Yeagley*, 6 P.R. 60.

The Master in Chambers made an order to amend the writ and proceedings, the costs to be costs in the cause. The plaintiff having succeeded in the action, claimed the costs of the amendment allowed by the order in taxing his costs of suit, which the taxing officer refused to allow, ruling that he could under Rule 442 (now Con. Rule 1214), exercise his discretion to disallow costs which he thought were improperly incurred.

*Held*, Ferguson, J., that the taxing officer had no discretion, but was obliged to tax the costs as ordered, and that Rule 442 refers to the moderation of costs not disposed of by express order or judgment. *Edwards* v. *Pearson*, 3 C.L. Times 504, 20 C.L. Journal 93.

See *Dominion, etc.*, v. *Stinson*, 9 P.R. 177, under COMMISSION TO TAKE EVIDENCE.

*Præcipe* orders are orders of the Court, and a fee of $1 should be allowed thereon, under item 115 of the tariff. *Gage* v. *Canada Publishing Co.*, 3 C.L. Times 267, 19 C.L. Journal 175.

Where a motion is made in Chambers, and argued as a Chamber motion, the Judge has no power to make the order as a Court order, so as to tax the costs of a Court motion. *Re Fleming*, 11 P.R. 272.

Only one attendance should be allowed for obtaining a *præcipe* order. *Latour* v. *Smith*, 13 P.R. 214.

See the remarks of Boyd, C., in *Snider* v. *Orr et al.*, 11 P.R. 140, as to the unnecessary multiplication of orders in respect of the same matter.

Costs of an affidavit filed but not read in the order will be disallowed even on a taxation as between solicitor and client. *Stevens* v. *Lord Newborough*, 11 Beav. 403; see, too, *Stuart* v. *Greenall*, 13 Price 755.

Where the costs of an interlocutory order have been dealt with by the Court of Appeal, and the case finally comes up to the Court of Appeal for decision on the merits, the costs of the interlocutory order cannot be reconsidered. *Beynon* v. *Godden*, 4 Ex. D. 246.

The jurisdiction of the Court to stay proceedings in an action until compliance with an order for the payment of costs is founded, and ought to be exercised, on the principle and for the purpose of prevention of vexation and oppression, and does not depend on any old practice of the Court of Chancery under process of contempt, or on the mere fact of non-payment. *Re Wickham*, 35 W.R. 524, 35 Ch. Div. 272; dissenting from *Re Neal*, 31 Ch. Div. 437; *Re Youngs*, 31 Ch. Div. 239.

No counsel fee is taxable on an *ex parte* order; and no fee should be allowed for engrossing an *ex parte* order. *Carlisle* v. *Roblin*, 16 P.R. 328. And see *ante*, EX PARTE ORDERS.

An order shortening time for appearance should include in it an order allowing the issue of the writ for service out of the jurisdiction. If two orders are taken out, the costs of one will be disallowed. *Sparks* v. *Purdy*, 15 P.R. 1.

The costs of an order of revivor, obtained by the plaintiff after judgment, are taxable. *Girardot* v. *Welton*, 19 P.R. 201.

## PARTNERSHIP ACTIONS.

*Hamer* v. *Giles* (1879), 11 Ch. Div. 942, is always cited as authority for the rule as to costs in partnership actions. On the argument in that case counsel cited from Seton on Decrees: "The rule is that the Court makes no order as to the costs up to the hearing, even though the cause of the dissolution is the negligence of a partner; but that the costs after the hearing are paid out of the partnership estate."

Jessel, M.R.:—"My opinion is that the rule is not as stated in Seton. It appears to me that where there is no fault on either side, but the partnership accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where the action for dissolution is rendered necessary by the misconduct of a partner, as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so, the Court not only has jurisdiction, but is bound to exercise it, by making the partner pay so much of the costs as are occasioned by his misconduct. But in all other cases there is no difference between the costs of the action for taking the account prior to the trial and the subsequent accounts, and I have always acted on that rule."

The balance found due in a partnership action from the firm to one of the partners must be paid out of the assets in priority to the costs of the action. *Potter* v. *Jackson* (1880), 13 Ch. Div. 845.

The costs of the action should not be paid out of partnership assets to the prejudice of the creditors. *Bingham* v. *Smith*, 16 Gr. 373.

Where all the debts have been thus paid, if there are no assets remaining out of which the costs of the action can be paid, the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant. *Austin* v. *Jackson*, 11 Ch. Div. 942.

Where the existence of the partnership is denied, and it becomes necessary to bring an action to establish a partnership, and the plaintiff succeeds, the defendant will be ordered to pay the costs up to the trial. *O'Lone* v. *O'Lone*, 2 Gr. 125; *Bingham* v. *Smith*, 16 Gr. 373.

Where the executors of a deceased partner filed a bill against the surviving partner, who was bound to pay them annually half the profits of the business, alleging that no accounts had been rendered though application had been made for some years, and the defendant by his answer admitted the allegations in the bill and submitted to account, it was held that he must pay the costs up to the hearing. *Norton* v. *Russell*, 19 Eq. 343.

The costs of a suit for the dissolution of a partnership (two surgeons) on the ground that the defendant had become insane, were ordered to be paid out of the partnership. *Jones* v. *Welch*, 1 K. & J. 765, 103 R.R. 339.

The usual rule as to costs in partnership actions applies also to an action for winding up the affairs of a partnership which has been dissolved before the action was commenced. *Timothy* v. *Hindley*, 14 W.R. 382.

## PARTY AND PARTY COSTS.

*Con. Rule 1175.*—Where costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party. Con. Rule 1214.

*Con. Rule 1176.*—(1) Between party and party the taxing officer shall not allow the costs of proceedings:—

(*a*) Unnecessarily 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; unless he is of opinion that such proceedings were taken by the solicitor because, in his judgment, reasonably exercised, they were conducive to the interests of his client.

(2) Between solicitor and client the taxing officer may allow the costs of proceedings taken as mentioned in the above clauses (*a*) and (*c*) of this rule, 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 taken as mentioned in clause (*b*) where the same were taken by the desire of the client after being informed by his solicitor that the same were unnecessary and not calculated to advance the interests of the client. Con. Rule 1215.

*Con. Rule 1177.*—Where costs are to be taxed between party and party, the taxing officer may allow the like costs as are taxable where costs are directed to be taxed as between solicitor and client, in respect of the following matters:—

(1) Advising with counsel on the pleadings, evidence, and other proceedings;

(2) Procuring counsel to settle such pleadings and petitions as may appear to have been proper to be settled by counsel;

(3) Procuring and attending consultations of counsel;

(4) The amendment of pleadings;

(5) On proceedings in the Master's office;

(6) Supplying counsel with copies of, or extracts from, necessary documents. Con. Rule 1216.

*Con. Rule 1178.*—Costs shall be allowed and taxed according to the table of costs set forth in the 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. Con. Rule 1217, *amended.*

Rule 1177 is not as broad as the English rule on which it is founded, and, as a consequence, party and party costs are taxed more liberally in England than in Ontario. See *ante*, MAPS AND PLANS.

"I adhere to the rule which has already been laid down, that the costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them." Malins, V.-C., *Smith* v. *Butler*, 19 Eq. 473, 45 L.J. Ch. 69.

As to counsel fees, see *Smith* v. *Harwood*, 17 P.R. 36, *ante* under COUNSEL FEES.

Under Rule 1176 by implication costs of such proceedings, taken because, in the judgment of the solicitor reasonably exercised, they were conducive to the interests of his client, should be allowed. *Ludlow* v. *Irwin* (1906), 12 O.L.R. 43.

## PERUSALS.

Where a reply is a simple joinder of issue, no fee for perusal will be allowed. Rep. I.L.O., 1885.

No fee is allowed for perusal of depositions or examinations of an opposite party. *Ib.*

Item 88 of the tariff provides, however, for the perusal of interrogatories and cross-interrogatories on commission, in special or contested actions.

Where more affidavits than one relating to the same matter, or filed on the same motion, are served or delivered, and they do not together exceed twenty folios, no more than $1 will be allowed for perusal.

"It was argued that it wasn't much of an affidavit anyway, and didn't need perusal. I cannot think, however, that any solicitor would be justified, upon receiving an affidavit by and from a solicitor on the other side, in saying, 'Oh, well, this is another of that man's affidavits. I shall just toss it into the waste paper basket.' It might, indeed, turn out that that would be the proper destination for it, but it would scarcely be considered safe for any solicitor to take that for granted." Riddell, J., in *Plenderleith* v. *Parsons* (1907), 15 O.L.R., p. 404.

## PETITIONS.

There were two petitions filed for winding-up, and each petitioner asked for costs, under the circumstances mentioned in the judgment. Teetzel, J.:—"The petition in each matter makes out a *primâ facie* case of insolvency within the meaning of section 5(*a*) of the Winding-up Act, and there being no question of the good faith of the second petition, or that it was prepared without notice of the first, the costs should be allowed. See *Re Manitoba Milling Co.*, 8 Man. L.R. 426; *Re Building Societies Trust*, 44 Ch. Div. 144; *Re General Financial Bank*, 20 Ch. Div. 276; *Re Scott and Jackson* (1893), W.N. 184; *Re Sherringham*, 37 Sol. J. 175. Order in each case accordingly." *Re Algoma Commercial Co.; Re Algoma Steel Co.*, 3 O.W.R. 140.

On an application for a winding-up order, the solicitor for the company appeared, and did not oppose the petition, but asked for costs. Boyd, C.:—"The company have not opposed, but rather facilitated the application for a winding-up order. No one else has been served. It seems proper to allow costs out of the estate to the company, according to the rule laid down in *Re Hunter*, L.R. 2 Eq. 15, which was cited, not dissented from on this point, in *Ex parte Baylis*, *ib.* 521." *Re Wiarton Beet Sugar Co.*, 3 O.W.R. 393.

## PLANS.

See MAPS AND PLANS.

## PLEADINGS.

*Con. Rule 265.*—(1) Every writ, pleading or other document may be printed or written in whole or in part, but no more than four copies thereof, exclusive of the draft, but inclusive of all other copies that may be required or made, in the progress of the cause, shall be allowed. Con. Rule 395. Rules 23 June, 1894, 1325.

(2) If more than three copies exclusive of the draft, are required the party may have the writ or pleading or document printed, and he shall in lieu of all charges for copies be allowed thirty cents per folio of the writ or pleading or document, and his reasonable disbursements for printing. Con. Rule 396. Rules 23 June, 1894, 1325.

The provisions of the above rule as to four copies covers all copies required during the litigation, and extends to the copy of the pleadings in the brief. *Sparks* v. *Purdy*, 15 P.R. 1.

In a proper case a fee to counsel may be allowed on settling reply, although a mere joinder of issue. *Tisdall* v. *Richardson*, 20 L.R. Ir. 190.

In taxing costs the taxing officer should look at the pleadings to see if proper admissions have been made, without any special direction to do so. *Baines* v. *Wormsley*, 47 L.J. Ch. 844. And see Con. Rule 269.

Pleadings should be in language and statements as brief and concise as possible, and neither matters of argument nor evidence should be introduced into them. When the costs of any such pleadings are disallowed on any of these grounds, the solicitor cannot claim them from his client. If he does it is open to the client to complain to the Court. *Kennedy* v. *Lawlor*, 14 Gr., at p. 229.

In *Malloch* v. *Grier*, 2 U.C.Q.B. 113, a great portion of the pleadings were disallowed on both sides as being unnecessarily pleaded. And in *The Canada Permanent Building and Savings Society* v. *Harris*, 16 U.C.C.P. 54, unnecessarily lengthy pleadings were ordered to be reduced by the Master at the party's expense.

A counsel fee for settling plaintiff's reply to defendant's counterclaim should be taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

Where a reply is a simple joinder of issue no fee for perusal will be allowed. Rep. I.L.O., 1885.

Where documents are embodied or copied in the pleadings, the solicitor will only be allowed 10 cents per folio for so much of the original pleading as consists of such copy, instead of 20 cents per folio.

Costs occasioned by scandalous matter in a pleading will, as a rule, be ordered to be paid by the offending party as between solicitor and client. *Christie* v. *Christie*, 8 Ch. 499; Mor. & Wurt. 36 *et seq.* And see *ante*, "Impertinence and scandal in affidavits," under AFFIDAVITS.

## PHOTOGRAPHS.

The costs of procuring photographs would not be taxable. See *ante*, under MAPS AND PLANS.

"Had I been the taxing master, I probably would not have allowed the expenses of bringing witnesses merely required to prove some photographs, unless the defendants had first been asked to make the necessary admissions, and had refused to do so." North, J., *East Stonehouse* v. *Victoria* (1895), 2 Ch. 514.

## POSTPONING TRIAL.

It seems clear that in the Court of Chancery the rule was well established that where a party had made diligent efforts to secure the attendance of a witness within the jurisdiction of the Court, and failed to secure it from a cause which he could not control, then the costs of an application to postpone would be costs in the cause, unless it was possible to take the evidence before a special examiner, or the knowledge of the fact that the attendance could not be secured, came to the applicant in time to enable him to advise the other side so that the witnesses might be notified not to attend. *Brown* v. *Porter*, 11 P.R. 250, 6 C.L. Times 126.

In all other cases costs will be disposed of according to the circumstances and in the discretion of the Judge. It makes no difference that the witness is a party to the record unless he is in the same interest with the party against whom it is proposed to call him, and then circumstances must govern. *Pattison* v. *McNab*, 12 Gr. 483.

Where the plaintiff ascertained on Sunday that a witness, who was his mother, was confined to her bed, and unable to attend at the sittings which began on the Tuesday following, but failed to give notice of this fact to the defendant, a motion made by the plaintiff to postpone the hearing was granted only on the terms of paying the costs. *McMillan* v. *McDonald*, 22 Gr. 362.

The plaintiff sued on a promissory note for $3,000, and the defendant moved to postpone the trial on the ground of the illness of a material witness. The Master in Chambers made it a condition of the order that the defendant should give security in the sum of $1,200, and the defendant appealed.

Boyd, C.:—"The order made by the Master is one within his discretion: Rule 681 (now 553); and under the old practice it was a frequent term to impose on a defendant that he should bring the money sued for or a part of it into Court." *Bank of Hamilton* v. *Stark*, 13 P.R. 213.

The action had been twice postponed without any direction as to the costs of the postponements. The plaintiff now moved for costs. Anglin, J.:—"The motion is refused on the ground that there is no jurisdiction in a Judge in Chambers to make the order asked. . . . These costs could probably have been dealt with either by myself, sitting as trial Judge when the action of the younger plaintiff was finally disposed of, or again at the trial before the Chancellor, when the action of the senior plaintiff was finally tried. Plaintiffs appear not to have asked for these costs upon either occasion. Neither as a trial Judge nor as a Judge in Chambers have I now jurisdiction to deal with them." *Liddiard* v. *Toronto R.W. Co.*, 8 O.W.R. 222.

## PRELIMINARY OBJECTION.

In *Ex parte Shead*, 15 Q.B.D. 338, Brett, M.R., delivering the judgment of the Court of Appeal, said: "I agree with Cave, J., to this extent, that, as a matter of professional courtesy, a solicitor, who knows of a preliminary objection to an appeal which he intends to raise, ought to inform his opponent of it without delay. But the omission to do this is not a sufficient ground for depriving the respondent of the costs of the appeal."

The cases of *In re Speight*, 13 Q.B.D. 42, and *Ex parte Blease*, 14 Q.B.D. 123, where a different course was adopted, were not followed.

On a motion to dismiss for want of prosecution, the Master in Chambers said: "It certainly is a commendable practice that the solicitor for a defendant should call attention to the fact of plaintiff being in any default before moving to dismiss as in the present case. The omission so to do cannot fail to effect the disposition of costs." *Thibadeau* v. *Lindsay*, 2 O.W.R. 431.

## PROCEEDINGS TO SAVE EXPENSE.

"When it has been satisfactorily proved that proceedings have been taken by solicitors out of Courts to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefore in the discretion of the taxing officer in Toronto (or Judge of County Court in C. C. cases)." Item 142 of tariff A.

Item 81 of Schedule 4 of the British Columbia tariff is practically the same as the above. After an appeal was opened it stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were not successful and the appeal was ultimately dismissed with costs.

*Held*, that the successful party was entitled to an allowance for costs of the negotiations for settlement under item 81 of schedule No. 4. *Milton* v. *District of Surrey*, 40 C.L. Journal 439.

The plaintiff's solicitor sought to tax (1) a charge of $2 for procuring a certain deed for use at the trial which the defendant's solicitor refused to admit. It would have been much more expensive to procure the attendance of a witness with the deed. (2) A charge of $7.73 for procuring from Montreal certain documents and stock register, which saved the expense of a commission to Montreal.

The taxing officer held that he had power to tax charges for work done which caused a saving of expense only when the work was done between the solicitors on either side, and disallowed these charges. On appeal Proudfoot, J., made an order allowing the charges. *Torrance* v. *Torrance*, 9 P.R. 271. See *Toronto* v. *G. T. Ry.* (1906), 13 O.L.R. 13, under DOCUMENTS.

## PRODUCTION OF DOCUMENTS.

See DOCUMENTS; NOTICES.

## PREPARING FOR TRIAL.

See *Toronto* v. *G. T. Ry.* (1906), 13 O.L.R. 13, under **DOCUMENTS**.

## RECORD.

Where the trial of a case is postponed from one Assize to another by the order of the Judge at the Assizes, the clerk of Assize has no right to levy the fee for certifying the record and the entry and jury fees over again, the former payment holding good.

In this case an order had been made by the Master in Chambers on application to postpone the trial when the trial was coming on for the second time, that the case should be entered at the foot of the list in order that the plaintiff might be examined, but it was held, by Wilson, C.J., that this did not necessitate a re-entry of the case, and that the case once entered remained entered on the list until it was tried, struck out or withdrawn. *Morton* v. *Grand Trunk Railway Co.*, 19 C.L. Journal 372.

Records are not taxable against the opposite party if made up before issue joined and notice of trial given. But if the notice of trial has been reasonably given, the record may then be drawn up, and it will be taxable between party and party if the case is settled before trial.

Where demurrer books had been prepared after issue joined, but a month before term, and the case was subsequently referred to arbitration, Wilson, J., held that the costs of preparing the books were taxable. *Elliott* v. *Northern Assurance Co.*, 6 P.R. 111.

## REFERENCES.

See under the following titles: ADMINISTRATION PROCEEDINGS; ADVERTISEMENT OF SALE; AUCTIONEER; COMMISSION IN LIEU OF COSTS; COMMISSION TO TAKE EVIDENCE; COPIES; EXPERTS; INCUMBRANCERS; SALE; STENOGRAPHER'S FEES.

## REFRESHERS.

Wharton's Law Lexicon defines a refresher as "A further or additional fee to counsel in a long case, which may be, but is not necessarily, allowed on taxation." *Laurie* v. *Wilson*, L.R. 10 C.P. 152.

Whiteway, p 154: "In the common law division the practice as to refreshers is not quite the same as in Chancery. On both sides in actions with witnesses refreshers are allowed in the case of actions which have taken up more than one entire day for each day afterwards; but where the action is tried on affidavit no refreshers are allowed. The amount is in the discretion of the Master, and depends upon the fee originally marked on the brief and the nature of the case. The true rule is stated by Jessel, M.R., in *Brown* v. *Sewell*, 16 Ch. Div. 520.

When a case, the brief of which was delivered in one term, is not reached until another, a refresher is generally allowed.

"The meaning put upon this phrase ('the costs of the day') includes only a single counsel fee of $10, named a refresher, a term which would seem more appropriate if the case were adjourned for a day or so at the one Assize, than to a case where the postponement is until another Assize." Proudfoot, J., *Hogg* v. *Crabbe*, 12 P.R. 14.

Refreshers to counsel are allowable only where the case is so circumstanced as that it may be called on, and are therefore not allowable when a cause has been ordered to stand over to await the decision of a Court of Error in another cause involving the same question, and therefore cannot by possibility come on. *Hughes* v. *Birkenhead Improvement Commissioners*, 16 L.T.N.S. 350 Q.B.

As to the allowance of refreshers on an argument in the Court of Appeal see *Swensden* v. *Wallace*, 16 Q.B.D. 27; *Easten* v. *London Joint Stock Bank*, 38 Ch. Div. 25.

## RETAINING FEE.

A retaining fee to counsel will not be allowed on taxation as between party and party. *Green* v. *Briggs*, 7 Hare, 279; *Smith* v. *Earl of Effingham*, 10 Beav. 378; *Cullen* v. *Cullen*, 2 Chy. Ch. 94.

"No retaining fee will be allowed, on a solicitor and client taxation, to a solicitor who is himself also counsel. In England there is no such thing as a retaining fee to a solicitor. It is a fee paid to counsel only, and it is paid to secure his services either in a particular suit, or generally for any suit the client may be interested in. I do not think the argument that the solicitor being in this country both solicitor and counsel, the retaining fee is chargeable as if paid by the solicitor to retain his own services as counsel, a sound one. If employed as a solicitor it is his duty to devote himself to further the interests of his client, and he certainly could not consistently with that duty hold a brief as counsel for the other side, so his services, if he intends acting as counsel, are already secured." *In re McBride, Farley* v. *Davis*, 2 Chy. Ch. 153.

If a retaining fee is actually paid it could not be recovered back by the client, but an unpaid retainer fee cannot be taxed by a solicitor against his client. *Re Geddes & Wilson, Solicitors*, 2 Chy. Ch. 447.

A retaining fee was paid by executors to a solicitor in an administration suit, and under the circumstances of the case, was held to be a reasonable disbursement, and allowed them in their accounts. *Chisholm* v. *Barnard*, 10 Gr. 479.

A solicitor acted for a client in defending him on a charge of arson, and in prosecuting actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money and had no prospect of getting any, and in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee, to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be $150 for the two actions, the amount claimed being about $1,250. Subsequently, and when some costs had been incurred, the client made an assignment to a third party of the moneys due to him from the insurance companies, in trust to pay the solicitor his costs, including the retaining fees agreed upon, and to pay the balance to creditors.

*Held*, Falconbridge, J., that the assignment in trust was a security for costs already incurred, a confirmation of the original agreement, and a *quasi* appropriation of the money; and as it appeared that the client understood that the payment of retaining fees was voluntary, and that they could not be recovered from the opposite party, the retaining fees were properly allowed to the solicitor by the taxing officer; and under the exceptional circumstances of the case the amount was not unreasonable. *Re J. S. Fraser, a Solicitor*, 13 P.R. 409.

In *McKee* v. *Hamlin*, 16 P.R. 207, Rose, J., distinguished the last case: "*Re Fraser* turns, as I understand it, on the effect of the assignment in trust and the right of the solicitor to retain, the moneys for the purpose of accounting to the assignee of the client, the client in that case being willing he should do so."

If *Re Fraser* is to be supported, it is on the grounds laid down in *Re Geddes & Wilson*, namely, that the fee had been actually paid and could not be recovered back.

In *Ford* v. *Mason*, 16 P.R. 25, the solicitor during the progress of the action made a contract in writing with his client for the payment of a retaining fee of $100, explaining fully the effect of the bargain, and that in case of success in the action he would not be able to tax this fee against the opposite party. The taxing officer reported that the bargain was a fair and reasonable one, and allowed the retaining fee. On appeal, Ferguson, J., held that the contract could not be enforced. He said: "I am unable to see that the case falls under the decision of my brother Falconbridge in *Re Fraser*, 13 P.R. 409, which was a peculiar case."

*Ford* v. *Mason* was followed by Rose, J., in *Hamlin* v. *Connelly*, 16 P.R. 207.

"The promise to pay a 'retainer' is void. Apart from special statutory authority, any agreement between a solicitor and his client by which the solicitor stipulates for a remuneration upon any basis other than that provided by law, *i.e.*, a solicitor and client bill in accordance with any tariff applicable and subject to taxation, is void. *Re Solicitor* (1907), 14 O.L.R. 464. No statute authorizes such an agreement as that here set up. I may also point out that there can be no promise to pay a retainer which will be enforced in law. A retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act." Middleton, J., *Re Solicitor* (1910), 21 O.L.R. 257; affirmed on appeal, 2 O.W.N. 67, 22 O.L.R. 30.

The fact that retaining fees had been charged against a client were looked upon as a "special circumstance" to justify a taxation in Toronto instead of the country town where the solicitor resided. *Re George A. Skinner, a Solicitor*, 13 P.R. 276, 25 C.L. Journal 623.

## REVISION OF TAXATION.

*Con. Rule 1167.*—All bills of costs or disbursements in actions for the administration or partition, or for the foreclosure, redemption or sale of mortgaged premises, 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 (or which is to be paid out of any estate 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. Con. Rule 1207.

The taxing officers on revision of bills of costs have power not only to strike out items improperly allowed, but also to restore items improperly struck out, and generally to revise the taxation.

But the taxing officer cannot receive evidence to make costs payable otherwise than they appear to be by the order awarding costs when explained by the ordinary rules of construction. *Keim* v. *Yegley*, 6 P.R. 60.

The taxing officers have power to call for evidence on taxations before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer should report to a Judge in Chambers. *Williamson* v. *Town of Aylmer*, 12 P.R. 129.

The expression "a fund in Court" in Rule 1167 has no technical signification which makes it mean anything different from "a sum of money in Court." *Cousineau* v. *London Fire Ins. Co.*, 13 P.R. 42.

Where commission and disbursements are allowed in lieu of costs, under Rule 1146, the disbursements must be revised pursuant to Rule 1167. *Campbell* v. *Campbell*, [illegible] P.R. 159.

A revision of the bill of costs by the taxing officer at

Toronto is a re-taxation of the bill, and in this respect differs from a review of a taxation. *Campbell* v. *Baker* (1905), 9 O.L.R. 291.

## REVIVOR.

The plaintiff in an action had judgment in his favour at the hearing and then died. B., the executor of the plaintiff's will, took out the usual order of revivor. The defendants then appealed, and the judgment at the trial was reversed and the action dismissed with costs. *Held*, that the executor was liable personally for all the costs of the action. The executor by reviving the action at any stage adopts the litigation and becomes liable for costs, without prejudice to any right he may have to get his costs out of the estate. *Boynton* v. *Boynton*, 9 Ch. Div. 250.

The same rule applies where the trustee of a bankrupt defends an action. *Watson* v. *Holliday*, 20 Ch. Div. 781.

The costs of an order of revivor obtained by a plaintiff after judgment in order to tax his costs, is a necessary step and should be taxed to him and added to his other costs. *Girardot* v. *Welton*, 19 P.R. 201.

## SALE.

Sometimes a fixed sum for the entire sale, or for each lot sold or bought in, is arranged to be paid to the auctioneer for his remuneration; and sometimes he is allowed a commission on each lot sold, and a fixed sum for each lot not sold. The amount in either case depends upon the magnitude of the sale, the ability and position of the auctioneer, the trouble he has had, or is likely to have, in the business, and whether he is to pay any and what expenses attending the sale, to make any survey with a view to lotting the property, or any valuation preparatory to fixing the reserved bidding. The terms should be fixed by the Master before the proposed auctioneer is appointed to sell. Dan. Chy. Pr. 1079; *Re Page*, 9 Jur. N.S. 1116.

Where the Master sells instead of an auctioneer he is entitled to charge $1.50 per hour, or if he travels more than two miles from his office $2 per hour, and 20 cents per mile travelled. Rep. I.L.O., 1889.

Where a sale under the judgment of the Court is put off the expense and delay of a new advertisement should not be incurred, but a note at the foot of the old advertisement stating the postponement should suffice. This, being less expensive, the increased costs of a new advertisement would be disallowed. *Thompson* v. *Milliken*, 15 Gr. 197.

See *In re Richardson*, 3 Chy. Ch. 144, where the practice is defined as to the manner in which a solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money, will be taxed.

Instalments of purchase money (not the deposits on sale) were paid by the purchasers to the solicitors for the plaintiff, and by him paid into Court.

*Held*, that he was not entitled to any remuneration from the estate for such services, it being the duty of the purchaser to pay these moneys into Court. *Re Robertson, Robertson* v. *Robertson*, 24 Gr. 555.

It is the duty of the vendor's solicitor on a sale by the Court to compare the conveyances tendered by the purchasers, and for so doing he is entitled to tax the necessary and reasonable costs thereof. *In re Robertson, Robertson* v. *Robertson, supra.*

See ADVERTISEMENT OF SALE.

## SCANDAL, ETC.

Where any scandalous matter is introduced into any pleading, petition or affidavit, it may be struck out, and such directions may be given as to costs as to the Court may seem just. Con. Rules 296-8.

As to what is and what is not scandalous, see *ante*, p. 21, under AFFIDAVITS.

Where costs are given because of scandalous matter in a pleading or other document, they are generally given as between solicitor and client. *Christie v. Christie*, 8 Chy. 499. And both the solicitor and the client may be ordered to pay the costs. *Emerson v. Dallison*, 1 Ch. Rep. 194; *Bishop v. Willis*, 5 Beav. 83.

Where charges of misconduct are introduced into the claim, and are denied in the defence, and then withdrawn, the Court will, at the trial, make an order for payment by the plaintiff of all costs occasioned by such unfounded charges without any special application for the purpose. *Finch v. Westrope*, 12 L.R. Eq. 24.

Analogous to the rule governing costs in cases of scandalous matter, is the case where fraud is alleged and not proved. Where a charge of fraud fails, the party making it without ground ought to pay the costs. *New Brunswick & Canada Ry. v. Conybeare*, 9 H.L. Cases 711.

The general rule is that a charge of fraud not proved will be visited with costs. *Standish v. Whitwell*, 14 W.R. 512.

Costs are always given against any party appearing on a petition who endeavours to support a case of fraud. *Ex parte Taylor*, 4 Deac. & C. 125.

## SEARCHES FOR DOCUMENTS, ETC.

See *Toronto v. G. T. Ry.*, 13 O.L.R. 12, under DOCUMENTS, where $350 was allowed on a party and party taxation for searching for lost plans.

Searching affidavit on production is not now taxed against the opposite party; it is a measure of precaution which the client pays for. *Carlisle v. Roblin*, 16 P.R. 328.

An order having been made that the plaintiff do give security for costs, the defendant sent a person into the country to inquire into the ability of the person proposed as security, and to search for judgments against him. Although this course was not strictly conformable to practice, the costs were not disallowed. *Bainbridge v. Moss*, 3 K. & J. 62, Jur. N.S. 107.

## SERVICE OF PAPERS AND PROCESS.

In case a sheriff fails to serve a writ within ten days after it is delivered to him, it may be served by any literate person afterwards, and the costs of such service allowed on taxation. Con. Rule 148.

Mileage is payable only in case of service by a sheriff, or his bailiff, and under the conditions set out in Con. Rule 1172.

No fees can be taxed on a party and party taxation for service of subpœnas or mileage, if the service is not made by the sheriff, his deputy or bailiff. *McLean* v. *Evans*, 3 P.R. 154; *Ham* v. *Lasher*, 24 U.C.Q.B. 357.

*McLean* v. *Evans* was decided on the ground that a subpœna was a *mesne* process, and the charges for service were disallowed under section 277 of the Common Law Procedure Act, which read as follows: "In the taxation of costs no fees shall be allowed for the mileage or service of writs of summons or other *mesne* process unless served by the sheriff or his deputy or bailiff," etc. This section is now represented by Con. Rule 1172 which omits the words "or other *mesne* process." In a case that came before the full Court it was contended that because of the omission of these words the service of subpœnas was taxable to the solicitor.

*Held*, Armour, C.J., *dubitante*, that the successful party was not entitled to tax anything for costs of service by his solicitor of writs of subpœna. *Carty* v. *City of London*, 13 P.R. 285.

A person of the same name as the defendant, served by mistake with the writ in the action, was held entitled to his costs of opposing a motion for judgment under Rule 324, O. J. A. (now Con. Rule 608). *Lucas* v. *Fraser*, 9 P.R. 319.

In *Rew* v. *Anthony*, 9 P.R. 545, costs were allowed for serving an infant out of the jurisdiction. Con. Rule 152 now authorizes such service to be made on the official guardian, and *Rew* v. *Anthony* is no longer an authority.

In a mortgage action it is not necessary to serve infant defendants personally, if they are not personally in possession

of the mortgaged premises. *Sparks* v. *Purdy*, 15 P.R. 1.
See *post*, WRIT OF SUMMONS.

## SHERIFF'S COSTS.

*Con. Rule 1189.*—The fees and allowances to be taken and received by sheriffs and coroners other than those provided for by any statute or Rule of Court shall be the fees and allowances set forth in the tariff C appended to these rules. Con. Rule 1232.

*Con. Rule 1190.*—(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 or a Judge may deem reasonable. Con. Rule 1233. Rules 23, June, 1894, 1375, *part*.

(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 or a Judge may deem reasonable. Rules 23, June, 1894, 1375, *part*.

*Con. Rule 1191.*—Where there are writs of execution upon the same judgment to several counties, and the personal estate of the judgment debtor has been seized or advertised, in one or more or all of such counties, but not sold, by reason of satisfaction having been obtained under and by virtue of a writ in any of the counties, and no money has been actually made on the execution, the sheriff shall not be entitled to poundage, but to mileage and fees only for the services actually rendered and performed by him, and the Court or Judge, may allow him a reasonable charge for such services, in case no special fee therefore is assigned in any tariff of costs. Con. Rule 1234.

*Con. Rule 1192.*—Where any person liable on an execution is dissatisfied with the amount of poundage fees or expenses of execution claimed by a sheriff, the Court or a Judge 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 be refunded upon such terms as may seem just. Con. Rule 1235.

*Con. Rule 1193.*—Upon the settlement of an execution, in whole or in part, by payment, levy or otherwise, the sheriff claiming any fees, poundage, expenses or remuneration, which have not been taxed, shall, upon being required by either party, and on payment or tender of the expenses of taxation, and the sum of 25 cents for a copy of his bill in detail (which 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 the county wherein such sheriff keeps his office. Con. Rule 1236.

*Con. Rule 1194.*—The taxing officer shall tax the bill and give, when requested, a certificate of the taxation. Con. Rule 1238.

*Con. Rule 1195.*—A sheriff shall not without taxation collect any fees, costs, poundage or expenses, after he has been required to have the same taxed. Con. Rule 1237.

*Con. Rule 1196.*—The taxing officer, upon proof of notice of the time and place of the taxation having been duly served upon the sheriff, deputy sheriff, or other officer charged with the execution of the writ, shall examine the bill, whether such taxation is opposed or not, and satisfy himself that the items charged in such bill are correct and legal, and strike out items charged for unnecessary services. Con. Rule 1239.

*Con. Rule 1197.*—A party dissatisfied with the taxation may appeal therefrom as in ordinary cases of taxation between party and party. Con. Rule 1240.

The sheriff on making a levy under a *fi.fa.* is only entitled to poundage and to such fees as are allowed by the tariff, and he cannot claim more although he may be put to extra trouble and expense in making the levy. *Slater* v. *Haines*, 7 M. & W. 413; *Davies* v. *Edmonds*, 1 D. & L. 395.

## MILEAGE.

A sheriff is entitled to mileage only on going to make a levy, not on going to sell also. *Burwell* v. *Tomlinson*, H. T. 2 Vict.; *Morrison* v. *Taylor*, 9 P.R., at p. 395.

"Mileage should be charged, according to the tariff, only on going to seize or sell and not on returning, nor for putting up notices of sale or postponements." *Hay* v. *Drake*, 8 P.R. 120.

Where a sheriff makes a seizure in one place, and subsequently has another *fi. fa.* delivered to him, he is not entitled to charge a fee or mileage for a second seizure unless he in fact makes a fresh seizure in a different place, or, probably, of further goods at the same place, where the first seizure was only of sufficient to satisfy the writs at the time in his hands. *Re Wells*, 68 L.T. 231.

## POSSESSION AND CARE OF GOODS.

The goods seized consisted of farm stock, and the sheriff had charged—

| | |
|---|---|
| Schedule of goods | $5.55 |
| Expenses of taking stock | 6.00 |

Cameron, J.:—"A schedule could not be made properly without to some extent taking stock, and the fee allowed for the schedule was intended to cover and include the expense of taking stock or enumerating the different articles seized." The $6.00 was disallowed. *Morrison* v. *Taylor*, 9 P.R. 390.

Draper, C.J.:—"If the sheriff's bailiff seizes unthreshed wheat, and acting in good faith for the interest of all concerned agrees to pay for having it threshed for the better sale of it, the expenses of the thrashing would be allowable to the sheriff. There are many cases in which the incurring expense in relation to things seized before sale is indispensable, and it is a question of degree." *Galbraith* v. *Fortune*, 10 C.P. 109.

Wilson, C.J.:—"The sum allowed for taking stock, $68, was objected to, and *Morrison* v. *Taylor* was referred to as a decision in point against the allowance of such a charge. The taxing officer can allow only such items as 'are correct and legal,' and such an item is not allowable by the tariff.

"The item apparently intended to cover such a charge in the tariff is, 'schedule of goods taken in execution including copy to defendant, if not exceeding five folios, ten cents.' That allowance, however, is for the mere writing of the schedule, and not for the measuring, classifying and valuing the goods which requires skilled labour.

"It would be a very proper item to allow in all cases where the goods are offered or bid upon at so much on the dollar, now a very usual mode of sale, and that cannot be done in some cases until the standard or dollar value has been ascertained, but even if the bidding is before the valuation, such valuation must be made before the goods can be paid for.

"The section before referred to says the taxing officer shall 'strike out all charges for services which, in his opinion, were not necessary to be performed.' These words do not authorize the allowance of charges not expressly given by the tariff. They may give the taxing officer the power to disallow such items for services as were not in his opinion necessary to have been performed." $68 disallowed. *Grant* v. *Grant*, 10 P.R. 42.

"$1.25 per day of 24 hours is the proper and usual charge for possession, unless the circumstances are very unusual." *Hay* v. *Drake*, 8 P.R. 120.

Where the goods under seizure were mining properties, a long distance from civilization, and $2.25 per day was allowed for possession money, the Court refused to interfere, that being a reasonable allowance under the circumstances of that case. *Re Black* (1903), 6 O.L.R. 512.

"Affidavits, several of which are charged for, ought not to be allowed unless absolutely necessary. The same remark applies to letters, which should only be allowed when required by the party or his attorney. The charge of $2 for indemnity bond does not appear to be allowed in the tariff." *Hay* v. *Drake*, 8 P.R. 120.

## POUNDAGE AND ALLOWANCE IN LIEU THEREOF.

The proper mode of computing sheriff's poundage is to allow six per cent. on the first $1,000, and in addition thereto three per cent, on the amount over $1,000, and under $4,000; and in addition thereto one and one-half per cent. on the amount over $4,000. *Fleming* v. *Hall*, 9 P.R. 310.

Where the sheriff makes the money on several writs in his hands against the same debtor, he is entitled to charge poundage upon each of the several writs, even though all were issued by the same solicitor and placed in his hands at the same time. The amounts cannot be added together to reduce the percentage. *Grant* v. *Grant*, 10 P.R. 40.

So if the sheriff arrest upon one writ, and detain the defendant upon another writ, he is entitled to poundage on both writs. Tidd's Pr. (9th ed.), 1040.

The sheriff is only entitled to the sum paid over, not on what he retains for himself. *Michie* v. *Reynolds*, 24 U.C.R. 303.

The sheriff is entitled to poundage on the sum actually passing through his hands. Where the parties to a suit arranged outside the sheriff's office for the payment of $3,000 on account of the execution in his hands, the sheriff was held not entitled to poundage on that sum. *Hamilton* v. *Gore Bank*, 20 Gr. 190.

If, however, satisfaction was obtained after seizure by the sheriff he would be entitled to poundage on the value of the property seized, or such less sum as the Court or a Judge might deem reasonable under Rule 1190.

The right to poundage attaches upon the actual seizure of goods, but in the case of lands there can be no such actual seizure and no such corporal possession of the property. Advertising the lands for sale, etc., are not to be regarded as equivalents to seizure in the case of goods.

In many of the older cases are to be found expressions of opinion against the right of the sheriff to claim poundage on executions against lands unless there has been an actual sale. These are all reviewed by a Divisional Court in *French* v. *Lake Superior Mineral Co.*, 14 P.R. 541.

In that case the lands had been advertised, and all preparations made for sale, when the defendants paid the sheriff the amount due under the writ. The Court held he was not entitled to poundage.

Rule 1190 (2) now provides for payment of poundage in such a case.

The decision in the above case does not apply to goods. Where a sheriff had seized and advertised personal property for sale, and an hour before the time advertised for sale the solicitor for the defendants paid the amount to the sheriff to stay winding-up proceedings, the local Judge held the money had not been made by the sheriff, and that he was not entitled to poundage, but only to an allowance. Falconbridge, C.J.: "I am of opinion that under the circumstances, and on the authorities cited, the money paid to the sheriff was made under the execution, and that the rules referred to (1190, 1192) do not apply to or supersede the effect of the earlier cases, and that the sheriff is entitled to full poundage according to the tariff." *Re Black* (1903), 6 O.L.R. 512.

Where, after the sheriff had made a seizure, an execution was set aside because the judgment had been irregularly entered, the sheriff was held entitled to full poundage unless deprived thereof under Rule 1190. *Morrison* v. *Taylor*, 9 P.R. 390.

In *Turner* v. *Crozier*, 14 P.R. 272, the sheriff had seized a stock of store goods; interpleader proceedings followed. The goods were sold by the sheriff and the proceeds paid into Court. On the trial of the issue the claimant succeeded. The Master at Chatham allowed poundage. On appeal Ferguson, J., held the sheriff was not entitled. He held that Rule 1233 was based on the fact that the goods seized were the goods of the judgment debtor. It is quite evident that his decision would have been different but for this fact.

It will be noticed that Rule 1190, which is the successor of the old Rule 1233, omits the words relied on in *Turner* v. *Crozier*, and gives the sheriff poundage where the money is made "on, or by force of an execution against goods and chattels."

If the action of the sheriff be intercepted so that he does not make the money, then it is left to the Court to say what allowance, if any, should be made to him. This allowance is not the amount he would receive as poundage, because poundage covers the risk the sheriff assumes when he sells goods.

The sheriff seized goods under an execution for $2,075, taking a satisfactory bond, and advertised the goods for sale. He seized a second time under an alias writ, and upon the day advertised for the sale received notice the judgment was settled. Blake, V.-C.: "I have been surprised to see how small the allowances are that have been made to the sheriff where the process has been intercepted; but I am bound to follow the conclusion arrived at in these cases, and, doing so, cannot allow more than $20 for each seizure." *Wadsworth* v. *Bell*, 8 P.R. 478.

Where on receipt of a *fi. fa.* the defendant requested the sheriff not to make a seizure of his household goods, and afterwords paid the money to the plaintiff, the sheriff was held entitled to his poundage. *Consolidated Bank* v. *Bickford,* 7 P.R. 172.

The foregoing case was decided by Morrison, J., on the authority of *Bissicks* v. *Bath Colliery Co.,* 3 Ex. D. 174, but it is difficult to understand how the latter case is any authority for the judgment in the former. In the English case the sheriff's officer went to the debtor's residence with another man, shewed the debtor the warrant, and told him that in default of payment the man would remain in possession. The debtor then paid the sum demanded which included poundage. The three Judges all agreed that, in order to entitle the sheriff to poundage, there must be a seizure, but upon the above facts (one doubtful) there was a seizure.

The sheriff seized goods under an execution for $1,100, and after retaining possession seven days the defendant settled with the plaintiff by giving him joint notes. The sheriff demanded $64 poundage. "I think the execution is really satisfied within the statute so as to entitle the sheriff to something for poundage. As to the amount, as nothing important has been done, I think $10 in addition to the ordinary charges will be sufficient." Dalton, M.C., *McRoberts* v. *Hamilton,* 7 P.R. 95.

Under executions for $13,335 the sheriff seized rolling stock of a railway, when an injunction was issued restraining the sale. Afterwards the executions were withdrawn. The local taxing officer allowed the sheriff $367, and on appeal Cameron, J., refused a revision of the taxation, and thought under all the circumstances the sheriff had not been too liberally dealt with. *Brockville* v. *Canada Central Ry.,* 7 P.R. 372.

Under an execution for $1,400 the sheriff seized, but learning that the defendants intended to appeal, of his own motion, and to save expense, withdrew his man from possession. The appeal was dismissed and the judgment settled between the parties, the defendants to pay the sheriff his proper fees. *Held,* that the sheriff had not so withdrawn from the seizure as to disentitle him to poundage, or an allowance—the words "from some other cause" in the rule being wide enough to cover the case: $20 was allowed. *Weegar* v. *G. T. Ry.*, 16 P.R. 371.

Under a *fi. fa.* for $79,000 the sheriff seized $50,000 of property and remained in possession about two weeks. Several claims were made to the goods while he was in possession, and some of the property was of a nature to require careful supervision. The plaintiff in this action obtained control of the judgment under which the *fi. fa.* issued, and instructed the sheriff to withdraw. The Master in Chambers allowed the sheriff $60. On appeal, Osler, J., thought $150 a reasonable recompense. *Bowman* v. *Masson,* 1 C.L.T. 109.

Under an execution for $4,000 the sheriff seized a locomotive engine and advertised it for sale. Before the sale took place the execution was stayed by an order of the Court pending an appeal, the defendants to pay the sheriff's costs. The clerk fixed the value of the engine at $3,000 and allowed poundage on that sum. Reduced on appeal from $85 to $40. *Patton* v. *Alberta Ry. Co.* (N.W.T.), 17 C.L.T. 41.

## SIMILITER.

The costs of a similiter with a jury notice were held properly disallowed. *Alexander* v. *School Trustees of Gloucester,* 11 P.R. 157.

## SOLICITOR AND CLIENT COSTS.

"The Court makes a distinction with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs, and this distinction is marked by the terms of 'costs as between party and party' and 'costs as between solicitor and client,' the Court in the latter case permitting a larger proportion of actual expenditure than it allows in the former case. No definite rules can be laid down with respect to the difference between the costs allowed upon one principle of taxation and those allowed upon the other. In general, however, in taxations as between party and party only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees annexed to the general orders and regulations of the Court, while in taxations as between solicitor and client, the party will be allowed as many of the charges which the party would have been compelled to pay his own solicitor, for costs of suit, as fair justice to the other party will permit." Dan. Chy. Pr. 1233.

"There is a material difference between taxation between party and party and that between a solicitor and his client. Many charges are allowed in the latter case which would not be allowed in the former. Before a solicitor incurs expenses which would not in the ordinary course, be allowed on taxation between party and party, he should explain to his client that the proposed expenses would not be so allowed, and obtain his authority for incurring them. If he fails to explain this the costs may be disallowed on taxation between himself and his client, even although he had the client's express authority for incurring them." Arch. Pr. 700.

"The costs in an action as between solicitor and client include, in my opinion, such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action." Armour, C.J., *Cousineau v. City of London Insurance Co.*, 12 P.R. 512, 22 C.L. Journal 409.

"I take it to be the general rule of law, and an important rule, that is to be observed in all cases, that if an unusual expense is about to be incurred in the course of an action, it is the duty of a solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will, or may, not be allowed on taxation between party and party whatever may be the result of the trial." Baggallay, L.J., *Blyth* v. *Fanshawe*, 10 Q.B.D. 207. This was approved of in *Re Broad and Broad*, 15 Q.B.D. 252, affirmed in appeal, 15 Q.B.D. 420.

Where costs have to be paid by the opposite party and not by the client there is no difference between "costs as between solicitor and client" and "costs between solicitor and client"; both mean costs between party and party, to be taxed as between solicitor and client; and the plaintiff, in this case, was held entitled to tax against the defendant only such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action: but that the taxation should be as liberal as possible under the practice in favour of the plaintiff. *Heaslip* v. *Heaslip*, 10 C.L. Times 318, 14 P.R. 21.

The words "all costs incidental to the arbitration" were held not to extend to costs as between solicitor and client. *In re Bronson and Canada Atlantic Railway Co.*, 10 C.L. Times 154, 13 P.R. 440.

In the taxation of costs between solicitor and client where there is no tariff of costs regulating the charges for the business done, and in the absence of any specific contract the general custom and practice of solicitors in such cases is to be the guide for the compensation allowed, if any such custom or practice exists; if not, the value of the services rendered is to be estimated upon a *quantum meruit*. *In re Richardson*, 3 Chy. Ch., at p. 149.

"I think the defendant is entitled, as between attorney and client, to various attendances upon his client and for charges which the client would have to pay for, occupying the attorney's time, which could not be charged against the opposite party. So also with respect to the counsel fee. The tariff of fees is no guide in this last respect, except between party and party. What is a fair and proper fee commensurate with the importance of the case and the trouble the counsel has had with it should be allowed." *Cameron* v. *Campbell*, 1 P.R. 170.

In *Archer* v. *Severn*, 3 C.L. Times 602, Mr. Thom, taxing officer, held that he was not restricted to the allowance of a fee not exceeding $80 to counsel for executors, in an action in the Court of Appeal, where the costs were taxed as between solicitor and client.

"Business may be done between solicitor and client for which the tariffs make no provision; but for business which the tariff does specify it is binding for all purposes, with, I believe, the single exception of counsel fees, an exception which was made very early in the history of the Court and has ever since been recognized." *Re Geddes & Wilson, Solicitors*, 2 Chy. Ch. 447, *per* Mowat, V.-C.; *Re Totten*, 8 P.R. 385.

If charges in a bill are unusual or exceptional the solicitor has to make out a very clear case to have them allowed.

If, however, the usual charges are made, but the client complains of negligence or unskilfulness, not apparent on the bill, then the onus rests on him to establish the case. *In re A. B., Solicitor*, 8 L.J.N.S. 21.

The Court has a general and discretionary power to award costs as between solicitor and client to a successful party whenever the justice of the case may so require. *Andrews* v. *Barnes*, 39 Ch. Div. 133.

In cases where there is something in the nature of scandal, such as gross charges of fraud which are not sustained, the Court will sometimes give the other party costs as between solicitor and client. *Turner* v. *Collins*, L.R. 12 Eq. 440.

Where solicitors instituted an action for administration by writ instead of by notice of motion, in the absence of evidence to shew that the client had, with knowledge of the practice of the Court and the risk she ran, expressly instructed the solicitors to proceed the way they did, it was held they could not tax against her any more costs than they would be entitled to had they proceeded by notice of motion instead of by writ of summons.

Robertson, J.:—"I think it is a wholesome rule to apply, that solicitors should not be allowed to make litigation unnecessarily expensive, either to their clients or to those against whom they are employed. *Re Allenby and Weir, Solicitors*, 13 P.R. 403, 14 P.R. 227.

A party gave instructions to an attorney to commence an action for malicious arrest, without specifying the Court in which the action was to be brought, and the attorney sued in the superior Court and recovered £40 damages. The presiding Judge refused a certificate for costs, and the Master only taxed the plaintiff's solicitor County Court costs.

*Held*, as the attorney had not informed the plaintiff that by bringing the action in the superior Court he incurred the risk of recovering a verdict which would only entitle him to County Court costs, the attorney could only recover from his client, between attorney and client, costs on the County Court scale. *Scanlon v. McDonough*, 10 U.C.C.P. 104.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and it appeared that the defendant's solicitor had at the request of his client, made in good faith and on reasonable grounds, travelled from Sarnia to Toronto to attend the examination of the plaintiff for discovery.

*Held*, Proudfoot, V.-C., on appeal from the Master, that the defendant could tax against the plaintiff a sum of $60 paid to the defendant's solicitor for two days' services and $15.50 travelling expenses. *Gough v. Park*, 8 P.R. 492.

Where the circumstances of the case were somewhat exceptional, and the client understood that the payment of the fees was voluntary, and that they could not be recovered back from the opposite party, a solicitor was held entitled to retaining fees of $150 pursuant to an agreement between the solicitor and client. *Re J. S. Fraser, a Solicitor*, 13 P.R. 409. See RETAINER.

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, and that the costs of them should be disallowed under Con. Rule 1176, unless it is shewn that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket, and without regard to the interests of his client. *Re O'Donohoe, a Solicitor*, 12 P.R. 612, 24 C.L. Journal 565.

Where the costs of any pleadings are disallowed because the pleadings are not as concise as they should be, or because they state matters of argument or evidence, the solicitor cannot claim these costs from his client. If he does it is open to the client to complain to the Court. *Kennedy* v. *Lawlor*, 14 Gr. 229.

Solicitor and client costs cannot be recovered as damages.

Jessel, M.R.:—"I am of opinion that it is not according to law to give a party by way of damages the costs as between solicitor and client of the litigation in which the damages are recovered."

Brett, L.J.:—"The damages in an action of tort must have been incurred when the action is brought except in some cases where they include everything up to the time of trial, and they cannot include any expenses incurred in the action itself. The law considers the extra costs which are disallowed on taxation between party and party as a luxury for which the other party ought in no case to be liable, and they cannot be allowed by way of damages. *Cockburn* v. *Edwards*, 18 Ch. Div. 449.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure—

*Held*, that the appointment of a solicitor need not be under the corporate seal.

Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action commenced—

*Held*, that the original retainer to defend continued in the new suit. *Clarke* v. *Union Fire Insurance Co.—Caston's Case*, 10 P.R. 339.

In a creditor's action to set aside a conveyance or mortgage as fraudulent or preferential the plaintiff has a right to object to the other creditors coming in to share in the fund realized by the action until they have contributed to the additional costs as between solicitor and client.

The judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant Cox, "as may contribute to the expenses of the suit," and directed that the plaintiff should be paid his party and party costs by the defendant McCall, and his additional costs, as between solicitor and client, out of the fund recovered for the creditors by setting aside the mortgage. The defendants appealed to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was affirmed, but the additional costs as between solicitor and client were not given by the Court of Appeal or the Supreme Court.

On a motion by the plaintiff for a direction to the taxing officer to tax these costs incurred by him in the Court of Appeal and Supreme Court, Boyd, C., held that the plaintiff's expenses in saving the fund are not limited to party and party costs, but extend to those incurred as between solicitor and client to the end of the proceedings in the appeal to the Supreme Court. The English cases are referred to in the judgment. *Macdonald* v. *McCall*, 7 C.L. Times 83.

Where a first mortgagee exercised the power of sale in his mortgage and sold thereunder, and a second mortgagee applied for an order to tax the costs of the solicitor for the first mortgagee, the order directed the taxation to be as between solicitor and client. *Re Crear & Muir*, 8 P.R. 56; and see *Re Macdonald, Macdonald & Marsh*, 8 P.R. 88.

Where a special privilege as to costs is conferred by statute upon certain litigants the general jurisdiction of the Court or Judge over costs does not extend to deprive them of such privilege, and the Judicature Act and the rules have not altered the law in this respect.

Under section 22 of the Act to protect justices of the peace and others from vexatious actions (R.S.O. 1897, ch. 88), the successful party in certain actions "shall be entitled to his costs to be taxed as between solicitor and client." In these actions the successful party has an absolute right to these costs. *Arscott* v. *Lilley*, 14 A.R. 282; *Ing King* v. *Archibald*, 10 O.W.R. 997.

For the purposes of taxation under the Solicitors Act "disbursements" means actual payments before the delivery of the bill, and any sums claimed in the bill as disbursements and not paid before delivery must be disallowed. *Sadd* v. *Griffen* (1908), 2 K.B. 510.

It has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it the right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew would stand taxation. *In re Thompson*, 30 Ch. Div. 441; *Sadd* v. *Griffen* (1908), 2 K.B. 510.

The Court will, however, in a proper case, allow the solicitor to amend a bill already delivered. *Re Solicitor*, 13 O.W.R. 57; *Re Solicitor*, 13 O.W.R. 273.

In *Baldwin* v. *Quinn*, 16 P.R. 248, the Court refused a solicitor the costs of proceedings in an action that proved useless. But the decision of the taxing officer allowing a solicitor the costs of an unsuccessful interlocutory application, undertaken in the exercise of an honest and fair discretion, should not be interfered with. *Smith* v. *Harwood*, 17 P.R. 36.

On solicitor and client taxations the local taxing officers have power to tax increased counsel fees without a fiat. *Re Macaulay*, 17 P.R. 461.

Where a solicitor retains counsel against the wish of his client he cannot tax the costs of such counsel against the client. *In re Harrison* (1908), 1 Ch. 282.

Where a solicitor is retained to collect money he is entitled to insist that the cheque for the amount shall be payable to himself and not to the client. Where the defendant's solicitor sent the plaintiff's solicitor a cheque for the amount of the judgment, payable to the order of the plaintiff, and the plaintiff's solicitor refused to accept it, the Court refused to set aside the writ of *fi. fa.* *Knowlton* v. *Faquier*, 11 C.L. Times 327.

## SOLICITOR SUING OR DEFENDING IN PERSON.

Where a person, not a solicitor, appears in person and carries on his own action he is only entitled to disbursements.

So an attorney suing as an unprivileged person would appear not entitled to charge fees. *Beardsley* v. *Clench*, Taylor 309.

Attorneys suing in person were held entitled to tax the usual fees, with the exception of instructions, instructions for brief and preparing brief. And where the attorney also acts as counsel he cannot tax counsel fee. *Smith & Crooks* v. *Graham*, 2 U.C.Q.B. 268.

The plaintiff, a solicitor, obtained a verdict for damages and costs in an action of libel, in which, although another solicitor appeared as acting for him in all the pleadings and proceedings in the suit, he actually did the work and carried on the suit himself.

*Held*, on appeal from the taxing officer, that full fees and disbursements except "instructions" had been properly allowed him, and that his acting as agent for the solicitor whose name appeared in the proceedings as *his* solicitor did not affect his right. *King* v. *Moyer*, 9 P.R. 514.

In *Malone* v. *Davies*, 10 C.L. Times 18, it was held that "instructions for brief" could not be allowed where the plaintiff, a solicitor of the Court, was acting on his own behalf.

The defendant was himself a solicitor, but retained another solicitor to conduct his defence, and was awarded costs against the plaintiff.

*Held*, that the defendant was entitled as against the plaintiff to the usual costs of a defendant. *Clarke* v. *Creighton*, 9 C.L. Times 313, 25 C.L. Journal, 380.

This case does not appear to be reported any more fully than as above, and there is nothing to explain what is meant by "the usual costs of a defendant."

Where a solicitor is a trustee, and he sues in person, either alone or on behalf of himself and his co-trustees, his right to profit costs is not always clear.

A solicitor trustee is not allowed, as against his *cestuis que trust*, any costs other than those out of pocket in respect of any professional services rendered by him, either in the administration of the trust estate out of Court, or in conducting a suit by himself, or his own defence to a suit regarding the trust estate. Mor. & Wurt. 386.

The rule applies as well to a constructive as an express trustee. The rule also applies where the trustee is a member of a firm by whom the business is done. *Collins* v. *Carey*, 2 Beav. 128.

But it is said that a trustee solicitor may employ his partner, who will be entitled to full costs, provided the trustee does not participate in the profits. *Clack* v. *Carlon*, 30 L.J. Ch. 639, 7 Jur. N.S. 441. Spragge, C., refused to follow the decision in *Clack* v. *Carlon*. See *Meighen* v. *Buell*, 24 Gr. 503.

The Chancellor's judgment in the last case was reversed (25 Gr. 604) but no reference was made to *Clack* v. *Carlon*.

The rule depriving a trustee who acts as his own solicitor of profit costs, only applies between the trustee and his *cestui que trust*, where the costs are payable out of the trust funds, not where they are payable by an adverse party. *Colonial Trust Co.* v. *Cameron*, 24 Gr. 548; *Meighen* v. *Buell*, *supra*. Mor. & Wurt. 390.

It was held that a solicitor mortgagee defending his title to the mortgaged property will be entitled as against the mortgagor and subsequent incumbrancers to costs out of pocket only, if he acts for himself. *Sclater* v. *Cottam*, 3 Jur. N.S. 630. See 24 Gr., p. 552, as to this.

The reasons for depriving a solicitor trustee of profit costs where he is a plaintiff would not seem to apply where he is a defendant. *Meighen* v. *Buell*, 25 Gr., at p. 606; *Ontario* v. *Winnaker*, 13 Gr. 443.

And see *Blakeley* v. *Ingram*, 9 C.L. Times 143.

A testatrix appointed a solicitor one of the executors and trustees of her will, and declared that any trustee who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. The solicitor trustee was one of the attesting witnesses.

*Held*, following the decision of Chitty, J., *In re Barber*, 31 Ch. Div. 665, that the solicitor trustee was not entitled to any profit costs for business done by him for the estate, because his right could only arise under the will and by the Wills Act, section 15 (R.S.O. ch. 109, sec. 17), this benefit was invalidated as being a gift to a witness. *In re Pooley*, 40 Ch. Div. 1.

## SPECIAL JURY.

The costs of a special jury are paid, in the first instance, by the party suing out the writ of *venire facias juratores*. R.S.O. 1897, ch. 61, sec. 121.

The party suing out the *venire facias* cannot tax the costs of the special jury unless the trial Judge certifies in open Court immediately after the verdict, or afterwards in Chambers, that the case was a proper one to be tried by a special jury. R.S.O. 1897, ch. 61, sec. 129.

Where a special jury is summoned, but the cause is not heard, is provided for by section 130.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. *Hooker* v. *Garnett*, 16 U.C.Q.B. 180.

The costs of a special jury are not costs of the day, but part of the general costs of the cause. *Whitehead* v. *Brown*, 2 O.S. 345.

In *Farquhar* v. *Robertson*, 13 P.R. 156, Mr. Justice Rose certified for the costs of a special jury in an action of libel. On pages 164, 165, the rule as to costs of a special jury, and the reasons for allowing them in that case, are fully stated.

Where a case turned on a question of law, and there was no fact in dispute between the parties, the Judge refused to certify for a special jury. *Wemys* v. *Greenwood*, 2 C. & P. 483.

Where the trial Judge certifies that the case was a proper one for a special jury, the taxing officer must allow the full costs of the jury where the verdict is found in favour of the party by whom the jury was summoned. *Broadrick* v. *Clark*, 12 Price 154.

## STENOGRAPHER'S FEES.

*Con. Rule 1270.*—Rule 1143 is repealed and the following substituted therefor:—

(1143) In cases not otherwise provided for, the taxing officer may allow a reasonable sum for the expense of a shorthand writer, on the certificate of the Judge before whom the examination of any witness or witnesses in any such cause, matter or other proceeding takes place; and also on the certificate of the Local Master in references before him when the parties agree to the employment of a shorthand writer.

See this rule referred to in *Murphy* v. *Cory*, 8 O.W.R. 68.

Copies of shorthand notes of evidences taken on a reference may be allowed for in a proper case. See *Plenderleith* v. *Parsons*, 15 O.L.R. 397, *ante* under COPIES.

But the copies of each day's evidence, made for use of counsel, will not be allowed in the absence of an order or agreement between the parties. *Wells* v. *Mitcham*, 4 Exch. D. 1.

## STOP-ORDER.

Persons having claims on funds in Court are not entitled, under all circumstances, to the costs of obtaining a stop-order. *Grimsby* v. *Webster*, 8 W.R. 725.

A mortgagee of a fund in Court empowered by his mortgage deed to apply for a stop-order, is entitled to the costs of his so doing; he must, however, ask specially for them, as they will not be allowed by the taxing master, under the common order, to tax the mortgagee's costs. *Waddilove* v. *Taylor*, 6 Ha. 307.

An incumbrancer petitioning for a stop-order, after notice that a petition had been presented for payment out of the fund, was not allowed his costs. *Hoole* v. *Roberts*, 12 Jur. 108.

The person obtaining a stop-order may be ordered to pay any costs occasioned thereby to any person interested in the money to which the order relates. Con. Rule 82(2).

The applicant may be ordered to pay the costs of parties unnecessarily notified. *Glazbrook* v. *Gilatt*, 6 Beav. 614.

## SUBPŒNA.

*Con. Rule 480.*—Any number of names may be included in one subpœna, and no more than one subpœna shall be allowed on taxation of costs, unless a sufficient reason be established to the satisfaction of the taxing officer for issuing more than one.

"It is argued that once a subpœna has been procured in any action, no second subpœna should be obtained, and Rule 480 is appealed to to support that contention. Counsel for [illegible] stated that it was his practice, after having used a subpœna for one day, to alter it for use in the same action if [illegible] to subpœna a witness for a subsequent occasion. I hope that he is singular in that practice. Once a subpœna has been used to bring the witnesses who are required to be sworn at any sittings of the Court, or in the Master's office, it is proper, and I think necessary, to procure a new subpœna for the witnesses to be examined upon a subsequent day. I am not now discussing cases in which it is known in advance and before the first sittings that a certain witness will be required at a particular later day—or even at any time in the future. In that case the witness may be subpœnaed before the first sittings and told that he will be needed on a day certain, or that he will be notified of the day upon which he will be needed. I am not deciding that such a subpœna and notice would be effective, but simply that it would not be improper. But after the first day of the sittings it would be irregular to alter the date of the subpœna, and a witness served with a subpœna on its face for a day then past could not be compelled to obey the subpœna." Riddell, J., *Plenderleith* v. *Parsons* (1907), 15 O.L.R. 397.

In an arbitration under the Railway Act there was no power to compel the attendance of witnesses. Subpœnas, however, were issued, and the parties attended upon them and were examined.

*Held*, there was no power to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses. *Re McRae and The Ontario and Quebec Railway Co.*, 12 P.R. 282; affirmed, p. 327.

On a party and party taxation costs will not be allowed for service of a subpœna unless such service is made by the sheriff. *Carty* v. *London*, 13 P.R. 285.

A subpœna is a "writ" within the meaning of Rule 265, and only four copies can be taxed. *Sparks* v. *Purdy*, 15 P.R. 1.

Other means having been provided by statute for proving documents at the trial of actions, the costs of obtaining orders for subpœnas to public officers to produce documents, and of procuring the attendance of such officers, should not be allowed except where it is clearly shewn that the documents could not be proved in any other way. *Hope* v. *Traders Bank*, 27 C.L.J. 61.

Where subpœnas *duces tecum* have been directed by counsel, and are necessary to enforce the production of documents, they should be allowed on taxation. *Jessop* v. *Cusack*, 25 L.R. Ir. 244.

Two subpœnas for one witness were allowed, where the time for service was short and it was not known in which of two places the witness could be found. *Craig* v. *New Oxley Ranch Co.*, 15 C.L.T. 322.

A subpœna was issued by one plaintiff for the purpose of calling his co-plaintiff as a witness; *held*, that he was reasonably justified in doing so, and the costs of the subpœna were allowed. *Alison v. Christie*, 15 C.L.T. 324.

## TAXATION OF COSTS.

*Con. Rule 86.*—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 him.

*Con. Rule 1161.*—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.

These rules are substantially the same as the English rules; and under these it was held there is no power to direct shorthand notes of evidence before the taxing officer without the consent of the parties. *Re Hilleary and Taylor*, 36 Ch. Div. 262.

See *Williamson v. Town of Aylmer*, 12 P.R. 129, under REVISION.

Where solicitor and client contradict one another in affidavits the taxing officer should allow oral evidence to be taken under Con. Rule 86. *Re Evans*, 35 W.R. 546.

A Master or a single Judge has no discretion to allow a solicitor more than $1 per hour for attendance on the taxation of a bill of costs, either between solicitor and client, or party and party; the tariff being fixed at that rate by G. O. 608 (now item 97 of the Tariff). *Re Totten*, 8 P.R. 385, 17 C.L. Journal 49.

And a bargain between a solicitor and his client for $2 an hour would not be binding. *Re Geddes & Wilson, Solicitors*, 2 Chy. Ch. 447. But see *Gough v Park*, 8 P.R. 492.

On a party and party taxation two clear days' notice of appeal from the taxation is sufficient. *McCallum* v. *McCallum*, 11 P.R. 179. Where the bill is taxed by a Local Master at the instance of the solicitor, and the certificate is equivalent to a certificate, the appeal requires the same notice as on an appeal from a Master's report. *Exchange Bank* v. *Newell*, 19 C.L.J. 253.

In *McCallum* v. *McCallum, supra*, the Chancellor held that an informal certificate of the result of the taxation at the end of the bill by the local taxing officer, where the bill had been duly filed and execution issued thereon, was sufficient on which to base an appeal; but in a later case the same learned Judge distinguished *McCallum* v. *McCallum*, and refused to consider such a certificate where it was not filed in the proper office. *Gall* v. *Collins*, 12 P.R. 413.

As a foundation for an appeal objections must be filed with the taxing officer, and these objections must be directed to specific items; if a general objection is relied on it must be expressly stated to be directed to each and every item of the bill. A general objection that the bill is exorbitant is not sufficient.

On an appeal from taxation by a local taxing officer the Judge hearing the appeal has no right to refer the bill to one of the taxing officers at Toronto for revision or retaxation. He may ask the opinion of the taxing officer at Toronto on any question arising, but he must himself decide the points involved. The practice adopted in *Quay* v. *Quay*, 11 P.R. 258, to the contrary, would not now be followed. *Campbell* v. *Baker* (1905), 9 O.L.R. 291.

A taxing officer's certificate may, in a proper case, be set aside in order to allow objections to be carried in, and the certificate resigned at a later date; and this was ordered in a case where the solicitor for the party objecting had himself taken out the certificate, intending to appeal from it, but not remembering that it was necessary to carry in objections in writing, and had promptly applied for relief. *Robinson* v. *England* (1906), 11 O.L.R. 385.

Appeals from taxation by local officers must be brought on within eight days. *Stark* v. *Fisher*, 11 P.R. 235; *Ireland* v. *Pitcher*, 11 P.R. 403; but the time for appealing may be enlarged by the Master in Chambers or a Judge. *Quay* v. *Quay*, 11 P.R. 258.

The time for appealing begins to run from the date of the certificate of taxation, not from the date of each ruling in the taxation. *Re O'Donohue*, 12 P.R. 612.

No appeal lies from the taxation of a mortgagee's costs of proceedings under a power of sale had under R.S.O. 1897, ch. 121, sec. 30, the taxing officers there named being *persona designata*. *Re Vanluven and Walker*, 19 P.R. 216.

## TELEGRAMS.

Where a telegram was sent, by the direction of the Judge, advising defendants of the result of the judgment which had been reserved,

*Held*, Wilson, C.J., the charges for the telegram were taxable between party and party. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

Where injunctions are obtained in cases where the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait until the order could be issued and served, it is usual to telegraph the defendant, or his solicitor, that the injunction has been granted, and shortly, the terms of it. In such cases the costs of telegrams are taxable.

## TRANSLATIONS.

The costs of procuring translations of documents in a foreign language for the use of the Court in the conduct of litigation are taxable between party and party.

In an administration action documents in the French language were brought into the Master's office, and it became necessary to have translations of them. The taxing officer disallowed the costs of making these translations because the work was done by clerks in the office of the plaintiff's solicitor, who were not professional translators, and because it had not been the practice to tax allowances for such work (see *Ellington* v. *Clark*, 38 Ch. Div. 332). *Held*, that the taxing officer was wrong, and that he should make such allowances for the translations as were reasonable. *In re Bowes* (1901), 2 Ch. 251.

The expenses of a witness at the trial to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, were allowed on taxation between party and party. *Bastard* v. *Smith*, 10 A. & E. 213, 50 R. R. 387.

## TENDER.

*Con. Rule 1153.*—Where a petition or a notice of motion is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, accompanied by a tender of $5 for costs, the person making the payment shall be allowed the same in his costs, provided the service was proper, but not otherwise; but this rule is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge considers the party entitled, notwithstanding such notice or tender, to appear in Court. Con. Rule 1193.

Practically the same as the English rule. *In re Sutton*, 21 Ch. Div. 855, trustees who had been tendered and accepted the 42 shillings payable under the English rule, were refused further costs of appearing on a petition.

Where a receiver of mortgaged lands was served with a petition, but was not tendered his costs under the above rule, he was allowed his taxed costs. *Gardner* v. *Burgess*, 13 P.R. 250.

Where a defendant pleads tender for a sum before action and pays that sum into Court in full satisfaction of the plaintiff's claim, and the plaintiff accepts the sum paid in, he is not entitled to any costs of the action. But if the defendant pays money into Court as an offer to buy peace, and pleads a denial of liability in case the plaintiff does not choose to accept the offer, then in case the plaintiff takes out the money in satisfaction of his claim, he is entitled to tax his costs of the action. *Griffiths* v. *School Board of Ystradyfodwg*, 24 Q.B.D. 307.

If the amount paid into Court and accepted by the plaintiff is an amount that might have been recovered in the County Court his costs will be taxed on the County Court scale, in a case where the defendant admits liability. *Chick* v. *Toronto*, 12 P.R. 58.

Where the defendant pleaded that after action brought the plaintiff agreed to accept a certain sum for debt and costs, and brought that sum into Court, and the plaintiff served notice accepting the sum "in satisfaction of the plaintiff's claim in respect of which it was paid in," *held*, that the plaintiff was not entitled to any further costs. *Goodbody* v. *Gallaher*, 16 L.R. Ir. 336.

In an action against a bank to recover money paid into the savings department, the defendants paid into Court the amount less 22 cents. *Held*, that the plaintiff was entitled to his costs of the action. *Henderson* v. *Bank of Hamilton*, 25 O.R. 641. And see *Tobin* v. *McGillis*, 12 P.R. 60.

## TERM FEES.

Item 113 of tariff A provides that "no two fees to be allowed to either party when such proceedings are taken, or had, between the first day of any sittings of the Courts (as formerly fixed by Rule 216 of the Con. Rules of 1888, or as fixed by R.S.O. 1887, ch. 47, sec. 12, as the case may be), and the first day of the following sittings so fixed."

By Rule 216 of the Rules of 1888, the sittings of the Divisional Court were three in every year, viz.: Michaelmas, beginning on the third Monday in November, and ending on the Saturday of the second week thereafter; Hilary, beginning on the first Monday in February, and ending on the

Saturday of the following week; and Easter, beginning on the third Monday in May and ending on the Saturday of the second week thereafter. These dates are still applicable in fixing fees in actions in the High Court of Justice.

R.S.O. 1887, ch. 47, referred to in the tariff, is the former County Courts Act, and section 12 thereof provides for four quarterly sittiugs in lieu of terms, commencing on the second Monday in January and the first Monday in April, July and October, and ending on the Saturday of the same week. In the County of York the sittings were the second Monday in January, June and October, and the first Monday in April. These dates will fix the limit of fees in County Court actions.

No fee is taxable on proceedings after judgment. *Wilt* v. *Lai*, 1 Ch. R. 216.

## TRAVELLING EXPENSES.

A solicitor has no right to make journeys, either in England or elsewhere, at the expense of his client, without specific instructions; and, except under very special circumstances, the costs of such journeys will not be allowed. Mor. & Wurt. 502, and cases there cited.

*In re Snell,* a solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on their behalf. Being employed by another client to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions. On his return to England he reported to the company what he had done, and they made use of the information he had obtained. He also took three journeys to Paris to conduct negotiations for a compromise of the suit, without instructions from the company, but with the knowledge of some of the directors. The Court of Appeal held that, under the special circumstances of the case, he was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Re Snell,* 5 Ch. Div. 815, 25 W.R. 736.

A solicitor for a company was held entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Clarke* v. *Union Fire Insurance Co., Caston's Case*, 10 P.R. 339.

As to a solicitor attending on a client in the country, where corespondence would have answered the same purpose, see *Re Mortimer*, Ir. R. 4 Eq. 96, 18 W.R. 367.

The travelling expenses of experts were allowed in *Churton* v. *Frewen*, 15 W.R. 559.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had, at the request of his client, made in good faith and on reasonable grounds, travelled from Sarnia to Toronto to attend on the examination of the plaintiff, the Master allowed only $6 for a special attendance of three hours.

*Held*, on appeal, that the Master could tax against the plaintiff a sum of $60 paid to the defendant's solicitor for two days' time and travelling expenses. *Gough* v. *Park*, 8 P.R. 492.

On a solicitor and client taxation the client objected to the allowance of a charge of $12 for travelling expenses in addition to $35 counsel fee. On appeal the Court refused to interfere with the taxing officer's discretion. *Re Robinson*, 16 P.R. 423.

On a solicitor and client taxation where the journey was under all the circumstances reasonable, the solicitor will be allowed his charge upon proof of instructions given by the client; where the journey was not necessary, and the work could have been done through an agent, the solicitor must prove that he advised the client that the services could be as well performed by an agent, and that the client insisted on the solicitor making the journey, knowing that the extra costs would not be allowed as between party and party. *Crossley* v. *Parker*, 1 J. & W. 460; *Alsop* v. *Lord Oxford*, 1 My. & K. 564; *In re Mowat*, 17 P.R. 180.

In *Bell* v. *Atkin*, L.R. 3 C.P. 320, on a party and party taxation, Bovill, C.J., said: "Cases may arise in which it is necessary that the attorney who has had the conduct of the case from the commencement and is acquainted with all the facts, should be present at the trial, and I think the present was such a case"; and the travelling expenses of the attorney were allowed.

This case was approved of and followed in *The Solo* (1893), P. 73, where the Judge said: "In the conduct in Court of a difficult collision case, it is, according to my experience at the Bar, most important that the solicitor who is responsible for the case, and the preparation of the evidence, should be present, and that counsel should have his assistance."

*In re Dixon* (1898), 2 Ch. 443, the Court of Appeal allowed the travelling expenses of a country solicitor attending the hearing in London where the case was disposed of on affidavit evidence, but the Court was careful to point out that such expenses will be allowed only in very exceptional cases.

The rulings in the last three cases do not appear to have turned upon any special rule or item of the tariff, and there seems no reason why they are not applicable to the practice in Ontario. At the same time no such allowances appear to have been taxed on party and party taxations in this province.

An arbitrator made charges for his travelling expenses and loss of time in travelling, in addition to his per diem allowance, and the taxing officer disallowed them, and on appeal his decision was affirmed by Galt, J. *Re Hillyard and The Royal Insurance Co.*, 12 P.R. 285.

## TRIAL.

A party is not in any case entitled to the costs of preparing for trial, such as preparing briefs and documents and advising on evidence, until after notice of trial is given. *Freeman* v. *Springham*, 14 C.B.N.S. 197; *Cooper* v. *Boles*, 5 H. & N. 188.

See WITNESSES AND WITNESS FEES.

On the first trial of the action the jury disagreed, and on the second trial they found a verdict for the plaintiff. No order was made as to the costs of the first trial.

*Held*, Rose, J., that the costs of the first trial were governed by Rule 428, O. J. A. (now Con. Rule 1130), and were costs in the cause to the plaintiff, and were taxable without any special directions. *Copeland* v. *The Corporation of the Township of Blenheim*, 11 P.R. 54.

The same rule applies where a nonsuit is directed and set aside and judgment given at the second trial. *Creen* v. *Wright*, 2 C.P.D. 354; or where the verdict for the plaintiff is set aside without any direction as to costs and the plaintiff succeeds at the second trial. "All the complications which formerly existed are cleared away, and one plain rule now governs all these cases. The costs are to follow the event, and the event is the result of the entire litigation. In this case the first trial was not like an interlocutory application, nor was it an abortive issue; it was one of the stages in the whole proceeding, which ended in the judgment in favour of the plaintiff. The plaintiff is, therefore, entitled to the costs of the whole case." *Field* v. *Great Northern Ry.*, 3 Ex. D. 261.

See New Trial.

## UNNECESSARY OR VEXATIOUS COSTS.

*Con. Rule 1154.*—The Court or Judge may, at the hearing of any action or matter, or upon any appeal, application or proceeding in any action or matter in Court or Chambers, and whether the same is objected to or not, direct the costs of any writ, pleading, petition, affidavit, evidence, account, statement, or other proceeding, or any part thereof, which is improper, unnecessary or contains unnecessary matter, or is of unnecessary length, to be disallowed; or may direct the taxing officer to look into the same and to disallow the costs thereof, of of such part thereof, as he shall find to be improper, unnecessary or to contain unnecessary matter, or to be of unnecessary length. In such case the party whose costs are so disallowed shall pay the costs occasioned to the other parties by such unnecessary proceeding, matter or length; and in any case where such question has not been raised before and dealt with by the Court or Judge, the taxing officer may look into the same (and, as to affidavits and evidence, although the same may be entered as read in any judgment or order) for the purpose aforesaid, and thereupon the same consequence shall ensue as if he had been specially directed to do so. Con. Rule 1195.

*Con. Rule 1175.*—Where costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party. Con. Rule 1214.

*Con. Rule 1176.*—(1) Between party and party the taxing officer shall not allow the costs of proceedings:—

(*a*) Unnecessarily 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;

unless he is of opinion that such proceedings w[illegible] taken by the solicitor because, in his judgment, reason[illegible] exercised, they were conducive to the interests of his client.

(2) Between solicitor and client the taxing officer may allow the costs of proceedings taken as mentioned in the above clauses (*a*) and (*c*) of this rule, 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 ta[illegible]n as mentioned in clause (*b*) where the same were taken by the desire of the client after being informed by his solicitor that the same were unnecessary and not calculated to advance the interests of the client. Con. Rule 1215.

Where the object of a suit has been attained, the proper course is to apply to the defendant to have the question of costs disposed of on motion; unless he does so, the plaintiff will not be given the extra costs occasioned by going on to a trial. *Webb* v. *McArthur*, 3 Chy. Ch. 364; *O'Sullivan* v. *Claxton*, 26 Gr. 612.

It would appear that the costs cannot be so disposed of except by consent. *Merchants Bank* v. *Musgrove*, 7 P.R. 59.

If a defendant at any time during the progress of the action offers to submit to all the relief to which the plaintiff is entitled, the Court will not give the plaintiff the costs of the subsequent prosecution of the action if he brings it to a hearing. Mor. & Wurt. 102, 110.

The taxing officer must exercise the jurisdiction conferred upon him by Con. Rule 1176 as to inquiring into the propriety of proceedings in an action, although no special directions have been given for that purpose. *Re Wormsley, Baines* v. *Wormsley*, 47 L.J. Ch. 844.

Where unnecessary parties were made to an administration suit, the Court refused to burden the estate with any of the extra costs hereby occasioned. *Rodgers* v. *Rodgers*, 13 Gr. 457.

Where a plaintiff filed a bill for an administration decree in a case in which a decree would have been made on notice without a bill, he was not given the costs thereby occasioned. *Sovereign* v. *Sovereign*, 15 Gr. 559; *Moore* v. *Buckner*, 28 Gr. 606; *Re Allenby and Weir, Solicitors*, 13 P.R. 403.

Where instead of demurring to a bill, the defendant put in an answer, and went to an examination and hearing: the Court on dismissing the bill, gave the defendant costs only as upon a demurrer. *Brouse* v. *Cram*, 14 Gr. 677; *Gildersleeve* v. *Cowan*, 25 Gr. 460.

Where the plaintiff instituted administration proceedings without any shew of reason, or proper foundation for the benefit of the estate, they were ordered to pay the costs of all parties. *Re Woodhall, Garbutt* v. *Hewson*, 2 Ont. R. 456.

In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple and inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs.

Where the amount due on a mortgage was $32, and an action was brought in the High Cou and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed to the plaintiff. *Vanderwaters* v. *Horton*, 9 Ont. R. 548; and see *Gildersleeve* v. *Cowan*, 25 Gr. 460.

Where the defendant set up by counterclaim matters that should have been pleaded as a set-off,

*Held*, Armour, C.J., that he was not entitled to have the costs dealt with as if what he had set up was properly a counterclaim. *Cutler* v. *Morse*, 12 P.R. 594, 24 C.L. Journal 540.

See the remarks of the Chancellor as to unnecessary and vexatious proceedings. *Snider* v. *Snider*, 11 P.R. 140.

Where separate days were appointed for payment of amounts found due in a mortgage action, and separate powers of attorney given, see *Goodhue* v. *Carter*, 1 Ch. Ch. 13.

Where unnecessary petition for foreclosure presented after abortive sale, see *Odell* v. *Doty*, 1 Chy. Ch. 207.

Where separate affidavits were made wher only one necessary see *Boulton* v. *McNaughton*, 1 Chy Ch. 216, under AFFIDAVITS.

The claimant having succeeded in the trial of an interpleader issue, moved for a final order barring the execution creditors, and served notice of the motion upon the sheriff. It was unnecessary to serve the sheriff. The claimant was ordered to pay the sheriff's costs of the motion without recourse over to the execution creditors. *O'Brien* v. *Bull*, 19 C.L. Journal 211.

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. *Clark*, 15 Gr. 664.

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.

Where a defendant appealed from a Master's report, where the matter might have been disposed of on an application before a Judge in Chambers, no costs were given. *Fauchier & Son v. St. Louis*, 13 P.R. 318.

On an application to tax a solicitor's bill, held, that bringing three separate actions, which might have been joined in one, and charging excessive counsel fees, were special circumstances to be regarded in ordering a taxation after twelve months. *Re Solicitor*, 11 C.L.T. 79.

Where a solicitor, acting for three clients, brought three separate actions for malicious prosecution against the same defendant arising out of one information for assault, the Court held that under Rule 300 (now 185) the three causes of action could have been joined in one action; that it was the duty of the solicitor to so have advised his clients; and that not having done so he could recover only the costs of one action. *Re Butterfield*, 14 P.R. 567.

But where the successful plaintiffs in two separate and independent actions against the same defendant, for the same object, and supported mainly by the same evidence, and in which there has been no order or agreement that the result of one shall govern the other, have been represented by the same solicitor and the same counsel, the plaintiff in each case is entitled, on the taxation of the costs of his action to have his own costs treated as entirely distinct from and independent of the other, and to have the same allowances as if the two actions had been conducted by separate solicitors and counsel, except as regards attendances or other matters which were or ought to have been done at one and the same time. Thus, where charges for copies of documents and correspondence have been allowed in one action, the taxing master ought not to disallow charges for copies in the other act on merely because the copies in the one action have been used in the other, nor ought he to reduce the charges for counsel fees in the later action. *In re Metropolitan Coal, etc.*, 45 Ch. Div. 606.

Trustees served with notice of appeal, and holding merely a neutral position, without any intention of taking part in the argument, ought not to appear by separate counsel. *Carroll* v. *Graham* (1905), 1 Ch. 478.

Where a petition contained immaterial statements, the Court inserted in the order a direction to the taxing master to have regard to such statements. *Hyder* v. *Coleman*, 21 L.J. Ch. 592.

A similar direction was given where a petition was of vexatious length. *Coning* v. *Bell*, 13 L.J. Ch. 304.

"The appeal book invites the attention of the taxing officer, as it appears to me to contain much unnecessary matter. The submission and award are twice printed at length, and there is much so-called evidence which might, with ordinary care, in settling the book, have been judiciously omitted. On the whole, we think it might save the parties some expense, and the taxing officer some trouble, if we direct that one-third of the appeal book shall be disallowed on the taxation." *Bryce* v. *Loutit*, 21 A.R. 100.

On a solicitor and client taxation the solicitor was refused the costs of an application for speedy judgment under Con. Rule 739 (now 603), the application being unsuccessful because the writ was not properly indorsed. *Baldwin* v. *Quinn*, 16 P.R. 248.

But a solicitor will not be deprived of his costs of an unsuccessful application if it is undertaken in the exercise of an honest and fair discretion. *Smith* v. *Harwood*, 17 P.R. 36.

Where six affidavits on production were made by the same party, he was allowed the costs of one and extra folios for the additional matter in the subsequent affidavits. See *Baldwin* v. *Quinn*, under AFFIDAVITS.

Costs will not be allowed for shorthand notes of evidence which are not used on the hearing, the decision turning on a question of law. *Ex parte Webster*, 22 Ch. Div. 136.

In an administration action commenced by writ the plaintiff was allowed only such costs as would have been taxed had he begun his proceedings by a summary application. The defendant claimed to have set off his additional costs incurred by reason of the less expensive proceedings not having been adopted. The defendant had not admitted the plaintiff's right to an account, but had pleaded a release, and had not objected to the procedure adopted, and it was held that his additional costs had not been incurred by reason of the plaintiff's improper or unnecessary proceedings, but by his own conduct. *Moon v. Caldwell*, 15 P.R. 159.

See PRELIMINARY OBJECTIONS; SUBPOENAS.

## VESTING ORDER.

Although a purchaser, at a sale under judgment or order of the Court, must prepare the conveyance and tender it for execution, if he does this, and the parties entitled refuse to execute the conveyance and he is compelled to apply for a vesting order, he is entitled to the costs of the motion for the vesting order. *Lawrason v. Buckley*, 3 Chy. Ch. 270; *Re McMorris*, 3 Chy. Ch. 430.

## VOUCHERS.

All vouchers or affidavits produced on taxation for the purpose of proving disbursements should be filed with the papers in the cause. Disbursements should not be taxed for which there are not proper vouchers or evidence of payment. *Wilson v. Moulds*, 4 P.R. 101.

On proving accounts in the Master's office the vouchers are not filed, but simply initialed by the Master and returned. The Master is not, therefore, entitled to any charge for filing. Rep. I.L.O., 1885.

## WINDING-UP PROCEEDINGS.

See PETITIONS.

## WILLS, ACTIONS RESPECTING.

"There is, perhaps, too much litigation in this province growing out of disputed wills. It must not be fostered by awarding costs lightly out of the estate.

"Parties should not be tempted into a fruitless litigation by a knowledge that their costs will be paid by others. On the other hand, there is the contrasted danger of letting doubtful wills pass into probate by making the costs of opposing them depend upon successful opposition. It is only by the careful adjustment of costs that these opposite evils can be guarded against." Boyd, C., in *Logan* v. *Herring*, 19 P.R. 168.

Two rules were laid down by Sir J. P. Wilde, in *Mitchell* v. *Gard*, 3 Sw. & Tr. 275, for the future guidance of the Court in probate cases.

First, if the cause of litigation takes its origin in the fault of the testator, or of those interested in the residue, the costs may properly be paid out of the estate;

Secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

The same rules were re-stated by the President of the Probate Division in a recent case in these words: "In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will, or persons who are interested in the residue, have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them." Neither of these grounds, which, however, are not exhaustive, justifies a plea of undue influence unless there were reasonable grounds of putting it forward. *Spiers* v. *English* (1907), P. 122.

In a still more recent case Mr. Justice Kekewich thus states the practice with regard to costs in these cases:—

"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit.

"There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.

"There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court." *In re Buckton* (1907), 2 Ch. 406.

Within a reasonable compass it is possible to refer only to a few authorities illustrating these principles.

*Primâ facie* an executor is justified in propounding his testator's will, and if the facts within his knowledge at the time he does so tend to shew merely eccentricity on the party of the testator, and he is wholly ignorant at the time of the circumstances and conduct which afterwards induce the Court to find the testator insane at the date of the will, he will on the principle that the testator's conduct was the cause of the litigation, be entitled to receive his costs out of the estate, although the will is pronounced against. *Boughton* v. *Knight*, 42 L.J.P. 25, L.R. 3 P. & D. 64.

On the same principle costs of all parties were allowed out of the estate where the doubts were caused by the condition in which the testatrix had left her testamentary papers. *Jenner* v. *Finch* 29 L.J.P. 25; and where the testator had made two wills, one of which he had concealed from his wife: *Du Boison* v. *Maxwell*, 28 L.T. 369; so where the testator, by his own conduct, and habits and mode of life, had given the opponents of the will reasonable ground for questioning his testamentary capacity; *Davies* v. *Gregory*, 42 L.J.P. 33, L.R. 3 P. 28; where the litigation was caused by the testator's duplicity; *Cousins* v. *Tubb*, 65 L.T. 716; and where the mode in which the will was executed by the testator: *Williams* v. *Coker*, 67 L.T. 626.

Where a testator misdescribed his farm lot, on a motion for judgment on the pleadings, the costs of all parties were paid out of the estate. *McFadyen* v. *McFadyen*, 27 O.R. 598.

An executrix proved a will and afterwards a subsequent will was found, dated about a time when the testator was in a weak condition, physically and mentally. In the action the first will was set aside. *Held*, there was a fair question for litigation and the executrix was entitled to her costs out of the estate. *Hill* v. *Hill*, 6 O.R. 244.

Where the facts surrounding the making of a will impose upon the party propounding the will, not merely the onus of proving due execution and testamentary capacity, but the additional burden of removing the suspicion attached to the making of the will, a person opposing it is *primâ facie* justified in pleading fraud, and, although unsuccessful, ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues. *Wilson* v. *Bassil* (1903), P. 239; *Orton* v. *Smith*, L.R. 3 P. & M. 23.

Britton, J.:—"I have given a good deal of consideration in this case to the question of costs.

"Should persons who, in opposing probate of a will, set up fraud and undue influence and fail, ever get costs out of the estate, and if so, in what cases?

"In *Goodacre* v. *Smith* (1867), L.R. 1 P. & D. 359, Sir J. P. Wilde reserved the question of costs, and afterwards gave to the defendants their costs out of the estate, saying: 'The Court cannot regard the method of will making adopted by the plaintiffs, and their conduct in keeping the relatives away from the testatrix, as satisfactory. Under all the circumstances, I think the defendants' costs ought to be paid out of the estate.'

"In *Orton* v. *Smith* (1873), L.R. 3 P. & D. 23. 'The Court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified these pleas.'

"The facts of this case are quite applicable to the present case, and I think I should go further than to merely relieve the defendants of the plaintiff's costs.

"I have read the following cases upon the point: *Tippett* v. *Tippett* (1865), L.R. 1 P. & D. 54; *Smith* v. *Smith* (1866), L.R. 1 P. & D. 239; *Macaulay* v. *Kemp* (1880), 27 Gr. 442; *Aylwin* v. *Aylwin* (1902), P. 203; *McFadyen* v. *McFadyen* (1896), 27 O.R. 598; *Wilson* v. *Wilson* (1875), 22 Gr. 39.

"Upon the peculiar facts and circumstances which came out upon the trial, and considering fairly the conduct of the beneficiary, I think the case is well within the rule under which the Court allows costs out of the estate, and I so order as to all the parties." *Gilbert* v. *Ireland* (1904), 9 O.L.R. 124.

A plaintiff claiming under a will insisted on a construction which was decided against her, and although the decision materially reduced her interest in the estate, she was given her costs. *Goldsmith* v. *Goldsmith*, 17 Gr. 213.

An action to set aside a will for undue influence was dismissed but without costs, because there were circumstances which might, unexplained, appear to be suspicious. Two of the defendants asked for costs out of the estate. One was a pecuniary legatee, the other a religious society to whom land was devised. These defendants appeared by separate counsel at the trial, and joined in resisting the plaintiff's claim.

"These defendants submitting their rights were no more than mere formal defendants—certainly not a more advantageous position than the intervener of the English procedure, and who comes in that he may protect his rights. Now the rule is, that where the executor defends, supporting the will, as here, interveners in the same interest will not be allowed costs out of the estate: *Colvin* v. *Fraser,* 2 Hagg. Eccl., at p.

368. See *Shaw* v. *Marshall*, 1 Sw. & Tr. 129.'' Boyd, C., in *Logan* v. *Herring*, 19 P.R. 168.

In *Toronto General Trusts Co.* v. *Allen*, 17 P.R. 402, interveners were allowed their costs out of the estate, failing to make them out of the defendant. The defendant had attacked the will and failed; had appealed and failed. The interveners were certain religious bodies taking legacies under the will. They ''took the labouring oar on the appeal and should be allowed the usual costs, and the executors their costs as of a watching brief, both out of the estate, if the defendant does not answer them.''

Where litigation for the construction of a will related wholly to certain real estate, the costs were ordered to be paid out of the real estate. *McMylor* v. *Lynch*, 24 O.R. 632.

In a very recent case a motion was made before Middleton, J., for an order declaring the effect of two wills.

''The question of costs has to be dealt with. There was no argument before me. Counsel for all parties admitted that the law was clear, and that there was no room for argument. The motion, it was said, was made with the approval of all those beneficially concerned and upon their written instructions.

''The question might well appear to present some difficulty to the lay mind, but to one versed in the law there could not have been any difficulty. Upon the question arising, the executors were entitled to consult a solicitor, and, if well advised, the rights of the parties would have been plain. There was not necessity for an application to the Court. The Court is to be resorted to only where there is some real doubt. In such cases the executors are entitled to the protection of an order of the Court; in cases which present no difficulty, the executors and their legal advisers must assume the responsibility of acting on well-known and well-understood legal principles.

''It is suggested that this small fund of $600 should be depleted by allowing out of it three sets of costs incurred in ascertaining information that any counsel would have imparted for a nominal fee. The consent of the beneficiaries makes no difference, as it is not shewn they were advised that no application was really necessary. The form of the document signed suggests that they thought there was a real and not an imaginary doubt.

"Had the application been opposed, I should have dismissed it with costs as unnecessary and frivolous. As it was assented to I give no costs.

"The theory upon which costs are given out of an estate is that the difficulty is caused by the act of the testator, who has used such ambiguous language, or has in some way occasioned such difficulty, as to render resort to the Courts a part of the testamentary expenses necessary to the administration of the estate: *O'Neil* v. *Owen*, 17 O.R. 547.

"It follows that this refusal of costs to the executors will preclude the allowance of these costs to them on passing their accounts: see *In re Hodgkinson* (1895), 2 Ch. 190. A fee of $10 for obtaining counsel's advice might properly be then allowed." *Re Mathe* (1910), 2 O.W.N. 327.

## WITNESSES AND WITNESS FEES.

(1) *Generally.*
(2) *Amount payable to witnesses.*
(3) *Fees must be paid before taxation.*
(4) *Witness subpœnaed but not sworn.*
(5) *Foreign witnesses.*
(6) *Maintenance of witnesses.*
(7) *Professional witnesses.*
(8) *Materiality of witnesses.*
(9) *Witnesses on different issues.*
(10) *Attendance of witnesses.*
(11) *Miscellaneous.*

---

### (1) *Generally.*

*Con. Rule 1173.*—(1) An affidavit of disbursements shall be made by the solicitor in the cause or matter or some clerk having the management thereof, or by the client.

(2) The affidavit shall set forth the sums paid to counsel, naming them, and for what service, the names of witnesses, their places of abode, the places at which they were subpœnaed, and the distance which each such witness was necessarily obliged to travel in order to attend the trial, 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. 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. Con. Rule 1213, *part*.

*Con. Rule 1174*.—The necessity for maps or 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 an affidavit of disbursements. Con. Rule 1213, *part*.

As to expenses incurred in proving wills, registered instruments, etc., see the Evidence Act, 9 Edw. VII. ch. 43.

As to payment of witness for the Crown, see 10 Edw. VII. ch. 42.

The taxing officer may without any special directions inquire into the truth of any affidavit of disbursements. *Boulton* v. *Switzer*, 1 C.L. Cham. 83.

All costs occasioned by unnecessary evidence must be paid by the party offering it. *Littlewood* v. *Collins*, 1 N.R. 457.

In taxing witness fees the taxing officer should act on no fixed rule, but should take into consideration and determine what is a reasonable allowance to be made for the coming, going and attendance at the trial of each witness whom he does not consider to have been called unnecessarily. *Commissioner of Railways* v. *O'Rourke* (1896), A.C. 594.

In the absence of special reasons witnesses should be in attendance on the day fixed for the trial, and from day to day while the case appears on the list for trial until the case is heard, and the costs of such witnesses should be allowed. *O'Meara* v. *Barry* (1895), 2 Ir. R. 454.

The plaintiff in his affidavit of disbursements said: "I was a necessary and material witness on my own behalf in this action, and upon the advice of my solicitor in this action, I did attend at the said time and place as such witness when the said action was so disposed of."

It was objected that the affidavit did not negative his attendance at the trial for the purpose of superintending the conduct of the case. Riddell, J.:—"No doubt this is the usual form of affidavit of disbursements (the old affidavit of increase), for years in use in Ontario, but I do not think it is at all necessary, unless probably the taxing officer should see fit to require it, in the exercise of that vigilance desiderated by Lord Campbell. The for .. in Chitty's Forms (12th ed.) do not contain such a clause. It is for the taxing officer to satisfy himself by examination of the party or otherwise whether the party was in fact a necessary witness and that his giving evidence was not a mere plan to be allowed his witness's fees." *Boyle* v. *Rothschild* (1908), 16 O.L.R. 428.

### (2) *Amount Payable to Witnesses.*

No public official or other witness subpœnaed or called upon to produce before any Court or other tribunal any public or other document shall be entitled to more than ordinary witness fees, unless the Court or other tribunal otherwise orders. Section 120, Jud. Act, and Con. Rule 1151.

*In re Nelson*, 2 Chy. Ch. 252, is no longer an authority.

The taxing officer ought not to allow for travelling expenses of witnesses a greater sum than is reasonable, though it does not exceed the maximum of the tariff, even if it has actually been paid by the party subpœnaing them. *Hunter* v. *Liddell*, 20 L.J.Q.B. 218.

Nor can the taxing officer allow more for expenses of the witnesses than has been actually paid. *Radcliffe* v. *Hall*, 4 L.J. Ex. 191.

No allowance beyond the ordinary witness fees can be made for attendance in the Master's office during the passing of accounts for a person specially familiar with them; nor to a party in the cause so attending. *Scott* v. *Griffen*, 8 C.L.T. 452, 6 Man. L.R. 116.

A plaintiff entitled to Division Court costs only can tax his travelling expenses from abroad. *Talbot* v. *Poole*, 15 P.R. 274.

### (3) *Witness Fees Must be Paid Before Taxation.*

"All witnesses should be paid before taxation. The Master allows and taxes actual disbursements proved, and not mere engagements to pay. The affidavit of disbursements is required to state that they did not attend as witnesses in any other cause." Draper, C.J., *Ham* v. *Lasher*, 24 U.C.Q.B. 357.

The witnesses in a cause should be actually paid before an affidavit of increase is made; and if the practice is not followed in this respect the Court will order the sums sworn to have been paid and allowed by the Master to be refunded. *Trent* v. *Harrison*, 2 D. & L. 941, 9 Jur. 873.

An affidavit of increase ought not to state that the expenses charged for witnesses have been paid to them, unless they have been actually paid at the time when it is made; the fact of money due to a witness for his attendance having been set-off against expenses incurred by the successful party in conveying him to the Assize town, and keeping him there is insufficient. *Cross* v. *Darrell*, 6 Jur. N.S. 638, 8 W.R. 630.

An affidavit of increase stated that the deponent had paid a certain sum as witness fees to one Creighton. The alleged payment was made after the trial but before swearing to the affidavit, and was in fact not an actual handing over of cash, but a setting-off, with the consent of the witness, a sum due by him to the defendant.

Armour, C.J., held that the consent made the transaction quite different from a mere set-off, and that it was payment of the witness fees. *In re Solicitors*, 9 C.L. Times 35.

In a case of *Salois* v. *Walker*, decided by Rouleau, J. (North-West Territories), reported 9 C.L. Times 386, it was held that an affidavit of increase stating that the plaintiff "was indebted to each of said witnesses for his loss of time," etc., was sufficient. This decision is not in accordance with the English and Ontario cases, and would not be followed here.

The taxing officer disallowed witness fees to the amount of $300, on the ground that they were not paid at the time the affidavit was made by the plaintiff, though stated in the affidavit to have been paid. They were actually paid after the affidavit was sworn to and before the taxation was closed.

The Divisional Court held the taxing officer was right in disallowing the witness fees. *Per* Armour, C.J.: "Those who propound false affidavits must take the consequences." *Hornick v. Romney*, 11 C.L.T. 329.

The plaintiff taxed certain witness fees and counsel fees on an affidavit made by himself that such fees had been paid. After the taxation was closed the defendant discovered that such fees had not been paid as sworn to, and moved to set aside the certificate of taxation, etc.

Rose, J.:—"I think this case is governed by *Hornick v. Romney*, 11 C.L.T. 329, and that the items of witness and counsel fees moved against must be disallowed.

The object of the rule requiring prepayment of witness fees is stated by Erle, J., in *Freeman v. Foster*, 6 D. & L. 517. Our rule provides for the affidavit of increase. Here the affidavit makes incorrect statements as to subpoenas, witness and counsel fees. Had the truth appeared, the taxing officer could not have properly allowed the items; and now that the truth is made to appear, they must be disallowed. Intentional wrong-doing was denied. I have not to deal with the motive. The rule is a salutary one. Its provisions have been violated, and the penalty must be enforced." *Harding v. Knust*, 15 P.R. 80.

### (4) *Witness Subpoenaed but not Sworn.*

Where witnesses are subpoenaed but not examined, the onus is on the party subpoenaing them to shew their relevancy. *Carlisle v. Roblin*, 16 P.R. 328.

Wilson, J.:—"The rule has always been as stated in Arch. Pr. (11th ed.), 512. 'The Master will allow the expenses of all necessary witnesses, and this although they were not called at the trial. So although the evidence of particular witnesses be not in strictness admissible, yet if there was reasonable ground for believing it to be admissible, the Master will allow the expenses of them, even although they were not examined at the trial. But the Master will not allow the expenses of witnesses whose testimony is clearly inadmissible, or whose testimony would not have supported any issue in the cause.'

The Master is the judge of the materiality of witnesses, subject to the review of the Court; but he is generally the sole judge of the number of witnesses to be allowed in support of the same matter."

The Master allowed fees to seventy witnesses subpœnaed but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses.

*Held*, that the Master exercised a proper discretion, even though the respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove. *Re Prescott Election Case*, 32 U.C.Q.B. 303.

Where two witnesses were subpœnaed for the defendant but not examined at the trial, Macaulay, J., held that in the absence of anything to shew them not material or not *bonâ fide* in attendance as witnesses in the cause, it was in the discretion of the Master, if satisfied they did so attend and were paid, to allow the charge. *Boulton* v. *Switzer*, 1 Ch. Rep. 83. And see *Morrison* v. *Harmer*, 5 Scott 410.

Even where a witness is rejected by the Judge, it would seem that the taxing officer should decide whether such witness was necessary or not, and allow or refuse his expenses accordingly. *McLean* v. *Evans*, 3 P.R. 154.

But 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 between party and party. *Galloway* v. *Keyworth*, 2 C.L.R. 860, 15 C.B. 228.

In an action on a promissory note the defendant having pleaded fraud, the plaintiff brought up a witness to disprove the fraud, but the defendant failing to make out a *primâ facie* case of fraud the witness was not called.

*Held*, that the plaintiff was entitled to the costs of such witness. *Miller* v. *Thomson*, 4 M. & G. 260.

If, by an alteration in the state of the pleadings after notice of trial, certain witnesses are unnecessary, the party who subpœnaed them must make reasonable efforts to prevent their attendances, or their expenses will not be allowed. *Allport* v. *Baldwin*, 2 D.P.C. 599.

The costs of witnesses whose attendance becomes useless, owing to an admission being made by the opposite party of the matter which they were summoned to prove, are in the discretion of the taxing officer. *Davis* v. *Thomas*, 5 Jur. N.S. 709.

But a party is not bound to rely on the admissions of the opposite party made on his examination for discovery, and the costs of procuring the attendance of a witness to prove what was then admitted were allowed on appeal from the local taxing officer. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157.

Where the plaintiff gave notice that he intended to raise a point on the question of value, which he was, at the trial, precluded by the defendant from going into, and the defendant succeeded.

*Held*, that he was not entitled to the costs of the witnesses brought by him to the Assizes to rebut the plaintiff's evidence on the point as to value. *Fisher* v. *Berrell*, 1 D.N.S. 565, 6 Jur. 282.

Where costs were awarded to the plaintiff upon a postponement of the trial, and the case was not tried until after the taxation of such costs was closed, but it appeared upon appeal from the taxation that some of the witnesses allowed for were not called when the case was actually tried, the taxing officer was instructed to reconsider the allowance of witness fees. *Conmee* v. *North American Railway Contracting Co.*, 13 P.R. 433, 10 C.L. Times 117.

Where the defendant subpœnaes witnesses after notice of trial is given, he is entitled to the costs thereof if the plaintiff afterwards, and before trial, discontinues. *Pegg* v. *Pegg*, 7 U.C.Q.B., at p. 223.

Where the plaintiff's attorney sent notice of countermand of trial to his agent in town, but it arrived too late for service, and the defendant's witnesses attended for the trial, *Held*, that the expense of such witnesses was rightly allowed in the costs of the day. *Spafford v. Buchanan*, 4 O.S. 325.

Where a witness is subpœnaed and paid, and in consequence of the cause being settled no trial takes place, and the witness incur no expense, and does not act in consequence of the subpœna, the amount paid can be recovered in an action for money had and received. *Martin v. Andrews*, 7 El. & Bl. 1; Taylor on Evidence, 1059.

In an action for libel the defendant did not plead justification, but before trial gave notice under Rule [illegible] of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. To meet such evidence the plaintiff had brought a number of witnesses to the trial, but the trial Judge refused to admit the evidence of the defendant's witnesses on the ground that it was only admissible in support of a plea of justification. The plaintiff's witnesses were not, therefore, called in reply and the taxing officer disallowed the costs thereof. On [illegible] Anglin, J., after quoting Rule 1176, he said:—

"By implication costs of such proceedings taken because, in the judgment of the solicitor reasonably [illegible], they were conducive to the interests of his client should be allowed. Though not perhaps 'proceedings' in the strict sense the procuring of the attendance of witnesses and the [illegible] of their evidence, etc., are, I think, within the spirit of the Rule. If not, by analogy to the very reasonable provisions therein prescribed, such costs as those here in question should be similarly dealt with." *Ludlow v. Irwin* [illegible].

Where the trial Judge intimated that the evidence might be shortened, and in consequence certain witnesses were not sworn, the Court refused an appeal from the taxing officer allowing the costs of these witnesses. [illegible] *v. Menard*, 11 O.W.R. 424.

(5) *Foreign Witnesses.*

A reasonable allowance in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to a subpœna, and who will not attend without compensation. *Lonergan* v. *Royal Exchange*, 1 D.P.C. 233, 7 Bing. 729.

The taxing officer allowed the defendant for witness fees paid to a witness brought from Buffalo to give evidence as an expert, at the rate of $33 *per diem* and expenses. The plaintiffs appealed from this, on the ground that there is no power to tax such an item, as it is not provided for in the tariff.

An appeal, Boyd, C., held that the tariff now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. And as the personal attendance of this witness, who was not accessible to subpœna, accomplished what could not have been done by interrogatories at a distance, the taxing officer was justified in making such allowance as he thought proper. *Ball* v. *Crompton Corset Co.*, 11 P.R. 256.

B., a civil engineer residing in the Yukon Territory, and earning there from $35 to $50 a day, was a necessary and material witness in an action in Ontario involving half a million dollars. Before agreeing to come to Ontario and give evidence he was promised $1,000 professional fee and his expenses. He was absent from home 51 days, and the taxing officer allowed $1,020. On appeal Riddell, J., allowed the $1,000 and $510 travelling expenses. He said the case was governed by *Ball* v. *Crompton Corset Co.*, that it would not have been safe for the plaintiff not to have had the evidence, and that it was reasonably necessary to have the witness in person at the trial, and not rely on evidence to be taken by commission. *Boyle* v. *Rothschild* (1908), 16 O.L.R. 424.

The plaintiff resided in England, and the action was tried in Toronto. A commission had been issued and the evidence of witnesses taken in London. The plaintiff was a necessary and material witness on his own behalf, and on the advice of his solicitors attended and gave evidence. The Master disallowed the plaintiff's expenses at the trial, £56.

Morrison, J., held that the plaintiff was entitled to his expenses, as it would not have been prudent, under the circumstances, to have been examined under the commission, and being the plaintiff in the case made no difference. *Fox* v. *Toronto and Nipissing Railway Co.*, 7 P.R. 157.

When the action began plaintiff resided in Toronto, but afterwards, and before trial, moved to England. She was a necessary and material witness, and came from England to give evidence on her own behalf. The case was not one in which evidence would properly be taken under commission.

The plaintiff succeeded at the trial, and the defendants appealed to the Divisional Court, the appeal being heard some two months later and the judgment given a month afterwards. Acting on the advice of her solicitor the plaintiff remained in Ontario so as to be here to give evidence if a new trial should be ordered.

On appeal from the taxation Meredith, C.J., held that the allowance of the travelling expenses of the plaintiff coming from England to give evidence on her own behalf and of returning to England, and the *per diem* allowance for the time necessarily occupied in doing so, were properly allowed: but disallowed the claim for subsistence money for the period while the plaintiff was awaiting the result of the appeal. There would have been no difficulty in the plaintiff returning to Toronto in time for the new trial, if one had been ordered, and there was no loss in livelihood as in the case of *Dowdell* v. *Australian Royal Mail Co.*, 3 E. & B. 902. *Tattersall* v. *People's Life Ins. Co.* (1905), 10 O.L.R. 537.

Where a plaintiff brought over a foreign witness in order to judge by his testimony whether there was ground to bring the action, and afterwards sued and examined the witness at the trial,

*Held*, that the plaintiff might be allowed the costs of detaining him from the time the writ was issued until the trial, and a reasonable sum for his subsistence during the same time, but not the costs of his passage or of his return. *Schimmel* v. *Lousada,* 4 Taunt. 695.

And if a witness is sent for to give evidence in one action which is discontinued, and the plaintiff calls him as a witness in another action against a different defendant, but arising out of the same transaction, he is entitled in the second action to the costs only of the witness's subsistence and detention for the purpose of the second action. *Tremain* v. *Barrett,* 1 Marsh. 463, 563, 16 R.R. 584.

Where a foreign witness appeared to be domiciled in England, he was held not entitled to the expenses of his return home. *Lopes* v. *DeTastet,* 7 Moore 120, 3 B. & B. 292.

A plaintiff who is entitled only to Division Court costs of an action can tax as part of such costs his travelling expenses from abroad to attend the trial, if he is a necessary and material witness. *Talbot* v. *Poole,* 15 P.R. 274.

### (6) *Maintenance of Witnesses.*

The Ontario rules and tariff do not expressly authorize any allowance for the costs of maintenance or subsistence of witnesses, but by Rule 1181 the practice of any Court, whose jurisdiction is vested in the High Court of Justice, relating to costs, and the taxation of costs, existing prior to the Judicature Act of 1881, remain in force. Moreover, the practice of allowing such costs seems to have been recognized in several cases in our own Courts. See *Fox* v. *Toronto and Nipissing Ry.,* 7 P.R. 157; *Ball* v. *Crompton Corset Co.,* 11 P.R. 256; *Tattersall* v. *People's Life Ins. Co.* (1905), 10 O.L.R. 537.

The captain of a vessel was a necessary witness in an action on a policy of insurance. The trial was delayed by sending out commissions and did not come on for hearing until eighteen months after the writ was issued. The Master taxed subsistence money for the captain during all this time. The Court, with some hesitation, refused to interfere with the Master's discretion. *Potter* v. *Rankin,* L.R. 5 C.P. 518.

The plaintiff, a captain of a ship, remained in England for the purpose of being examined at the trial, and the Master allowed his expenses from the service of the writ in the cause in September till the trial in January following. It was held that the Master might allow for his maintenance if his testimony was necessary and material, and if he attended for the purpose of giving evidence, and not merely to superintend the cause. *Howes* v. *Barber*, 18 Q.B. 588, 16 Jur. 614.

The plaintiff was a witness on his own behalf at the trial, when he obtained a verdict. The defendant obtained a rule *nisi* for a new trial, which was ultimately discharged. On taxation the Master allowed the plaintiff subsistence money from the time the rule was granted until it was discharged.

*Held*, if the plaintiff was a necessary witness, and remained for the purpose of giving evidence if a new trial was granted, and so incapacitated himself from earning his subsistence, the detention might, under the special circumstances, be considered as part of the costs of the cause, and the allowance was right. *Dowdell* v. *Australian Royal Mail, etc. Co.*, 3 El. & Bl. 902.

So in another case the Court approved of the allowance of subsistence money for a witness, the captain of a ship, from the service of a subpœna till the time of the trial. *Temperly* v. *Scott*, 1 M. & Scott 601, 8 Bing. 392.

Where the master of a merchant ship was detained by the plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given,

*Held*, that the Master was at liberty to allow the expenses of maintaining the witness during such detention. *Berry* v. *Pratt*, 1 B. & C. 276, 2 D. & R. 424.

And a witness who is *bonâ fide* detained in the country for the purposes of a trial is entitled to the expenses of his maintenance during the time he is so detained, and that although he may not be a seafaring man. *Ansett* v. *Marshall*, 17 Jur. 114, 22 L.J.Q.B. 118.

The expenses of detaining a witness should not be allowed when it cannot be shewn that such detention was necessary to insure his attendance to give evidence, nor where his detention was for some other purpose, such as to watch the proceedings in the suit. *The Bahia*, 14 W.R. 411, 11 Jur. N.S. 1008.

See also *Picasso v. Trustees of Maryport Harbour*, W.N. (1884), 85, 28 Solr. Journal 391, where costs of keeping a witness until a trial were allowed under special circumstances.

Costs of witnesses allowed where the trial was delayed for several days by unforeseen contingencies. *Campbell v. McNeed*, 11 O.W.R. 424.

### (7) *Professional Witnesses.*

"Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon by either side without the leave of the Judge or other person presiding, to be applied for before the examination of any such witnesses." Sec. 10, ch. 43, 9 Edw. VII.

Under items 119 and 120 of tariff B, 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; and 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, are entitled to $4 *per diem*.

Veterinary surgeons would not come within the tariff, but they are entitled to professional fees in such cases as relate to the profession, by virtue of section 2 of chapter 184, R.S.O. 1897.

The English tariff does not, apparently, define who are professional men, and in one case it was held that an auctioneer was entitled to fees as a professional witness. *Re Workingmen's Mutual Society*, 21 Ch. Div. 831. This case would not be followed in Ontario. See under AUCTIONEER.

Some of the English cases like *Parkinson* v. *Atkinson*, 31 L.J.C.P. 199, hold that a professional witness is entitled to fees as such, although he is not called to give professional evidence. This is specially provided against in our tariff, and would not be allowed in Ontario. See *Butler* v. *Toronto Mutoscope Co.* (1905), 11 O.L.R. 12, *ante*, p. 136.

Where a solicitor on the record attends as a witness, his right to be paid professional witness fees depends in every case on a question of fact, namely, was the solicitor's attendance at the trial attributable to his character as a solicitor or as witness? If the former his claim should be disallowed; if the latter his claim should be allowed. *Hamilton* v. *Calhoun* (1906), 2 Ir. R. 104.

No allowance beyond ordinary witness fees can be made for attendance in the Master's office during the passing of accounts, of a person specially familiar with them; nor to a party in the cause so atteading. *Scott* v. *Griffen*, 8 C.L. Times 452, 6 Man. L.R. 116.

A barrister is *primâ facie* entitled to the expenses of a professional man, without proof of his being in practice. *Turner* v. *Turner*, 5 Jur. N.S. 839.

A practising barrister and solicitor made an affidavit on an interlocutory application. He was served with a subpœna and appointment for cross-examination on the affidavit and paid $1. He refused to be sworn unless he was paid $4. On a motion to commit, Rose, J., followed *Clarke* v. *Gill*, 1 K. & J. 19, and held that a witness who is a professional man, is entitled to the same allowance when subpœnaed for cross-examination on an affidavit as he would be if required to give evidence at the trial, where he is called on to give evidence in consequence of professional services. *Sutherland* v. *Phippen*, 7 C.L. Times 432.

The expenses of a witness at *nisi prius* to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, were allowed on taxation between party and party. *Bastard* v. *Smith*, 10 A. & E. 213, 2 P. & D. 453, 50 R.R. 387.

A plaintiff was not allowed his expenses incurred in the construction of a model, nor for loss of time by scientific persons who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony. *Bayley* v. *Beaumont*, 11 Moore 497.

Nor to sums paid to witnesses for inspecting, measuring and valuing improvements upon lands. *Murphy* v. *Nolan*, 7 Ir. R. Eq. 498.

The expenses incurred in qualifying witnesses to give evidence at the trial are not taxable between party and party. Such expenses are taxable in England under a special order which has not been adopted in Ontario. This does not, however, prevent the taxation of the costs incurred for plans and maps used at the trial, which are provided for by Con. Rule 1174. See MAPS. *McGannon* v. *Clarke*, 9 P.R. 555.

The costs of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men, is not allowed on taxation of costs. *Severn* v. *Olive*, 2 B. & B. 72; 23 R.R. 565. And see *post*, under MISCELLANEOUS.

(8) *Witnesses, Materiality of.*

The materiality of a witness is *primâ facie* a question for the taxing officer, but the Court may review his decision on that point. *Galloway* v. *Keyworth*, 15 C.B. 228.

Where there is a reasonable ground to believe that the testimony of a witness will be admissible, his expenses may be allowed on taxation of costs against the adverse party. *Rushworth* v. *Wilson*, 1 B. & C. 267.

Where the taxing master had, in an action of libel, disallowed all witnesses called to prove innuendoes, the Court refused to interfere to make him review his taxation. *Skelton* v. *Seward*, 1 D.P.C. 411.

The plaintiffs subpœnaed seventeen witnesses to attend the trial at Hamilton. The trial was postponed because the defendants had not obeyed an order to produce, and the defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement. These witnesses were examined at the abortive trial, and were examined at the adjourned trial, but their evidence related to matters which the trial Judge held could not be interfered with by the Court.

The taxing officer refused to tax the plaintiff the costs of these witnesses, and on appeal, Proudfoot, J., held that the taxing officer did not erroneously exercise the discretion given him by Rule 442, O.J.A. (now Con. Rule 1175). *Christopher* v. *Noxon*, 10 P.R. 149.

In an action for damages for trespass to land, the location of a boundary line was in dispute. The defendant, in his depositions taken before trial, said he knew nothing about the line except what he had been told, but that he had traced two lines run by B. and W. from the blazes. The trial was adjourned at the plaintiff's request on payment of costs of the day. The defendant, being a resident of the North-West Territories, swore that he had come to the trial for the sole purpose of giving evidence on his own behalf and not for the purpose of superintending the trial, and that he believed his evidence was necessary and material. In taxing the costs of the day the taxing officer refused to tax witness fees to the defendant, on the ground that he knew nothing about the boundary, and this being the only fact in issue, his evidence could not be material.

*Held*, reversing the ruling of the taxing officer, that it was premature for him to decide at this stage of the case, that no material evidence could be given by the defendant. *Goodfellow* v. *Shuttleworth*, 3 C.L. Times 105.

A party examining by means of an interpreter, a witness ignorant of the English language, must bear the expenses of the interpreter's services, as well on the cross-examination as on the examination in chief. *Plunkett* v. *Williams*, 6 Ir. Eq. R. 80.

But in *Earl of Shrewsbury* v. *Trappes*, 10 W.R. 663, the costs of employing an interpreter to prepare the answer of a foreign defendant were allowed on taxation as between party and party, but not the hotel and travelling charges occasioned by bringing him to town. See Mar. & Wurt. 497.

Where a witness was called to prove photographs that might have been proved under a notice to admit: See PHOTOGRAPHS.

If a doubt exists as to whether a witness was material and necessary, and the taxing officer allows the charge, the Court will not review the taxation. *Marshall* v. *Parsons*, 9 D.P.C. 251.

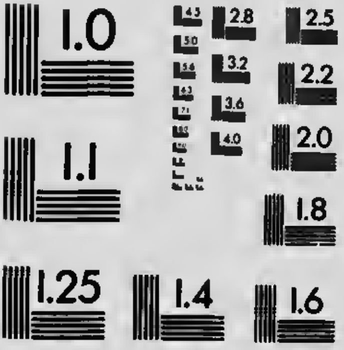
In an action for breach of warranty of a horse, the plaintiff produced three veterinary surgeons who had examined the horse shortly after the purchase and deposed to its unsoundness. The taxing officer disallowed the expenses of two of these witnesses, but the Court held that the trial Judge having considered them necessary witnesses their expenses should be allowed. *Weston* v. *Steeds*, 24 L.R. Ir. 283.

"The simple fact of (parties to the action) being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses, and if it appears that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected." *Hawes* v. *Barber*, 21 L.J.Q.B. 254.

The defendant apparently had not intended to give evidence, but being in Court and observations being made by the plaintiff's counsel on account of his not being put in the box, he was thereupon called as a witness. The plaintiff appealed from an allowance made for the defendant's witness fees, contending he was not a necessary and material witness. Williams, J., said: "The fair test is, what would counsel have recommended if advising on the evidence? I cannot help thinking that he would, under the circumstances have considered the defendant's presence necessary; and I think the defendant's attorney would have failed in his duty to his client

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



if he had not had him in Court. If so, it follows that the item in question does not fall within the class of extra costs, but was an expense created by the attendance of a witness the defendant was bound to have present." *Flower* v. *Gardner*, 3 C.B.N.S. 185.

See *Ludlow* v. *Irwin*, under WITNESSES SUBPOENAED BUT NOT SWORN, and *Boyle* v. *Rothschild* (1908), 16 O.L.R. 424, *ante*, 241.

(9) *Witnesses on Different Issues.*

The Master is the sole judge of the proper number of witnesses to be allowed in support of the same matters. Where the defendant succeeds on some of the issues an affidavit that the witnesses, whose expenses he claims, were called exclusively to support those issues, is not indispensable, provided the Master is satisfied of the fact by other means. *Pilgrim* v. *Southampton and Dorchester Railway Co.*, 8 C.B. 25.

A party succeeding on an issue is entitled to the costs of any witness called to give evidence on a fact involved in that issue, though the jury or arbitrator may find that fact against him. *Radcliffe* v. *Hall*, 1 Gale 140.

In taxing the costs of witnesses on several issues, where some issues are found for the plaintiff, and some for the defendant, it is for the Master to judge whether the evidence of such witnesses is exclusively applicable to such issues. *Elderton* v. *Emmens*, 5 D. & L. 680, 12 Jur. 728.

A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds because their testimony may, in a slight degree, be applicable also to an issue upon which he failed. The true question is, for what purpose were they called? *Jewell* v. *Parr*, 17 C.B. 636.

"The number of witnesses to be allowed to prove a point is usually a matter within the discretion of the Master, and so as to witnesses called to establish something on which the party calling them fails. It is for the Master to exercise his judgment in allowing or disallowing such items, and he is not to tax them all indiscriminately merely on the ground that costs generally are given to the party taxing." Boyd, C., *Latour* v. *Smith*, 13 P.R. 214.

When the jury return a verdict for the plaintiff for a distinct part of his claim, he will not be allowed the expenses of witnesses called to support a different part, although a verdict is entered for him generally. *Cocks* v. *Peachy*, 2 M. & R. 420.

In an action for a nuisance the defendant pleaded he did not commit the injury complained of, and that he had a right to do the act. A nonsuit was entered on the ground that it had not been proved the injury was done by the defendant. *Held*, the defendant entitled to the costs of all the witnesses, as well those who negatived his committing of the act, as those who came to establish his right. *Radcliffe* v. *Hall*, 4 L.J. Ex. 191.

Where some issues are found for the plaintiff and some for the defendant, the latter is not entitled to the expense of his own witnesses unless their evidence relates exclusively to the issues found for him. *Lardner* v. *Dick*, 2 D.P.C. 333: *Crowther* v. *Elwell*, 4 M. & W. 71, 51 R.R. 484.

In *Harrison* v. *Bush*, 5 E. & B. 344, 25 L.J.Q.B. 99, 103 R.R. 507, the plaintiff brought an action for libel. The defendant pleaded not guilty and justification. The defendant succeeded on the first issue on the ground of privilege, and the plaintiff succeeded on the second issue. *Held*, that the defendant being entitled to the general costs, was entitled to the costs of all such witnesses as were not called exclusively on the issue on which he failed; and the plaintiff to the costs only of the witnesses as were called exclusively on the issue on which he succeeded.

This case was followed recently by the Court of Appeal in *Brown* v. *Houston* (1901), 2 K.B. 855, where it is said: "As soon as it is shewn that a witness is called by an unsuccessful party to an action to give evidence on two issues, one of which is won and the other lost, he cannot get the costs of that witness."

Vaughan Williams, J., thought that where a defendant tried to prove a falsehood and failed to do so, he should not have the costs of bringing witnesses to prove the falsehood, but the rule was too firmly established to break into, and the injustice could be obviated by a special direction of the trial Judge.

Where special leave was obtained to give evidence before the Court of Appeal on two points, and the applicant gave the evidence of a witness on one point, but no evidence on the other point, the Court held that the taxing officer had no jurisdiction to allow the appellant the costs of a witness on the second point. *Leeds Forge Co. v. Deightons* (1903), 1 Ch. 475.

(10) *Witnesses, Attendance of.*

Where there is no daily peremptory list of cases at the Assizes, it is necessary to keep the witnesses in attendance from the first day, and the fees for such attendance should be taxed. *Alexander* v. *School Trustees of Gloucester*, 11 P.R. 157; *Cosgrave* v. *Evans*, 2 D.P.C. 443.

Where witnesses cannot reasonably reach their homes the same day they are dismissed they will be allowed expenses for the following day. *Fryer* v. *Sturt*, 16 C.B. 218.

Where the parties to a cause had produced and examined their witnesses at Toronto, all of whom resided at a distance therefrom, and in the proximity to a county town, the Court while awarding the general costs of the cause to the defendant refused him the costs of the attendance of his witnesses. *Ledyard* v. *McLean*, 10 Gr. 139.

It is a question for the discretion of the taxing officer, whether a witness ought to be allowed for the whole time of his attendance at the Assizes, or only a portion of it; but where the taxing officer has decided upon it, the Court will not review his taxation. *Platt* v. *Greene*, 2 D.P.C. 216.

In the absence of special reasons, witnesses should be in attendance on the day fixed for trial, and from day to day while the case appears on the list for trial until it is heard, and the costs of such attendance should be allowed. *O'Meara v. Barry* (1895), 2 Ir. R. 454.

The Court will not review the discretion of the taxing officer in such a case unless *mala fides* is shewn in the successful party, as an intention to unnecessarily increase the costs. *Thomas v. Saunders*, 3 N. & M. 572.

(11) *Miscellaneous.*

An action lies at the suit of a witness against the party subpœnaing him for his witness fees, if not duly paid. *Chamberlain v. Stoneham*, 24 Q.B.D. 113.

But he cannot recover more than the usual fees. A witness for the plaintiff was promised payment for his loss of time and attended the trial and gave evidence for the plaintiff. Not being paid the sum promised he brought action. *Held*, he could not recover. He was bound to attend and give evidence under his subpœna and there could be no consideration for the promise for additional remuneration. *Willis v. Peckham*, 1 B. & B. 515, 21 R.R. 706.

Where the witness is out of the jurisdiction and not bound to attend on a subpœna, the reasoning in the last case would not apply, and he could probably recover.

A party is not bound to rely on one witness to prove an item, and if he calls more than one he is entitled to the costs of his witnesses. *Lockard v. Waugh*, 17 P.R. 269.

A plaintiff had two actions against the same defendant and both were tried at the same Assizes, and the plaintiff gave evidence in each action. He succeeded in one and failed in the other. *Held*, he was entitled to tax only one-half his witness fees in the action in which he succeeded. *Griffen v. Hoskyns*, 1 H. & N. 95.

An action involving long accounts was referred. An order was made, on the plaintiff's application, that an accountant to be named by the arbitrators, should inspect the defendant's book. The accountant made the inspection and was afterwards examined as to the result of his inspection. The Court held that in the absence of any provision in the order for the costs of the inspection, these costs were preliminary expenses for qualifying the witness to give evidence and could not be taxed. *Nolan* v. *Copeman*, L.R. 8 Q.B. 84; *Small* v. *Attwood*, 1 Y. & C. 53.

But where an expert is called in by the direction of the Court his charges may be taxed as part of the costs of the cause. *Robb* v. *Conner*, Ir. R. 9 Eq. 373.

Where a witness is subpœnaed and paid by both parties to the action, the rule is that the successful party is entitled to tax the costs of the witness against the other party. *McLean* v. *Evans*, 3 P.R. 154.

Where the affidavit of increase stated the name of the witness as David Chapman instead of Daniel Chapman.

*Held*, immaterial if the Master was satisfied it was merely a misnomer. *Ham* v. *Lasher*, 24 U.C.Q.B. 357.

If a witness is so old and infirm, that it is a prudent course to take his examination, but he is afterwards able to attend the trial, the plaintiff may be allowed the costs of the commission, as well as the costs of the witness's attendance at the trial. *Beaufort* v. *Ashburnham*, 13 C.B.N.S. 598. And see *Fox* v. *Toronto and Nipissing Railway Co.*, 7 P.R., at p. 161.

"A person possessed of a pass entitling him to ride free on a railway is subpœnaed to attend as a witness at a trial, and to reach the place of trial and return therefrom he uses his pass; that would not deprive the litigant, who paid him his witness fees, from recovering them as part of the costs to which he was entitled from the other party.

"Both of the witnesses named may have had passes and may have used them, if so, each was in pocket the railway fare required to be paid going to and returning from the place of trial. But, so long as they received the witness fees from defendants, how they travelled is no concern of plaintiff." MacMahon, J., *Kerr* v. *Canadian Construction Co.*, 5 O.W.R. 168.

## WRITS OF SUMMONS.

The expense of serving a defendant out of the jurisdiction with the writ of summons, or reasonable efforts to serve him, is taxable as between party and party, and the amount to be allowed is for the Master to determine on the materials before him. *White* v. *Brett*, 28 L.J. Exch. 32.

But the costs of serving an infant defendant personally who is out of the jurisdiction will not be allowed. Service should be made on the official guardian. *Rew* v. *Anthony*, 9 P.R. 545.

Where the plaintiff obtains an order shortening the time for service of a writ on defendants out of the jurisdiction, he should include in it an order allowing for the issue of the writ for service, and the costs of both orders will not be allowed. *Sparks* v. *Purdy*, 15 P.R. 1.

In a mortgage action 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*, *supra*.

A writ of summons is a "pleading or other document" within the meaning of Rule 265, and more than four copies cannot be taxed. *Sparks* v. *Purdy*, *supra*.

In the taxation of costs the taxing officer is justified in allowing the expenses of two writs issued in one action against the defendant into two counties, where it was doubtful in which county he was to be found. *Morris* v. *Hunt*, 1 Chitt. 544.

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. *Killmallack*, 22 L.R. Ir. 326.

# TARIFF OF COSTS.

---

TARIFF A.

## SOLICITORS' COSTS.

---

TARIFF B.

## TARIFF OF DISBURSEMENTS.

---

TARIFF C.

## FEES OF SHERIFFS IN CIVIL MATTERS.

---

## TARIFF OF CRIERS IN CRIMINAL PROSECUTIONS.

---

## DIVISION COURT TARIFF—CLERK AND BAILIFF.

---

## COSTS OF PROCEEDINGS ALPHABETICALLY ARRANGED.

# TARIFF A.

## TABLE OF COSTS IN THE HIGH COURT OF JUSTICE, COURT OF APPEAL, AND COUNTY COURTS.

(*Rule* 1178.)

### GENERAL ALLOWANCE FOR PLAINTIFFS AND DEFENDANTS, AS WELL BETWEEN SOLICITOR AND CLIENT AS BETWEEN PARTY AND PARTY.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 1. Instructions to sue in undefended cases | $3.00 | $2.00 |
| 2. In defended cases | 4.00 | 3.00 |
| 3. Instructions to defend | 4.00 | 3.00 |
| 4. Instructions for petition where no writ of summons issued | 2.00 | 1.00 |
| **WRITS.** | | |
| 5. All writs, except writs of execution, subpœnas, and concurrent, and renewed writs | 2.00 | 1.00 |
| 6. Concurrent writ | 1.50 | .75 |
| 7. Renewed writ (except writs of execution) | 1.50 | .75 |
| 8. All writs, except subpœnas, if over four folios, for every folio | .20 | .20 |
| 9. Subpœna *ad testificandum* | 1.00 | .50 |
| 10. Subpœna *duces tecum* | 1.25 | .75 |
| 11. All subpœnas if over four folios, additional per folio | .15 | .15 |
| 12. Notice of writ for service in lieu of writ out of jurisdiction and copy | 1.00 | .75 |
| 13. (Alias, and subsequent, writs, to be allowed as originals.) | | |
| 14. Special indorsement of writ of summons | 1.00 | .75 |
| 15. Issuing any writ of execution | 6.00 | 4.00 |
| Renewal of any writ of execution | 4.00 | 2.50 |
| (In both cases, including placing same in the sheriff's hands, all attendance, indorsements and letters in connection therewith.) | | |

## COPY AND SERVICE OF WRITS OF SUMMONS, AND OTHER PROCESS.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 16. For copy, including copy of notices required to be indorsed, each | $1.00 | $ .75 |
| If over four folios, for every additional folio | .10 | .10 |
| 17. Service of each copy of writ, if not done by the sheriff or an officer employed by him, when taxable to solicitor on sheriff's default | 1.00 | .50 |
| 18. If served at a distance of over two miles from the nearest place of business, or office of the solicitor serving same, for each mile beyond such two miles | 13 | .10 |
| 19. For service of writ out of jurisdiction:— High Court. Such allowance as the taxing officer shall think fit. County Courts: Such allowance as the taxing officer or County Court Judge shall think fit. | | |

## INSTRUCTIONS AFTER COMMENCEMENT OF ACTION.

| | | |
|---|---|---|
| 20. To counsel in special matters | 1.00 | .50 |
| 21. To counsel in common matters | .50 | .25 |
| 22. For special affidavits when allowed by the taxing officer (or County Court clerk in County Court cases) | 1.00 | .50 |
| 23. For special affidavit on production when allowed by the taxing officer | 2.00 | 1.00 |
| 24. For pleadings in action and reasons for and against appeal | 1.50 | 1.00 |
| 25. For counterclaim, when such claim could not prior to the Ont. Jud. Act, 1881, have formed the subject of a set-off | 2.00 | 1.00 |
| 26. For reply to such counterclaims | 2.00 | 1.00 |
| 27. To amend any pleading when the amendment is proper | 2.00 | 1.00 |
| 28. For confession of defence under Rule 295 | 2.00 | 1.00 |
| 29. For special case in course of action | 2.00 | 1.00 |
| 30. For special case when no writ issued, or pleadings had, and no instructions to sue allowed | 3.00 | 2.00 |
| 31. To add parties by order of Court or Judge | 2.00 | 1.00 |
| 32. For brief | 2.00 | .50 |
| 33. For adding parties in consequence of marriage, death, assignment, etc. | 1.00 | .50 |
| 34. For issue of fact, by consent, or Judge's order | 2.00 | 1.00 |
| 35. To defend added parties after death of original party | 2.00 | 1.00 |
| 36. For confession of action in ejectment as to the whole, or in part | 1.00 | .50 |
| 37. To strike or reduce special jury | 2.00 | 1.00 |
| 38. For such other important step or proceeding in the suit as the taxing officer is satisfied warrants such a charge | 2.00 | 1.00 |

## DRAWING PLEADINGS, ETC.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 39. Statement of claim | $2.00 | $1 00 |
| 40. If above ten folios, for every folio above ten, in addition | 20 | .15 |
| 41. Statement of defence, if five folios or under | 2 00 | 1.00 |
| 42. Counterclaim if five folios or under | 2 00 | 1 00 |
| 43. Statement of defence or counterclaim if above five folios, for every folio in addition | .20 | 20 |
| 44. Reply and other pleadings for or on behalf of plaintiff or defendant | 2.00 | 1.00 |
| 45. If above five folios, for each additional folio | .20 | 15 |
| 46. Petition, per folio | 20 | 15 |
| 47. Issue for trial of facts by agreement or order, for every folio | .20 | 20 |
| 48. In special or contested actions or matters on the higher scale to be increased to such sum as the taxing officer in Toronto may think fit. | | |
| 49. Special case, per folio | .20 | .20 |
| 50. Drawing interrogatories, or answers for any purposes required by law, per folio | .20 | .20 |
| 51. Drawing reasons for or against appeal, five folios or under | 2 00 | 1.00 |
| For each folio above five | 20 | .15 |
| 52. (The above charges do not include engrossing, or copies to file or serve.) | | |
| 53. Taking *cognovit* and entering judgment thereon, when there has been no previous proceeding, and the true debt does not exceed $200 | 8.00 | 8 00 |
| 54. For same services when the true debt exceeds $200 | 12.00 | 10.00 |
| 55. Drawing and engrossing *cognovit*, and attending execution, when there have been previous proceedings | 2.00 | 1 00 |
| 56. Preparing bond to secure costs, bond on any appeal to secure costs or damages, or any recognizance (to include drawing affidavits and all attendances in connection with the preparation thereof) | 5.00 | 3 00 |

## COPIES.

| | | |
|---|---|---|
| 57. Of pleadings, brief and other documents, when no other provision is made, and copies properly allowable | 10 | 10 |
| 58. Certified copy of pleadings, or issue, for use of Judge | 1 50 | .75 |
| 59. For every folio above 15, per folio | .10 | .10 |
| 60. Of special and common orders, per folio | .10 | .10 |
| 61. Of depositions properly taken for use on a motion in Court or Chambers—in the discretion of the taxing officer not exceeding the amount payable to a Special Examiner for copies | | |

## NOTICES, INCLUDING ONE COPY.

| | | |
|---|---|---|
| 62. Notice, in action for recovery of land, to defend for part of premises; not to be allowed when defence limited by appearance | 1.00 | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 63. Notice of plaintiff's or defendant's title in action for recovery of land | $1.00 | $ .50 |
| 04. Notice of admission of right and denial of ouster by joint tenant | 1.00 | |
| 65. Notice of confession of action in action for recovery of land as to whole or part | .50 | |
| 60. Notice in lieu of statement of claim | .50 | .25 |
| 67. Notice to produce and admit each | .50 | .25 |
| 68. Notice by defendant to third party under Rule 209 (not to include copy of statement of claim) | 1.00 | .50 |
| 09. In any case where any of the above exceed two folios, for every additional folio | .20 | .20 |
| For every additional folio of copy | .10 | |
| For every additional copy per folio | .10 | |
| 70. Particulars of claim, demand, set off, or counterclaim, five folios or under | 2.00 | .75 |
| If exceeding five folios, per folio in addition | .20 | .15 |
| 71. Notice of motion in Court or Chambers, drawing and copy to serve, per folio | .30 | .15 |
| 72. Notice of appearance when entered after time limited by writ, and notice given forthwith, but not otherwise | .50 | .25 |
| 73. Notice of entry of appearance in action for recovery of land by person not named in the writ | .50 | .25 |
| 74. Notice to sheriff to discharge prisoner out of custody. | .50 | .40 |
| 75. Notice of discontinuance | .50 | .25 |
| 70. Notice of disputing amount of claim | .50 | .25 |
| 77. Notice of trial or assessment | .50 | .25 |
| 78. Demand of residence of plaintiff | .50 | .25 |
| 79. Demand of names of partners | .50 | .25 |
| 80. Notice of setting down on motion for judgment or on further directions | .50 | .25 |
| 81. Notice of taxation or appointment to tax | .50 | .25 |
| 82. Notice of filing affidavits when required (only one notice to be allowed for a set of affidavits filed or which ought to be filed together) | .50 | .25 |
| 83. All common notices, demands or appointments, not specified | .50 | .25 |
| 84. Every additional copy, per folio | .10 | .10 |
| 85. (In no case less than fifty cents to be taxed for notice, demand or appointment, and one copy.) (Where necessary to be served and served on more than one party the extra services to be allowed.) | | |

## PERUSALS.

| | | |
|---|---|---|
| 80. Of each of the pleadings as defined by the Judicature Act, 1895, including reasons for and against appeal | 1.00 | .50 |
| 87. Of special case by the solicitor of any party, except the one by whom it is prepared, when the case is submitted in the course of the cause | 2.00 | 1.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 88. And in special, or contested actions, or matters, or of interrogatories, and cross-interrogatories on commission (in the High Court, such sum as the taxing officer in Toronto thinks fit) ........... | | $ .50 |
| 89. Of affidavits and exhibits of a party adverse in interest, filed or produced on any application, where perusal is necessary if 20 folios or under .............. | $1.00 | .50 |
| On the higher scale per folio over 20 folios.......... | .05 | |
| (Not in any case to exceed the sum of $5.) | | |

## ATTENDANCES.

| | | |
|---|---|---|
| 90. Necessary attendances consequent on the service of a notice to produce or admit, or an inspection of documents when produced under order including making admission, altogether ........................ | 1.00 | .50 |
| To be increased by taxing officer (or County Court clerk) in cases of special, difficult and important nature, to ................................ | 2.00 | 1.00 |
| 91. Attending on return of motion, in Chambers........ | 1.00 | .50 |
| To be increased in the discretion of the taxing officer, or in County Court cases of the Judge, to ........ | 2.00 | 1.50 |
| 92. On consultation, or conference, with counsel, in special, difficult, and important matters, in the discretion of the taxing officer in Toronto (or in County Court cases of the County Court clerk) to............ | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer as between solicitor and client, to such sum as he shall see fit, or in County Court cases in the discretion of the County Court Judge to, not exceeding.. | | 3.00 |
| No special attendance to be allowed to a solicitor on proceedings on which he also appears as counsel. | | |
| 93. Solicitor attending Court on trial of cause, when not himself counsel, or partner of counsel........... | 2.00 | 1.00 |
| And in special, difficult, and important cases, each hour necessarily present at trial................ | 2.00 | 1.00 |
| In no case to exceed, per day.... ................ | 10.00 | 5.00 |
| (Provided the attendance of such solicitor, and the length of time of such attendance, be duly entered at the time in the book of the registrar, deputy-registrar, deputy clerk of the Crown, clerk of Assize, County Court clerk, or other officer of the Court present at the time, or proved by affidavit.) | | |
| 94. To hear judgment when not given on close of argument | 2.00 | 1.00 |
| 95. To hear judgment when cause on list for judgment, but judgment not given ..................... | 2.00 | 1.00 |
| 96. On taxation of costs ......................... | | 1.00 |
| 97. On taxation of costs, per hour.................. | 1.00 | |
| 98. On revision, per hour, when attendance required by taxing officer, or revision had on order........... | 1.00 | .50 |
| 99. On revision by County Court Judge on appeal....... | | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 100. To obtain or give undertaking to appear, when service accepted by a solicitor | $1.00 | $ .50 |
| 101. Attendance to file, or serve | .50 | .25 |
| 102. Attendance on warrant, or appointment, of Master, registrar, examiner, referee, or County Court clerk, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases, of the County Court Judge, to not exceeding per hour | 2.00 | 1.00 |
| 103. Attendance on Master, or registrar (or County Court clerk), in special matters, per hour | 1.00 | .50 |
| 104. Attending to search bond | .50 | .25 |
| 105. Attending to search and perusing bond | 1.00 | .50 |
| 106. Every other necessary attendance | .50 | .25 |
| 107. On important points and matters, requiring the attendance of counsel, and when counsel attends, before a Master, examiner, referee, registrar, inspector of titles, or county clerk, a counsel fee may may be allowed by a taxing officer in Toronto (or the Judge in County Court cases), in lieu of fees for attendance, such counsel fee in County Court cases not to exceed $5. | | |

## BRIEFS.

| | | |
|---|---|---|
| 108. For drawing briefs, five folios or under | 2.00 | 1.00 |
| 109. For drawing briefs, for each folio above five | .10 | .10 |
| 110. For drawing brief, per folio, for original and necessary matter | .20 | .20 |
| 111. Copy of documents, other than pleadings, per folio | .10 | .10 |
| 112. Copy of brief for second counsel, when fee taxed to him, per folio | .10 | |

## COURT FEES.

| | | |
|---|---|---|
| 113. Fees after statement of claim, or, where statement dispensed with, after filing writ, on defence, joinder of issue, trial, or argument before Courts or any other step in the cause, and on judgments, other than præcipe judgments in mortgages cases. No two fees to be allowed to either party when such proceedings are taken, or had, between the first day of any sittings of the Courts (as formerly fixed by Rule 215 of the Con. Rules of 1888, or fixed by R.S.O. 1887, ch. 47, sec. 12, as the case may be), and the first day of the following sittings so fixed. | 1.00 | .50 |
| 114. Fees on certified copy of pleadings for Judge | 1.00 | .50 |
| 115. Fee on every order, or judgment to the party obtaining the same | 1.00 | .50 |
| 116. Fee on præcipe judgment in mortgage cases. | 4.00 | 2.00 |

## AFFIDAVITS.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 117. Drawing affidavits, per folio | $ .20 | $ .20 |
| 118. Engrossing same to have sworn, per folio | .10 | .10 |
| 119. Copies of affidavits, per folio, when necessary | .10 | .10 |
| 120. Common affidavit of service, including service by post when necessary, or of payment of mileage and of non-appearance, including copy, oath, and attendance to swear | 1.00 | .75 |
| 121. The solicitor for preparing each exhibit | .10 | .10 |

## DEFENDANTS.

| | | |
|---|---|---|
| 122. Appearance, including attending to enter | 1.00 | .50 |
| For each additional defendant | .20 | .10 |
| 123. For limiting defence in action for recovery of land in appearance, besides above allowance for appearance; not to be allowed when notice of limiting defence served | 1.00 | .50 |

## JUDGMENTS OR ORDERS.

| | | |
|---|---|---|
| 124. Drawing minutes of judgment, or order, per folio, when prepared by solicitor, under direction of officer settling the same (or, in County Court cases, of the County Court Judge) | .20 | .20 |
| 125. Judgment for non-appearance on specially indorsed writs, and in action for recovery of land | 1.00 | .50 |
| 126. For every hour's attendance before proper officer on settling or passing minutes | 1.00 | .50 |
| To be increased in the discretion of the officer in special and difficult cases, when the solicitor attends personally, to a sum not exceeding altogether | 5.00 | 2.50 |

## LETTERS.

| | | |
|---|---|---|
| 127. Letter to each defendant before suit, only one letter to be allowed to any defendants who are in partnership, and when subject of suit relates to the transactions of their partnership | .50 | .25 |
| 128. Common letters, including necessary agency letters | .50 | .25 |
| 129. With power to the taxing officer (or in County Court cases the County Court clerk), as between solicitor and client, to increase the fee for special and important letters, to an amount not exceeding | 2.00 | 1.00 |
| 130. Postages—the amount actually disbursed. | | |
| 131. For correspondence during the progress of an appeal to the Court of Appeal a reasonable sum in the discretion of the taxing officer may be allowed not exceeding | 5.00 | 2.00 |

## SALES BY MASTER, OR AUCTIONEER; OR REAL REPRESENTATIVE IN PARTITION SUITS.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 132. Drawing advertisements for the sale of real or personal estate under the direction of the Court, including all copies, except for printing .......... | $2.00 | $1.00 |
| And for each folio over five, per folio.............. | .20 | .15 |
| (To be increased in the discretion of the Master (or in County Court cases the County Court Judge) to a sum not exceeding ten dollars, when special information has been procured for the purpose of sale.) | | |
| 133. Copies for printing, per folio..................... | .10 | .10 |
| 134. Each necessary attendance on printer.............. | .50 | .25 |
| 135. Attending and making arrangements with auctioneer | 1.00 | .50 |
| 136. Revising proof .............................. | 1.00 | .50 |
| 137. Fee on conducting sale when held where solicitor resides.................................... | 5.00 | 3.00 |
| 138. If solicitor is engaged for more than three hours, for every hour beyond that time.................. | 1.00 | .75 |
| 139. Fee on conducting the sale elsewhere, besides all necessary travelling and hotel expenses, when solicitor attends with the approval of the Master (or real representative) previously given............ | 10.00 | 5.00 |
| If the sale occupies more than one day, the Master may allow him, in addition to his travelling expenses, *per diem*, a sum not exceeding twenty dollars. | | |
| The Master may also allow to one other party to the suit his fees and expenses for attending sales, if, in his opinion, it is necessary and proper that he should attend. | | |

## MISCELLANEOUS.

| | | |
|---|---|---|
| 140. Statement of issues in Master's office, when required by the Master .............................. | 2.00 | 1.00 |
| In special matters to be increased in the discretion of the taxing officer in Toronto. | | |
| 141. For each folio over 10 .......................... | .20 | .20 |
| 142. When it has been satisfactorily proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the taxing officer in Toronto (or Judge of County Court in County Court cases). | | |
| 143. Drawing bill of costs as between party and party for taxation (including engrossing and copy for taxing officer, or County Court clerk), per folio........ | .30 | .20 |
| 144. Copy, per folio, to serve........................ | .10 | .10 |
| 145. For maps and plans necessary for and used at the trial—a reasonable sum in the discretion of the taxing officer (Con. Rule 1213)......... ......... | | |

## COUNSEL FEES.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 146. Fee on motion of course, or on motion in matters not special .................................... | $2.00 | $1.00 |
| 147. On special *ex parte* motion or application to the Court (only one counsel fee to be taxed) ......... | 5.00 | 2.00 |
| To be increased in the discretion of the taxing officer in Toronto (or Judge of County Court in County Court cases, who shall mark amount to be taxed on order of Court, if any, before taxation) to........ | 10.00 | 5.00 |
| 148. Fee on argument on supporting or opposing application to the Court, or argument in the High Court of special case, or appeal ........................ | 10.00 | 5.00 |
| In High Court and Court of Appeal to be increased in the discretion of the taxing officer in Toronto, but no more than two counsel fees to be allowed in any case. | | |
| In County Court to be increased in the discretion of the Judge, to ............................. | | 10.00 |
| 149. On argument of appeal in the Court of Appeal, in the discretion of taxing officer at Toronto, but no more than two counsel fees to be allowed in any case. (Rules 1 Jan., 1896, 1504, *amended.*) | | |
| 150. On argument in County Court appeals, in the discretion of the taxing officer at Toronto, not exceeding $25. (Rules 1 Jan., 1896, 1504.) | | |
| 151. On consultations ................................ | 5.00 | 2.00 |
| 152. Fee, with brief, on assessment ................. | 10.00 | 6.00 |
| 153. Fee, with brief, at trial ........................ | 10.00 | 10.00 |
| In High Court cases to be increased by the taxing officer in his discretion to a sum not exceeding $40 to a senior counsel, and $20 to junior counsel, in actions of a special and important nature. Provided that the taxing officer in Toronto shall have power to tax increased fees, but more than one counsel fee shall not be allowed in any case not of a special and important nature; not more than two in any case. Provided that if an application to increase fees be made in the first instance to the local taxing officer, and a *fiat* granted, no application shall thereafter be made to the taxing officer at Toronto. | | |
| In County Court cases to be increased by the Judge in actions of a special or important nature falling within the increased jurisdiction conferred by 50 Vict. ch. 19, upon County Courts (on notice to the opposite party) to a sum not exceeding ......... | | 50.00 |
| In County Court cases to be increased by the Judge, in actions of a special or important nature not falling within the increased jurisdiction aforesaid (on notice to the opposite party) to a sum not exceeding.................................... | | 25.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| (In County Court cases no charge to be made by either party in connection with such application.) | | |
| 154. On argument or examination in Chambers in cases proper for the attendance of counsel and where counsel attends | $2.00 | $1.00 |
| To be increased in the discretion of the taxing officer in cases in the High Court or Court of Appeal to a sum not exceeding | | 5.00 |
| To be increased in the discretion of the Judge in County Court cases to a sum not exceeding | | 5.00 |
| Subject to further increase in the discretion of the taxing officer at Toronto. Provided that the Master in Chambers may in cases before him recommend a fee. | | |
| 155. On attendance on reference to Master, County Court clerk, or referee, when counsel necessary | 5.00 | 3.00 |
| To be increased in special and important matters requiring the attendance of counsel, in the discretion of the taxing officer in Toronto (or the County Court clerk in County Court cases, not exceeding) | | 10.00 |
| 156. Fee on drawing, and settling, allegations in præcipe for revivor, in special cases, proper for opinion of counsel | 2.00 | 1.00 |
| To be increased in the discretion of taxing officer (or County Court clerk in County Court cases), to an amount not exceeding | 5.00 | 2.00 |
| 157. On settling pleadings, interrogatories, special cases, issues or petitions, and advising on evidence in contested cases, in the discretion of the taxing officer (or County Court clerk in County Court cases), not exceeding | 5.00 | 3.00 |
| 158. On settling the appeal case and reasons for or against appeal | 5.00 | 2.00 |
| To be increased in the discretion of the taxing officer at Toronto in special and important matters to a sum not exceeding | 20.00 | 5.00 |

## GENERAL.

159. Where any fee is subject to be increased, in the discretion of the taxing officer in Toronto, either party to the taxation may, during its progress, require that such item shall be referred by the local taxing officer to the taxing officer in Toronto, whose decision shall be final as to that item, but this shall not prevent an appeal from such taxation.

160. The necessary letters and attendances incurred in obtaining the decision of the taxing officer in Toronto in any matters which are in his discretion shall be allowed as part of the costs of the cause.

161. The taxing officer in Toronto may apply to a Judge, or the Courts, on the taxation of any item which is in his discretion, or is referred to him.

162. No application shall be allowed by either solicitor, or counsel, to a Judge, or the Court, in reference to any item which is in the discretion of the taxing officer in Toronto, but this shall not prevent an appeal from a taxing officer.

163. On arbitrations, counsel fees may be allowed and taxed on the same scale and conditions, so far as possible as those hereinbefore prescribed for counsel fees at trials.

164. On appeals to the Court of Appeal and in County Court appeals where the fees are not above provided for, the same fees and allowances shall be taxed as are allowed for similar services in the High Court or County Court, as the case may be.

165. In taxing costs between solicitor and client, the taxing officer or County Court clerk, in County Court cases, may allow for services rendered not provided for by this tariff, a reasonable compensation as far as practicable analogous to its provisions

166. Where a taxation is between solicitor and client on a reference made under the Act respecting Solicitors R.S.O. 1887, ch. 147) and Rules 1184 to 1188, the officer to whom the matter is referred may exercise all the powers of the taxing officer at Toronto in respect to increasing allowances made by this tariff.

# TARIFF B.

## TABLE OF DISBURSEMENTS.

*(Rule 1179.)*

Except where otherwise expressly provided by Statute or Rule of Court, the following fees and allowances shall be taken and received by the officers and persons herein mentioned in civil actions in the High Court and Court of Appeal and in the County Courts in lieu of all fees payable to those officers and persons under the tariffs heretofore in force in the said Courts.

### FEES TO BE PAYABLE IN STAMPS OR OTHERWISE TO OFFICERS OF THE COURTS.

*(Inclusive of all Fees expressly imposed by Statute.)*

### REGISTRAR OF COURT OF APPEAL.

| | Higher Scale. High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 1. Setting down for argument (*a*) .................. | $4.00 | |
| 2. On every judgment or order of the Court passed and entered (*a*) .................................. | 2.00 | |
| 3. Certificate on discharging appeal.................. | .90 | |
| 4. On every order in Chambers....................... | .50 | |
| 5. For other services the like charges as are payable in the High Court for similar services. | | |

(*a*) Imposed by 58 Vict. ch. 12, sec. 184.

### MASTER IN ORDINARY, LOCAL MASTERS AND OFFICIAL AND SPECIAL REFEREES.

| | | |
|---|---|---|
| 6. Filing and entering judgment or order in Master's book ........................................ | $ .20 | $ .10 |
| 7. Every warrant or appointment .................. | .50 | .10 |
| 8. Administering oath or taking affirmation........ .... | .20 | .20 |
| 9. Marking every exhibit.......................... | .20 | .10 |
| 10. Drawing depositions (in infancy matters only) reports or orders, per folio, to include time occupied | .20 | .20 |
| 11. Fair copy, per folio (when necessary)............. | .10 | .10 |
| 12. Copies of evidence supplied to parties or for the use of the Judges—such sums as may be authorized under any Order in Council. | | |
| 13. Copies of evidence not provided for by any such Order in Council, and copies of papers given out when required, per folio ............................ | .10 | .10 |

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 14. Every attendance upon any proceeding or enlargement thereof or selling property ........ | $1.50 | $ .50 |
| 15. For each additional hour ........ | 1.50 | .50 |
| 16. Fee on report signed (only one to be allowed in each action or matter, on first report) ........ | 2.00 | *Nil.* |
| 17. Every certificate, if not longer than two folios ........ | .50 | .20 |
| 18. For each folio over two ........ | .20 | *Nil.* |
| 19. Filing each paper or subsequent order ........ | .10 | .10 |
| 20. Taxing costs, per hour ........ | 1.00 | |
| 21. Taxing costs, including attendance ........ | | .80 |
| 22. Making up and forwarding depositions, bills of costs and proceedings in Master's office ........ | .50 | .10 |
| 23. Every special attendance out of office within two miles, per hour occupied by reference or sale ........ | 2.00 | .50 |
| 24. Every additional mile above two for travelling expenses ........ | .20 | .10 |
| 25. Every order in Chambers ........ | .50 | .20 |
| 26. Searching files in office ........ | | .10 |
| 27. Searching files in office on higher scale same allowance as to deputy registrar. | | |

## CLERK OF THE PROCESS, CLERK OF THE CROWN AND PLEAS, REGISTRARS, LOCAL REGISTRARS, DEPUTY REGISTRARS, DEPUTY CLERKS OF THE CROWN, CLERK IN CHAMBERS, ACCOUNTANT AND TAXING OFFICERS IN THE HIGH COURT, AND THE CLERKS OF THE COUNTY COURTS.

| | | |
|---|---|---|
| 28. Every writ ........ | .50 | .50 |
| 29. Every concurrent, alias, pluries or renewed writ ........ | .50 | .40 |
| Additional on every writ by statute (*b*) ........ | .50 | |
| 30. Every appearance entered, and filing memorandum thereof ........ | .20 | .15 |
| 31. Every appearance, each defendant after the first ........ | .10 | .10 |
| 32. Filing every affidavit, writ or other proceeding ........ | .10 | .10 |
| 33. Amending every writ or other proceeding ........ | .30 | .25 |
| 34. Upon payment of money into Court where the amount is upwards of $10 ........ | .30 | .30 |
| [No sum to be payable in respect of payments into Court upon mortgages or securities held by the accountant (Rule 18 Feb., 1892, 1271).] | | |
| 35. Upon payment of money out of Court where the amount is upwards of $10 (Rules of 18 Feb., 1892, 1271) ........ | .30 | .30 |
| 36. Passing and certifying record (payable in cash to deputy clerks of the Crown, local registrars and deputy registrars not paid by salary ........ | 1.00 | .50 |
| 37. Entering action for trial or assessment (including High Court cases entered for trial at County Court) (*b*) ........ | 2.00 | .50 |

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| (The foregoing fee of $2 payable by statute (b) to be payable in cash to deputy clerks of the Crown, local registrars and deputy registrars not paid by salary.) | | |
| Additional fee in High Court cases payable by statute for the shorthand reporters' fund payable in cash (c) | $1 00 | |
| Additional fee by statute in jury cases (d) | 3.00 | $1.50 |
| 38. On setting down on the paper for argument every special case | .20 | .20 |
| Additional fee payable by statute (b) | .30 | |
| 39. Setting down a cause for any other purpose | .50 | .20 |
| 40. Subpœna, including filing præcipe | .50 | .20 |
| Additional fee by statute (b) | .50 | |
| 41. Every reference, inquiry, examination, or other special matter for every meeting not exceeding one hour, not including the settlement of minutes of a judgment nor the allowance or disallowance of a bond | 1.00 | .75 |
| 42. Every reference, inquiry, examination, or other special matter for every additional hour or less | 1 00 | .50 |
| 43. Fee on report made on such reference, etc | 1.00 | 1.00 |
| 44. Attending on opening commission | 1.00 | .50 |
| 45. Every certificate made evidence by law, or required by the practice, including any necessary search | .50 | .50 |
| Additional fee where seal is required (b) | .50 | |
| 46. Every certificate for registration | .50 | .20 |
| Additional fee for seal of Court or office (b) | .50 | |
| 47. Entering certificate of title or conveyance, per folio | .10 | .10 |
| 48. Every ordinary order | .30 | .30 |
| Additional fee by statute (b) | .20 | |
| 49. Every special order, not exceeding six folios, per folio | .20 | .20 |
| Additional fee by statute (b) | .20 | |
| 50. Every Chamber order | .50 | .50 |
| 51. Every interlocutory judgment or judgment by default | .50 | .30 |
| Additional fee by statute (b) | .60 | |
| 52. Every final judgment otherwise than judgment by default | .50 | .50 |
| Additional fee by statute (b) | .60 | |
| 53. Taxing bill of costs, and giving allocatur or certificate | .70 | .80 |
| Additional fee by statute (b) | .20 | |
| 54. Entering order when necessary, per folio | .10 | .10 |
| 55. Taking account on præcipe judgment | 1.00 | .50 |
| 56. Exemplification, or office or other copy of papers or proceedings required to be given out, per folio, besides certificate and seal when required | .10 | .10 |
| Additional fee by statute for seal of Court (b) | .50 | |
| 57. Examining and authenticating papers when copy prepared by solicitor—every three folios | .05 | .05 |
| 58. Every search, if within one year | .10 | .10 |
| 59. Every search, if over one year and within two years | .20 | .10 |
| 60. Every search, if over two years, or a general search | .50 | .20 |
| 61. Every affidavit, affirmation, etc., taken before them | .20 | .20 |

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 62. Every allowance and justification of bail .......... | $ .30 | |
| 63. Taking recognizance of bail ........................ | .30 | |
| 64. Entering satisfaction on record, and filing satisfaction piece, including any necessary search .......... | .50 | $ .30 |
| 65. Every commission for the examination of witnesses... | 1.00 | .50 |
| 66. Making up and forwarding papers, including bills of costs................................ | .50 | .10 |
| 67. Every commission for taking bail and affidavit (to be on parchment) ....... | 2.00 | |
| 68. Entering exoneretur on bail piece.................. | .30 | .20 |
| 69. Making up records of conviction, or of acquittal, per folio .......................................... | .10 | |
| 70. Entering and docketing judgment.................. | .60 | |
| 71. For making the entry required in *cognovit* book..... | .50 | .50 |

(*b*) Imposed by 58 Vict. ch. 12, sec. 183, and payable in stamps.

(*c*) Imposed by 58 Vict. ch. 12, sec. 131, as amended by 59 Vict. ch. 18, Sched. (21).

(*d*) Imposed by R.S.O. 1887, ch. 52, sec. 148.

## CLERKS OF THE COUNTY COURTS (ADDITIONAL).

| | | |
|---|---|---|
| 72. Every judgment pronounced, jury discharged, record withdrawn, or order of reference at the trial...... | | .50 |
| 73. Drawing appointments made by the Judge.......... | | .25 |
| 74. Every appointment for taxation of costs or otherwise, made by County Court clerk.................. | | .10 |
| 75. For every jury sworn.......................... | | 1.00 |
| 76. Every enlargement on application to the Judge in Chambers, including search, if marked by the clerk | | .15 |

## DEPUTY REGISTRARS NOT PAID BY SALARY.

(Additional, only so long as the present officers retain office and are not paid by salary.)

| | | |
|---|---|---|
| 77. Marking every exhibit produced on the examination of witnesses.................................. | .20 | |
| 78. Swearing each witness.......................... | .20 | |
| 79. Attending on inspection of documents, produced with affidavits on production, per hour.............. | 1.00 | |

## SPECIAL EXAMINER.

| | | |
|---|---|---|
| 80. Every appointment .............................. | .50 | .10 |
| 81. Administering oath or taking affirmation.......... | .20 | .20 |
| 82. Marking every exhibit............................ | .20 | .20 |
| 83. Taking depositions per hour...................... | 1.50 | .75 |
| 84. Fair copy for solicitor, per folio (when required).... | .10 | .10 |
| 85. Every attendance out of office when within two miles. | 2.00 | .50 |
| 86. Every attendance over two miles out of office—extra per mile .................................. | .20 | .10 |
| 87. Every certificate ................................ | .50 | .25 |

| | Higher Scale. High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 88. Making up and forwarding answers, depositions, etc., including filing præcipe ........................ | $ .50 | $ .25 |
| 89. For every attendance upon an appointment, when solicitor or witnesses do not attend and examiner not previously notified ........................ | 1.00 | .50 |

### REFEREE OF TITLES.

| | | |
|---|---|---|
| 90. Every warrant or appointment in contested cases.... | .30 | |
| 91. Administering oath or taking affirmation.... ...... | .20 | |
| 92. Marking every exhibit........................ | .10 | |
| 93. Taking depositions, reports or orders, advertisements and notices, per folio ........................ | .20 | |
| 94. Copy of papers given out when required, per folio.... | .10 | |
| 95. Every attendance upon a reference in a contested case | 1.00 | |
| 96. For each additional hour after the first............ | 1.00 | |
| 97. Every certificate not being the certificate of title..... | .50 | |
| 98. Filing each paper ........................ | .10 | |
| 99. Taxing costs, including attendance................ | 1.00 | |
| 100. Making up and forwarding papers to the inspector of titles ........................ | .30 | |
| 101. Every special attendance out of office within two miles | 1.00 | |
| 102. Every additional mile above two................ | .20 | |
| 103. Reading affidavit, per folio................ | .02 | |
| 104. Matter added, per folio ................ | .20 | |
| 105. Searching files in office................ | .20 | |
| 106. Every deed in the chain of title other than satisfied mortgages.... ................ | .50 | |
| 107. Where title is claimed by possession only.......... | 4.00 | |
| 108. Drawing and engrossing certificate of title, or conveyance in duplicate ........................ | 4.00 | |
| 109. All necessary sums paid for postage or transmission of papers ........................ | | |

### INSPECTOR OF TITLES.

| | | |
|---|---|---|
| 110. On entering petition, for all correspondence, examination of the title, drawing and engrossing certificate or conveyance and every other matter or thing done under the petition (Con. Rule 1036)... | 8.00 | |

### REAL REPRESENTATIVE.

111. The real representative acting under the Act respecting the partition and sale of real estate (R.S.O. 1887, ch. 104) shall, in the case of proceedings being instituted in the High Court or a County Court, be entitled to demand and receive for all services performed by him under the said Act, the same fees as nearly as may be as are allowed to local Masters or special examiners for similar services.

## CRIER.

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 112. Calling every case, with or without jury | $ .60 | $ .50 |
| 113. Swearing each witness, or constable | .15 | .15 |

## COMMISSIONERS.

| | | |
|---|---|---|
| 114. For taking every affidavit | .20 | .20 |
| 115. For taking every recognizance of bail | .50 | .50 |
| 116. For marking every exhibit | .10 | .10 |

## ALLOWANCE TO WITNESSES.

| | | |
|---|---|---|
| 117. To witnesses residing within three miles of the Court house, *per diem* | 1.00 | 1.00 |
| 118. To witnesses residing over three miles from the Court house | 1.25 | 1.25 |
| 119. 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* | 4.00 | 4.00 |
| 120. 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* | 4.00 | 4.00 |

121. 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.

122. 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.

N.B.—In all applications and proceedings before the County Court Judges not relating to suits instituted in any Court of civil jurisdiction there shall be payable to the clerks of the County Courts the same fees as in this table so far as the same are applicable.

# TARIFF C.

## FEES OF SHERIFFS AND CORONERS IN CIVIL MATTERS.

(*Referred to in Rule* 1189.)

### FEES PAYABLE TO SHERIFFS AND CORONERS.

#### GENERAL MATTERS.

| | Higher Scale. High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 1. Receiving, filing, entering, and indorsing all writs, pleadings, rules, notices, or other papers, each.... | $ .25 | $ .10 |
| 2. Return of all process and writs, except subpœnas.... | .50 | .25 |
| 3. Return of pleadings, rules, notices, or other papers... | .25 | .15 |
| 4. Every search, not being by a party to a cause or his solicitor.......... | .30 | .30 |
| 5. Certificate of result of such search, when required (a search for a writ against lands of a party shall include sales under writ against same party, and for the then last six months) .......... | .75 | .75 |
| 6. Where a certificate respecting executions against lands is required, the sheriff, if so requested, is to include in one certificate any number of names in respect of which the certificate may be required in the same matter or investigation, but shall be entitled to the same fees as if one certificate were given for each name, provided that no greater sum than $4 shall be charged or collected in respect of such certificate. (50 Viet. ch. 7, sec. 5.) | | |
| 7. Every warrant to execute any process *mesne* or final, directed to the sheriff, when given to a bailiff...... | .75 | .50 |
| 8. Every jury sworn, or cause tried before a Judge..... | 1.00 | .80 |
| 9. Every letter written (including copy) required by party or his solicitor respecting writs or process, when postage prepaid .......... | .50 | .30 |
| 10. Drawing every affidavit when necessary and prepared by sheriff .......... | .25 | .25 |

#### SERVICE OF PROCESS AND PAPERS.

| | | |
|---|---|---|
| 11. Service of non-bailable process, each defendant (no fee for affidavit of service in such cases to be allowed, unless service made or recognized, by sheriff; on County Court scale, including affidavit of service). | 1.50 | 1.00 |

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 12. Serving subpœnas, orders, notices, or other papers (besides mileage) | $ .75 | $ .50 |
| 13. For each additional party served | .50 | .25 |
| 14. Actual and necessary mileage from the Court House to the place where service of any process, paper or proceeding is made, per mile | .13 | .13 |

## ARREST AND ATTACHMENT.

| | | |
|---|---|---|
| 15. Arrest, when amount does not exceed $200 | 2.00 | 2.00 |
| Arrest, when amount does not exceed $400 | 4.00 | 4.00 |
| Arrest, when amount over $400 | 6.00 | |
| 16. Bail bond or bond to the limits | 2.00 | 1.00 |
| 17. Assignment of the same | 1.00 | .25 |
| 18. Mileage going to arrest when made, per mile | .13 | .13 |
| Mileage conveying party arrested from place of arrest to the gaol, per mile | .13 | .13 |
| 19. Bringing up prisoner on attachment or habeas corpus, besides travel at 20c. per mile | 1.50 | 1.00 |
| 20. Certificate of surrender by sureties under Rule 1049. | 1.00 | 1.00 |

## ABSCONDING DEBTORS.

| | | |
|---|---|---|
| 21. Seizing estate and effects on attachment against an absconding debtor | 3.00 | 1.50 |
| 22. Valuators, each | 1.00 | 1.00 |
| 23. Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the taxing officer, or in the County Court by order of the Court or a Judge. | | |
| 24. Drawing bond to secure goods taken under an attachment against an absconding debtor, if prepared by sheriff | 1.50 | 1.50 |

## REPLEVIN.

| | | |
|---|---|---|
| 25. Precept or warrant to bailiff in replevin | .75 | .40 |
| 26. Drawing notice for service on defendant in replevin | .75 | .40 |
| 27. Delivering goods to the party obtaining the order of replevin | 3.00 | 1.50 |
| 28. For writ *de retorno habendo* | 1.00 | .50 |
| 29. On replevin bond | 4.00 | 2.00 |
| 30. Assignment | 1.00 | .25 |
| 31. All necessary disbursements for the possession, care and removal of property taken in replevin. | | |

## JURIES.

| | | |
|---|---|---|
| 32. Notice of appointment for ballot of jury | .50 | .25 |
| 33. Notice to clerk of peace of such appointment | .50 | .25 |
| 34. Fee on balloting special jury | 5.00 | 2.50 |
| 35. Fee on striking special jury | 2.50 | 1.25 |

| | Higher Scale. High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 36. Serving each special juror (besides mileage at 13c. per mile) | $ .50 | $ .25 |
| 37. Returning panel of special jurors | 1.00 | .50 |
| 38. Keeping and checking pay list of special jurors' attendance, in each case | 1.00 | 1.00 |

## SALES, POUNDAGE, ETC.

| | | |
|---|---|---|
| 39. Poundage on executions, and on attachments in the nature of executions, where the sum made does not exceed $1,000 (in the County Court on the sum made) | 6% | 5% |
| 40. Where the sum is over $1,000 and under $4,000, upon the excess over $1,000 (in addition to the poundage allowed up to $1,000) | 3% | |
| 41. Where the sum is $4,000 and over, upon the excess over $4,000 (in addition to the poundage allowed up to $4,000) | 1½% | |
| (Exclusive of mileage for going to seize and sell, and of all disbursements necessarily incurred in the care and removal of property.) | | |
| 42. Schedule taken on execution, attachment, or other process, including copy to defendant, not exceeding 5 folios | 1.00 | .50 |
| 43. Each folio above 5 | .10 | .10 |
| 44. Drawing advertisements when required by law to be published in the official *Gazette* or other newspaper, or to be posted up in a Court house or other place, and transmitting same, in each suit | 1.50 | .75 |
| 45. Every necessary notice of sale of goods (not more than 3), in each suit | .75 | .40 |
| 46. Every notice of postponement of sale, in each suit | .25 | .20 |
| 47. The sum actually disbursed for advertisements required by law to be inserted in the official *Gazette* or other newspaper. | | |

## SEQUESTRATION.

| | | |
|---|---|---|
| 48. Upon seizure of estate and effects under writ of sequestration | 4.00 | 1.00 |
| 49. Schedule of goods taken in execution (including copy for defendant) if not exceeding five folios | 1.00 | .50 |
| 50. Each folio above five | .10 | .10 |
| 51. Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the taxing officer, or by order of the Court or Judge. | | |
| 52. (Poundage upon sequestration followed by sale and collection—as on other executions.) | | |

## WRIT OF POSSESSION.

| | Higher Scale, High Court and Court of Appeal. | County Courts. |
|---|---|---|
| 53. Executing writ of possession and serving and executing writ of restitution, besides mileage ........ | $6.00 | $2.00 |

### HAB. FAC. SEISIN.

| | | |
|---|---|---|
| 54. Viewing lands, and instructing surveyors under Hab. Fac. Seisin, exclusive of mileage, per day ...... | 5.00 | |
| 55. Giving possession, exclusive of mileage and assistance | 5.00 | |
| 56. All necessary disbursements to surveyors and others for surveying the lands and giving possession, to be allowed to the sheriff. | | |

### ON A VIEW BY A JURY.

| | | |
|---|---|---|
| 57. For travelling expenses to the sheriff, shewers, and jurymen—Expenses actually paid, if reasonable. | | |
| 58. Fee to the sheriff, when the distance does not exceed five miles from his office.................... | 2.00 | |
| 59. When such distance exceeds five miles ............ | 3.00 | |
| 60. In case he is necessarily absent more than one day—then for each day after the first, a further fee of | 3.00 | |
| 61. Fee to each of shewers—the same as to the sheriff, calculating, etc. | | |
| 62. Fee to each common juryman, per diem .......... | 1.00 | |
| 63. Fee to each special juryman, per diem .......... | 2.00 | |
| 64. Allowance for refreshment to the sheriff, shewers, and jurymen, common or special, each, per diem.. | 1.00 | |
| 65. To the sheriff for summoning each juryman, whose residence is not more than five miles distant from the sheriff's office ............................ | .40 | |
| 66. And for each whose residence exceeds five miles from sheriff's office ............................ | .60 | |

### WRIT OF INJURY, ESCHEAT, ETC.

| | | |
|---|---|---|
| 67. Presiding or attending on execution of writ of inquiry, or under any writ of escheat, or other writ of a like nature ........................ | [illegible] | 4.00 |
| 68. Summoning each juror in such case .............. | .50 | .50 |
| 69. Bailiff's fee summoning jury, mileage per mile ..... | .13 | .13 |
| 70. Hire of room, if actually paid, not to exceed $2 per day. | | |
| 71. Mileage from the court house to the place where writ executed, per mile ........................ | .13 | .13 |

### CORONERS.

72. The same fees shall be taxed and allowed to coroners for services rendered by them in the service, execution and return of process, as allowed to sheriffs for the same services above specified.

## CRIER'S FEES.

AS FIXED BY SEC. 16, CH. 12, 2 EDW. VII.

*(Criminal Prosecutions.)*

| | |
|---|---|
| 1. Making proclamation for opening or adjourning the Court of Assize, Nisi Prius, Oyer and Terminer, and General Gaol Delivery, General Sessions, County Court, and County Judge's Criminal Court | $0.25 |
| 2. Making every other proclamation | .25 |
| 3. Calling and swearing grand jury | .50 |
| 4. Calling and swearing every petit jury | .50 |
| 5. Calling and swearing every witness or constable | .10 |
| 6. Attending Assizes, General Sessions, County Court, and County Judge's Criminal Court, *per diem* | 2.00 |

# DIVISION COURT TARIFF.

## FEES TO BE RECEIVED BY THE SEVERAL CLERKS AND BAILIFFS OF DIVISION COURTS FROM AND AFTER 1st OF JULY, 1894.

### FORM I.

### CLERK'S FEES.

1. Receiving claim, numbering and entering in procedure book. . $0.15
(This item to apply to entering in the procedure book a transcript of judgment from another Court, but not an entry made for the issue of a judgment summons.)
2. Issuing summons, with necessary notices and warnings thereon, or judgment summons (as provided in forms) in all
Where claim exceeds $10 and does not exceed $20. . . . . . . . . .40
Where claim exceeds $20 and does not exceed $60. . . . . . . . . .50
Where claim exceeds $60 and does not exceed $100. . . . . . . . .60
Where claim exceeds $100 . . . . . . . . . . . . . . . . . . . . . . . . . . 1.00
(N.B.—In replevin and interpleader suits the value of goods to regulate the fee.)
3. Copy of summons, including all notices and warnings thereon. . .25
4. Copy of claim (including particulars), when not furnished by plaintiff . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .25
5. Copy of set-off or counterclaim (including particulars), when not furnished by defendant . . . . . . . . . . . . . . . . . . . . . . . . . . .25
(Note.—In either of the last two preceding items the fee may be taxed against the party ordered to pay costs.)
6. Receiving and entering bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons or paper from another division) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .15
7. Taking confession of judgment . . . . . . . . . . . . . . . . . . . . . . . .10
(This does not include affidavit and oath, chargeable under item 8.)
8. Every necessary affidavit if actually prepared by the clerk, and administering oath to the deponent . . . . . . . . . . . . . . . . . .25
9. Furnishing duly certified copies of the summons and notices and papers with all proceedings, for purposes of appeal (under section 157), as required by either party, per folio of 100 words . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .05
10. Certificate therewith . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .25
11. Certifying under seal of the Court and delivering to a judgment creditor a memorandum of the amount of judgment and costs against a judgment debtor, under the Creditor's Relief Act, or for any other purpose . . . . . . . . . . . . . . . . . . . .25

12. Copies of papers, for which no fee is otherwise provided, necessarily required for service or transmission to the Judge, each. $0.10
If exceeding two folios, per folio .... .05
13. Every notice of defence or admission entered, or other notice required to be given by the clerk to any party to a cause or proceeding, including mailing, but not postages .... .15
14. Entering final judgment by clerk, on special summons, where claim not disputed .... .50
15. Entering every judgment rendered at the hearing, or final order made by the Judge .... .50
(Note.—This fee does not apply to any proceeding on judgment summons.)
(This one fee of 50 cents will include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and order in its entirety, rendered or made at the trial. If a garnishee proceeding before a judgment, the fee of 50 cents will be allowed for the judgment in respect to the primary debtor, and a like fee of 50 cents for the adjudication, whenever made, in respect to the garnishee.)
16. Subpœna to witness .... .25
(The subpœna may include any number of names therein, and only one original subpœna shall be taxed, unless the Judge otherwise orders.)
17. For every copy of subpœna required for service .... .05
18. Summons for jury (including copy for each juryman), when required by parties .... 1.25
19. Calling and returning jury ordered by the Judge .... .25
20. Every order of reference, or order for adjournment, made at hearing, and every order requiring the signature of the Judge, and entering the same, including final order of judgment debtor's examination .... .25
(Any warning necessary with order, *e.g.*, the warning in Form 73, forms part of the order.)
21. Transcript of judgment to another Division Court .... .25
22. (Abolished—Transcript to County Court.)
23. Every writ of execution, warrant or attachment or warrant of commitment and delivering same to bailiff .... .50
24. Renewal of every writ of execution, when ordered by the judgment creditor, or of warrant of commitment, when ordered by the Judge .... .15
25. Every bond, when necessary, and prepared by the clerk (including affidavits of justification and of execution) .... 1.00
26. For necessary entries in the debt attachment book, in each case (in all) .... .20
27. Transmitting transcript of judgment; or transmitting papers for service to another division; or to the Judge, on application to him, including necessary entries and mailing, but not including postage .... .25
28. Receiving papers from another division for service, entering the same, handing to the bailiff, receiving and entering his return and transmitting the same (if return made promptly, not otherwise) .... .30

29. Search by person not party to the suit or proceeding, to be paid
by the applicant ..........................................
Search by party to the suit or proceeding, where the suit or ..........$0 10
proceeding is over one year old ..............................
(No fee is chargeable for search to a party to the suit or pro- .10
ceeding, if the same is not over one year old.)
30. Taxing costs, in defended suits, after judgment pronounced... .25
31. Making out statement of costs in detail (including bailiff's
fees) at the request of any party, or for the purpose of
settlement, or upon entering judgment by default ........ .10
(Neither item 30 nor 31 applies to statement of costs endorsed
on summons or copy to be served.)
32. Taxing bailiff's costs, under section 241 of the Division Courts
Act (R.S.O.), 1897 ..........................................
33. Copying and transmitting to municipal clerk, Judge's decision .25
to appeal ..........................................
.50

## 2—BAILIFF'S FEES.

1. Service of summons issued under the seal of the Court, or
Judge's summons or order on each person, except summons
to witness and summons to juryman:—
Where claim exceeds $10 and does not exceed $20........$ .30
Where claim exceeds $20 and does not exceed $60........ .40
Where claim exceeds $60 and does not exceed $100....... .50
Where claim exceeds $100 .............................. .75
(In interpleader suits the value of the goods to regulate the
fee.)
2. For every return as to service under item 1; attending at the
clerk's office and making the necessary affidavit (as provided
by Rule 183) ..........................................
3. Service of summons on witness or juryman, or service of notice .15
4. Taking confession of judgment and attending to prove ..... .15
5. For calling parties and their witnesses at the sitting of the .10
Court, in every defended case, and at the hearing of every
judgment summons ..........................................
6. Enforcing every writ of execution or summons of replevin, or .15
warrant of attachment or warrant against the body, each:
Where claim does not exceed $20 ..............................
Where claim exceeds $20 and does not exceed $60 .......... .50
Where claim exceeds $60 .............................. .75
(Where goods replevied, the value of the goods to regulate the 1.00
amount of the fee. This fee does not include service of
summons in replevin on defendant.)
Fees under Creditor's Relief Act (see section 7 of 52 Vict.
ch. 12; and section 25 of R.S.O., ch. 65) shall be taxed
according to the tariff.
7. Every mile necessarily travelled to serve summons, or pro-
cess, or other necessary papers, or in going to replevy goods,
or to seize on attachment, or in going to seize on a writ
of execution, where money, paid on demand, or made on
execution, or case settled after seizure .................. .12
8. Mileage going to arrest under warrant, when arrest made, per
mile ......................................................... .12

9. Mileage carrying delinquent to prison, including all expenses and assistance, per mile ........................ $0.20
10. Every schedule of property seized, attached, or replevied, including affidavit of appraisal, when necessary:
    Exceeding $10 and not exceeding $20 .................... .30
    Exceeding $20 and not exceeding $60 .................... .50
    Exceeding $60 .................... .75
11. Every bond, when necessary, when prepared by the bailiff, including affidavit of justification and execution ........... .50
12. Every notice of sale, not exceeding three, under execution, or under attachment, each .................... .15
13. Reasonable allowances and disbursements, necessarily incurred in the care and removal of property:
    (*a*) If a bailiff removes property seized, he is entitled to the necessary disbursements, in addition to the fees for seizure and mileage.
    (*b*) If he takes a bond, then to 50 cents, instead of disbursements for removal of property.
    (*c*) If assistance is necessary in the seizure, or securing, or retaining of property, the bailiff is entitled to the disbursements for such assistance.
    (*d*) All charges for disbursements are to be submitted to the clerk for taxation, subject to appeal to the Judge.
    (*e*) The bailiff must in all cases endorse a memorandum of all his charges on the back of the execution, or state them on a separate slip of paper, so that the clerk may conveniently tax the bailiff's charges for fees and disbursements.
    (*f*) The clerk is in all cases to sign the memorandum of his taxation and preserve it among the papers in the cause, together with the execution, for future reference, and thereby enable the clerk to certify the bailiff's returns properly.
14. If execution or process in attachment in the nature of execution be satisfied in whole or in part, after seizure and before sale, whether by action of the parties or otherwise, the bailiff shall be entitled to charge and receive 3 per cent. on the amount directed to be levied; or on the amount of the value of the property seized, whichever shall be the lesser amount.
15. Poundage on executions, and on attachments in the nature of executions, 5 per cent., exclusive of mileage for going to seize and sell, upon the amount realized from property necessarily sold.

## 3.—FEES TO WITNESSES AND APPRAISERS.

### ALLOWANCES TO WITNESSES.

Attendance, *per diem*, to witnesses within three miles of the place where the Court is held, if within the county ...$ 75
And if without the county .................... 1.00
Attendance, if witness resides over three miles from the place of sittings and within the county, *per diem* ............ 1.00

Attendance, if witness resides without the county and more than three miles from the place of sittings, *per diem* ...... $1.25

Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, *per diem* 4.00

(Note.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees, by statute, are to be taxed, as authorized by such statute. If witnesses attend in one case only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportional part in each 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 20 cents per mile, one way.

## FEES OF APPRAISERS.

FEES TO APPRAISERS OF GOODS, ETC., SEIZED UNDER WARRANT OF ATTACHMENT.

To each appraiser, 50 cents per day, during the time actually employed in appraising goods—to be paid in the first instance by plaintiff and allowed as costs in the cause.

## FEES IN SUITS NOT EXCEEDING $10.

(57 Vict. ch. 23, sec. 11.)

### CLERK.

For all services, from entering action, or suing out a judgment or interpleader summons, up to and including the entering of final judgment, or final order on any such judgment or interpleader summons, in case the action proceeds to judgment or final order ....................................$1.25

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

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

### BAILIFF.

For all services rendered in serving summons and making return, and any other service that may be necessary before the judgment is entered by the clerk or pronounced by the Judge, mileage excepted ........................................ .40

For enforcing execution, schedule of property seized, or attached bond, where necessary, and all other necessary acts done by him, after seizure, mileage excepted, if money made or case settled, after levy ........................................ 1.00

(Necessary disbursements incurred in the care and removal of property shall be allowed to be first taxed by the clerk, subject to the approval of the Judge.)

# COST OF PROCEEDINGS ALPHABETICALLY ARRANGED.

In the following arrangement the number following the item refers to the number of the tariff item, and, unless otherwise indicated, the reference is to tariff A.

ABATEMENT. See *Revivor*.

ABSTRACT OF TITLE.

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Drawing abstract, per folio | $0.20 | $0.20 |
| Engrossing, per folio | .10 | .10 |
| Notice endorsed, per folio | .20 | .20 |
| Copy of abstract and notice endorsed to serve, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |

ABSCONDING DEBTOR.

| | | |
|---|---|---|
| Instructions to proceed against, if defended | 4.00 | 3.00 |
| If undefended | 3.00 | 2.00 |
| Writ of summons. See *Writ of Summons* and ch. 19, 9 Edw. VII. sec. 3 (2). | | |
| Affidavits. See *Affidavits*. (There must be the affidavit of the plaintiff and of two other persons; see sec. 4 of above Act.) | | |
| Attending Chambers for order | 1.00 | .50 |
| Drawing order, per folio | .20 | .20 |
| Drawing duplicate order per folio, see C.R. 1059 | .10 | .10 |
| Paid, besides filings | .50 | .30 |
| Attending sheriff with | .50 | .25 |

ACCEPTANCE OF SERVICE.

| | | |
|---|---|---|
| Attending to give or obtain undertaking to appear (100) | 1.00 | .50 |

ACCOUNT.

| | | |
|---|---|---|
| Drawing account, per folio | .20 | .20 |
| Engrossing, per folio | .10 | .10 |
| Instructions for affidavit verifying (when special and allowed by the taxing officer) 22 | 1.00 | .50 |
| Drawing affidavit, per folio | .20 | .20 |
| Engrossing, per folio | .10 | .10 |
| Preparing each exhibit | .10 | .10 |
| Attending to swear | .50 | .25 |

ACCOUNT—*Continued.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Paid Commissioner, each oath ....... | $0.20 | $0.20 |
| Paid Commissioner, marking each exhibit ....... | .10 | .10 |

ACCOUNTANT. *Fees payable to.*

| | | |
|---|---|---|
| Upon payment of money into Court where the amount is upwards of $10 .......... | .30 | .30 |
| (No sum to be payable in respect of payments into Court upon mortgages or securities held by the accountant. Rule 18 Feb., 1892, 1271) (34 B.) | | |
| Upon payment of amount out of Court where the amount is upwards of $10. (35 B.) ............ | .30 | .30 |
| For every certificate of matters appearing from his books, if not over two folios .............. | .30 | .30 |
| For every folio above two ...................... | .20 | .20 |

ADDING PARTIES. See *Instructions.*

ADMISSIONS. See *Notice to Admit.*

ADVERTISEMENT.

| | | |
|---|---|---|
| Drawing advertisement for the sale of real or personal estate under the direction of the Court, including all copies, except for printing (132) .......... | 2.00 | 1.00 |
| And for each folio above five, per folio ............. | .20 | .15 |
| (To be increased in the discretion of the Master, or in County Court cases the County Court Judge, to a sum not exceeding $10, when special information has been procured for the purpose of sale.) | | |
| Drawing affidavit verifying advertisement, per folio .. | .20 | .20 |
| Engrossing same to have sworn, per folio .......... | .10 | .10 |
| Preparing each exhibit ...................... | .10 | .10 |
| Attending to swear ...................... | .10 | .10 |
| Paid Commissioner, oath ...................... | .50 | .25 |
| Paid Commissioner, each exhibit ................ | .20 | .20 |
| Attending auctioneer making arrangements with him for the sale .............................. | 1.00 | .50 |
| Affidavit of fitness of auctioneer, drawing same, per folio ........................ | | |
| Engrossing affidavit, per folio .................... | .20 | .20 |
| Attending to have sworn .................... | .10 | .10 |
| Paid Commissioner, oath .................... | .50 | .25 |
| Attending Master for warrant to settle advertisement | .20 | .20 |
| | .50 | .25 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| ADVERTISEMENT—*Continued.* | | |
| Paid (besides fillings) | $0.50 | $0.10 |
| Copy and service, each | .60 | .35 |
| Attending Master's office on return of warrant, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases, of the County Court Judge, to not exceeding per hour (102) | 2.00 | 1.00 |
| Paid per hour (besides filings) 14 D. | 1.50 | .50 |
| Paid for fair copy of advertisement per folio | .10 | .10 |
| Copy of advertisement for printer, per folio | .10 | .10 |
| Attending him with | .50 | .25 |
| Attending for proof | .50 | .25 |
| Revising proof | 1.00 | .50 |
| Attending for posters | .50 | .25 |
| Paid printer | | |
| Attending bill-poster with bills | .50 | .25 |
| Drawing affidavit of bill-poster, per folio | .20 | .20 |
| Engrossing same, per folio | .10 | .10 |
| Preparing exhibit | .10 | .10 |
| Attending to swear | .50 | .25 |
| Paid Commissioner, oath | .20 | .20 |
| Paid Commissioner, exhibit | .10 | .10 |
| Paid bill-poster's charges | | |
| Copy of advertisement for newspaper, per folio | .10 | .10 |
| Attending with same for insertion | .50 | .25 |
| Drawing affidavit of publication, per folio | .20 | .20 |
| Engrossing same, per folio | .10 | .10 |
| Preparing exhibits, each | .10 | .10 |
| Attending to swear | .50 | .25 |
| Paid Commissioner, oath | .20 | .20 |
| Paid Commissioner, each exhibit | .10 | .10 |
| Paid newspaper's charges | | |
| ADVISING ON EVIDENCE. | | |
| In contested cases, in the discretion of the taxing officer, (or County Court clerk in County Court cases) counsel fee not exceeding (157) | 5.00 | 3.00 |
| AFFIDAVITS. | | |
| Instructions for affidavits when allowed by the taxing officer, or County Court clerk in County Court cases (22) | 1.00 | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **AFFIDAVITS—*Continued.*** | | |
| Drawing affidavits, per folio. (117) | $0 20 | $0 20 |
| Engrossing to have sworn, per folio, (118) | 10 | 10 |
| The solicitor for preparing each exhibit (121) | 10 | 10 |
| Attending to swear | .50 | .25 |
| Paid Commissioner for oath (114 B.) | .20 | .20 |
| Paid Commissioner for each exhibit (116 B.) | 10 | .10 |
| Copies of affidavits, when necessary, per folio (119) | 10 | 10 |
| Common affidavits of service, including service by post when necessary, or of payment of mileage and of non-appearance, including copy, oath and attendance to swear (120) | 1 00 | .75 |
| Perusing affidavits and exhibits of a party adverse in interest, filed and produced on any application where perusal is necessary, if 20 folios or under, (80) | 1 00 | .50 |
| On the higher scale per folio over 20 folios (not in any case to exceed the sum of $5,00) | .05 | |
| **ALLOWANCE FOR SERVICE OUT OF JURISDICTION.** *See Service.* | | |
| **AMENDMENTS.** | | |
| Of Writ. Attending to amend | .50 | 25 |
| Paid (33 B.) | .30 | .25 |
| Of pleadings. Instructions to amend any pleading when the amendment is proper (27) | 2.00 | 1 00 |
| Drawing amended pleading, per folio | .20 | 20 |
| Attending counsel with and for to settle (when fee allowed and counsel not solicitor, nor partner of solicitor) | 1.00 | .50 |
| Counsel fee settling—not exceeding (157) | 5.00 | 3 00 |
| Attending to make amendments | .50 | .25 |
| Amending, per folio (See C.R. 306) | .10 | .10 |
| Paid (33 B.) | .30 | .25 |
| Attending to amend opposite party's copy of pleading | .50 | .25 |
| Amending same, per folio | .10 | .10 |

If amendments require the insertion of more than 200 words in any one place, or 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; the amendment must be made by redelivering a reprint or fresh copy of the pleading as amended. C.R. 306. In such case charge, after settling amendment:

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| AMENDMENTS—*Continued.* | | |
| Copy of amended pleading, per folio | $0.10 | $0.10 |
| Attending to file | .50 | .25 |
| Paid filing | .10 | .10 |
| Copy to serve, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| APPEAL. See *Correspondence, Counsel Fee.* | | |
| APPEAL FROM CHAMBERS. | | |
| Instructions to appeal | 2.00 | 1.00 |
| Attending to set down appeal | .50 | .25 |
| Paid (39 B.) | .50 | .20 |
| Notice of motion, drawing and copy to serve, per folio (71) | .30 | .15 |
| Attending to serve | .50 | .25 |
| Counsel fee on argument | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer in Toronto to a sum not exceeding $10. | | |
| Attending to hear judgment, if reserved | 1.00 | .50 |
| Draft minutes of order, per folio, when prepared by solicitor under direction of officer settling the same (124) | .20 | .20 |
| Appointment to settle, copy and service, if directed by the Registrar | .80 | .60 |
| When served on more than one party, each extra copy and service | .60 | .35 |
| Attending to settle, per hour | 1.00 | .50 |
| To be increased in the discretion of the officer in special and difficult cases, when the solicitor attends personally, to a sum not exceeding altogether (126) | 5.00 | 2.50 |
| Engrossing order as settled, per folio | .10 | .10 |
| Paid on order (48 B.) | .50 | .30 |
| And for entering, per folio (54 B.) | .10 | .10 |
| Drawing bill of costs, including engrossing and copy for taxing officer, per folio | .30 | .20 |
| Copy to serve, per folio | .10 | .10 |
| Attending on taxation, per hour | 1.00 | |
| In County Court cases, or on lower scale | | 1.00 |
| Paid, besides filings | .90 | .80 |

## Appeal Bond.

(C.R. 825 does not apply to appeals from the Surrogate Court to a Divisional Court, and in such cases a bond is still necessary. Re Nichol, 1901, 1 O.L.R. 213).

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Drawing bond, per folio | | |
| Engrossing | | $0.20 |
| Attending on execution | | .10 |
| Affidavit of execution, per folio | | .50 |
| Engrossing same, per folio | | .20 |
| Attending to swear | | .10 |
| Paid Commissioner | | .25 |
| Affidavit of justification, per folio | | .20 |
| Engrossing same, per folio | | .20 |
| Attending to swear | | .10 |
| Paid Commissioner | | .25 |
| Attending to file bond and affidavits | | .20 |
| Paid filing (Filing must be paid on bond and each affidavit. Macbeth v. Smart, 1 Ch. Ch. 269). | | .25 |
| Notice of filing, copy and service | | .50 |
| Attending to search bond (104) | | .25 |
| Attending to search and perusing bond (105) | | .50 |
| In the Court of Appeal for Ontario, the bond and all affidavits is allowed at (56) | $5.00 | |
| And a fee to the opposite party for inspection of the bond, of | 3.00 | |
| In the Supreme Court of Canada: | | |
| Notice of giving security | 2.00 | |
| Attending on allowance of security | 3.00 | |

## Appearance.

| | | |
|---|---|---|
| Drawing, including to enter (122) | 1.00 | .50 |
| For each additional defendant | .20 | .10 |
| Paid entering appearance (30 B.) | .20 | .15 |
| Paid for each defendant after the first (31 B.) | .10 | .10 |
| Attending to obtain or give undertaking to appear, when service accepted by a solicitor (100) | 1.00 | .50 |
| Drawing undertaking to appear | .50 | .25 |
| For limiting defence in an action for the recovery of land in appearance, besides above allowances for appearance; not to be allowed when notice of limiting defence served (123) | 1.00 | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Appearance**—*Continued.* | | |
| Notice of appearance when entered after time limited by writ, and notice given forthwith, but not otherwise (72) | $0.50 | $0.25 |
| Notice of entry of appearance in action for the recovery of land by person not named in the writ (73) ... | .50 | .25 |
| Attending to serve notice | .50 | .25 |
| Attending to search appearance | .50 | .25 |
| Paid | .10 | .10 |
| Affidavit of non-appearance, including copy, oath, and attending to swear (120) | 1.00 | .75 |
| **Appointment.** | | |
| To settle or pass judgment or order of Court, attending for, drawing, copy and service | .80 | .55 |
| When served on more than one party, the extra copies and services are to be allowed, each | .60 | .35 |
| For every hour's attendance before the proper officer on settling minutes or passing | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases, of the County Court Judge, to not exceeding, per hour | 2.00 | 1.00 |
| Assessment, notice of and one copy (77) | .50 | .25 |
| Attending to serve, etc., as in notice of trial. | | |
| **Arbitrations.** | | |
| On arbitrations, counsel fees may be allowed and taxed on the same scale and conditions, as far as possible, as those hereinbefore prescribed for counsel fees at trial. Item 163 tariff A. | | |
| **Attendances.** | | |
| Admissions. Necessary attendances consequent on the service of a notice to produce or admit, or an inspection of documents when produced under order, including admissions, altogether (90) | 1.00 | .50 |
| To be increased by the taxing officer or County Court clerk, in cases of special, difficult and important nature, to | 2.00 | 1.00 |
| Appearance. To obtain or give undertaking to appear, when same accepted by a solicitor (100) .. | 1.00 | .50 |
| On appointment or warrant of Master, registrar, examiner, referee, or County Court clerk, per hour (102) | 1.00 | .50 |

| Attendances—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases, of the County Court Judge, to not exceeding, per hour ......... | $2.00 | $1.00 |
| On Master, or registrar, or County Court clerk, in special matters, per hour (103) ............... | 1.00 | .50 |
| Chambers. On return of motion in Chambers (91) .. | 1.00 | .50 |
| To be increased in the discretion of the taxing officer, or in County Court cases, of the Judge, to ..... | 2.00 | 1.00 |
| Consultation or conference, with counsel, in special, difficult and important matters, in the discretion of the taxing officer in Toronto (or in County Court cases of the County Court clerk) to (92) ....... | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer as between solicitor and client, to such sum as he shall seem fit, or in County Court cases in the discretion of the County Court Judge to not exceeding ..................................... | | 3.00 |
| No special attendance to be allowed to a solicitor on proceedings in which he also appears as counsel (92). | | |
| Judgment. Attending to hear when not given on close of argument (94) ..................... | 2.00 | 1.00 |
| (This is taxable where the judgment is not given in open Court, and the solicitor attends to peruse a written judgment. Gage v. Canada Publishing Co. 3 C.L.T. 267). | | |
| To hear judgment when cause on the list for judgment, but judgment not given (95) ........... | 2.00 | 1.00 |
| Revision, per hour, when attendance required by taxing officer, or revision had by order (98) ........ | 1.00 | .50 |
| On revision by County Court Judge on appeal (99) ... | | .50 |
| Taxation, per hour ............................ | 1.00 | |
| In County Court cases (97) .................... | | 1.00 |
| Trial. Solicitor attending Court on trial of cause, when not himself counsel, or partner of counsel... | 2.00 | 1.00 |
| And in special, difficult, and important cases, each hour necessarily present at trial .............. | 2.00 | 1.00 |
| In no case to exceed, per day ................... | 10.00 | 5.00 |
| (Provided the attendance of such solicitor, and the length of time of such attendance, be duly entered at the time in the book of the registrar, deputy registrar, deputy clerk of the Crown, clerk of | | |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Attendances**—*Continued.* | | |
| Assize or other officer of the Court present at the time, or proved by affidavit) (93). | | |
| Warrant. See appointment, supra. | | |
| Attendance on Master, or registrar (or County Court clerk) in special matters, per hour (103) .. | $1 00 | $0.50 |
| Every other necessary attendance (106) ............ | .50 | .25 |
| On important points and matters, requiring the attendance of counsel, and when counsel attends, before a Master, examiner, referee, registrar, inspector of titles, or County Court clerk, a counsel fee may be allowed by a taxing officer in Toronto (or the Judge in County Court cases) in lieu of fees for attendance, such counsel fee in County Court cases not to exceed $5 (107). | | |
| **Bill of Costs.** | | |
| Drawing bill of costs as between party and party for taxation, (including engrossing and copy for taxing officer or County Court clerk) per folio (143) | .30 | .20 |
| Copy to serve, per folio (144) .................. | .10 | .10 |
| Attending to file and for appointment to tax ......... | .50 | .25 |
| Paid, each filing .............................. | .10 | .10 |
| Paid for appointment ........................... | | .10 |
| Copy and service of appointment, each ............. | .60 | .35 |
| Attending on taxation (96) ...................... | | 1.00 |
| Attending on taxation, per hour (97) ............ | 1.00 | |
| Paid, besides filings ........................... | .90 | .80 |
| If taxation before local master paid, per hour ....... | 1.00 | |
| **Bond.** See *Appeal Bond*, and Item 56 Tariff A. | | |
| **Brief.** | | |
| Instructions for brief .................. .......... | 2.00 | .50 |
| Drawing, five folios or under (108) ............... | 2.00 | 1.00 |
| Drawing for each folio above five (109) ............. | .10 | .10 |
| Copy of documents, other than pleadings, per folio, (111) .................. ..................... | .10 | .10 |
| For original and necessary matter (110) (original matter does not include any statement of law or argument) .................................. | .20 | .20 |
| Copy of brief for second counsel, when fee taxed to him, per folio (112) ......................... | .10 | |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Brief**—*Continued.* | | |
| Attending counsel with and for brief, when counsel not solicitor nor partner of solicitor .......... | $1.00 | $0.50 |
| Counsel fees. See *Counsel Fees.* | | |
| Solicitor attending trial. See *Attendances.* | | |
| **Certified Copy of Pleadings.** See *Record.* | | |
| **Certificate.** | | |
| Accountant: Attending to bespeak and for ......... | 1.00 | .50 |
| Paid, if not longer than two folios .............. | .50 | .20 |
| For each folio over two ...................... | .20 | |
| Bank manager: Drawing, per folio ............... | .20 | .20 |
| Attending for signature ...................... | .50 | .25 |
| Drawing affidavit verifying, per folio ........... | .20 | .20 |
| Engrossing, per folio ........................ | .10 | .10 |
| Attending to swear ......................... | .50 | .25 |
| Paid Commissioner, oath ..................... | .20 | .20 |
| Master in ordinary, local master and referee. | | |
| Every certificate if not longer than two folios (17 B.) | .50 | .20 |
| For each folio over two (18 B.) ................. | .20 | |
| Registrar of Court of Appeal. | | |
| Certificate of discharging appeal (3 B.) .......... | .90 | |
| Local registrar, etc. | | |
| Every certificate for registration (*Lis pendens*, state of cause, etc.) (46 B.) ...................... | 1.00 | .20 |
| Every certificate made evidence by law, or required by the practice, including any necessary search ...................................... | .50 | .50 |
| Additional fee when seal required (45 B.) ....... | .50 | |
| Taxing officer. | | |
| Certificate of taxation; attending for (only taxable where the taxing officer is not the officer entering judgment) .......................... | .50 | .25 |
| **Cheques.** | | |
| Attending to bespeak and for .................... | 1.00 | |
| Paid when the amount is upwards of $10 .......... | .30 | |
| **Claim.** *Proving in Master's office.* | | |

(Where, under the circumstances set forth, *ante*, under "Incumbrancers," the claimant is entitled to taxed costs instead of an allowance for proving his claim.)

| Claim—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Instructions, including instructions for affidavit, in the discretion of the Master | $1.00 | $0.50 |
| Drawing claim, per folio | .20 | .20 |
| Engrossing, per folio | .10 | .10 |
| Drawing affidavit verifying, per folio | .20 | .20 |
| Engrossing same, per folio | .10 | .10 |
| Preparing exhibits, each | .10 | .10 |
| Attending to swear | .50 | .25 |
| Paid Commissioner, oath | .20 | .20 |
| Paid Commissioner, each exhibit | .10 | .10 |
| Attending to file affidavit | .50 | .25 |
| Paid | .10 | .10 |
| Copies to serve, if demanded, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| Attending Master's office, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or County Court Judge, to not exceeding, per hour (103) | 2.00 | 1.00 |
| Paid Master's fees, besides filings, per hour | 1.50 | .50 |
| If the matter is important, requiring the attendance of counsel, the taxing officer in Toronto (or Judge in County Court cases) a counsel fee may be allowed in lieu of such attendance, not to exceed $5 in County Court cases (107). | | |
| Where it is necessary to procure *viva voce* evidence of witnesses, other than of the claimant, charge for subpœnas, etc., as in other cases. | | |
| Bill of costs and copy for Master, per folio | .30 | .20 |
| Copy to serve, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| Attending on taxation | 1.00 | .50 |
| Paid besides filings | 1.00 | .80 |
| If revision is necessary under C. R. 1167 (see *post* "Revision of Costs") add: | | |
| Paid Master forwarding bill for revision | .50 | |
| Paid revision fee besides postage both ways (see C.R. 1170) | 1.00 | |

Claim. See *Statement of Claim; Particulars of Claim.*

| | High Court of Appeal, and Court | Courts, County |
|---|---|---|
| CLAIM. Notice in lieu of. | | |
| Drawing same (66) | $0.50 | $0.25 |
| For every additional folio above two | .20 | .20 |
| For every additional folio of copy | .10 | .10 |
| Attending to file | .10 | .10 |
| Paid, filing | .50 | .25 |
| Attending to serve | .10 | .10 |
| Fee on filing writ where statement of claim dispensed with (113) | 1.00 | .50 |

CLERK OF COUNTY COURT.

| | |
|---|---|
| Affidavit, affirmation, etc., every, taken before him (61 B.) | .20 |
| Amending every writ or other proceeding (33 B.) | .25 |
| Appearance, entering and filing (30 B.) | .15 |
| Appearance, for each defendant after the first | .10 |
| Appointment for taxation of costs, or otherwise 71 B.) | .10 |
| Appointment made by the Judge drawing (73 B.) | .25 |
| Attending on opening commission (44 B.) | .50 |
| Commission for the examination of witnesses (65 B.) | .50 |
| Certificate made evidence by law, or required by the practice, including any necessary search (45 B.) | .50 |
| Chamber order (50 B.) | .50 |
| Copies of papers, per folio (56 B.) | 10 |
| Cognovit book, for making the entries in (71 B.) | .50 |
| Computation. "Taking account on Præcipe judgment:" (55 B.) | .50 |
| Examination. See *post, Reference.* | |
| Examining and authenticating papers when copy prepared by solicitor, every 3 folios (57 B.) | .05 |
| Exemplification, or office copy of papers or proceedings required to be given out, per folio, besides certificate and seal when required (56 B.) | .10 |
| Additional if seal required | .10 |
| Additional if certificate required | .50 |
| Enlargement on application to the Judge in Chambers, including search, if marked by the clerk (76 B.) | .15 |
| Entering action for trial or assessment (37 B.) | .50 |
| Additional fee in jury cases | 1.50 |
| Entering order, when necessary, per folio (54 B.) | .10 |
| Entering satisfaction on record, and filing satisfaction piece, including necessary search (64 B.) | .20 |

| Clerk of County Court—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Fee on report made on reference (43 B.) | | $1.00 |
| Filing every affidavit, writ or other proceeding (32 B.) | | .10 |
| Judgment, interlocutory or by default (51 B.) | | .30 |
| Judgment, every final (52 B.) | | .50 |
| Judgment, every, pronounced at trial (72 B.) | | .50 |
| Jury. Every jury sworn (75 B.) | | 1.00 |
| Every jury discharged (72 B.) | | .50 |
| Making up and forwarding papers, including bills of costs (66 B.) | | .10 |
| Order, every ordinary order (48 B.) | | .30 |
| Every special order, not exceeding 6 folios, per folio (49 B.) | | .20 |
| Every order of reference at the trial (72 B.) | | .50 |
| Entering order when necessary, per folio | | .10 |
| Passing and certifying record (36 B.) | | .50 |
| Payment of money into Court where the amount is upwards of $10 (34 B.) | | .30 |
| Payment of money out of Court where the amount is upwards of $10 (35 B.) | | .30 |
| Reference, examination, or other special matter, for every meeting not exceeding one hour, and not including the settlement of minutes of a judgment nor the allowance or disallowance of a bond (41 B.) | | .75 |
| For every additional hour or less (42 B.) | | .50 |
| Report made on such reference, fee on | | 1.00 |
| Record, every record withdrawn (72 B.) | | .50 |
| Passing and certifying (36 B.) | | .50 |
| Satisfaction on record, entering and filing, including any necessary search (64 B.) | | .30 |
| Search, if within one year | | .10 |
| If over one year and within 2 years | | .10 |
| If over 2 years, or a general search | | .20 |
| Setting down on the paper for argument every special case (38 B.) | | .20 |
| Subpœna, including filing præcipe (40 B.) | | .20 |
| Taking account on præcipe judgment (55 B.) | | .50 |
| (This item applies to mortgage actions where the defendant disputes the amount only and no reference as to incumbrances is desired. Gilpin v. Cole, 17 C.L.T. 380.) | | |
| Taxing bills of costs and giving allocatur or certificate, besides filings (53 B.) | | .80 |

| Clerk of County Court—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Appointment for taxation ..... | | $0.10 |
| Writ, every (28 B.) ..... | | .50 |
| Every concurrent alias, pluries or renewed writ (29 B.) ..... | | .40 |
| Amending every writ (33 B.) ..... | | .25 |

Cognovit.

| | | |
|---|---|---|
| Taking cognovit and entering judgment thereon, when there has been no previous proceeding, and the true debt does not exceed $200 (53) ..... | $8.00 | 8.00 |
| For the same services when the true debt exceeds $200 (54) ..... | 12.00 | 10.00 |
| Drawing and engrossing cognovit, and attending execution, when there have been no previous proceedings (55) ..... | 2.00 | 1.00 |
| Paid for entry in cognovit book (71 B.) ..... | .50 | .50 |

Commission to Examine Witness.

| | | |
|---|---|---|
| Instructions for motion, in discretion of the taxing officer ..... | 2.00 | 1.00 |
| Drawing affidavits, per folio ..... | .20 | .20 |
| Engrossing each, per folio ..... | .10 | .10 |
| Preparing exhibits, each ..... | .10 | .10 |
| Attending to swear ..... | .50 | .25 |
| Paid Commissioner, each oath ..... | .20 | .20 |
| Paid Commissioner, each exhibit ..... | .10 | .10 |
| Attending to file affidavits ..... | .50 | .25 |
| Paid filings, each ..... | .10 | .10 |
| Notice of motion, drawing and copy to serve, per folio (71) ..... | .30 | .15 |
| Attending to serve ..... | .50 | .25 |
| If copies of affidavits demanded: Copies of affidavits to serve, per folio ..... | .10 | .10 |
| Attending to serve ..... | .50 | .25 |
| Attending Chambers on motion ..... | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer in cases in the High Court or Court of Appeal to a sum not exceeding ..... | 5.00 | |
| To be increased in the discretion of the Judge in County Court cases to a sum not exceeding (154) | | 5.00 |
| Attending to hear judgment (if reserved) ..... | 1.00 | .50 |

| COMMISSION TO EXAMINE WITNESS—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Drawing minutes of order, per folio, when prepared by solicitor under direction of officer settling the same (or in County Court cases of the County Court Judge) (124) | $0 20 | $0.20 |
| Copy to serve, per folio | .10 | .10 |
| Appointment to settle, copy and service | .80 | .60 |
| Attending to settle order | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases of the County Court Judge, to not exceeding, per hour (102) | 2.00 | 1.00 |
| Engrossing order as settled, per folio | .10 | .10 |
| Attending to bespeak and for order | 1.00 | .50 |
| Paid on order (50 B.) | .50 | .50 |
| Fee on order | 1.00 | .50 |
| Attending to bespeak and for commission | 1.00 | .50 |
| Paid on commission (65 B.) | 1.00 | .50 |
| Letter to Commissioner with | .50 | .25 |
| Notice of forwarding commission, copy and service | .80 | .60 |
| Letter to agents with instructions to attend on commission | .50 | .25 |
| May be increased as between solicitor and client to a sum not exceeding (129) | 2.00 | 1.00 |
| Agents attending Commissioner for appointment and arranging a day for the examination | 1.00 | .50 |
| Drawing appointment and copy | .50 | .25 |
| Attending to serve agents for opposite party | .50 | .25 |
| Copy for witness to be examined | .10 | .10 |
| If the witness will not attend on the appointment, the necessary fees and disbursements for issuing order or subpœna to compel his attendance, and service thereof, according to tariff of the country where the process is executed, will be allowed, in the discretion of the taxing officer. | | |
| Counsel fee on examination. This is in the discretion of the taxing officer. Such reasonable sum as is actually paid, and is usual in the country where the commission is executed, will be taxable. | | |
| Attending for draft or post office order for Commissioner's fees | .50 | .25 |
| Paid | | |
| Letter to Commissioner with fees | .50 | .25 |
| Notice of opening commission, copy and service | .80 | .60 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **COMMISSION TO EXAMINE WITNESS**—*Continued.* | | |
| Attending when commission opened | $1.00 | $0.50 |
| Paid on opening commission (44 B.) | 1.00 | .50 |
| Attending for office copy | .50 | .25 |
| Paid, per folio | .10 | .10 |
| If evidence taken on interrogatories. See "Interrogatories." | | |
| **COMMISSIONERS.** | | |
| Paid for taking every affidavit (114 B.) | .20 | .20 |
| Paid for taking every recognizance of bail (115 B.) | .50 | .50 |
| Paid for marking every exhibit (116 B.) | .10 | .10 |

**COMPROMISE OF ACTION.**

"When it has been satisfactorily proved that proceedings have been taken by solicitors out of Court to expedite proceedings, save costs, or compromise actions, an allowance is to be made therefor in the discretion of the taxing officer in Toronto (or Judge of the County Court in County Court cases.) Item 142, Tariff A.

**CONCURRENT WRITS.** See *Writs.*

**CONFERENCE.** See *Consultations.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **CONFESSION OF ACTION.** | | |
| Instructions (36) | 1.00 | .50 |
| Notice of, in action for the recovery of land, as to whole or part and copy (65) | .50 | .25 |
| Attending to serve | .50 | .25 |
| **CONFESSION OF DEFENCE UNDER C.R. 295.** | | |
| Instructions for (28) | 200 | 1.00 |
| Drawing, including copy | .50 | .25 |
| Attending to serve | .50 | .25 |
| **CONSULTATIONS.** | | |
| Attending on consultation, or conference, with counsel, in special, difficult and important matters, in the discretion of the taxing officer in Toronto (or in County Court cases of the County Court clerk) to (92) | 2.00 | 1.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| CONSULTATION—*Continued.* | | |
| To be increased in the discretion of the taxing officer as between solicitor and client, to such sum as he shall seem fit, or in County Court cases in the discretion of the County Court Judge to, not exceeding | | $3 00 |
| No special attendance to be allowed to a solicitor on proceedings on which he also appears as counsel (92). | | |
| Paid counsel on consultation (93) | $5 00 | 2.00 |
| COPIES. | | |
| (No more than four copies of any writ, pleading or other document will be allowed. (C.R. 265). | | |
| Bill of costs. For each copy to serve, per folio (144) | 10 | 10 |
| Brief. For each folio above five (109) | .10 | 10 |
| For second counsel when taxed to him, per folio (112) | 10 | |
| Depositions, properly taken for use on a motion in Court or Chambers, in the discretion of the taxing officer not exceeding the amount payable to a special examiner for copies (61). | | |
| Notices. The charges allowed for drawing notices includes one copy. | | |
| Any additional copy, per folio (84) | .10 | 10 |
| Orders. Special and common, per folio (60) | .10 | .10 |
| Pleadings, brief and other documents, when no other provision is made, and copies properly allowable (57) | .10 | .10 |
| Certified copy for use of Judge (58) | 1.50 | .75 |
| For every folio above 15 (59) | .10 | .10 |
| Writs. For each copy, including copies of notices required to be indorsed (16) | 1 00 | .75 |
| If over four folios, for every additional folio | .10 | .10 |
| CORRESPONDENCE. | | |
| Letter to each defendant before suit, only one letter to be allowed to any defendants who are in partnership, and when subject of suit relates to the transactions of their partnership (127) | .50 | .25 |
| Common letters, Including necessary agency letters (128) | .50 | .25 |
| (Agency letters are taxable where the principal and agent reside in the same county). | | |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| CORRESPONDENCE—*Continued.* | | |
| The taxing officer, or County Court clerk in County Court cases, has power as between solicitor and client, to increase the *fee for special and important* letters, to an amount not exceeding (129) | $2 00 | $1 00 |
| For correspondence during the progress of an appeal to the Court of Appeal a reasonable sum in the discretion of the taxing officer may be allowed not exceeding (131) | 5 00 | 2 00 |
| The necessary letters and attendances incurred in obtaining the decision of the taxing officer in Toronto in any matters which are in his discretion shall be allowed as part of the costs of the cause (160). | | |
| COUNSEL FEES. | | |
| Advising on evidence in contested cases, in the discretion of the taxing officer (157) | 5 00 | 3 00 |
| Arbitrations. Counsel fees may be allowed and taxed on the same scale and conditions, as far as possible, as those prescribed in the tariff for counsel fees at trials (163). | | |
| Assessment. Fee with brief on (152) | 10 00 | 6 00 |
| Chambers. On argument or examination in, on cases proper for the attendance of counsel and when counsel attends (154) | 2 00 | 1 00 |
| To be increased in the discretion of the taxing officer in cases in the High Court or Court of Appeal to a sum not exceeding | 5 00 | |
| To be increased in the discretion of the Judge in County Court cases to a sum not exceeding | | 5 00 |
| Subject to further increase in the discretion of the taxing officer in Toronto. Provided that the Master in Chambers may in cases before him recommend a fee. | | |
| Court. Fee on argument on supporting or opposing application to Court, or argument in the High Court of special case, or of appeal (148) | 10.00 | 5 00 |
| In the High Court and Court of Appeal to be increased in the discretion of the taxing officer in Toronto, but no more than two counsel fees to be allowed in any case. | | |
| In County Court cases to be increased in the discretion of the Judge to | | 10 00 |

| Counsel Fees—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Court of Appeal. On argument of appeal, in the discretion of the taxing officer in Toronto, but no more than two counsel fees to be allowed in any case (149). | | |
| County Court appeals. In the discretion of the taxing officer at Toronto, not exceeding $25 (150). | | |
| Consultations, on (151) .......................... | $5.00 | $2.00 |
| Motions. On motion of course, or on motions in matters not special (146) ...................... | 2.00 | 1.00 |
| On special ex parte motion or application to the Court (only one fee to be taxed) (147) ......... | 5.00 | 2.00 |
| To be increased in the discretion of the taxing officer in Toronto (or Judge of County Court in County Court cases who shall mark amount to be taxed on order of Court, if any, before taxation) to .... | 10.00 | 5.00 |
| Reference. Attendance on reference to Master, County Court clerk, or referee, when counsel necessary (155) .................................... | 5.00 | 3.00 |
| To be increased in special and important matters requiring the attendance of counsel, in the discretion of the taxing officer at Toronto (or the County Court clerk in County Court cases) not exceeding .................................. | | 10.00 |
| Settling pleading, interrogatories, special cases, issues or petitions, and advising on evidence in contested cases in the discretion of the taxing officer (or County Court clerk in County Court cases) not exceeding (157) ............................ | 5.00 | 3.00 |
| Settling appeal case, and reasons for or against appeal (158) ............................... | 5.00 | 2.00 |
| To be increased in the discretion of the taxing officer in Toronto in special and important matters to a sum not exceeding .......................... | 20.00 | 5.00 |
| Drawing and settling allegations in præcipe for revivor, in special cases proper for opinion of counsel ... | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer, or County Court clerk in County Court cases, to an amount not exceeding (156) ............... | 5.00 | 2.00 |
| Trial. Fee with brief at trial .................. | 10.00 | 10.00 |
| In High Court cases to be increased by the taxing officer in his discretion to a sum not exceeding $40 to senior counsel, and $20 to junior counsel, in actions of a special and important nature. Pro- | | |

COUNSEL FEES · *ntinued.*

| | ...gh Court and Court of Appeal. | County Courts. |
|---|---|---|
| vided tha. the taxing officer in Toronto shall have power to tax increased fees, but more than one counsel fee shall not be allowed in any case not of a special and important nature; not more than two in any case. Provided that if an application to increase fees be made in the first instance to the local taxing officer, and a fiat granted, no application shall thereafter be made to the taxing officer at Toronto. | | |
| In County Court cases to be increased by the Judge in actions of a special or important nature falling within the increased jurisdiction conferred by 59 Vict., ch. 19, upon County Courts (on notice to the opposite party) to a sum not exceeding (*a*) .... | | $50.00 |
| In County Court cases to be increased by the Judge, in actions of a special or important nature not falling within the increased jurisdiction aforesaid, (on notice to the opposite party) to a sum not exceeding (153) .......... | | 25.00 |
| Instructions to counsel in common matters .......... | $0.50 | .25 |
| Instructions to counsel in special matters .......... | 1.00 | .50 |

(*a*) No provision has been made for extending this fee to the further increased jurisdiction conferred on the County Courts by 10 Edw. VII. ch. 30, but some of the Judges have held it might be applied.

COUNTERCLAIM.

| | | |
|---|---|---|
| Instructions for, when such claim could not prior to the Ontario Judicature Act, 1881, have formed the subject of a set-off (25) .......... | 2.00 | 1.00 |
| Instructions for reply to such counterclaim (26) .... | 2.00 | 1.00 |
| Drawing counterclaim, if 5 folios or under (42) .... | 2.00 | 1.00 |
| For every folio in addition .......... | .20 | .20 |
| Attending counsel with and for to settle .......... | 1.00 | .50 |
| Counsel fee settling in the discretion of the taxing officer (or County Court clerk in County Court cases (157) .......... | 5.00 | 3.00 |
| Engrossing as settled, per folio .......... | .10 | .10 |
| Copy to file, per folio .......... | .10 | .10 |
| Attending to file .......... | .50 | .25 |
| Paid filing .......... | .10 | .10 |
| Copy to serve, per folio .......... | .10 | .10 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| COUNTERCLAIM—*Continued.* | | |
| Attending to serve | $0.50 | $0.25 |
| Fee after, if statement of defence | 1.00 | .50 |

COURT, SOLICITOR ATTENDING. See *Attendances.*

COURT FEES.

| | | |
|---|---|---|
| After statement of claim, or where statement dispensed with, after filing writ | 1.00 | .50 |
| On defence | 1.00 | .50 |
| Joinder of issue | 1.00 | .50 |
| Trial | 1.00 | .50 |
| Argument before the Court | 1.00 | .50 |
| Judgments, other than præ. judgments in mortgage cases | 1.00 | .50 |
| No two fees to be allowed to either party when such proceedings are taken or had, between the first day of any sittings of the Courts (as formerly fixed by Rule 216 of the Con. Rules of 1888, or fixed by R.S.O. 1887, ch. 42, sec. 12, as the case may be) and the first day of the following sittings so fixed (113). | | |
| On certified copy of pleadings (record) (114) | 1.00 | .50 |
| On every order or judgment, to the party obtaining the same (115). This applies to præ. orders | 1.00 | .50 |
| On præcipe judgments in mortgage cases (116) | 4.00 | 2.00 |

CRIER.

| | | |
|---|---|---|
| Paid calling every case, with or without jury (112 B.) | .60 | .50 |
| Paid swearing each witness or constable (113 B.) | .15 | .15 |
| (For crier's fees in criminal prosecutions, see Tables of Costs.) | | |

CROSS-INTERROGATORIES. See *Interrogatories.*

DEFENCE. See *Statement of Defence.*

DEMAND.

| | | |
|---|---|---|
| Of residence of plaintiff and one copy (78) | .50 | .25 |
| Of names of partners and one copy (79) | .50 | .25 |
| Other demands and one copy (83) | .50 | .25 |
| Every additional copy, per folio (84) | .10 | .10 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Demand**—*Continued.* | | |
| Attending to serve | $0.50 | $0.25 |
| (When necessary to be served on more than one party the extra services to be allowed) (85). | | |
| **Discontinuance.** | | |
| Notice of discontinuance and copy (75) | .50 | .25 |
| Attending to file | .50 | .25 |
| Paid filing | .10 | .10 |
| Copy to serve, per folio (84) | .10 | .10 |
| Attending to serve | .50 | .25 |
| **Discovery.** See *Examination; Production.* | | |
| **Documents.** See *Copies; Inspection; Production.* | | |
| **Entering Appearance.** | | |
| Appearance, including attending to enter (122) | 1.00 | .50 |
| For each additional defendant | .20 | .10 |
| Paid entering (30 B.) | .30 | .15 |
| Paid for each defendant after the first | .10 | .10 |
| Notice of entering appearance, when entered after time limited by writ, and notice given forthwith, but not otherwise (72) | .50 | .25 |
| **Examination of Parties.** | | |
| Instructions to examine opposite party | 2.00 | 1.00 |
| Attending for appointment | .50 | .25 |
| Copy of appointment to serve on solicitor under C.R. 447, per folio | .10 | .10 |
| Attending to serve solicitor with copy of appointment, pay conduct money and obtain receipt, etc. | 1.00 | .50 |
| Affidavit of service and payment (if admission is refused) | 1.00 | .75 |
| If, for any reason, the examination cannot be had under C.R. 447, and it is necessary to secure the attendance of the party by subpœna, charge for subpœna, copy, service, etc. See *Subpœna.* | | |
| Attending on examination per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or, in County Court cases, of the County Court Judge, to not exceeding, per hour (102) | 2.00 | 1.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Examination Papers**—*Continued.* | | |
| Where the examination is important, requiring the attendance of counsel, and when counsel attends, a counsel fee may be allowed by a taxing officer in Toronto (or the Judge in County Court cases) in lieu of attendance, such counsel fee in County Court cases not to exceed $5 (107). | | |
| Attending for copy of depositions | $0.50 | $0.25 |
| Paid special examiner, local master, etc. | | |
| Appointment | .50 | .10 |
| Each oath | .20 | .20 |
| Marking each exhibit | .10 | .10 |
| Taking depositions, per hour | 1.50 | .75 |
| Copy of depositions, per folio | .10 | .10 |
| Certificate | .50 | .20 |
| Making up and forwarding | .50 | 10 |
| Necessary postage | | |
| Paid examiner (Not being a special examiner) | | |
| Appointment. County Court clerk | | .10 |
| Each oath | .20 | .20 |
| Taking depositions, first hour | 1.00 | .75 |
| Each additional hour | 1.00 | .50 |
| Copy of depositions, per folio | .10 | .10 |
| Certificate | .50 | .50 |
| Making up and forwarding | .50 | .10 |
| Necessary postage. | | |

**Costs of Party Examined.**

| | | |
|---|---|---|
| Instructions for examination | 2.00 | 1.00 |
| Letter to client advising | .50 | .25 |
| Attending on examination, per hour (as above). | | |
| Attending for copy of depositions | .50 | .25 |
| Paid, per folio | .10 | .10 |

**Executions.** See *Writ.*

**Exemplification.**

| | | |
|---|---|---|
| Attending to bespeak and for | 1.00 | .50 |
| Paid, per folio (56 B.) | .10 | .10 |
| Paid for certificate (45 B.) | .50 | .50 |
| Paid for seal of Court (45 B.) | .50 | |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Exhibits.** | | |
| Preparing each exhibit—to solicitor (121) | $0.10 | $0.10 |
| Paid Commissioner marking each exhibit (113 B.) | .10 | .10 |
| Perusal of exhibits (and affidavits) of a party adverse in interest, filed or produced on any application, where perusal is necessary, if 20 folios or under | 1.00 | .50 |
| On the higher scale per folio over 20 | .05 | |
| Not in any case to exceed the sum of $5 (89). | | |
| **Exonereteur on Bail Piece.** | | |
| Attending to enter | .50 | .25 |
| Paid entering (68 B.) | .30 | .20 |

**Fiats.**

The necessary letters and attendances incurred in obtaining the decision of the taxing officer in Toronto in any matters which are in his discretion shall be allowed as part of the costs of the cause (160).

In County Court cases no charge is to be made by either party in connection with any application for increased counsel fees with brief at trial (153).

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Filings.** | | |
| Attending to file | .50 | .25 |
| Paid each filing | .10 | .10 |

**Foreclosure.** See *Reference.*

**Incumbrancer.** See *Claim.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Inspection.** | | |
| Notice to produce for inspection and copy | .50 | .25 |
| Attending to serve | .50 | .25 |
| Attending on inspection of documents | 1.00 | .50 |
| To be increased by taxing officer (or County Court clerk) in cases of special, difficult and important nature, to (90) | 2.00 | 1.00 |
| **Instructions.** | | |
| To sue in undefended cases (1) | 3.00 | 2.00 |
| In defended cases (2) | 4.00 | 3.00 |
| To defend (3) | 4.00 | 3.00 |

| INSTRUCTIONS—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| For petition, when no writ of summons issued (4) .. | $2.00 | $1.00 |
| Adding parties in consequence of marriage, death, assignment, etc. (33) | 1.00 | .50 |
| Add parties, by order of Court or Judge (31) | 2.00 | 1.00 |
| Affidavits, special, when allowed by the taxing officer (or County Court clerk in County Court cases) (22) | 1.00 | .50 |
| Affidavit on production, special, when allowed by the taxing officer (23) | 2.00 | 1.00 |
| Amend any pleading, when amendment is proper (27) . | 2.00 | 1.00 |
| Appeal, reasons for and against (24) | 1.50 | 1.00 |
| Brief (32) | 2.00 | .50 |
| Confession of action in ejectment as to the whole or in part (36) | 1.00 | .50 |
| Confession of defence under Rule 295 (28) | 2.00 | 1.00 |
| Counsel, to, in special matters (20) | 1.00 | .50 |
| Counsel to, in common matters (21) | .50 | .25 |
| Counterclaim, when such claim could not prior to the Ont. Jud. Act, 1881, have formed the subject of a set-off (25) | 2.00 | 1.00 |
| Issue of fact, by consent, or Judge's order (34) | 2.00 | 1.00 |
| Jury, to strike or reduce special jury (37) | 2.00 | 1.00 |
| Pleadings in action (24) | 1.50 | 1.00 |
| Special case in course of action (29) | 2.00 | 1.00 |
| Special case when no writ issued, or pleadings had, and no instructions to sue allowed (30) | 3.00 | 2.00 |
| Such other important step or proceeding in the suit as the taxing officer is satisfied warrants such a charge | 2.00 | 1.00 |

INTERLOCUTORY JUDGMENT. See *Judgment.*

INTERROGATORIES.

| | | |
|---|---|---|
| Instructions for, in discretion of taxing officer (38) | 2.00 | 1.00 |
| Drawing, per folio | .20 | .20 |
| Attending counsel with and for to settle, when counsel not solicitor, nor partner of solicitor | 1.00 | .50 |
| Counsel fee settling in contested case, in the discretion of the taxing officer (or County Court clerk in County Court cases) not exceeding (157) | 5.00 | 3.00 |
| Attending to file | .50 | .25 |
| Paid filing | .10 | .10 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| INTERROGATORIES—*Continued.* | | |
| Copy to serve, per folio | $0.10 | $0.10 |
| Attending to serve | .50 | .25 |
| Cross-Interrogatories, same as above. | | |
| Perusing Interrogatories and Cross-Interrogatories on commission. Such sum as the taxing officer in Toronto thinks fit (88). | | |
| In County Court cases | | .50 |
| ISSUE OF FACT. | | |
| Instructions for, by consent or Judge's order (34) | 2.00 | 1.00 |
| Drawing per folio (47) | .20 | .20 |
| In special or contested actions or matters on the higher scale to be increased to such higher sum as the taxing officer in Toronto may think fit (48). | | |
| Statement of issues in the Master's office, when required by the Master (140) | 2.00 | 1.00 |
| In special matters to be increased in the discretion of the taxing officer in Toronto. | | |
| For each folio over ten (141) | .20 | .20 |
| JOINDER OF ISSUE. | | |
| Drawing, including engrossing | 2 00 | 1.00 |
| Copy to file, per folio | .10 | .10 |
| Attending to file | .10 | .10 |
| Paid | .10 | .10 |
| Copy to serve, per folio | .10 | .10 |
| Attending to serve | .10 | .10 |
| Fee after | .50 | .25 |
| Perusing joinder of issue | 1.00 | .50 |
| | 1.00 | .50 |
| JUDGMENT. *Default or Interlocutory.* | | |
| Attending to search appearance | .50 | .25 |
| Paid | .10 | .10 |
| Affidavit of non-appearance, including attending to swear and oath | 1.00 | .75 |
| Drawing judgment | 1.00 | .50 |
| Attending to bespeak and for judgment | 1.00 | .50 |
| Paid, besides filings (51, 70 B.) | 1.00 | .50 |
| Fee on judgment (113) | 1.00 | .50 |
| Fee on, in mortgage cases (116) | 4.00 | 2.00 |
| *Final, after trial, where no special minutes.* | | |
| Drawing judgment, per folio | .20 | .20 |

| JUDGMENT—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Attending to bespeak and for | $1.00 | $0.50 |
| Paid, besides filings | 1.60 | .50 |
| Fee on judgment | 1.00 | .50 |
| *Final judgment where special minutes.* | | |
| Drawing minutes of judgments, per folio (124) | .20 | .20 |
| Copy to serve, per folio | .10 | .10 |
| Attending for appointment to settle | .50 | .25 |
| Paid (in County Court) | | .10 |
| Copy and service, each | .60 | .35 |
| Attending to settle, per hour | 1.00 | .50 |
| To be increased in the discretion of the officer in special and difficult cases when the solicitor attends personally to a sum not exceeding, altogether ('26) | 5.00 | 2.50 |
| Engrossing (if necessary), per folio | .10 | .10 |
| Attending to bespeak and for judgment | 1.00 | .50 |
| Paid, besides filings (51, 70 B.) | 1.60 | .50 |
| Fee on judgment | 1.00 | .50 |

JURISDICTION, SERVICE OUT OF. See *Service*.

JURY.

| | | |
|---|---|---|
| Instructions to strike or reduce special jury (37) | 2.00 | 1.00 |
| Jury notice and copy | .50 | .25 |

LETTERS. See *Correspondence*.

LIS PENDENS, CERTIFICATE OF.

| | | |
|---|---|---|
| Attending to bespeak and for | 1.00 | .50 |
| Paid, including filing pr≈ì (46 B.) | 1.10 | .30 |
| Attending registrar of deeds, with | .50 | .25 |
| Paid registering | .50 | .50 |

LOCAL MASTER. See *Master*.

MAPS OR PLANS.

If maps or plans were used at the trial, the necessity for them, the sum paid for them, and that they were prepared or procured with a view to the trial, shall be shewn by an affidavit of disbursements. Con. Rule 1174.

| Master in Ordinary, Local Master, and Official and Special Referees. | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Administering oath or taking affirmation (8 B.) | $0.20 | $0.20 |
| Appointment, every (7 B.) | .50 | .10 |
| Attendances, every, upon any proceeding or enlargement thereof or selling property (14 B.) | 1.50 | .50 |
| For each additional hour | 1.50 | .50 |
| Attendance, every special out of office within two miles, per hour occupied by reference or sale | 2.00 | .50 |
| Every additional mile above two, for travelling expenses (24 B.) | .20 | .10 |
| Certificate, every, if not longer than two folios (17 B.) | .50 | .20 |
| For each folio over two (18 B.) | .20 | |
| Copies of evidence supplied to parties or for the use of the Judges—such sums as may be authorized under any order in council. (As far as known no such order in council has been made). | | |
| Copies of evidence not provided for by any such order in council, and copies of papers given out when required, per folio (13 B.) | .10 | .10 |
| Depositions, drawing (in infancy matters only), per folio, to include time occupied (10 B.) | .20 | .20 |
| Exhibit, marking every (9 B.) | .20 | .10 |
| Fair copy of depositions, reports or orders, per folio | .10 | .10 |
| Fee on report signed (only one to be allowed in each action or matter, on first report) (16 B.) | 2.00 | |
| Filing and entering judgment or order in Master's book (6 B.) | .20 | .10 |
| Filing each paper or subsequent order (19 B.) | .10 | .10 |
| Judgment, filing and entering in Master's book (6 B.) | .20 | .10 |
| Making up and forwarding depositions, bills of costs and proceedings in Master's office (22 B.) | .50 | .10 |
| Oath or affirmation, every (8 B.) | .20 | .20 |
| Order in Chambers, every (25 B.) | .50 | .20 |
| Drawing, per folio (10 B.) | .20 | .20 |
| Fair copy, per folio, when necessary (11 B.) | .10 | .10 |
| Filing and entering in Master's book | .20 | .10 |
| Report, drawing, per folio, to include time (10 B.) | .20 | .10 |
| Fair copy, per folio (when necessary) | .10 | .10 |
| Fee on report (one fee only) (16 B.) | 2.00 | |
| Searching files in office (County Court scale) (26 B.) | | .10 |
| On higher scale. If within one year (27, 58, 59, 60 B.) | .10 | |

| Master in Ordinary, Local Master, and Official and Special Referees—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| If over one year and within two | $0.20 | |
| Over two years, or general search | .50 | |
| Taxing costs per hour (21 B.) | 1.00 | |
| In County Court, including attendance | | $0.80 |
| Transmitting depositions, bills of costs and proceedings in Master's office (22) | .50 | 10 |
| Warrant, every (7 B.) | .50 | .10 |
| Local master as referee of titles. For fees, see *Quieting Titles.* | | |

MILEAGE.

| | | |
|---|---|---|
| Service of each copy of writ, if not done by a sheriff or an officer employed by him, then taxable to the solicitor on sheriff's default, each mile beyond two. (18) | .13 | .10 |
| If writ is not served by the sheriff within ten days it may then be served by the solicitor and the service charged for. See R.S.O. 1898, ch. 17, s. 40). | | |
| Affidavit of mileage, including oath, attendance, etc. (120) | 1.00 | .75 |

MINUTES. See *Judgments; Orders.*

MORTGAGE ACTIONS. See *Reference.*

MOTIONS.

*Chambers:*

| | | |
|---|---|---|
| Instructions for motion—in discretion of the taxing officer, not exceeding (38) | 2.00 | 1.00 |
| (Affidavits, drawing, filing, etc.). | | |
| Attending for leave to serve short notice of motion (if necessary) | 1.00 | .50 |
| Notice of motion, engrossing and copy to serve, per folio | .30 | .15 |
| Each additional copy, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| Affidavit of service (if admission refused) | 1.00 | .75 |
| Recd. demand for copies of affidavits and exhibits. Copies, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| Demand for copies of affidavits in answer, copy and service | 1.00 | .50 |
| Having received copies. Perusing same | 1.00 | .50 |
| If over 20 folios, per folio | .05 | — |

| MOTIONS—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Instruction for special affidavits in reply, in the discretion of the taxing officer | $1.00 | $0.50 |
| (Charge affidavits, filing, etc.) | | |
| Counsel fee on motion when same argued (154) | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer or County Court Judge to not exceeding | 5.00 | 5.00 |
| Subject to be further increased in the discretion of the taxing officer in Toronto in High Court cases. | | |
| If judgment reserved: Attending to hear judgment | 1.00 | .50 |
| Drawing order, per folio | .20 | .20 |
| If order settled on notice: Copy of minutes, per folio | .10 | .10 |
| Notice of settling, copy and service | 1.00 | .50 |
| Attending on settlement, per hour (126) | 1.00 | .50 |
| To be increased in the discretion of the officer in special and difficult cases, to a sum not exceeding, altogether | 5.00 | 2.50 |
| Engrossing order as settled (if necessary) per folio | .10 | .10 |
| Attending to issue order | .50 | .25 |
| Paid (50 B.) | .50 | .50 |
| If order entered: Attending for after entry | .50 | .25 |
| Paid entering, per folio | .10 | .10 |
| Fee on order | 1.00 | .50 |
| Copy of order to serve, per folio (60) | .10 | .10 |
| Attending to serve | .50 | .25 |
| *Court:* | | |
| Charge as in the foregoing down to counsel fee, then add:— | | |
| Instructions for brief (32) | 2.00 | .50 |
| Drawing brief, five folios or under (108) | 2.00 | 1.00 |
| Each folio over five (109) | .10 | .10 |
| Attending counsel with and for brief, if counsel not solicitor nor partner of solicitor | 1.00 | .50 |
| Counsel fee on motion | 10.00 | 5.00 |
| In High Court and Court of Appeal to be increased in the discretion of the taxing officer in Toronto, but no more than two counsel fees to be allowed in any case. In County Court cases in the discretion of the Judge to (148) | | 10.00 |
| Attending to hear judgment, if reserved | 2.00 | 1.00 |
| (For order, etc., finish as in Chamber motion.) | | |

| Notices. | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Action for recovery of land, to defend for part of premises; not to be allowed when defence limited by appearance (62) | $1.00 | $0.50 |
| For every folio above two (69) | .20 | .20 |
| For every additional folio of copy | .10 | |
| For every additional copy, per folio | 5 | |
| Admission of right and denial of ouster by joint tenant (64) | 1.00 | |
| For additional folios and copies, as above. | | |
| Admit, notice to, each (67) | .50 | .25 |
| Additional folios and copies, as above. | | |
| Appearance, notice of, when entered after time limited by writ, and notice given forthwith, but not otherwise (72) | .50 | .25 |
| Entry of appearance, notice of, in action for recovery of land by person not named in the writ (73) | .50 | .25 |
| Assessment, notice of (77) | .50 | .25 |
| Common notices, demands or appointments not specified (83) | .50 | .25 |
| Confession of action, notice of, in action for recovery of land as to whole or part (65) | .50 | |
| Additional copies and folios as above. | | |
| Discontinuance, notice of (75) | .50 | .25 |
| Disputing amount of claim (76) | .50 | .25 |
| Filing affidavits, notice of, when required (only one notice to be allowed for a set of affidavits filed or which ought to be filed together) (82) | .50 | .25 |
| Motion, notice of, in Court or Chambers, drawing and copy to serve, per folio (71) | .30 | .15 |
| Produce, notice to, each | .50 | .25 |
| Additional copies and folios as above. | | |
| Setting down, notice of, on motion for judgment or on further directions (80) | .50 | .25 |
| Sheriff, to discharge prisoner out of custody (74) | .50 | .40 |
| Taxation, notice of, or appointment to tax (81) | .50 | .25 |
| Third party, notice to, by defendant under Rule 209 (not to include copy of statement of claim) (68) | 1.00 | .50 |
| Additional copies and folios as above. | | |
| Trial, notice of | .50 | .25 |
| Writ, notice of, for service in lieu of writ out of jurisdiction and copy (12) | 1.00 | .75 |

| | High Court and Court of Appeal. | County Courts |
|---|---|---|
| **Notices**—*Continued.* | | |
| Notice in lieu of statement of claim (68) | | |
| Additional copies and folios as above. | $0.50 | $0 25 |
| The above allowances for notices include one copy. For every additional copy, per folio (84) | .10 | .10 |
| (In no case less than fifty cents to be taxed for notice, demand or appointment, and one copy.) | | |
| When necessary to be served and served on more than one party the extra services to be allowed (85) | | |
| **Oath.** | | |
| Paid Commissioner each oath (114 B.) | | |
| Recognizance of bail | .20 | .20 |
| Each exhibit, marking | .50 | .50 |
| | .10 | .10 |
| **Orders.** | | |
| Drawing minutes, per folio, when prepared by solicitor, under direction of officer settling (or in County Court cases of the County Court Judge) (124) | .20 | .20 |
| Copies of special and common orders, per folio (80) | .10 | .10 |
| Fee on every order to the party obtaining the same (115) | 1.00 | .50 |
| Attendance on settling orders, etc., see *Motions*. | | |
| **Particulars.** | | |
| Demand for and one copy | .50 | .25 |
| Drawing particulars of claim, demand (defence ?), set-off, or counterclaim, five folios or under (70) | 2.00 | .75 |
| If exceeding five folios, per folio in addition | .20 | .15 |
| **Perusals.** | | |
| Of each of the pleadings as defined by the Judicature Act, 1895, including reasons for and against appeal (86) | 1.00 | .50 |
| Of special case by the solicitor of any party, except the one by whom it is prepared, when the same is submitted in the course of the cause (87) | 2.00 | 1.00 |
| Interrogatories and cross-interrogatories on commission. In special or contested actions or matters—such sum as the taxing officer in Toronto sees fit | | .50 |
| Affidavits and exhibits of a party adverse in interest, filed or produced on any application, where perusal is necessary, if 20 folios or under (89) | 1.00 | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| PERUSALS—*Continued.* | | |
| On the higher scale per folio over 20 folios ....... | $0.05 | |
| (Not in any case to exceed the sum of $5.) | | |
| PAYMENT INTO COURT. | | |
| Attending to bespeak and for direction to pay in..... | 1.00 | $0.50 |
| Paid, if amount over $10 (34 B.) ................ | .30 | .30 |
| Attending to pay in ........................... | .50 | .25 |
| PAYMENT OUT OF COURT. | | |
| Attending to bespeak and for cheque ............... | 1.00 | |
| Paid, if amount over $10 (35 B.) ................ | .30 | .30 |
| PETITION. | | |
| Instructions for when no writ of summons issued (4).. | 2.00 | 1.00 |
| Attending counsel with and for to settle when counsel not solicitor or partner of solicitor .............. | 1.00 | .50 |
| Counsel fee settling, in the discretion of the taxing officer (or County Court clerk in County Court cases) not exceeding (157) .................... | 5.00 | 3.00 |
| Engrossing, per folio ........................... | .10 | .10 |
| Copy to file, per folio ........................... | .10 | .10 |
| Copies to serve, each, per folio ..................... | .10 | .10 |
| Notice of presentation to endorse and copy.......... | .50 | .25 |
| For affidavits verifying petition, see *Affidavits.* | | |
| Attending to set down petition for hearing ............ | .50 | .25 |
| Paid, besides filings ...... ........................ | .50 | .20 |
| Notice of setting down and copy ..................... | .50 | .25 |
| Each additional copy, per folio .................. | .20 | .10 |
| Attending to serve, each service ................. ... | .50 | .25 |
| (Proceed as on motion.) | | |
| PLEADINGS. | | |
| Instructions for pleadings in action (24) ............ | 1.50 | 1.00 |
| Instructions to amend when amendment proper (27) .. | 2.00 | 1.00 |
| Copies of, when no other provision made, and copies properly allowable, per folio (57) .................. | .10 | .10 |
| Certified copy for Judge (58) ...................... | 1.50 | .75 |
| For every folio above 15 ....................... | .10 | .10 |
| Perusal of each pleading as defined by the Jud. Act, 1895 (86) .................................. | 1.00 | .50 |

Drawing. See *Counterclaim; Statement of Defence; Statement of Claim; Petition.*

And see *Counsel Fees; Court Fees.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **PRAECIPE.** | | |
| Judgment in mortgage cases, fee on (116) ........ | $4.00 | $2.00 |
| Revivor, prae for, in special cases proper for opinion of counsel; fee on drawing and settling allegations in (156) .................................. | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer (or County Court clerk in County Court cases) to an amount not exceeding ..................... | 5.00 | 2.00 |
| **PRINTER.** See *Advertisement.* | | |
| **PRODUCE.** | | |
| Notice to, if not exceeding 2 folios and one copy (67) .. | .50 | .25 |
| For every additional folio ..................... | .20 | .20 |
| For every additional folio of copy .............. | .10 | |
| For every additional copy, per folio ............. | .10 | |
| **PRODUCTION.** | | |
| Attending for order to produce ............ ... | .50 | .25 |
| Paid, including filing prae ...................... | .60 | .40 |
| Copy to serve, per folio ....................... | .10 | .10 |
| Attending to serve ............................ | .50 | .25 |
| Fee on order ................................. | 1.00 | .50 |
| (*When order to produce served*) | | |
| Letter to client advising and to call in .............. | .50 | .25 |
| Instructions for affidavit, on production, if special, when allowed by the taxing officer (23) ............ | 2.00 | 1.00 |
| Drawing affidavit, per folio ..................... | .20 | .20 |
| Engrossing, per folio ........................ | .10 | .10 |
| Attending to swear ........ ....... ...... ...... | .50 | .25 |
| Paid Commissioner ............................ | .20 | .20 |
| Attending to file affidavit ....................... | .50 | .25 |
| Paid ......................................... | .10 | .10 |
| Notice of filing, copy and service ................ | 1.00 | .50 |
| Having received demand for copy of affidavit. Copy per folio ........................... ....... | 10 | .10 |
| Attending to serve ............................ | .50 | .25 |
| Having received notice to produce documents for inspection. Notice to inspect, copy and service.... | 1.00 | .50 |
| Attendance when documents produced for inspection (90) .................................... | 1.00 | .50 |
| To be increased by the taxing officer (or County Court clerk) in special and difficult cases to ... | 2.00 | 1.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Quieting Titles.** | | |
| *Fees payable to inspector of titles.* | | |
| On entering petition, for all correspondence, examination of the title, drawing and engrossing certificate or conveyance and every other matter or thing done under the petition (Con. Rule 1036) (110 B.) | $8.00 | |
| *Fees payable to local referees.* | | |
| Every warrant or appointment in contested cases.... | .30 | |
| Administering every oath or taking affirmation ...... | .20 | |
| Marking every exhibit | .10 | |
| Drawing depositions, reports or orders, advertisements or orders, per folio | .20 | |
| Copy of papers given out when required, per folio .... | .10 | |
| Every attendance upon a reference in a contested case.. | 1.00 | |
| For each additional hour after the first | 1.00 | |
| Every certificate, not being the certificate of title.... | .50 | |
| Filing each paper | .10 | |
| Taxing costs, including attendance | 1.00 | |
| Making up and forwarding papers to the inspector of titles | .30 | |
| Every special attendance out of office within two miles. | 1.00 | |
| Every additional mile above two | .20 | |
| Reading affidavit, per folio | .02 | |
| Matter added, per folio | .20 | |
| Searching files in office | .20 | |
| Every deed in the chain of title other than satisfied mortgages | .50 | |
| Where title is claimed by possession only | 4.00 | |
| Drawing and engrossing certificate of title, or conveyance in duplicate | 4.00 | |
| All necessary sums paid for postage or transmission of papers (90-109B.). | | |
| **Reasons for or Against Appeal.** | | |
| Drawing, five folios or under (51) | 2.00 | $1.00 |
| For each folio above five | .20 | .15 |
| Attending counsel with and for to settle, where counsel not solicitor nor partner of solicitor | 1.00 | .50 |
| Counsel fee settling | 5.00 | 2.00 |
| To be increased in the discretion of the taxing officer in Toronto in special and important matters to a sum not exceeding (158) | 20.00 | 5.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Reasons for or Against Appeal**—*Continued.* | | |
| Engrossing reasons, per folio | $0.10 | $0.10 |
| Copy to serve, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| **Record.** | | |
| Certified copy of pleadings for Judge (58) | 1.50 | .75 |
| For every folio above fifteen, per folio (59) | .10 | .10 |
| Attending to have certified | .50 | .25 |
| Paid | 1.00 | .50 |
| Fee on | 1.00 | .50 |
| **Reference.** See *Account; Advertisement; Attendances; Claim; Counsel Fees.* | | |
| Mortgage action; Foreclosure. When judgment entered with reference to Master. | | |
| Copy of judgment for Master, per folio | .10 | .10 |
| Attending registrar to bespeak and for abstract of title | 1.00 | .50 |
| Paid registrar's fees. | | |
| Attending sheriff for certificate | .50 | .25 |
| Paid, sheriff. | | |
| Attending Master with copy of judgment and certificates and considering per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding per hour | 2.00 | 1.00 |
| Drawing, notice to incumbrancers, per folio | .20 | .20 |
| Paid Master; entering and filing judgment | .20 | .10 |
| Filings, each | .10 | .10 |
| Appointment under C.R. 748 | .50 | .10 |
| Notice to incumbrancers | 1.00 | .50 |
| Copies of appointment to serve (not exceeding four) per folio | .10 | .10 |
| Attending to serve copies on original defendants, each | .50 | .25 |
| Affidavit of service, oath, etc. | 1.00 | .75 |
| Copies of notice to incumbrancers (not exceeding four) per folio | .10 | .10 |
| Attending to serve, each | .50 | .25 |
| Affidavit of service, oath, etc. | 1.00 | .75 |
| (If services made by sheriff charge accordingly.) | | |
| Instructions for account and affidavit verifying (in the discretion of the taxing officer) | 1.00 | .50 |
| Drawing affidavit and account, per folio | .20 | .20 |
| Engrossing, per folio | .10 | .10 |

| REFERENCE—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Preparing exhibits, each | $0.10 | $0.10 |
| Attending to swear affidavit | .50 | .25 |
| Paid oath | .20 | .20 |
| Each exhibit | .10 | .10 |
| Attending on warrant taking account, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding | 2.00 | 1.00 |
| Paid Master, per hour (besides filings) | 1.50 | .50 |
| Bill of costs, engrossing and copy for Master, per folio. | .30 | .15 |
| Attending to file and for appointment to tax costs and settle report | .50 | .25 |
| Paid filing | .10 | .10 |
| Paid for appointment | .50 | .10 |
| Copies of bill and appointment to serve, per folio | .10 | .10 |
| Attending to serve, each | .50 | .25 |
| Attending on taxation, per hour | 1.00 | |
| On County Court scale | | 1.00 |
| Paid Master on taxation, besides filings per hour | 1.00 | |
| On County Court scale (besides filings) | | .80 |
| Transmitting bill of costs for revision | .50 | |
| Postage, both ways. | | |
| Paid revision fee | 1.00 | |
| Attending settling report, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding, per hour | 2.00 | 1.00 |
| Paid Master settling report, per hour | 1.50 | .50 |
| Filings, each | .10 | .10 |
| Drawing report, per folio | .20 | .20 |
| Fair copy, per folio | .10 | .10 |
| Fee on report | 2.00 | |
| Copy of report to keep, per folio | .10 | .10 |
| Attendiug for report | .50 | .25 |
| Attending to file report | .50 | .25 |
| Notice of filing, copy and service | 1.00 | .50 |
| Each additional service | .60 | .35 |
| *Final Order.* | | |
| If money not paid in at the time and place appointed, charge:— | | |
| Instructions to obtain final order, in the discretion of the taxing officer, not exceeding | 2.00 | 1.00 |
| Attending bank to search if money paid | .50 | .25 |
| Drawing certificate of bank manager and engrossing, per folio | .30 | .30 |

REFERENCE—*Continued.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Attending for same | $0.50 | $0.25 |
| Drawing affidavit verifying and engrossing, per folio | .30 | .30 |
| Preparing exhibit | .10 | .10 |
| Attending to swear | .50 | .25 |
| Paid Commissioner, oath and exhibit | .30 | .30 |
| Drawing affidavit of plaintiff, per folio | .20 | .20 |
| Engrossing, per folio | .10 | .10 |
| Attending to swear | .50 | .25 |
| Paid commissioner | .20 | .20 |
| Attending Chambers for order | 1.00 | .50 |
| Drawing order, per folio | .20 | .20 |
| Paid on order (besides filings) | .50 | .50 |
| Paid entering, per folio | .10 | .10 |
| Attending for order when entered | .50 | .25 |
| Fee on order | 1.00 | .50 |
| Attending for certificate of order for registration | .50 | .25 |
| Paid, including filing prae | 1.10 | .30 |
| Attending to register certificate | .50 | .25 |
| Paid registering | .50 | .50 |

*Mortgage Action. Sale.*

Proceed as in foreclosure down to and including final order, then charge:—

| | | |
|---|---|---|
| Copy of final order for Master, per folio | .10 | .10 |
| Attending Master with and for warrant to settle advertisement, fix reserve bid, etc., per hour | 1 00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding, per hour | 2.00 | 1.00 |
| Paid Master, per hour | 1.50 | .50 |
| Filings, each | .10 | .10 |
| Warrant | .50 | .10 |
| Copies of warrant to serve, per folio | .10 | .10 |
| Attending to serve, each | .50 | .25 |
| Affidavit of service, where admission not given, including oath and atte. | 1.00 | 75 |
| If service by sheriff, charge accordingly. | | |
| Drawing advertisement, including all copies except for printing | 2.00 | 1.00 |
| And for each folio above five, per folio | .20 | .15 |

(To be increased in the discretion of the Master, or in County Court cases of the County Court Judge, to a sum not exceeding $10, when special information has been obtained for the purpose of sale.)

| REFERENCE—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Instructions for affidavits verifying advertisement, for fitness of auctioneer, reserved bid, etc., in the discretion of the taxing officer | $1.00 | $0.50 |
| (Charge affidavits, drawing, engrossing, attendances, etc., as ordinary affidavits.) | | |
| Attending and making arrangements with auctioneer.. | 1.00 | .50 |
| Attending Master, settling advertisement, reserve bid, appointing auctioneer, etc., per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding, per hour | 2.00 | 1.00 |
| Paid Master, per hour | 1.50 | .50 |
| Fixing reserve bid | .50 | .20 |
| Fair copy of advertisement, per folio | .10 | .10 |
| Conditions of sale per folio | .10 | .10 |
| Each filing | .10 | .10 |
| (For charges for advertisement, printing, posting, etc., see ante, *Advertisement*.) | | |
| Copy of conditions of sale for auctioneer, per folio ... | .10 | .10 |
| Fee conducting sale, when sale held where solicitor resides | 5.00 | 3.00 |
| If solicitor engaged more than 3 hours, for every hour beyond that time | 1.00 | .75 |
| Fee on conducting sale elsewhere, besides all necessary travelling and hotel expenses, when solicitor attends with the approval of the Master (or real representative) previously given | 10.00 | 5.00 |
| If the sale occupies more than one day, the Master may allow him, in addition to his travelling expenses, *per diem*, a sum not exceeding twenty dollars. | | |
| The Master may also allow to any other party to the suit his fees and expenses for attending sales, if, in his opinion, it is necessary and proper that he should attend. | | |
| Paid auctioneer. | | |
| Drawing affidavit of auctioneer as to result of sale, and engrossing, per folio | .30 | .30 |
| Attending to swear and paid | .50 | .25 |
| Drawing contract for purchaser to sign and conditions thereto, per folio | .10 | .10 |
| Attending for direction to pay in deposit | .50 | .25 |
| Paid | .30 | .30 |
| Attending bank with | .50 | .25 |

| REFERENCE—*Continued.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| Attending Master for warrant to settle report on sale.. | $0.50 | $0.25 |
| Paid for warrant .................................. | .50 | .10 |
| Each filing ................................ | .10 | .10 |
| Copy and service, each .......................... | .60 | .35 |
| Attending Master on return of warrant per hour .... | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, to not exceeding, per hour.. | 2.00 | 1.00 |
| Paid Master, per hour ............................ | 1.50 | .50 |
| Each filing ................................ | .10 | .10 |
| Drawing report, per folio .................. | .20 | .20 |
| Fair copy, per folio ....................... | .10 | .10 |
| Fee on report (if no previous fee charged) ...... | 2.00 | — |
| Copy report to keep, per folio ............... | .10 | .10 |
| Attending for report .......................... | .50 | .25 |
| Attending to file report ........................ | .50 | .25 |
| Paid .............................................. | .10 | .10 |
| Notice of filing, copy and service .................. | 1.00 | .50 |
| (Taxation, etc., as in foreclosure). | | |

RENEWAL. See *Writs.*

| REPLY. | | |
|---|---|---|
| Instructions for reply to counterclaim, when such claim could not prior to the Ontario Judicature Act, 1881, have formed the subject of a set-off (26) | 2.00 | 1.00 |
| Drawing reply on behalf of plaintiff or defendant (44) | 2.00 | 1.00 |
| If above five folios, for each additional folio ........ | .20 | .15 |
| Attending counsel with and for to settle, where counsel not solicitor nor partner of solicitor ........... | 1.00 | .50 |
| Counsel fees settling, in the discretion of the taxing officer, or County Court clerk in County Court cases, not exceeding ........................ | 5.00 | 3.00 |
| Engrossing, per folio ........................... | .10 | .10 |
| Copy to file, per folio ......................... | .10 | .10 |
| Attending to file .............................. | .50 | .25 |
| Paid filing .................................... | .10 | .10 |
| Copy to serve, per folio ........................ | .10 | .10 |
| Perusing reply ................................. | 1.00 | .50 |

REVISING PROOF. See *Advertisement.*

| REVISION OF COSTS. | | |
|---|---|---|
| Attending on revision, per hour, when attendance required by taxing officer, or revision had on order (98) ...................... .............. | 1.00 | .50 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Revision of Costs**—*Continued.* | | |
| Attending on revision by County Court Judge on appeal (60) | | $0.50 |
| Paid Master or local taxing officer forwarding bill of costs for revision (22, 66 B.) | $0.50 | |
| Paid revision fee, besides postage both ways. (C.R. 1170) | 1.00 | |
| **Revivor.** | | |
| Instructions for, in consequence of marriage, death, assignment, etc. (33) | 1.00 | .50 |
| Drawing præcipe for revivor, per folio | .20 | .20 |
| Attending counsel with and for to settle, when counsel, not solicitor, nor partner of solicitor | 1.00 | .50 |
| Counsel fee on drawing and settling allegations in præcipe, in special cases proper for opinion of counsel (156) | 2.00 | 1.00 |
| To be increased in the discretion of the taxing officer (or County Court clerk in County Court cases) to an amount not exceeding | 5.00 | 3.00 |
| Engrossing, per folio | .10 | .10 |
| Attending for order | .50 | .25 |
| Paid, besides filings | .50 | .50 |
| Fee on order | 1.00 | .50 |
| Attending to enter order | .50 | .25 |
| Paid entering, per folio | .10 | .10 |
| Attending for, when entered | .50 | .25 |
| Indorsement on order (C.R. 309) per folio | .10 | .10 |
| Copy of order and indorsement to serve, each, per folio | .10 | .10 |
| Attending to serve, each | .50 | .25 |
| (Both original and added parties must be served, unless otherwise ordered. C.R. 307.) | | |
| Affidavit of service, oath, etc | 1.00 | .75 |
| If services, or any of them, made by sheriff, charge accordingly. | | |

**Sales.** See *References; Advertisement.*

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Service.** | | |
| Of writ, each copy, if not done by the sheriff, or an officer employed by him, when taxable to solicitor on sheriff's default (17) | 1.00 | .50 |
| As to when sheriff is in default, see *Mileage.* | | |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Service**—*Continued.* | | |
| If served at a distance of over two miles from the nearest place of business, or office of the solicitor serving same, for each mile beyond two miles (18) | $0.13 | $0 10 |
| Service of writ out of the jurisdiction: | | |
| In High Court cases such allowance as the taxing officer shall think fit. | | |
| In County Court cases such allowance as the taxing officer or County Court Judge shall think fit (19). | | |
| Service, common affidavit of, including service by post when necessary, including copy, oath, and attendance to swear (120) .................. | 1.00 | .75 |
| **Setting Down.** See *Special Case.* | | |
| **Set-Off.** | | |
| Drawing particulars of, five folios or under (70) ... | 2.00 | .75 |
| If exceeding five folios, per folio in addition ........ | .20 | .15 |
| Engrossing, per folio .................. | .10 | .10 |
| Copy to file, per folio .................. | .10 | .10 |
| Attending to file .................. | .50 | .25 |
| Paid filing .................. | .10 | .10 |
| Copy to serve, per folio .................. | .10 | .10 |
| Attending to serve .................. | .50 | .25 |
| **Settling.** See *Judgments; Orders; Counsel Fees.* | | |
| **Solicitor Attending Court.** | | |
| On trial of cause, when not himself counsel, or partner of counsel .................. | 2.00 | 1.00 |
| And in special, difficult, and important cases, each hour necessarily present at trial .................. | 2.00 | 1.00 |
| In no case to exceed, per day .................. | 10.00 | 5.00 |
| (Provided the attendance of such solicitor, and the length of time of such attendance, be duly entered at the time in the book of the registrar, deputy-registrar, deputy clerk of the Crown, clerk of Assize, County Court clerk or other officer present at the time, or proved by affidavit) (03). | | |
| **Special Indorsement.** | | |
| Of writ of summons (14) .................. | 1.00 | .75 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Special Jury.** | | |
| Instructions to strike or reduce (37) | $2.00 | $1.00 |
| **Special Case.** | | |
| Instructions for when no writ issued, or pleadings had, and no instructions to sue allowed (30) | 3.00 | 2.00 |
| Instructions for in course of action (29) | 2.00 | 1.00 |
| Drawing special case, per folio (40) | .20 | .20 |
| Attending counsel with and for to settle when counsel not solicitor nor partner of solicitor | 1.00 | .50 |
| Counsel fee settling in the discretion of the taxing officer, or County Court clerk in County Court cases, not exceeding (157) | 5.00 | 3.00 |
| Engrossing special case, per folio | .10 | .10 |
| Copy to file, per folio | .10 | .10 |
| Paid filing | .10 | .10 |
| Copy to serve, per folio | .10 | .10 |
| Attending to serve | .50 | .25 |
| If affidavits necessary to verify special case, charge for drawing, attendances, etc. | | |
| Attending to set down special case | .50 | .25 |
| Paid, besides filings | .50 | .20 |
| Notice of setting down, copy and service | 1.00 | .50 |
| Each additional copy and service | .00 | .35 |
| Instructions for brief | 2.00 | .50 |
| Drawing brief, if under five folios | 2.00 | 1.00 |
| Additional folios over five, per folio | .10 | .10 |
| Attending counsel with and for brief when counsel not solicitor nor partner of solicitor | 1.00 | .50 |
| Counsel fee on argument of special case (148) | 10.00 | 5.00 |
| In High Court cases to be increased in the discretion of the taxing officer in Toronto. In County Court cases to be increased in the discretion of the Judge to | | 10.00 |
| Attending to hear judgment, if reserved | 2.00 | 1.00 |
| For order, taxation, etc., proceed as on a Court motion. | | |
| **Statement of Claim.** | | |
| Instructions for pleadings (24) | 1.50 | 1.00 |
| Drawing statement of claim (39) | 2.00 | 1.00 |

| | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| **Statement of Claim**—*Continued.* | | |
| *If* above ten folios for every folio above ten, in addition | \$0.20 | \$0.20 |
| Attending counsel with and for to settle, . . . a counsel not solicitor nor partner of solicitor | 1.00 | .50 |
| Counsel fee settling, in the discretion of the taxing officer, or County Court clerk, not exceeding (157) | 5.00 | 3.00 |
| Engrossing, per folio | .10 | .10 |
| Copies to file and serve, each, per folio | .10 | .10 |
| (Copies not to exceed, including engrossment, four copies.) | | |
| Attending to file | .50 | .25 |
| Paid filing | .10 | .10 |
| Attending to serve | .50 | .25 |
| Fee after statement of claim | 1.00 | .50 |

**Statement of Defence.**

Same charges as for statement of claim, except that the solicitor is allowed twenty cents per folio additional for each folio above five (43).

**Statement of Issues.**

| | | |
|---|---|---|
| In Master's office, when required by the direction of the Master (140) | 2.00 | 1.00 |
| In special cases to be increased in the discretion of the taxing officer in Toronto. | | |
| For each folio above ten (141) | .20 | .20 |

**Subpoenas.**

| | | |
|---|---|---|
| Subpœna ad testificandum (9) | 1.00 | .50 |
| Subpœna duces tecum (10) | 1.25 | .75 |
| All subpœnas if over four folios, additional, per folio (11) | .15 | .15 |
| Paid for every subpœna, including filing præcipe (40 B.) | 1.00 | .20 |
| Copy of subpœna, including notices, (16) | 1.00 | .75 |
| If over 4 folios, for every additional folio | .10 | .10 |
| (Not more than four copies of subpœna will be taxed. Sparks v. Purdy, 15 P.R. 1.) | | |

Service of subpœna, see *Service.*

**Summons.** See *Writ of Summons.*

| | High Court and Court of Appeal. | County Courts |
|---|---|---|
| **Taxation.** | | |
| Notice of taxation, or appointment to tax and one copy (81) | $0.50 | $0.25 |
| For every additional copy, per folio | 10 | .10 |
| Attending on taxation, in County Court (96) | | 1.00 |
| Paid on taxation, besides filings (53 B.) | | .80 |
| Attending on taxation, High Court, per hour (97) | 1.00 | |
| Paid on taxation, besides filings | .00 | |
| *If costs taxed before Local Master:* | | |
| Attending on appointment to tax per hour | 1.00 | |
| Paid Master, besides filings, per hour | 1.00 | |
| In County Court cases, including attendance | | .80 |
| **Third Party.** | | |
| Notice by defendant, to, under Rule 209, not to include copy of statement of claim (68) | 1.00 | 50 |
| For every additional folio above two | .20 | .20 |
| For every additional folio of copy | .10 | |
| For every additional copy, per folio | .10 | |
| **Trial.** See *Counsel Fees.* | | |
| Solicitor attending, see *Solicitor.* | | |
| **Undertaking to Appear.** | | |
| Attending to obtain or give, when same accepted by a solicitor (100) | 1.00 | .50 |
| **Warrant.** | | |
| Paid on every warrant of a Master (7 B.) | .50 | .10 |
| Attendance on every warrant, per hour | 1.00 | .50 |
| To be increased in the discretion of the taxing officer in Toronto, or in County Court cases of the County Court Judge, to not exceeding, per hour (102) | 2.00 | 1.00 |
| On important points and matters, requiring the attendance of counsel, and when counsel attends, before a Master, examiner, referee, registrar, inspector of titles or county clerk, a counsel fee may be allowed by a taxing officer in Toronto (or the Judge in County Court cases) in lieu of fees for attendance, such counsel fee in County Court cases not to exceed $5 (107). | | |

| WITNESSES. *Allowances to.* | High Court and Court of Appeal. | County Courts. |
|---|---|---|
| To witnesses residing within three miles of the court house, *per diem* | $1.00 | $1.00 |
| To witnesses residing over three miles from the court house | 1.25 | 1.25 |
| 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* | 4.00 | 4.00 |
| Engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, *per diem* | 4.00 | 4.00 |

If witnesses attend in one case only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way (117-122 B.).

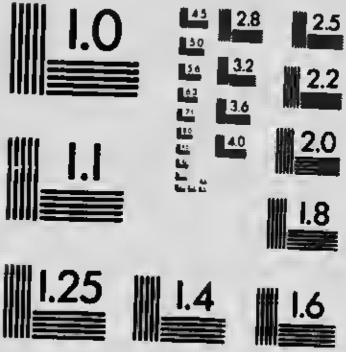
Veterinary practitioners holding the proper diplomas are entitled to professional fees in attending any Court of law as witnesses in such cases as relate to their profession (R.S.O.C. 184, s. 2).

| WRIT OF EXECUTION. | | |
|---|---|---|
| Issuing any | 6.00 | 4.00 |
| Renewal of any writ of execution | 4.00 | 2.50 |
| In both cases including placing same in the sheriff's hands, all attendances, indorsements and letters in connection therewith (15). | | |
| Writ of summons, every | 2.00 | 1.00 |
| Concurrent writ | 1.50 | .75 |
| Renewed writ | 1.50 | .75 |
| If any of these writs over four folios for every additional folio | .20 | .20 |
| Special indorsement on writ of summons | 1.00 | .75 |
| Notice of writ for service in lieu of writ out of the jurisdiction and copy | 1.00 | .75 |
| Copy of writ, including copy of notices required to be indorsed | 1.00 | .75 |
| If over four folios, for every additional folio | .10 | .10 |
| Service of writ, see *Service*. | | |

# INDEX.

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

misses